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### Specifically Authorized by Binding Precedent Does Not Mean Suggested by Persuasive Precedent: Applying the Good Faith Exception after Davis v. United States

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**SPECIFICALLY AUTHORIZED BY BINDING PRECEDENT DOES  
NOT MEAN SUGGESTED BY PERSUASIVE PRECEDENT:  
APPLYING THE GOOD-FAITH EXCEPTION AFTER *DAVIS* v.  
*UNITED STATES***

*Zachary C. Bolitho\**

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ABSTRACT

A number of federal circuit courts have refused to apply the Fourth Amendment’s exclusionary rule to evidence obtained from GPS vehicle trackers that were installed and monitored without a warrant before *United States v. Jones*. Those courts have largely reached that result by invoking *Davis* v. *United States*’s holding that the exclusionary rule does not apply where an officer reasonably relied on binding appellate precedent that was later overruled. More specifically, the circuit courts have viewed the Supreme Court’s 1983 decision in *United States v. Knotts* (addressing “beeper” tracking

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devices) as binding precedent that specifically authorized the warrantless installation and monitoring of GPS vehicle trackers prior to *Jones*.

The Fourth Circuit's decision in *United States v. Stephens* is representative of the "*Knotts* is binding precedent under *Davis* approach" that most of the circuit courts have used to resolve the exclusionary rule question. This Article, therefore, uses *Stephens* as a vehicle for analyzing that approach. This Article argues that decisions like *Stephens* have stretched the holding of *Davis* and interpreted *Knotts* in a way that contradicts Supreme Court precedent. And, the circuit courts have done so for no good reason because they could have reached the same result—refusing to exclude the GPS vehicle tracker evidence—by working through the general good-faith analysis. Instead, most of the circuit courts have chosen to resolve the exclusionary rule issue by defining the terms "specifically authorized" and "binding precedent" to mean "suggested" and "persuasive precedent." In the process, the courts have converted the intentionally narrow holding of *Davis* into a broad decision with unknown boundaries.

## I. INTRODUCTION

At first blush, the Supreme Court's holding in *Davis v. United States*<sup>1</sup> seems straightforward: "We hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."<sup>2</sup> Those words, however, have proven to be anything but straightforward. Identifying the scope of *Davis*'s holding has generated much controversy in the lower courts<sup>3</sup> and the legal academy.<sup>4</sup>

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<sup>1</sup> 131 S. Ct. 2419 (2011).

<sup>2</sup> *Id.* at 2423–24.

<sup>3</sup> Compare *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013) (rejecting the government's good-faith argument and reading *Davis* narrowly), with *United States v. Stephens*, 764 F.3d 327, 337 (4th Cir. 2014) (adopting the government's good-faith argument and "expressing serious doubts" about the defendant's narrow interpretation of *Davis*), *cert. denied*, 2015 WL 1970174 (U.S. Oct. 5, 2015) (No. 14-1313), and *United States v. Katzin*, 769 F.3d 163, 177–79 (3d Cir. 2014) (en banc) (divided en banc decision accepting the government's good-faith argument and vacating prior panel decision that rejected the good-faith argument based on a narrow reading of *Davis*), *cert. denied*, 135 S. Ct. 1448 (2015).

<sup>4</sup> See, e.g., Susan Freiwald, *The Davis Good Faith Rule and Getting Answers to the Questions Jones Left Open*, 14 N.C. J.L. & TECH. 341, 357–61 (2013) (explaining the competing interpretations of *Davis* and arguing in favor of a narrow reading of the Court's opinion); Orin Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2010–2011 CATO SUP. CT. REV. 237, 255 (discussing *Davis* and the future direction of the exclusionary rule); Caleb Mason, *New Police Surveillance Technologies and the Good-Faith Exception: Warrantless GPS Tracker Evidence After United States v. Jones*, 13 NEV. L.J. 60, 63–64 (2012) (disagreeing with Professor Tomkovicz and reading *Davis* as a "straightforward adoption" of the rule that reliance on binding precedent does not trigger the exclusionary rule); James J. Tomkovicz, *Davis v. United States: The Exclusion*

Much of the controversy has occurred in cases involving the installation and subsequent monitoring of Global Positioning System (“GPS”) vehicle trackers.<sup>5</sup> More specifically, the courts have been grappling with whether the exclusionary rule applies to information obtained from GPS vehicle trackers that were installed and monitored before January 23, 2012—the date of the Supreme Court’s decision in *United States v. Jones*.<sup>6</sup> The *Jones* Court held that a Fourth Amendment “search” occurs when police officers install and then monitor a GPS vehicle tracker.<sup>7</sup> The Court reached that result by resuscitating a Fourth Amendment theory that most believed had been dead for decades: trespass law.<sup>8</sup>

Prior to *Jones*, it was widely believed that installation and monitoring of a GPS vehicle tracker did not constitute a Fourth Amendment “search,” so long as the monitoring occurred only on public roadways.<sup>9</sup> That belief was grounded in two Supreme Court cases from the 1980s—*United States v. Knotts*<sup>10</sup> and *United States v. Karo*<sup>11</sup>—that dealt with location information obtained from a precursor to GPS technology colloquially referred to as a

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*Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 382 (2011) (arguing that *Davis* “confirms the advent of a new era of exclusionary rule development, reflecting the Roberts Court’s commitment to a revolutionary, and stifling, revision of the Fourth Amendment bar to illegally obtained evidence”).

<sup>5</sup> See, e.g., *Katzin*, 769 F.3d at 168–69, 171–73 (vacating panel decision and discussing the application of *Davis* to cases involving the installation and monitoring of GPS vehicle trackers); *United States v. Brown*, 744 F.3d 474, 478 (7th Cir.) (recognizing the “legitimate debate” over the application of *Davis* to cases involving the installation and monitoring of GPS vehicle trackers), *cert. denied* 135 S. Ct. 378 (2014).

<sup>6</sup> 132 S. Ct. 945, 949 (2012).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 949–50; see also Jordan Miller, *New Age Tracking Technologies in the Post-United States v. Jones Environment: The Need for Model Legislation*, 48 CREIGHTON L. REV. 553, 555–56 (2015) (referring to the property-based rationale used by the *Jones* Court as an analysis that “was thought long dead”).

<sup>9</sup> See *United States v. Katzin*, 732 F.3d 187, 229 (3d Cir. 2013) (Van Antwerpen, J., dissenting) (citing cases and recognizing that there had been “a uniform consensus across the federal courts of appeals to address the issue that the installation and subsequent use of GPS or a GPS-like device was not a search or, at most, was a search but did not require a warrant”); *United States v. McIver*, 186 F.3d 1119, 1125–27 (9th Cir. 1999) (holding that installation and monitoring of a GPS device was not a Fourth Amendment “search”), *partially abrogated by United States v. Jones*, 132 S. Ct. 945 (2012), *as recognized in United States v. Pineda-Moreno*, 688 F.3d 1087, 1091 (9th Cir. 2012); see also *United States v. Rayford*, 556 F. App’x 678, 679 n.2 (10th Cir. 2014) (pointing out that prior to *Jones* most courts believed the police did not need a warrant to install and monitor GPS vehicle trackers); *United States v. Marquez*, 605 F.3d 604, 609–10 (8th Cir. 2010) (stating in dicta that the warrantless use of a GPS device to track the defendant’s vehicle did not violate the Fourth Amendment).

<sup>10</sup> 460 U.S. 276 (1983).

<sup>11</sup> 468 U.S. 705 (1984).

“beeper.”<sup>12</sup> Both *Knotts* and *Karo* applied the tried-and-true reasonable expectation of privacy test from *Katz v. United States*<sup>13</sup> to determine whether a Fourth Amendment “search” occurred.<sup>14</sup>

The *Jones* Court’s reliance on trespass law instead of the *Katz* reasonable expectation of privacy test was unanticipated,<sup>15</sup> and it caused considerable angst in the law enforcement community.<sup>16</sup> That angst was understandable; at the moment *Jones* was decided, there were thousands of GPS vehicle trackers being monitored by police agencies nationwide.<sup>17</sup> Very few of those were installed and monitored with judicial approval.<sup>18</sup> Given the generally accepted belief that *Knotts* and *Karo* authorized GPS tracking on public roadways, the warrantless installation and monitoring of GPS vehicle trackers was standard police practice.<sup>19</sup> Indeed, it was United States Department of Justice policy not to seek a warrant to monitor a GPS device on public roadways.<sup>20</sup> So, the question raised in courtrooms nationwide in the

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<sup>12</sup> See *Knotts*, 460 U.S. at 277 (“A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver.”); see also Ian Herbert, Note, *Where We Are with Location Tracking: A Look at the Current Technology and the Implications on Fourth Amendment Jurisprudence*, 16 BERKELEY J. CRIM. L. 442, 467–76 (2011) (explaining how the “beeper” used in *Knotts* worked and comparing it to newer location-tracking technology, including GPS).

<sup>13</sup> 389 U.S. 347 (1967).

<sup>14</sup> See *Knotts*, 460 U.S. at 281–82 (applying the *Katz* reasonable expectation of privacy test and concluding that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another”); see also *Karo*, 468 U.S. at 712–15 (applying the *Katz* test and distinguishing *Knotts* because the beeper in *Karo* was monitored while inside of a home, a place (unlike the public roadways) where the defendant had a reasonable expectation of privacy).

<sup>15</sup> See Jace C. Gatewood, *It’s Raining Katz and Jones: The Implications of United States v. Jones—A Case of Sound and Fury*, 33 PACE L. REV. 683, 690 (2013) (explaining that “many were left utterly shocked by the Court’s almost total rejection” of *Katz*, *Knotts*, and *Karo* “in favor of a doctrine that most believed was dead—the ‘trespass doctrine’”).

<sup>16</sup> See Carrie Johnson, *FBI Still Struggling with Supreme Court’s GPS Ruling*, NPR (Mar. 21, 2012), <http://www.npr.org/2012/03/21/149011887/fbi-still-struggling-with-supreme-courts-gps-ruling> (reporting that “*Jones* set off alarm bells inside the FBI, where officials are trying to figure out whether they need to change the way they do business”).

<sup>17</sup> See Transcript of Oral Argument, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259), 2011 WL 5360051, at \*59 (estimating that federal law enforcement agencies annually installed GPS devices “in the low thousands”).

<sup>18</sup> See Johnson, *supra* note 16.

<sup>19</sup> See generally *United States v. Stephens*, 764 F.3d 327, 331 (4th Cir. 2014) (reporting that the officer who installed the GPS vehicle tracker at issue “had attached a GPS to other vehicles in public areas without a warrant, and it was his understanding that a warrant was needed only when . . . the GPS was wired into the vehicle’s battery system”), *cert. denied*, 2015 WL 1970174 (U.S. Oct. 5, 2015) (No. 14-1313).

<sup>20</sup> See *United States v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014) (en banc) (reporting that prior to *Jones*, the Department of Justice policy was “that a warrant was not required to install a

wake of *Jones* was (and continues to be) as follows: Does the exclusionary rule apply to evidence obtained from GPS vehicle trackers that were installed and monitored without a warrant before *Jones*?

In seeking to answer that question, the courts have run head-on into *Davis*'s holding that the exclusionary rule does not apply where officers relied in good faith on binding precedent that was later overruled. The question has now been considered by almost all of the federal circuit courts<sup>21</sup> and a handful of state appellate courts.<sup>22</sup> The vast majority of the courts have refused to apply the exclusionary rule on the basis that the officers who installed and monitored the GPS vehicle trackers pre-*Jones* acted in good faith. With the exception of the Sixth and Ninth Circuits,<sup>23</sup> the federal appellate courts have reached that conclusion by holding that the Supreme Court's decision regarding "beepers" in *Knotts* (or a circuit court decision authorizing the use of "beepers") qualified under *Davis* as binding precedent specifically authorizing the installation and monitoring of GPS vehicle trackers.<sup>24</sup> Those courts have endorsed a broad

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battery-powered GPS on a vehicle parked on a public street and to surveil it on public roads"), *cert. denied*, 135 S. Ct. 1448 (2015).

<sup>21</sup> See, e.g., *United States v. Robinson*, 781 F.3d 453 (8th Cir. 2015); *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 1448 (2015); *United States v. Fisher*, 745 F.3d 200 (6th Cir.), *cert. denied*, 135 S. Ct. 676 (2014); *United States v. Brown*, 744 F.3d 474 (7th Cir.), *cert. denied*, 135 S. Ct. 378 (2014); *United States v. Aguiar*, 737 F.3d 251 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 400 (2014); *United States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013); *United States v. Sparks*, 711 F.3d 58 (1st Cir.), *cert. denied*, 134 S. Ct. 204 (2013); *United States v. Andres*, 703 F.3d 828 (5th Cir.), *cert. denied*, 133 S. Ct. 2814 (2013); *United States v. Smith*, 741 F.3d 1211 (11th Cir. 2013), *cert. denied*, 135 S. Ct. 704 (2014); *United States v. Pineda-Moreno*, 688 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 994 (2013).

<sup>22</sup> See, e.g., *State v. Mitchell*, 323 P.3d 69 (Ariz. Ct. App. 2014); *People v. LeFlore*, 32 N.E.3d 1043 (Ill. 2015); *Kelly v. State*, 56 A.3d 523 (Md. Ct. Spec. App. 2012); *State v. Johnson*, 22 N.E.3d 1061 (Ohio 2014); *State v. Adams*, 763 S.E.2d 341 (S.C. 2014).

<sup>23</sup> The Ninth Circuit had a prior published decision that specifically authorized the warrantless installation and monitoring of GPS vehicle trackers. See *United States v. McIver*, 186 F.3d 1119, 1126–27 (9th Cir. 1999), *partially abrogated by United States v. Jones*, 132 S. Ct. 945 (2012), *as recognized in United States v. Pineda-Moreno*, 688 F.3d 1087, 1091 (9th Cir. 2012). The Ninth Circuit relied on its prior decision in *McIver* to conclude that the exclusionary rule was inappropriate under *Davis* because the installation and monitoring of the GPS vehicle tracker complied with binding circuit court precedent that was later overruled. See *Pineda-Moreno*, 688 F.3d at 1090 (refusing to apply the exclusionary rule under *Davis* because prior "circuit precedent held that placing an electronic tracking device on the undercarriage of a car was neither a search nor a seizure under the Fourth Amendment"). Similarly, the Sixth Circuit relied on one of its prior decisions in *Fisher* to conclude that precedent provided binding authority permitting the police to use the GPS tracker. *Fisher*, 745 F.3d at 203 (discussing *United States v. Forest*, 355 F.3d 942, 951–52 (6th Cir. 2004)).

<sup>24</sup> See, e.g., *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 1448 (2015); *United States v. Stephens*, 764 F.3d 327 (4th Cir. 2014), *cert. denied*, 2015 WL 1970174 (U.S. Oct. 5, 2015) (No. 14-1313); *United States v. Fisher*, 745 F.3d 200 (6th Cir.), *cert. denied*, 135 S. Ct. 676 (2014); *United States v. Brown*, 744 F.3d 474 (7th Cir.), *cert. denied*,

reading of *Davis* and have rejected the defendants' claims that *Davis* only applies in the rare circumstance where there is a prior published decision from the governing circuit court that directly addresses the *precise* issue raised in the current case.<sup>25</sup>

The Fourth Circuit's 2-1 decision in *United States v. Stephens*<sup>26</sup> is representative of the "*Knotts* is binding precedent under *Davis* approach." The *Stephens* majority and the dissent fully addressed the arguments on both sides; therefore, *Stephens* is an excellent vehicle for discussing and analyzing the applicability of *Davis* to the pre-*Jones* installation and monitoring of GPS vehicle trackers. The *Stephens* majority—like many of its sister circuits—scoffed at the defendant's narrow interpretation of *Davis* and held that the exclusionary rule did not apply to evidence obtained from a GPS vehicle tracker that was installed and monitored without a warrant.<sup>27</sup> Although the *Stephens* majority admitted there was no binding Fourth Circuit precedent specifically authorizing the warrantless installation and monitoring of GPS vehicle trackers, the Court opined that "a reasonably well-trained officer in this Circuit could have relied on [the Supreme Court's decision in] *Knotts* as permitting" such conduct.<sup>28</sup> Similar reasoning can be found in opinions from the First, Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits.<sup>29</sup>

Judge Stephanie Thacker sharply disagreed with the *Stephens* majority. She argued in her dissent that the holding of *Davis* was a "specific and narrow" one that required "*binding appellate precedent specifically authorizing*" the warrantless installation and monitoring of GPS vehicle trackers.<sup>30</sup> Because there was no such precedent in the Fourth Circuit, Judge Thacker would have concluded that *Davis*'s good-faith rationale did not apply.<sup>31</sup> Judge Thacker's dissent mirrored the approach of the five judges who dissented from the Third Circuit's en banc determination that *Knotts* qualified as binding precedent

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135 S. Ct. 378 (2014); *United States v. Sparks*, 711 F.3d 58 (1st Cir.), *cert. denied*, 134 S. Ct. 204 (2013); *United States v. Aguiar*, 737 F.3d 251 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 400 (2014); *United States v. Andres*, 703 F.3d 828 (5th Cir.), *cert. denied*, 133 S. Ct. 2814 (2013); *United States v. Smith*, 741 F.3d 1211 (11th Cir. 2013), *cert. denied*, 135 S. Ct. 704 (2014); *United States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013).

<sup>25</sup> See, e.g., *Katzin*, 769 F.3d at 176 ("Undoubtedly, certain language in *Davis* invites a narrow reading, but we are not persuaded this interpretation is true to *Davis*'[s] holding.").

<sup>26</sup> 764 F.3d 327 (4th Cir. 2014), *cert. denied*, 2015 WL 1970174 (U.S. Oct. 5, 2015) (No. 14-1313).

<sup>27</sup> See *id.* at 337–38.

<sup>28</sup> See *id.* at 338.

<sup>29</sup> See, e.g., *Katzin*, 769 F.3d 163; *Brown*, 744 F.3d 474; *Sparks*, 711 F.3d 58; *Aguiar*, 737 F.3d 251; *Andres*, 703 F.3d 828; *Barraza-Maldonado*, 732 F.3d 865; *Smith*, 741 F.3d 1211.

<sup>30</sup> *Stephens*, 764 F.3d at 341 (Thacker, J., dissenting).

<sup>31</sup> *Id.* at 341–42.

under *Davis*.<sup>32</sup> Several state appellate courts have also echoed Judge Thacker's thoughts on the issue.<sup>33</sup>

This Article examines the “*Knotts* is binding precedent under *Davis* approach” and explains why such an approach is inconsistent with Supreme Court precedent. This Article also argues that the circuit courts should have resolved cases like *Stephens* by applying the general “good-faith” analysis. Part II discusses the Fourth Amendment exclusionary rule with a particular focus on the good-faith exception. Part III provides a brief summary of the majority and dissenting opinions from the Fourth Circuit's decision in *Stephens*. Part IV analyzes the “*Knotts* is binding precedent under *Davis* approach” that has been adopted by *Stephens* and most other circuit courts. It argues that a better approach would have been for the courts to resolve the exclusionary rule issue by simply applying the general good-faith analysis. Part V considers how the broad reading of *Davis* that underlies the “*Knotts* is binding precedent under *Davis* approach” will play out in future cases, such as those involving the application of the exclusionary rule to cell phone searches conducted before the Supreme Court's recent watershed decision in *Riley v. California*.<sup>34</sup> A brief conclusion follows in Part VI.

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<sup>32</sup> See *Katzin*, 769 F.3d at 187–97 (Greenaway, J., dissenting). Judge Greenaway was the author of the Third Circuit's panel decision, which applied the exclusionary rule and found that *Knotts* did not qualify as binding appellate precedent under *Davis*. *Id.* The en banc Third Circuit vacated the panel decision and held eight to five that the evidence was saved from suppression by the good-faith exception to the exclusionary rule. *Id.* (“[W]e conclude that the good faith exception applies, and that suppression is unwarranted.”).

<sup>33</sup> See, e.g., *State v. Mitchell*, 323 P.3d 69, 78 (Ariz. Ct. App. 2014) (concluding that *Knotts* was “not sufficiently apposite on the trespass question and, therefore, cannot trigger application of the good-faith exception” under *Davis v. United States*); *State v. Hohn*, 321 P.3d 799 (Kan. Ct. App. 2014) (unpublished table decision) (holding that it “was clearly unreasonable for the State to have read *Karo* and *Knotts* as authorizing the warrantless installation of a [GPS] tracking device” on the defendant's car); *State v. Adams*, 763 S.E.2d 341, 346–47 (S.C. 2014) (applying the exclusionary rule and concluding that “*Knotts* and *Karo* did not constitute binding precedent that authorized law enforcement's warrantless” installation and monitoring of a GPS vehicle tracker).

<sup>34</sup> 134 S. Ct. 2473, 2480 (2014). The Court in *Riley* held that police officers must obtain a warrant before searching a cell phone, even if the cell phone was found on the defendant's person at the time of his lawful arrest. *Id.* at 2485. In reaching that conclusion, the Court carved out an exception to the search incident to lawful arrest doctrine—a doctrine that allows police officers who make a lawful arrest to conduct a warrantless search of the arrestee's person, including containers found on the arrestee's person. *Id.* at 2483–84.



## II. THE CURRENT STATUS OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

The Fourth Amendment exclusionary rule has long been controversial.<sup>35</sup> And, the rule's development has been anything but smooth. Indeed, Justice Potter Stewart once referred to the exclusionary rule as "a bit jerry-built—like a roller coaster track constructed while the roller coaster sped along."<sup>36</sup> In the years since its creation in 1914, the exclusionary rule has certainly taken many twists and turns. Perhaps the most significant twists and turns have occurred in the last decade—a time period during which the Supreme Court issued a number of important decisions regarding the exclusionary rule's scope. The following sections explain the current status of the exclusionary rule and describe the road the Court took to get there.

### A. *The Road to Davis v. United States*

The exclusionary rule, generally speaking, prevents the prosecution from introducing evidence that has been obtained in violation of the Fourth Amendment.<sup>37</sup> Although the general rule is easy enough to recite, its precise scope has been the source of ongoing debate and continual change.<sup>38</sup> That has been especially true in the last nine years as the Supreme Court has handed down three important decisions: *Hudson v. Michigan*,<sup>39</sup> *Herring v. United States*,<sup>40</sup> and *Davis v. United States*.<sup>41</sup> Depending on who one believes, those three decisions have either dramatically modified the exclusionary rule<sup>42</sup> or have simply returned the exclusionary rule to its original moorings.<sup>43</sup>

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<sup>35</sup> See *Elkins v. United States*, 364 U.S. 206, 216 (1960) (discussing the development of the exclusionary rule and stating that the rule "has for decades been the subject of ardent controversy").

<sup>36</sup> Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary [sic] Rule in Search-and-Seizure [sic] Cases*, 83 COLUM. L. REV. 1365, 1366 (1983).

<sup>37</sup> See *Illinois v. Krull*, 480 U.S. 340, 347 (1987) ("When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure.").

<sup>38</sup> See Tomkovicz, *supra* note 4, at 384–94 (discussing how the exclusionary rule has evolved with time); see also Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 624 (2014) (opining that the "Supreme Court has recently directed a sustained legal assault against the exclusionary rule").

<sup>39</sup> 547 U.S. 586 (2006).

<sup>40</sup> 555 U.S. 135 (2009).

<sup>41</sup> 131 S. Ct. 2419 (2011).

<sup>42</sup> See *id.* at 2440 (Breyer, J., dissenting) (discussing the Court's recent exclusionary rule decisions and expressing "fear" that the Court has undermined and "watered-down" the exclusionary rule); see also Joëlle Anne Moreno, *Rights, Remedies, and the Quantum and*

First recognized by the Supreme Court in 1914<sup>44</sup> and incorporated to the states through the Fourteenth Amendment in 1961,<sup>45</sup> the exclusionary rule is nowhere to be found in the text of the Fourth Amendment.<sup>46</sup> It is a judicially created remedy that was initially viewed as serving two purposes: (1) deterring unconstitutional police conduct<sup>47</sup> and (2) maintaining judicial integrity.<sup>48</sup> For a period of time after its creation, the exclusionary rule was viewed as “a self-executing” constitutional mandate that required no further analysis.<sup>49</sup> If there was a Fourth Amendment violation, then the evidence was automatically excluded.<sup>50</sup> That began to change over time, however, as the Court recognized numerous exceptions.

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*Burden of Proof*, 3 VA. J. CRIM. L. 89, 164 (2015) (stating that through cases like *Herring* and *Davis*, the Supreme Court has “clearly changed the suppression landscape”).

<sup>43</sup> See *Hudson*, 547 U.S. at 591 (insisting that the exclusionary rule “has always been our last resort, not our first impulse,” while recognizing that over the years some opinions “did not always speak so guardedly”).

<sup>44</sup> See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (“We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.”), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>45</sup> See *Mapp*, 367 U.S. at 655 (“Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.”); see also Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 757 (2009) (explaining that “the Supreme Court in *Mapp v. Ohio* gave full effect to the Fourth Amendment by extending the suppression remedy of *Weeks v. United States* to cases in the state courts as well”).

<sup>46</sup> See *Herring v. United States*, 555 U.S. 135, 139 (2009) (“The Fourth Amendment . . . ‘contains no provision expressly precluding the use of evidence obtained in violation of its commands.’” (quoting *Arizona v. Evans*, 514 U.S. 1, 10 (1995))); see also *Mapp*, 367 U.S. at 661 (Black, J., concurring) (recognizing that “the Fourth Amendment does not itself contain any provision expressly precluding the use of [unconstitutionally obtained] evidence”).

<sup>47</sup> *Mapp*, 367 U.S. at 656 (stating that the “purpose of the exclusionary rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it’” (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))).

<sup>48</sup> *Id.* at 659 (explaining that “there is another consideration—the imperative of judicial integrity” (quoting *Elkins*, 364 U.S. at 217)).

<sup>49</sup> *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011).

<sup>50</sup> See *Ferguson*, *supra* note 38, at 625 (explaining that the exclusionary rule was “once an automatic remedy for constitutional violations”).

Those exceptions include the independent source doctrine,<sup>51</sup> the inevitable discovery doctrine,<sup>52</sup> the attenuation doctrine,<sup>53</sup> and—of particular importance to the current discussion—the good-faith exception.<sup>54</sup> The good-faith exception was announced in *United States v. Leon*.<sup>55</sup> In *Leon*, the Court refused to apply the exclusionary rule where an officer reasonably relied on a magistrate’s issuance of a warrant that was later found to be invalid.<sup>56</sup> The rationale of *Leon* was applied in *Illinois v. Krull* to prevent the exclusion of evidence where an officer reasonably relied on a legislative enactment later determined to be unconstitutional.<sup>57</sup> It was also applied in *Arizona v. Evans* to prevent the exclusion of evidence where an officer reasonably relied on court-managed databases later found to be inaccurate.<sup>58</sup> *Leon*, *Krull*, and *Evans* all shared one key attribute—the good-faith reliance of a police officer on an erroneous act by either the judicial or legislative branches of government.<sup>59</sup> At the time they were announced, the exceptions were exactly that—exceptions. The general rule for evidence obtained in connection with a violation of the Fourth Amendment remained exclusion.

That paradigm began to shift dramatically in 2006 when the Court announced its decision in *Hudson v. Michigan*.<sup>60</sup> Justice Scalia, writing for the *Hudson* majority, refused to apply the exclusionary rule where officers violated

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<sup>51</sup> See *Murray v. United States*, 487 U.S. 533 (1988) (holding that evidence originally discovered illegally may be admitted if such evidence was also later discovered in a manner that was independent of the initial illegality).

<sup>52</sup> See *Nix v. Williams*, 467 U.S. 431, 432 (1984) (holding that evidence obtained from an illegal search may be admitted if the government proves by a preponderance of the evidence that the evidence would have “ultimately or inevitably . . . been discovered by lawful means”).

<sup>53</sup> See *Wong Sun v. United States*, 371 U.S. 471, 471 (1963) (holding that illegally discovered evidence may be admitted if the connection between the illegal search and the evidence has “become so attenuated as to dissipate the taint” (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939))).

<sup>54</sup> See *United States v. Leon*, 468 U.S. 897 (1984).

<sup>55</sup> *Id.* at 908–09.

<sup>56</sup> *Id.* at 913.

<sup>57</sup> See *Illinois v. Krull*, 480 U.S. 340 (1987).

<sup>58</sup> See *Arizona v. Evans*, 514 U.S. 1, 9–16 (1995).

<sup>59</sup> See Matthew Allan Josephson, *To Exclude or Not To Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 181 (2009) (explaining that before *Herring*, the Court “only applied the ‘good faith’ exception to the Fourth Amendment exclusionary rule in situations where police acted in reasonable reliance on a judicial or legislative representation that authorized the police conduct”).

<sup>60</sup> 547 U.S. 586 (2006); see Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751, 755 (2007) (stating that the Court in *Hudson* “fundamentally altered the traditional application of the exclusionary rule”).

the Fourth Amendment's knock and announce requirement.<sup>61</sup> *Hudson* ushered in a new era of Fourth Amendment law—an era where the exclusionary rule is the judiciary's "last resort, not our first impulse."<sup>62</sup> While the Court recognized that some of its prior cases did not "speak so guardedly" about the exclusionary rule, *Hudson* explained that evidence should only be excluded when the deterrent value of exclusion exceeds the "substantial social costs" of letting guilty people go free.<sup>63</sup> Whereas the exclusionary rule was initially viewed as serving the dual purposes of deterrence and the maintenance of judicial integrity, *Hudson* not so covertly signaled that deterrence was the principal rationale going forward.<sup>64</sup>

The signal from *Hudson* became a command three years later in *Herring v. United States*.<sup>65</sup> The specific holding in *Herring* was that the good-faith exception applied to an officer's objectively reasonable reliance on a law enforcement database that was later found to be inaccurate.<sup>66</sup> The Court's holding was significant because it extended the good-faith exception to an error committed by a law enforcement entity, as opposed to another branch of government.<sup>67</sup> But, *Herring* is less important for what it specifically held than for the broad doctrine-changing language that is littered throughout the opinion.<sup>68</sup>

<sup>61</sup> See *Hudson*, 547 U.S. at 594.

<sup>62</sup> *Id.* at 591; see Ferguson, *supra* note 38, at 631 (writing that prior to *Hudson* "Supreme Court opinions assumed with little difficulty an intrinsic link between the exclusionary rule and unconstitutional action, without any separation of rights and remedies"); see also Blair, *supra* note 60, at 760 ("The decision in *Hudson* has now made it possible to so finely delineate the interests protected by various parts of the Fourth Amendment that the exclusionary rule sanction will not be an appropriate remedy for some constitutional violations.").

<sup>63</sup> *Hudson*, 547 U.S. at 591, 596 (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

<sup>64</sup> *Id.* at 596, 599.

<sup>65</sup> 555 U.S. 135, 137 (2009).

<sup>66</sup> *Id.*

<sup>67</sup> See Josephson, *supra* note 59, at 181; see also Claire Angelique Nolasco, Rolando V. del Carmen & Michael S. Vaughn, *What Herring Hath Wrought: An Analysis of Post-Herring Cases in the Federal Courts*, 38 AM. J. CRIM. L. 221, 227 (2011) (explaining that prior to *Herring*, the good-faith exception case law "did not address whether the exclusionary rule applied to illegal searches made by law enforcement officers in good-faith reliance on mistakes made by other law enforcement employees").

<sup>68</sup> See Tomkovicz, *supra* note 4, at 390 (stating that the "*Herring* majority . . . was not content merely to resolve this narrow issue," opting instead to speak "quite broadly" about the exclusionary rule); see also LaFave, *supra* note 45, at 758 (criticizing *Herring* and speculating on how the Court's decision will alter the application of the exclusionary rule going forward); see also Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 Miss. L.J. 1183, 1203–04 (2012) (stating that *Herring* contained "big blast" language that signaled the Court's intent to "restrict the exclusionary rule to instances of culpable police behavior").

The *Herring* Court made clear that the exclusionary rule is a remedy that must be analyzed separately from the determination of whether there was a constitutional violation.<sup>69</sup> In the words of the Court, “that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies.”<sup>70</sup> Rather, the exclusionary rule only applies if the officer’s conduct was “deliberate, reckless, . . . grossly negligent” or the result of “recurring or systemic negligence.”<sup>71</sup> The language and tone of *Herring* has led some scholars to declare that the exclusionary rule is now best understood as less of a “rule” and more of an exception that only applies when the deterrent value of suppression outweighs the societal cost of excluding highly probative evidence of guilt.<sup>72</sup> The *Herring* Court focused entirely on “deterrence and culpability” with not a mention of *Mapp v. Ohio*’s judicial integrity rationale.<sup>73</sup> In a passage that would prove important two years later in *Davis*, the Court reiterated that the good-faith exception saves evidence from suppression if, under the circumstances, “a reasonably well trained officer” would have believed the search was lawful.<sup>74</sup>

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<sup>69</sup> See *Herring*, 555 U.S. at 137 (pointing out that “suppression is not an automatic consequence of a Fourth Amendment violation”); see also *Heien v. North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting) (disagreeing with the majority’s conclusion that an officer does not violate the Fourth Amendment by making a reasonable mistake of law, and pointing out that the better approach would be to handle the officer’s reasonable mistake of law at the “remedial” step because “[o]ur jurisprudence draws a sharp ‘analytica[l] distinct[ion]’ between the existence of a Fourth Amendment violation and the remedy for that violation” (quoting *Davis v. United States*, 131 S. Ct. 2419, 2431 (2011))); see also *Ferguson*, *supra* note 38, at 625 (explaining that *Herring* represents “new territory for lawyers and courts accustomed to an automatic linkage between constitutional wrongs and constitutional remedies”).

<sup>70</sup> *Herring*, 555 U.S. at 140.

<sup>71</sup> *Id.*

<sup>72</sup> See Josephson, *supra* note 59, at 176–77 (characterizing *Herring* as a “landmark criminal procedure opinion” that “could transform the exclusionary rule by making the exclusion of evidence the exception rather than the rule”); see also Maclin & Rader, *supra* note 68, at 1208 (explaining that “[i]f under *Herring*, only culpable or deliberate violations of the Fourth Amendment merit suppression, then a great number—perhaps the overwhelming majority—of unreasonable searches and seizures will be immunized from the exclusionary rule”).

<sup>73</sup> See *Herring*, 555 U.S. at 141 (“The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that ‘offends basic concepts of the criminal justice system.’” (quoting *United States v. Leon*, 468 U.S. 897, 908 (1984))); see also *id.* at 147 (explaining that “the deterrent effect of suppression must be substantial and outweigh any harm to the justice system”).

<sup>74</sup> See *id.* at 145 (citing *Leon*, 468 U.S. at 922, for the proposition that “our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances”).

### B. Davis v. United States

In 2011, the Court released its much-anticipated opinion in *Davis v. United States*.<sup>75</sup> The precise question before the Court was whether the exclusionary rule should apply to searches conducted in reliance on binding precedent that was later overruled.<sup>76</sup> To understand the Court's conclusion and reasoning, a brief overview of the factual and procedural history of the case is in order.

During the course of a routine traffic stop in 2007, local police officers in Alabama arrested Willie Davis (a passenger in the car) for lying about his identity.<sup>77</sup> The officers handcuffed Davis and secured him in the backseat of a police cruiser.<sup>78</sup> The officers then searched the passenger compartment of the car where they found a handgun in Davis's jacket.<sup>79</sup> Davis—a convicted felon—was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).<sup>80</sup> Prior to trial, he moved to suppress the gun on the ground that it was found during a warrantless search that was unsupported by probable cause.<sup>81</sup>

The trial court gave Davis's argument short shrift.<sup>82</sup> After all, it was well settled that the Supreme Court's 1981 decision in *New York v. Belton*<sup>83</sup> authorized police officers to search a car's passenger compartment without a warrant or probable cause so long as there was a lawful arrest of a recent occupant.<sup>84</sup> Indeed, the Eleventh Circuit (and every other circuit for that matter) had specifically upheld searches in cases with facts nearly identical to those in

<sup>75</sup> 131 S. Ct. 2419 (2011).

<sup>76</sup> *Id.* at 2423 (“The question here is whether to apply [the exclusionary rule] when the police conduct a search in compliance with binding precedent that is later overruled.”).

<sup>77</sup> *Id.* at 2425.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2425–26.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 2426 (pointing out that at the district court level Davis conceded that his argument was foreclosed by binding precedent).

<sup>83</sup> 453 U.S. 454 (1981), *abrogated by Davis*, 131 S. Ct. 2419. The *Belton* Court held that when an officer lawfully arrests the occupant of an automobile he may, as a contemporaneous incident of that arrest, search without a warrant or probable cause the passenger compartment of the automobile and any containers found therein. *Id.* at 460–61.

<sup>84</sup> See *United States v. Katzin*, 769 F.3d 163, 172 (3d Cir. 2014) (en banc) (“It was widely understood that the Court [in *Belton*] had issued a bright-line rule, and that vehicle searches incident to the arrest of recent occupants were reasonable, regardless of whether the arrestee ‘was within reaching distance of the vehicle at the time of the search.’”), *cert. denied*, 135 S. Ct. 1448 (2015).

*Davis*.<sup>85</sup> As *Davis*'s appeal was grinding its way through the system, however, the Supreme Court did an about-face with its 2009 decision in *Arizona v. Gant*.<sup>86</sup> The *Gant* Court held that officers may only search a car incident to a lawful arrest of a recent occupant if: (1) the arrestee is unsecured and within the grabbing area of the car during the search; or (2) there is reason to believe that evidence related to the crime of arrest will be found in the car.<sup>87</sup>

In light of *Gant*, the Eleventh Circuit found in *Davis* that the officers violated the Fourth Amendment when they searched the car.<sup>88</sup> But the Eleventh Circuit refused to exclude the gun because the officers relied in good faith on prior binding precedent that specifically authorized the search.<sup>89</sup> The Supreme Court granted certiorari and affirmed in an opinion by Justice Alito.<sup>90</sup>

Picking up where *Herring* left off, the *Davis* Court reinforced the notion that the exclusionary rule is a punitive device that should only be used in response to police conduct that was "deliberate enough to yield 'meaningful' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" <sup>91</sup> Reasoning that an officer who follows binding precedent should be faulted no more than an officer who follows a magistrate judge's probable cause determination (*Leon*),<sup>92</sup> a legislative enactment (*Krull*),<sup>93</sup> a court

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<sup>85</sup> See, e.g., *United States v. Gonzalez*, 71 F.3d 819, 822, 824–27 (11th Cir. 1996) (finding no Fourth Amendment violation where officers searched the defendant's car incident to his lawful arrest after he was handcuffed and secured away from the car); see also *Davis*, 131 S. Ct. at 2424 (recognizing that "*Belton* was widely understood to have set down a simple, bright-line rule . . . authoriz[ing] automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search").

<sup>86</sup> 556 U.S. 332 (2009).

<sup>87</sup> *Id.* at 342–43.

<sup>88</sup> *United States v. Davis*, 598 F.3d 1259, 1263 (11th Cir. 2010), *aff'd*, *Davis*, 131 S. Ct. 2419 ("There can be no serious dispute that the search here violated *Davis*'s Fourth Amendment rights as defined in *Gant*.").

<sup>89</sup> *Id.* at 1264 ("We now enter the fray and hold that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overruled.").

<sup>90</sup> *Davis*, 131 S. Ct. 2419. Justice Alito's opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Kagan. *Id.* at 2423. Justice Sotomayor concurred in the judgment. *Id.* at 2434. Justice Breyer authored a dissenting opinion that was joined by Justice Ginsburg. *Id.* at 2436.

<sup>91</sup> *Id.* at 2428 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)).

<sup>92</sup> *United States v. Leon*, 468 U.S. 897, 922 (1984) ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").

<sup>93</sup> *Illinois v. Krull*, 480 U.S. 340, 349 (1987) ("The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute

computer database (*Evans*),<sup>94</sup> or a law enforcement database (*Herring*),<sup>95</sup> the Court concluded that “evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.”<sup>96</sup> In her solo concurrence, Justice Sotomayor opined that the Court’s decision should not be read as addressing the “markedly different question” of whether the exclusionary rule applies when the law is in flux and there is no binding appellate precedent specifically authorizing the officer’s conduct.<sup>97</sup>

That “markedly different question” is one of many left unanswered by the Court’s holding in *Davis*.<sup>98</sup> Clearly, the exclusionary rule does not apply when an officer conducts a search that was specifically authorized by a prior published opinion from the governing federal circuit court. But how close do the facts of the current case and the prior case need to be in order for the officer’s conduct to be specifically authorized by the prior case?<sup>99</sup> What if a court opinion suggests that the officer’s search would be permitted, “or leaves a bunch of clues, without definitively resolving the question?”<sup>100</sup> Does *Davis* apply if the governing circuit court has not addressed a particular issue, but the overwhelming weight of authority from the other circuits supports the officer’s conduct?<sup>101</sup> These are the difficult questions that have confronted the circuit courts, including the Fourth Circuit in *Stephens*. And, the approach the Fourth

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would have as little deterrent effect on the officer’s actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant.”)

<sup>94</sup> *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995) (“There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record. Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees.”).

<sup>95</sup> *Herring*, 555 U.S. at 147–48 (“[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence [achieved by application of the exclusionary rule] does not ‘pay its way.’”).

<sup>96</sup> *Davis*, 131 S. Ct. at 2429.

<sup>97</sup> *Id.* at 2435 (Sotomayor, J., concurring).

<sup>98</sup> See Mason, *supra* note 4, at 67–72 (discussing some of the questions raised by the Court’s decision in *Davis*).

<sup>99</sup> See Kerr, *supra* note 4, at 255 n.78 (noting that “[e]xactly what counts as ‘binding’ precedent [under *Davis*] can be unclear”); see also Orin Kerr, *Lower Court Interpretations of Davis v. United States*, 131 S. Ct. 2419 (2011), VOLOKH CONSPIRACY (Aug. 14, 2013, 3:49 PM), <http://volokh.com/2013/08/14/lower-court-interpretations-of-davis-v-united-states-131-s-ct-2419-2011/> [hereinafter *Lower Court Interpretations of Davis*] (posing questions about the scope of *Davis*’s holding).

<sup>100</sup> See *Lower Court Interpretations of Davis*, *supra* note 99.

<sup>101</sup> See *id.*; see also Freiwald, *supra* note 4, at 365–66 (discussing whether *Davis* applies where there is persuasive authority from other circuits but no binding authority in the circuit where the search occurred); Mason, *supra* note 4, at 72–79 (analyzing how *Davis* could be potentially applied in a host of different scenarios).



Circuit took to answer the questions is representative of the approach the other circuits have taken.<sup>102</sup>

### III. THE FOURTH CIRCUIT'S DECISION IN *STEPHENS*

#### A. *Factual and Procedural Background*

The case against Henry Stephens began in 2011 when a federal drug taskforce suspected he was violating drug and firearms laws.<sup>103</sup> As part of the investigation, on May 13, 2011, a Baltimore police officer installed a GPS vehicle tracker underneath Stephens's car while it was in a public parking lot.<sup>104</sup> The officer, who had been deputized as a federal taskforce officer, did not have a search warrant.<sup>105</sup> Using the information provided by the GPS device, officers later located Stephens and his car outside of a nightclub where he worked as a security guard.<sup>106</sup> A search of Stephens's car led to the discovery of a handgun.<sup>107</sup> Because Stephens had a prior felony conviction, he was charged with being a felon in possession of a firearm.<sup>108</sup>

As Stephens awaited trial, the Supreme Court held in *Jones* that the installation and monitoring of a GPS vehicle tracker constituted a Fourth Amendment "search," even if the monitoring occurred on public roads.<sup>109</sup> Stephens promptly filed a motion to suppress based on *Jones*.<sup>110</sup> The district court found that *Jones* rendered the installation and monitoring of the GPS

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<sup>102</sup> See *People v. LeFlore*, 32 N.E.3d 1043, 1048 (Ill. 2015) (citing cases and reporting that "all of the federal circuits that have considered post-*Jones* whether the good-faith exception applies in cases of warrantless GPS searches conducted pre-*Jones* have rejected a narrow reading of *Davis* and have instead concluded that the good-faith exception applies").

<sup>103</sup> *United States v. Stephens*, 764 F.3d 327, 329 (4th Cir. 2014), *cert. denied*, 2015 WL 1970174 (U.S. Oct. 5, 2015) (No. 14-1313).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* It is a common practice for federal law enforcement agencies, such as the Drug Enforcement Administration (DEA), to form taskforces that involve state and local officers working in tandem with their federal counterparts. See generally *DEA Programs: State & Local Task Forces*, DRUG ENFORCEMENT ADMIN., <http://www.dea.gov/ops/taskforces.shtml> (last visited Oct. 5, 2015). The state and local officers who serve on federal taskforces are deputized and given the power to perform the same general duties as full-time federal law enforcement officers.

<sup>106</sup> *Stephens*, 764 F.3d at 330.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* Stephens moved to suppress the location information obtained from the GPS vehicle tracker. *Id.* He also sought suppression of the handgun on the theory that the handgun was a fruit of the location information illegally obtained from the GPS vehicle tracker. *Id.*

vehicle tracker on Stephens's car unconstitutional.<sup>111</sup> Nonetheless, the district court applied the good-faith exception and refused to suppress the evidence.<sup>112</sup> Stephens appealed, and a divided panel of the Fourth Circuit affirmed.<sup>113</sup>

### B. The Majority Opinion

The Fourth Circuit majority initially framed the question presented as “whether a reasonably well trained officer would have known” that it was unconstitutional to install and monitor a GPS tracking device without a warrant.<sup>114</sup> The Court answered that question in the negative and affirmed the district court's refusal to suppress the evidence.<sup>115</sup> The majority acknowledged that when the officer installed the GPS vehicle tracker on Stephens's car, there was no Supreme Court or Fourth Circuit precedent specifically holding that GPS vehicle trackers could be installed and monitored without a warrant.<sup>116</sup> This absence of binding precedent *specifically* authorizing GPS vehicle trackers, Stephens argued, placed the case beyond the scope of *Davis*'s holding.<sup>117</sup> Under Stephens's interpretation of *Davis*, the good-faith exception did not apply where an officer relied on “nonbinding precedent, no matter how extensive and well-developed that precedent may be.”<sup>118</sup>

Although skeptical of Stephens's narrow interpretation of *Davis*, the Fourth Circuit found it unnecessary to resolve whether the good-faith exception applies to an officer's reliance on nonbinding precedent because the court concluded that binding precedent, namely the Supreme Court's decision in

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Judge Shedd authored the majority opinion, which Judge Hamilton joined. *Id.* at 329. Judge Thacker dissented. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Interestingly, the first paragraph of the Fourth Circuit's opinion contains a significant typographical error. The court began by posing the question: “whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances.” *Id.* The court went on to say that “the answer to this question is ‘yes.’ Therefore, the exclusionary rule does not apply, and we affirm . . .” *Id.* Indeed, if the court's answer to the question it posed was actually “yes,” then the result would have been the application of the exclusionary rule and reversal. It is clear, however, from reading the opinion that the answer to the question posed was “no,” and the appearance of “yes” in the opinion was a typographical error.

<sup>116</sup> *Id.* at 332.

<sup>117</sup> *Id.* at 336–37.

<sup>118</sup> *Id.* at 337. This, of course, was the question Justice Sotomayor raised in her *Davis* concurrence. See *Davis v. United States*, 131 S. Ct. 2419, 2435 (2011) (Sotomayor, J., concurring) (“This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.”).

*Knotts*, authorized the officer's conduct.<sup>119</sup> The *Stephens* majority recognized that *Knotts* dealt with beepers and not GPS devices and was, therefore, not identical to the current case.<sup>120</sup> But the court concluded that the factual differences between the two cases were insignificant given *Knotts*'s broad proclamation that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."<sup>121</sup> From the majority's perspective, *Knotts* could reasonably have been read to cover GPS vehicle trackers.<sup>122</sup>

Indeed, before *Jones*, several other courts had specifically held that *Knotts* applied to GPS vehicle trackers.<sup>123</sup> Included among those courts was the Maryland Court of Special Appeals.<sup>124</sup> That fact was significant to the Fourth Circuit majority because the GPS vehicle tracker was installed on Stephens's car in Maryland by a local police officer who happened to also be deputized as a federal taskforce officer.<sup>125</sup> The language of *Knotts* itself and the general pre-*Jones* consensus by courts led the majority to conclude that the good-faith exception prevented suppression of the evidence.<sup>126</sup>

### C. *The Dissenting Opinion*

Judge Thacker advanced three primary points in her vigorous dissent. First, she argued that *Davis* was inapplicable because "no 'binding appellate precedent' existed in this circuit 'specifically authorizing' law enforcement's actions."<sup>127</sup> To Judge Thacker, *Davis* required published precedent from the governing circuit court addressing the same legal issue in the same factual circumstances. In her opinion, *Knotts* was not binding appellate precedent because it did not involve the unauthorized physical attachment of a GPS device to a suspect's property.<sup>128</sup> Additionally, Judge Thacker was concerned about the significant technological differences between the beeper in *Knotts*

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<sup>119</sup> *Stephens*, 764 F.3d at 337.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (quoting *United States v. Knotts*, 460 U.S. 276, 281 (1983)).

<sup>122</sup> *Id.* at 333.

<sup>123</sup> *Id.* (citing cases).

<sup>124</sup> *Id.* at 334 (citing *Stone v. State*, 941 A.2d 1238 (Md. Ct. Spec. App. 2008)).

<sup>125</sup> *See id.* at 338 ("[W]e would make a mockery of the good-faith inquiry if we were to ignore the clear pre-*Jones* state of the law in Maryland—as pronounced by Maryland's highest court—and hold that a Maryland officer's use of the GPS was objectively unreasonable.").

<sup>126</sup> *Id.* at 338–39.

<sup>127</sup> *Id.* at 342 (Thacker, J., dissenting) (quoting *Davis v. United States*, 131 S. Ct. 2419, 2429, 2434 (2011)).

<sup>128</sup> *Id.*

and the GPS device installed on Stephens's car.<sup>129</sup> Other judges have shared Judge Thacker's belief that GPS technology is fundamentally different from the antiquated beepers of days gone by.<sup>130</sup> As Chief Judge Alex Kozinski of the Ninth Circuit explained, GPS vehicle trackers "have little in common with the primitive [beeper] devices in *Knotts* . . . . Beepers could help police keep vehicles in view when following them, or find them when they lost sight of them, but they still required at least one officer—and usually many more—to follow the suspect."<sup>131</sup> Conversely, GPS vehicle trackers "can record the car's movements without human intervention—quietly, invisibly, with uncanny precision."<sup>132</sup>

Second, Judge Thacker criticized the majority for treating *Davis* as though it allowed officers to rely on a generalized "vast majority of decisions" from other jurisdictions instead of binding appellate precedent from the governing circuit.<sup>133</sup> By her reading of *Davis*, mere reliance on "widely accepted legal norms is not the standard, nor should it be."<sup>134</sup> Thus, it did not matter to Judge Thacker what other courts had held. The only thing that mattered was the absence of any Fourth Circuit or Supreme Court precedent directly on-point.<sup>135</sup>

Third, Judge Thacker argued that the deterrence rationale would have been served by applying the exclusionary rule. She emphasized that the officer's conduct occurred after the D.C. Circuit had ruled it unconstitutional to install and monitor GPS vehicle trackers without a warrant; thus, she asserted that the law in the other circuits was unclear at the time the GPS device was

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<sup>129</sup> *Id.* at 342 & n.4.

<sup>130</sup> See *United States v. Katzin*, 769 F.3d 163, 193 (3d Cir. 2014) (en banc) (Greenaway, J., dissenting) ("GPS technology is vastly different from the more primitive tracking devices of yesteryear—'beepers.'"), *cert. denied*, 135 S. Ct. 1448 (2015); see also *United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting from denial of rehearing en banc) ("The electronic tracking devices used by the police in this case have little in common with the primitive devices in *Knotts*.").

<sup>131</sup> *Pineda-Moreno*, 617 F.3d at 1124.

<sup>132</sup> *Id.*; see *State v. Adams*, 763 S.E.2d 341, 347 n.5 (S.C. 2014) (noting that "beepers serve as aids to law enforcement already conducting physical surveillance, while a GPS enables officers to take a passive role and simply monitor location data from a computer").

<sup>133</sup> *Stephens*, 764 F.3d at 344 (Thacker, J., dissenting).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Interestingly, the Supreme Court of South Carolina (located within the Fourth Circuit) agreed with Judge Thacker's position and refused to apply the good-faith exception to the pre-*Jones* installation and monitoring of a GPS vehicle tracker. See *Adams*, 763 S.E.2d at 347. According to the *Adams* court, neither *Knotts* nor *Karo* "expressly or impliedly authorized" the installation of a GPS device. *Id.* And, the court further concluded that "no pre-*Jones* precedent in this federal circuit extended *Knotts* or *Karo* to the installation and monitoring of a GPS device." *Id.*

installed.<sup>136</sup> In such a circumstance, Judge Thacker believed officers should be encouraged (via the exclusionary rule) to “err on the side of the Constitution and obtain a warrant.”<sup>137</sup> At least one Supreme Court Justice would share Judge Thacker’s position—Justice Sotomayor made clear in her *Davis* concurrence that the good-faith exception should not apply when the law in a particular area is in flux.<sup>138</sup>

#### IV. ANALYSIS OF THE “*KNOTTS* IS BINDING PRECEDENT UNDER *DAVIS*” APPROACH

The Fourth Circuit’s decision in *Stephens* is undoubtedly important for what it held—that *Knotts* constitutes binding appellate precedent under *Davis*. But it is perhaps even more important for what it *almost* (and should have) held. Reading the *Stephens* majority opinion is a bit like watching a movie where you think you know what is going to happen next, but then all of a sudden there is an unforeseen plot twist. And not just an unforeseen twist, but a twist that is inconsistent with events that previously occurred.

At the beginning of its legal analysis, the majority stated that neither the Supreme Court nor the Fourth Circuit had “expressly approved or disapproved of warrantless GPS usage in 2011.”<sup>139</sup> *Stephens*’s argument, of course, was that the absence of such express approval placed the case outside

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<sup>136</sup> *Stephens*, 764 F.3d at 345 (Thacker, J., dissenting). Judge Thacker was referring to the D.C. Circuit’s 2010 decision in *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010). In *Maynard* (which became entitled *United States v. Jones* when it reached the Supreme Court), the D.C. Circuit had concluded that the warrantless installation and monitoring of GPS vehicle trackers constituted a Fourth Amendment search. *Id.* at 555–56. The D.C. Circuit reached that conclusion by employing a theory known as the “mosaic theory”—meaning what may appear trivial to the uninformed may be greatly important to individuals with a broader view. *See id.* at 562; *see also* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313 (2012) (stating that *Maynard* was based on “a ‘mosaic theory’ of the Fourth Amendment” and explaining how theory was applied by the D.C. Circuit). The Supreme Court in *Jones* reached the same result as the D.C. Circuit in *Maynard* (i.e., treating the installation and monitoring of a GPS vehicle tracker as a “search”), but *Jones* did not adopt the mosaic theory. *See* Kerr, *supra*, at 326 (“Having resolved the case on trespass grounds, Justice Scalia [writing for the majority] did not need to reach the mosaic theory adopted in the D.C. Circuit.”). *Id.*

<sup>137</sup> *Stephens*, 764 F.3d at 346 (Thacker, J., dissenting).

<sup>138</sup> *See Davis v. United States*, 131 S. Ct. 2419, 2435 (2011) (Sotomayor, J., concurring) (“This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.”). Other circuit court judges have expressed the same sentiment as Judge Thacker. *See, e.g., United States v. Katzin*, 769 F.3d 163, 192 (3d Cir. 2014) (Greenaway, J., dissenting) (“Where an officer decides to take the Fourth Amendment inquiry into his own hands, rather than to seek a warrant from a neutral magistrate—particularly where the law is as far from settled as it was here—he acts in a constitutionally reckless fashion.”), *cert. denied*, 135 S. Ct. 1448 (2015).

<sup>139</sup> *Stephens*, 764 F.3d at 332 (majority opinion).

the scope of *Davis*'s holding.<sup>140</sup> The majority appeared poised to hold that the good-faith exception applied even in the absence of binding precedent.<sup>141</sup> Indeed, the court expressed its skepticism of the defendant's "narrow view of the good-faith inquiry,"<sup>142</sup> and it noted that accepting the narrow view would mean an officer could not rely on "universal, but non-binding, precedent that was directly on point."<sup>143</sup> Furthermore, the court pointed out that the good-faith exception "is not limited to the specific circumstances addressed by the Supreme Court."<sup>144</sup> The scene had been set for the court to take the next step and hold that even though there was no binding appellate precedent in the Fourth Circuit, a reasonable officer would not have known it was illegal to install and monitor a GPS vehicle tracker on public roadways. Then, out of nowhere, the *Stephens* court punted on that "interesting issue" and held instead that the case fit neatly within the scope of *Davis* because *Knotts* was binding appellate precedent that specifically authorized the officer's conduct.<sup>145</sup>

The Fourth Circuit has company at the table for its view of the interplay between *Knotts* and *Davis*. The First, Second, Third, and Seventh Circuits<sup>146</sup>—along with several state courts<sup>147</sup>—have reached the same result.

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<sup>140</sup> *Id.* at 336–37.

<sup>141</sup> *Id.* at 337.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 337 n.11.

<sup>144</sup> *Id.* at 336.

<sup>145</sup> *Id.* at 337.

<sup>146</sup> *See* *United States v. Katzin*, 769 F.3d 163, 175–76 (3d Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 1448 (2015); *United States v. Brown*, 744 F.3d 474, 478 (7th Cir. 2014); *United States v. Aguiar*, 737 F.3d 251, 261–62 (2d Cir. 2013) (treating *Knotts* as binding appellate court precedent for purposes of *Davis*); *United States v. Sparks*, 711 F.3d 58, 65 (1st Cir. 2013) (determining that *Knotts* and a prior First Circuit case applying *Knotts* were "sufficiently clear and apposite to trigger *Davis*"). Several other circuits have applied *Davis* based on the existence of their own circuit precedent regarding precursor technologies to GPS devices. *See* *United States v. Andres*, 703 F.3d 828, 835 (5th Cir. 2013) (holding that prior circuit decision authorizing the warrantless monitoring of beepers was binding appellate court precedent under *Davis* for purposes of warrantless GPS monitoring); *see also* *United States v. Fisher*, 745 F.3d 200, 204 (6th Cir. 2014) (holding that a prior circuit decision involving cell-site location information constituted binding precedent authorizing warrantless installation and monitoring of GPS vehicle trackers); *United States v. Smith*, 741 F.3d 1211, 1221–22 (11th Cir. 2013).

<sup>147</sup> *See, e.g.,* *Kelly v. State*, 82 A.3d 205, 215–16 (Md. 2013) ("We therefore hold that, before *Jones*, binding appellate precedent in Maryland, namely *Knotts*, authorized the GPS tracking of a vehicle on public roads."); *State v. Johnson*, 22 N.E.3d 1061, 1062 (Ohio 2014) (holding that "*Knotts* and *Karo* served as binding appellate precedent to justify placing GPS tracking devices on suspects' vehicles without obtaining a search warrant"). Notably, the Supreme Court of South Carolina has issued a decision that squarely contradicts the Fourth Circuit's decision in *Stephens*. *See* *State v. Adams*, 763 S.E.2d 341, 347 (S.C. 2014). The *Adams* court suppressed the evidence obtained from a GPS vehicle tracker and refused to apply the good-faith exception because there was no binding appellate precedent "in this federal circuit" authorizing warrantless installation

Although those courts and the *Stephens* court reached the right result (i.e., refusal to apply the exclusionary rule), they made a misstep by trying to cram the square peg that is *Knotts* into *Davis*'s round hole. There was a much cleaner way of reaching the same result. The *Stephens* court should have done what it initially seemed poised to do—hold that at the time the GPS vehicle tracker was installed and monitored no “reasonably well trained officer would have known that the [conduct] was illegal.”<sup>148</sup> Instead, the Fourth Circuit (and those courts that have taken the same approach) has distorted *Knotts* and stretched *Davis* to create binding appellate precedent where none existed. As explained below in Part III.A, *Knotts* does not constitute binding appellate precedent under *Davis*. And Part III.B argues that instead of distorting existing case law to reach a desired result, the courts should have resolved the exclusionary rule question by applying the general good-faith analysis.

#### A. *Knotts Does Not Constitute Binding Appellate Precedent*

In the pre-*Jones* era, *Knotts* could have reasonably been read to suggest that a warrant was not needed to install and subsequently monitor a GPS vehicle tracker on public roadways.<sup>149</sup> A suggestion, however, is not what *Davis* requires. Rather, *Davis* is a narrow opinion that was intended to address the very distinct situation of an officer engaging in conduct that was “specifically authorize[d]” by “binding precedent that [was] later overruled.”<sup>150</sup> Given that the words “specifically authorized” and “binding” appear throughout the *Davis* opinion,<sup>151</sup> it is easy to conclude that the Court was serious about its opinion only applying where there was prior “binding precedent” that “specifically authorized” the challenged police conduct.

To put it in terms familiar to any law student, *Davis* only applies when the prior precedent was a published opinion from the governing circuit court (or

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and monitoring of GPS vehicle trackers. *Id.* According to the court, “*Knotts* and *Karo* did not constitute binding precedent” because neither case “expressly or impliedly authorized, a physical trespass as occurred in this case.” *Id.*

<sup>148</sup> *Herring v. United States*, 555 U.S. 135, 145 (2009).

<sup>149</sup> *See generally Fisher*, 745 F.3d at 204 (stating that *Knotts* and *Karo*, when read together, “strongly suggested” but did not go so far as to specifically authorize the warrantless installation and monitoring of GPS devices).

<sup>150</sup> *See Davis v. United States*, 131 S. Ct. 2419, 2423, 2429 (2011); *see also* *People v. LeFlore*, 32 N.E.3d 1043, 1070, 1074 (Ill. 2015) (Burke, J., dissenting) (arguing that “*Davis* recognized a narrow exception” that applies only when “there exists binding precedent within the particular jurisdiction governing the law enforcement officials”); *State v. Hohn*, 321 P.3d 799 (Kan. Ct. App. 2014) (unpublished table decision) (explaining that adopting the prosecution’s interpretation of *Davis* “would be to extend the definition of binding precedent way beyond its original boundaries”); Mason, *supra* note 4, at 69–72 (arguing that *Davis* is a narrow opinion that does not apply unless there is binding precedent that “expressly authorized the search”).

<sup>151</sup> *See, e.g., Davis*, 131 S. Ct. at 2423–24, 2428–29.

the Supreme Court) that is “on all fours” with the current case. Returning to the example case of *Stephens*, there was no Supreme Court or Fourth Circuit precedent specifically authorizing the warrantless installation and monitoring of GPS vehicle trackers prior to *Jones*. Rather than acknowledging the absence of binding precedent and deciding the case without reliance on *Davis*, the Fourth Circuit and many of its sister circuits have mistakenly chosen to pretend that *Knotts* was binding precedent that specifically authorized the warrantless installation and monitoring of GPS vehicle trackers.<sup>152</sup>

A close reading of *Knotts*, however, shows that the Court’s decision only addressed the act of *monitoring* a vehicle’s location using a tracking device. It said nothing about the *installation* of a tracking device on an individual’s vehicle.<sup>153</sup> In the second beeper case, *Karo*, the Court briefly addressed whether installing the beeper in a container implicated the Fourth Amendment.<sup>154</sup> The *Karo* Court concluded that the installation of the beeper (with permission from the owner of the container where the beeper was placed) was insufficient to trigger the Fourth Amendment.<sup>155</sup> Thus, to arrive at the conclusion that the installation and monitoring of a GPS vehicle tracker was not a search prior to *Jones*, one would have to read *Knotts* and *Karo*, extrapolate general principles from them, combine those general principles together, and then apply those general principles to GPS vehicle trackers through analogical reasoning.<sup>156</sup> That is a far cry from *Davis*, where there was a binding appellate court decision holding “X is constitutional” and an officer performed “X.”

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<sup>152</sup> See *United States v. Katzin*, 769 F.3d 163, 175–76 (3d Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 1448 (2015); *United States v. Stephens*, 764 F.3d 327, 337 (4th Cir. 2014) (stating that the officer’s “use of the GPS was objectively reasonable because of the binding appellate precedent of *Knotts*”), *cert. denied*, 2015 WL 1970174 (U.S. Oct. 5, 2015) (No. 14-1313); *United States v. Brown*, 744 F.3d 474, 478 (7th Cir. 2014); *United States v. Sparks*, 711 F.3d 58, 65 (1st Cir. 2013) (determining that *Knotts* and a prior First Circuit case applying *Knotts* were “sufficiently clear and apposite to trigger *Davis*”); *United States v. Aguiar*, 737 F.3d 251, 261–62 (2d Cir. 2013) (treating *Knotts* as binding appellate court precedent for purposes of *Davis*).

<sup>153</sup> See *Mason*, *supra* note 4, at 78 (recognizing that neither *Knotts* nor *Karo* “expressly authorize the non-consensual installation of a tracker”).

<sup>154</sup> See *United States v. Karo*, 468 U.S. 705, 712–13 (1984). The Court viewed the installation of the beeper as a “technical trespass” that “was only marginally relevant to the question of whether the Fourth Amendment has been violated.” *Id.* According to the *Karo* Court, a physical trespass was “neither necessary nor sufficient to establish a constitutional violation.” *Id.* at 713.

<sup>155</sup> See *id.* (concluding “that no Fourth Amendment interest of *Karo* or of any other respondent was infringed by the installation of the beeper”).

<sup>156</sup> See *Mason*, *supra* note 4, at 78 (explaining that “*Davis* is about express authorization (rather than the possibility of creative analogizing)”; see also *Katzin*, 769 F.3d at 188 (Greenaway, J., dissenting) (criticizing the majority for holding that “two disparate Supreme Court precedents [*Knotts* and *Karo*]” can be read together to constitute binding appellate precedent for purposes of *Davis*).



Additionally, beepers and GPS devices (while sharing some similarities) are not synonymous.<sup>157</sup> A beeper “is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver.”<sup>158</sup> Beepers require active involvement by a police officer on the street because they only work if an officer with a radio receiver is physically close enough to the beeper to pick up the signal it emits.<sup>159</sup> Beepers also lack the ability to provide location information with pinpoint precision.<sup>160</sup> GPS devices, on the other hand, are much more precise, require fewer resources, and store significantly more data.<sup>161</sup> Indeed, some modern GPS devices can determine location “with accuracy to within ten inches.”<sup>162</sup> And, GPS devices can store “8,000 to 17,000 data points” per day<sup>163</sup> all with very little active involvement required on the part of law enforcement officers.<sup>164</sup>

To be blunt, treating a case about beepers as though it was binding precedent in a case about GPS devices is akin to treating a case about horses as

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<sup>157</sup> See *Stephens*, 764 F.3d at 342 n.4 (Thacker, J., dissenting) (noting that a beeper and a GPS device “are of an entirely different character. A beeper . . . requires law enforcement to at least be in proximity to the device to receive the transmitted signal, whereas a GPS device downloads location data at specific time intervals with no proximity needed.”); see also *Katzin*, 769 F.3d at 193 (Greenaway, J., dissenting) (“GPS technology is vastly different from the more primitive tracking devices of yesteryear—‘beepers.’”); *United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting from denial of rehearing en banc) (“The electronic tracking devices used by the police in this case have little in common with the primitive devices in *Knotts*.”).

<sup>158</sup> Jordan Miller, *New Age Tracking Technologies in the Post-United States v. Jones Environment: The Need for Model Legislation*, 48 CREIGHTON L. REV. 553, 557 (2015).

<sup>159</sup> *Id.* at 558 (explaining that the “beeper’s reliability and range vary, with a typical ground-to-ground signal in an uninhabited area of two to four miles,” and in more urban areas with an increased likelihood of interference, “the receiver’s efficacy may be limited to an area within a two-block radius of the beeper”).

<sup>160</sup> *Id.* (“Beeper devices lack the capacity to triangulate an individual’s location with pinpoint accuracy, instead only offering more generalized locational data.”).

<sup>161</sup> See *United States v. Jones*, 132 S. Ct. 945, 963–64 (2012) (Alito, J., concurring) (discussing the capabilities of GPS technology); see also Courtney Elgart, Note, *The Road from Jones: The Requirement of Reasonableness for a GPS Search of a Vehicle*, 52 AM. CRIM. L. REV. 631, 643 (2015) (“GPS uses satellites to determine the location of a receiver, including latitude, longitude, altitude, speed, and direction. A GPS device can calculate its location to within a few centimeters and usually recalculates its location over five to ten second intervals.”).

<sup>162</sup> See Miller, *supra* note 158, at 561.

<sup>163</sup> Elgart, *supra* note 161, at 631 (“A Global Positioning System (‘GPS’) device records its location every five to ten seconds. Over the course of one day, a GPS device could produce approximately 8,000 to 17,000 data points. Those data points include the device’s latitude, longitude, altitude, and a time stamp.”).

<sup>164</sup> See Miller, *supra* note 158, at 561–62 (explaining that GPS devices provide “the secondary advantage of allowing law enforcement to not allocate personnel to constant round-the-clock monitoring while allowing them to gain the same information on the movements of the individual/object tracked”).

binding precedent in a case about automobiles. There are similarities between the two technologies and they accomplish the same general goal, but they are not the same. Such a situation stands in stark contrast to what happened in *Davis*. The officer in *Davis* searched a car incident to the lawful arrest of a recent occupant, and he followed “to the letter” an Eleventh Circuit decision involving a virtually identical fact pattern.<sup>165</sup> The fact patterns were the same, and the legal questions were identical.<sup>166</sup>

Finally, and perhaps most importantly, the Supreme Court declared in *Jones* that neither *Knotts* nor *Karo* authorized the warrantless installation and monitoring of GPS vehicle trackers.<sup>167</sup> According to the Court, the *Jones* decision is “perfectly consistent” with *Knotts* and *Karo* because those cases did not involve the trespassory installation of a tracking device without the consent of the owner.<sup>168</sup> Thus, the Court’s decision in *Jones* left both *Knotts* and *Karo* intact. Put another way, the Supreme Court has made clear that neither *Knotts* nor *Karo* authorized officers to install and monitor GPS vehicle trackers without a warrant. It is, therefore, virtually beyond the realm of possibility to believe that the Supreme Court would view *Knotts* as “binding appellate precedent [that] specifically authorize[d]”<sup>169</sup> the installation and monitoring of GPS vehicle trackers.

Clearly, the circuit courts—like the *Stephens* court—that have adopted the “*Knotts* is binding precedent under *Davis* approach” have done so because they cringed at the thought of “set[ting] the criminal loose in the community without punishment”<sup>170</sup> because a well-meaning officer failed to predict the Supreme Court’s decision in *Jones*. Their reluctance to apply the exclusionary rule in such a situation is understandable.<sup>171</sup> But, their approach—squeezing *Knotts* to fit within *Davis*—is analytically indefensible and difficult to comprehend. It is made all the more difficult to comprehend by the fact that the

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<sup>165</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2428 (2011).

<sup>166</sup> *Id.* (explaining that the search of *Davis*’s car incident to his arrest followed then-existing Eleventh Circuit precedent “to the letter”).

<sup>167</sup> See *United States v. Jones*, 132 S. Ct. 945, 951–52 (2012).

<sup>168</sup> See *id.* at 952 (explaining that *Knotts* did not involve a challenge to the installation of the beeper and *Karo* addressed the “specific question” of whether installation of the device “with the consent of the original owner” of the container where the beeper was placed implicated the Fourth Amendment); see also *United States v. Stephens*, 764 F.3d 327, 343 (4th Cir. 2014) (Thacker, J., dissenting) (“Indeed, the Supreme Court’s discussion in *Jones* . . . of its own beeper cases forecloses the possibility that these cases support the warrantless GPS search in the case at hand.”), *cert. denied*, 2015 WL 1970174 (U.S. Oct. 5, 2015) (No. 14-1313); *State v. Mitchell*, 323 P.3d 69, 78 (Ariz. Ct. App. 2014).

<sup>169</sup> *Davis*, 131 S. Ct. at 2429.

<sup>170</sup> See *id.* at 2427.

<sup>171</sup> See *id.* (explaining the downsides of applying the exclusionary rule).

court in *Stephens* and its sister circuits could have taken another, much less rocky, path to the same result.

*B. A Better Path Leading to the Same Result*

The decisions of those courts that have adopted the “*Knotts* is binding precedent under *Davis* approach” would have been more analytically sound (but no less controversial) had they resolved the exclusionary rule issue without relying on *Davis*. Generally speaking, to determine whether the good-faith exception to the exclusionary rule applies, courts must determine “whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances.”<sup>172</sup> If the answer is “no,” then the exclusionary rule is inapplicable. The good-faith inquiry is reflective of the Supreme Court’s current view of the exclusionary rule as the nuclear option that only applies when there is “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence” by the police.<sup>173</sup>

The Supreme Court’s decision in *Davis* is only one example of a circumstance where an officer would not have known his conduct was illegal.<sup>174</sup> But other circumstances exist—circumstances not quite as clear as those presented in *Davis*—where the good-faith exception also should apply. As the Third Circuit has explained, “[e]ven where *Davis* does not control, it is our duty to consider the totality of the circumstances to answer the ‘objectively ascertainable question’ of whether a reasonable police officer would have known the search was illegal.”<sup>175</sup> Rather than devoting so much energy to unconvincingly explaining why *Knotts* was binding appellate precedent, the circuit courts should have simply answered the general good-faith question of whether on May 31, 2011, a reasonable officer would have known it was unlawful to install and monitor a GPS vehicle tracker on public roadways without a warrant. Considering the legal landscape prior to *Jones*, there is a strong argument that the question should have been answered “no.”<sup>176</sup>

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<sup>172</sup> Herring v. United States, 555 U.S. 135, 145 (2009).

<sup>173</sup> *Id.* at 144.

<sup>174</sup> See People v. LeFlore, 32 N.E.3d 1043, 1050 (Ill. 2015) (explaining that “application of the good-faith inquiry is not limited to the specific circumstances addressed by the Supreme Court in *Davis*”).

<sup>175</sup> United States v. Katzin, 769 F.3d 163, 177 (3d Cir. 2014) (en banc) (quoting United States v. Leon, 468 U.S. 897, 906–07, 922 n.23 (1984)), cert. denied, 135 S. Ct. 1448 (2015); see also LeFlore, 32 N.E.3d at 1057 (agreeing with Katzin that even if *Knotts* was not binding precedent under *Davis* the exclusionary rule would be inapplicable under the “Supreme Court’s general good-faith analysis” because the officer “in relying on the legal landscape that existed at the time the search was conducted” did not act unreasonably or with the required level of culpability).

<sup>176</sup> See generally United States v. Brown, 744 F.3d 474, 478 (7th Cir. 2014) (“One can doubt that much deterrence is to be had from telling the police that they are not entitled to rely on

Looking specifically at the facts of *Stephens*, it should be remembered that when the officer (a local Maryland police officer working on a federal taskforce) installed the GPS vehicle tracker on Stephens's car, there was Maryland state court precedent authorizing his conduct.<sup>177</sup> Moreover, from the officer's past experience with GPS vehicle trackers, he had no reason to believe a warrant was required.<sup>178</sup> In fact, as the district court judge remarked, if the officer had sought a warrant the magistrate judge likely would have said "you don't need a warrant for that."<sup>179</sup> The United States Department of Justice shared the same view.<sup>180</sup> So too did the Fourth Circuit's sister circuits (save one) who had addressed the issue of GPS vehicle trackers prior to *Jones*.<sup>181</sup> And while out-of-circuit decisions are not binding, it is commonplace and certainly not unreasonable for officers—like lawyers and judges—to rely on out-of-circuit precedent when the governing circuit has yet to confront a particular problem.<sup>182</sup> Expecting more of police officers than of Article III judges, state court judges, and federal prosecutors is fundamentally unfair.<sup>183</sup>

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decisions issued by several circuits, just because the circuit covering the state in which an investigation is ongoing lacks its own precedent.”)

<sup>177</sup> See *United States v. Stephens*, 764 F.3d 327, 334 (4th Cir. 2014) (citing case law from the Maryland Court of Special Appeals), *cert. denied*, 2015 WL 1970174 (U.S. Oct. 5, 2015) (No. 14-1313). The question of whether a state court precedent qualifies as binding appellate precedent for a state police officer who is working on a federal investigation is beyond the scope of this Article. Professor Caleb Mason, however, has written an article that discusses that issue and many others. See Mason, *supra* note 4, at 72–78.

<sup>178</sup> See *Stephens*, 764 F.3d at 331 (describing the officer's experience with GPS vehicle trackers and his understanding of the law at the time the device was installed on Stephens's car).

<sup>179</sup> See *id.*

<sup>180</sup> See *Katzin*, 769 F.3d at 181 (“[I]t was DOJ policy at the time that a warrant was not required to install a battery-powered GPS on a vehicle parked on a public street and to surveil it on public roads.”).

<sup>181</sup> See *id.* at 180 (stating that prior to *Jones* there “was a nearly uniform consensus across the federal courts of appeals that addressed the issue that the installation and subsequent use of a GPS or GPS-like device was not a search, or, at most, was a search but did not require a warrant. . . . The lone dissenting voice was *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010).”).

<sup>182</sup> See *United States v. Brown*, 744 F.3d 474, 478 (7th Cir. 2014) (“One can doubt that much deterrence is to be had from telling the police that they are not entitled to rely on decisions issued by several circuits, just because the circuit covering the state in which an investigation is ongoing lacks its own precedent.”).

<sup>183</sup> Interestingly, Justice Breyer's dissenting opinion recognized the difficulty of saying that an officer who relies in good faith on non-binding precedent (in the absence of binding precedent) is any more culpable than an officer who relies in good faith on binding precedent. See *Davis v. United States*, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting) (“But an 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

If the Supreme Court means what it has said, then the exclusionary rule only applies when officers have violated a defendant's rights deliberately, recklessly, or through gross or systemic negligence.<sup>184</sup> None of those labels fit the conduct of officers like the officer in *Stephens* who reasonably believed that he was acting lawfully. Thus, the circuit courts should have refused to apply the exclusionary rule in cases like *Stephens* because no "reasonably well trained officer would have known that . . . [it] was illegal"<sup>185</sup> to install and monitor a GPS vehicle tracker on public roadways before *Jones*. After all, how could an officer be viewed as violating a defendant's rights deliberately, recklessly, or through gross negligence when the officer's actions were consistent with (1) the vast majority of persuasive federal precedent,<sup>186</sup> (2) precedent from numerous state courts,<sup>187</sup> and (3) the legal advice espoused by the highly-trained lawyers at the United States Department of Justice?<sup>188</sup>

Instead of taking that straightforward approach, there is now circuit precedent nationwide standing for the proposition that "binding appellate precedent" actually means "persuasive precedent" and "specifically authorizing" actually means "suggesting." Aside from contradicting the express language of *Davis*'s holding, this approach obscures the true nature of the modern exclusionary rule inquiry. By going to such lengths to fit GPS vehicle trackers within the holding of *Knotts*, the circuit courts in decisions like *Stephens* have made it (incorrectly) appear that *Davis* is itself a separate exception rather than one example of a circumstance where a reasonably well trained police officer would not have known his or her conduct was illegal.<sup>189</sup>

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precedent is simply suggestive rather than 'binding,' where it only describes how to treat roughly analogous instances, or where it just does not exist.").

<sup>184</sup> See *Herring v. United States*, 555 U.S. 135, 147–48 (2009) (stating that "when police mistakes are the result of negligence . . . , rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.' In such a case, the criminal should not go free because the constable has blundered." (quoting *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984))).

<sup>185</sup> *Id.* at 145.

<sup>186</sup> See, e.g., *United States v. Robinson*, 781 F.3d 453 (8th Cir. 2015); *Brown*, 744 F.3d at 474; *United States v. Fisher*, 745 F.3d 200 (6th Cir. 2014); *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 1448 (2015); *United States v. Aguiar*, 737 F.3d 251 (2d Cir. 2013); *United States v. Andres*, 703 F.3d 828 (5th Cir. 2013); *United States v. Barraza-Maldonado*, 732 F.3d 865 (8th Cir. 2013); *United States v. Sparks*, 711 F.3d 58 (1st Cir. 2013); *United States v. Pineda-Moreno*, 688 F.3d 1087 (9th Cir. 2012).

<sup>187</sup> See, e.g., *Stone v. State*, 941 A.2d 1238 (Md. Ct. Spec. App. 2008), *abrogated by Kelly v. State*, 56 A.2d 523 (Md. Ct. Spec. App. 2012).

<sup>188</sup> See *Katzin*, 769 F.3d at 181 (reporting that prior to *Jones*, the Department of Justice policy was "that a warrant was not required to install a battery-powered GPS on a vehicle parked on a public street and to surveil it on public roads").

<sup>189</sup> The Third Circuit primarily held that the Supreme Court's decisions in *Knotts* and *Karo* "were binding appellate precedent upon which the agents could reasonably have relied under *Davis*." *Id.* at 173. The court, however, did conclude "[i]n the alternative we conclude that, under

As explained in the next Part of this Article, the scope of *Davis* and its place in the overall exclusionary rule scheme is an issue that will continue to face the courts.

#### V. THE NEXT WAVE OF LITIGATION REGARDING THE SCOPE OF DAVIS'S HOLDING

Over two years have passed since *Jones* declared the installation and monitoring of a GPS vehicle tracker to be a Fourth Amendment “search.” As discussed in the preceding sections, those two years have been filled with litigation over the fate of evidence gathered from GPS vehicle trackers installed and monitored pre-*Jones*. Given that most circuit courts have now addressed that question, new cases raising that precise issue will be few. But, *Stephens* and the other cases that have endorsed the “*Knotts* is binding precedent under *Davis* approach” will remain important. That is so because the question of *Davis*’s meaning—and the broader question about the applicability of the exclusionary rule in cases where new technology leads to the upheaval of settled Fourth Amendment expectations—is not going away. Indeed, the next wave of litigation raising those issues has already formed.

That wave of litigation involves the Supreme Court’s recent landmark decision in *Riley v. California*.<sup>190</sup> At issue in *Riley* was the applicability of the search incident to lawful arrest doctrine to cell phones found on a person who had been arrested.<sup>191</sup> Under the search incident to lawful arrest doctrine that was first announced in *Chimel v. California*,<sup>192</sup> officers who have made a lawful arrest may, without a warrant, search the arrestee’s person and the area within the arrestee’s immediate control.<sup>193</sup> In a series of cases following *Chimel*, the Court held that the search incident to lawful arrest doctrine also authorizes the police to search containers<sup>194</sup> and other items of “personal

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the Supreme Court’s more general good faith test, the evidence should not be suppressed because the agents acted with a good faith belief in the lawfulness of their conduct that was objectively reasonable.” *Id.*; see also *People v. LeFlore*, 32 N.E.3d 1043, 1057 (Ill. 2015) (following the approach taken by the Third Circuit in *Katzin*). The Third Circuit’s alternative holding is the approach this Article argues should have been the primary approach taken by all of the circuits.

<sup>190</sup> 134 S. Ct. 2473, 2480 (2014).

<sup>191</sup> See *id.* (stating the question presented as “whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested”).

<sup>192</sup> 395 U.S. 752, 762–63 (1969), *abrogated by* *Davis v. United States*, 131 S. Ct. 2419 (2011).

<sup>193</sup> See *id.* at 763 (“There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”).

<sup>194</sup> See *United States v. Robinson*, 414 U.S. 218, 236 (1973) (holding that the search incident to lawful arrest doctrine authorized a police officer to conduct a warrantless search of a cigarette pack that was found on the defendant’s person after his arrest).

property . . . immediately associated with the person of the arrestee.”<sup>195</sup> Thus, prior to *Riley*, the search incident to lawful arrest doctrine provided officers with near *carte blanche* authority to search every item found on an arrestee’s person or within the arrestee’s grabbing area, so long as the search was contemporaneous with the arrest.<sup>196</sup>

As the prevalence of cell phones increased, police officers were frequently finding them on arrestees.<sup>197</sup> And, that raised the following question in courts nationwide: Is a warrant required to search the contents of the cell phone, or may the police conduct such a search under the search incident to lawful arrest doctrine?<sup>198</sup> The lower courts were divided on the answer, but the majority view was that the search incident to lawful arrest doctrine authorized warrantless searches of cell phones found on an arrestee’s person at the time of arrest.<sup>199</sup> Those courts generally viewed cell phones as containers—and there was a bright-line rule that containers found on the person of an arrestee were subject to search under the search incident to lawful arrest doctrine.<sup>200</sup>

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<sup>195</sup> See *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (holding that the search incident to lawful arrest doctrine did not authorize a warrantless search of a 200-pound footlocker that was in the defendant’s trunk when he was arrested), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).

<sup>196</sup> See Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 381 (2001) (stating that the search incident to lawful arrest doctrine “affords police an unqualified right to search anyone they arrest, without first obtaining a search warrant from a neutral judicial official”); see also Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 30–31 (2008) (stating that “the search incident to [lawful] arrest doctrine has functioned as a bright-line rule—allowing police to search the entire person of an arrestee without getting into sticky questions of whether there was probable cause to open a particular container”).

<sup>197</sup> See Gershowitz, *supra* note 196, at 29 (discussing the prevalence of cell phones in American society); see also *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (stating that cell phones “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy”).

<sup>198</sup> See Margaret M. Lawton, *Warrantless Searches and Smartphones: Privacy in the Palm of Your Hand?*, 16 UDC/DCSL L. REV. 89, 89 (2012) (explaining that the question of whether cell phones may be searched incident to lawful arrest was one facing courts across the country).

<sup>199</sup> See *United States v. Trapp*, No. 1:13-cr-62, 2014 WL 1117012, at \*12 (D. Vt. Mar. 20, 2014) (stating that “at the time of the search, ‘all of the circuits to address the issue had permitted’ cell phone searches incident to arrest” (quoting *United States v. Mayo*, No. 2:13-CR-48, 2013 WL 5945802, at \*15 (D. Vt. Nov. 6, 2013))); see also *Gracie v. State*, 92 So. 3d 806, 812 (Ala. Crim. App. 2011) (“We agree with the majority of jurisdictions surveyed that a warrantless search of a defendant’s cellular telephone following his arrest does not violate Fourth Amendment principles . . . .”); Lawton, *supra* note 198, at 89 (explaining that “the vast majority of courts, both state and federal, to have considered the issue have allowed warrantless searches of cell phones”).

<sup>200</sup> See Lawton, *supra* note 198, at 104–05 (“Most courts, both federal and state, that have considered searches of cell phones incident to arrest have treated those devices as containers, drawing analogies between cell phones and address books, or pagers, for example.”); see also

That bright-line rule became much dimmer on June 25, 2014, when the Court issued its decision in *Riley*. The *Riley* Court narrowed the scope of the search incident to lawful arrest doctrine by holding that, absent exigent circumstances, officers must have a warrant to “search digital information on a cell phone seized from an individual who has been arrested.”<sup>201</sup> Due largely to their “immense storage capacity,” the Court distinguished cell phones from other containers that cannot store nearly as much private information.<sup>202</sup>

The issue now being litigated in the lower courts is whether the exclusionary rule applies to evidence obtained via warrantless searches of cell phones conducted incident to lawful arrest before *Riley*.<sup>203</sup> Building on its success in having the lower courts refuse to exclude evidence obtained from GPS vehicle trackers installed and monitored pre-*Jones*, the government has been pushing the courts to apply *Davis* to the pre-*Riley* cell phone search cases.<sup>204</sup> Thus, to determine whether the exclusionary rule applies to pre-*Riley*

Gershowitz, *supra* note 196, at 31 (“Thus, if we think of an iPhone as a container—like a cigarette package or a closed box—police can open and search the contents inside with no questions asked and no probable cause required, so long as they are doing so pursuant to a valid arrest.”).

<sup>201</sup> *Riley*, 134 S. Ct. at 2477.

<sup>202</sup> *See id.* at 2489 (“Cell phones differ in both a quantitative and qualitative sense from other objects that might be kept on an arrestee’s person. . . . Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion of privacy.”).

<sup>203</sup> *See, e.g.*, *United States v. Gary*, 790 F.3d 704, 705 (7th Cir. 2015) (applying *Davis* and affirming denial of motion to suppress evidence obtained from a cell phone search conducted without a warrant before *Riley*); *United States v. Clark*, 29 F. Supp. 3d 1131, 1135–36 (E.D. Tenn. 2014) (refusing to apply the exclusionary rule to a pre-*Riley* search of a cell phone even though there was no Sixth Circuit precedent specifically authorizing the search, and reading *Davis* broadly to encompass the Supreme Court’s decision in *Robinson* which upheld the search incident to lawful arrest of a container found on the defendant’s person); *United States v. Jenkins*, No. 3:13-cr-30125-DRH-11, 2014 WL 4470609, at \*1 (S.D. Ill. Sept. 10, 2014) (applying *Davis* and refusing to apply the exclusionary rule to a pre-*Riley* cell phone search, even though there was no Seventh Circuit precedent specifically authorizing cell phone searches incident to a lawful arrest); *Spence v. State*, 118 A.3d 864, 867–68 (Md. Ct. App. 2015) (applying *Davis* and concluding that the Supreme Court’s decision in *Robinson* constituted binding precedent on the issue of cell phone searches prior to *Riley*); *Trapp*, 2014 WL 1117012, at \*12 (citing *Davis* and concluding that the good-faith exception to a pre-*Riley* search of a cell phone incident to lawful arrest). *But see* *United States v. Eisenhour*, 44 F. Supp. 3d 1028, 1032 (D. Nev. 2014) (refusing to apply the good-faith exception to a pre-*Riley* cell phone search because there was no “binding appellate precedent in this case for the police to rely upon. No Ninth Circuit case explicitly rules that digital data on a cell phone can be searched incident to arrest.”).

<sup>204</sup> *See, e.g.*, *Clark*, 29 F. Supp. 3d at 1145 (“The government contends the exclusionary rule should not apply here because Officer Narramore engaged in a limited search of the smartphone at the scene of arrest and during the interview under a good faith assumption that no warrant was necessary.”).



searches of cell phones incident to lawful arrest, the courts are plowing the same ground they plowed in the post-*Jones* GPS vehicle tracker cases.

Three circuits had explicitly held in pre-*Riley* published opinions that warrantless searches of cell phones incident to arrest were authorized by the Fourth Amendment.<sup>205</sup> In those circuits, *Davis* clearly applies because the officers were relying on “binding precedent that [was] later overruled.”<sup>206</sup> And, one circuit—the First Circuit—had explicitly held pre-*Riley* that cell phones could not be searched incident to lawful arrest without a warrant.<sup>207</sup> It cannot be disputed, therefore, that *Davis* does not save the evidence obtained from pre-*Riley* cell phone searches in the First Circuit. But, what about the circuits that had not specifically addressed searching cell phones incident to lawful arrest before *Riley*?

Those circuits will be in the same position the Fourth Circuit and many of its sister circuits were in with regard to evidence obtained from GPS vehicle trackers that were installed and monitored before *Jones*. Relying on the broad reading of *Davis* embodied by the “*Knotts* is binding precedent under *Davis* approach,” the government is, unsurprisingly, advancing the argument that the Supreme Court’s 1973 decision in *United States v. Robinson*,<sup>208</sup> regarding the search of a cigarette pack, constituted binding precedent specifically authorizing the search of a cell phone incident to lawful arrest before *Riley*.<sup>209</sup> As the argument goes, prior to *Riley* the lower courts had generally viewed *Robinson* as standing for the proposition that the police may search incident to lawful arrest any container found on the arrestee’s person.<sup>210</sup> A cell phone is a

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<sup>205</sup> See, e.g., *United States v. Murphy*, 552 F.3d 405, 411–12 (4th Cir. 2009); *United States v. Finley*, 477 F.3d 250, 260 (5th Cir. 2007). The Seventh Circuit had upheld a search incident to lawful arrest of a cell phone before *Riley*, but the court suggested that its opinion was limited to authorizing a search of a cell phone to obtain the phone’s number. See *United States v. Flores-Lopez*, 670 F.3d 803, 809–10 (7th Cir. 2012) (providing a detailed analysis of the search incident to lawful arrest doctrine in the context of cell phones, but leaving the questions about searching the contents of a cell phone for “another day, since the police [in this case] did not search the contents of the defendant’s cell phone, but were content to obtain the cell phone’s phone number”). The Eleventh Circuit had issued an unpublished decision upholding the search of a cell phone incident to lawful arrest. See *United States v. Fuentes*, 368 F. App’x 95, 99 (11th Cir. 2010). The issue of whether unpublished decisions qualify as “binding precedent” under *Davis* is an interesting question that is beyond the scope of this Article.

<sup>206</sup> *Davis v. United States*, 131 S. Ct. 2419, 2423 (2011).

<sup>207</sup> See *United States v. Wurie*, 728 F.3d 1, 13 (1st Cir. 2013), *aff’d sub nom.*, *Riley v. California*, 134 S. Ct. 2473 (2014).

<sup>208</sup> 414 U.S. 218 (1973).

<sup>209</sup> See *United States v. Garcia*, 68 F. Supp. 3d 1113, 1120 (N.D. Cal. 2014) (rejecting the government’s argument that “the Court should refuse to suppress the cellphone search because the officers searched Defendant’s cellphone in reliance on the Supreme Court’s 1973 holding that officers may open a cigarette package found on a suspect’s person incident to his arrest”).

<sup>210</sup> See generally Lawton, *supra* note 198, at 104–05 (pointing out—pre-*Riley*—that “[m]ost courts . . . that have considered searches of cell phones incident to arrest have treated these

modern-day container. Therefore, *Robinson* authorized the search incident to lawful arrest of cell phones. So far, the government's argument has gained some traction with one circuit court and several district courts finding it persuasive.<sup>211</sup>

As the issue continues to work its way through the system, courts without any pre-*Riley* precedent directly addressing searches of cell phones incident to lawful arrest should resist the temptation to employ the reasoning that led to the “*Knotts* is binding precedent under *Davis* approach.” In other words, the courts should refuse to identify a case (i.e., *Robinson*) from over forty years ago that shares some basic similarities with the searching of cell phones and pretend that it qualifies under *Davis* as binding precedent that specifically authorized police officers to search a cell phone—a device that was little more than a pipe dream at the time *Robinson* was decided. Instead, the courts should simply conduct the general good-faith inquiry by asking and answering the following question: At the time of the search, would a reasonably well trained police officer have known that it was illegal to search a cell phone incident to lawful arrest? The answer to that question may not be easy, but at least it is the right question to ask. Should the courts choose, however, to adopt the same broad reading of *Davis* that led to the “*Knotts* is binding precedent under *Davis* approach,” the result will be a continued and unwarranted distortion of *Davis*'s narrow holding.<sup>212</sup>

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devices as containers, drawing analogies between cell phones and address books, or pagers”); *see also* Gershowitz, *supra* note 196, at 31 (stating pre-*Riley* that “if we think of an iPhone as a container—like a cigarette pack or a closed box—police can open and search the contents inside with no questions asked and no probable cause required, so long as they are doing so pursuant to a valid arrest”).

<sup>211</sup> *See, e.g.*, *United States v. Gary*, 790 F.3d 704, 705, 709–10 (7th Cir. 2015) (treating *Robinson* and prior circuit court precedent in analogous cases as binding appellate precedent authorizing the search incident to lawful arrest of a cell phone prior to *Riley*); *United States v. Clark*, 29 F. Supp. 3d 1131, 1145 (E.D. Tenn. 2014) (concluding that the “Supreme Court authority regarding searches of other types of containers found on an arrestee’s person, such as *Robinson* and its progeny, in combination with the decisions of all circuit courts to have addressed the issue of a cell phone search incident to arrest at the time of the searches of Defendant’s smartphone, render the actions of [the officer] objectively reasonable under the reasoning of *Davis*”); *see also* *United States v. Caldwell*, No. 1:13-cr-128, 2015 WL 179583, at \*12 (E.D. Tenn. Jan. 14, 2015).

<sup>212</sup> *See generally* *People v. LeFlore*, 32 N.E.3d 1043, 1070–71 (Ill. 2015) (Burke, J., dissenting) (opining that the broad “legal landscape” interpretation of *Davis* endorsed by many courts is “directly at odds with *Davis*” itself which “recognized a narrow exception” that “was limited to jurisdictions which clearly authorized the officer’s conduct . . . . There are no references in *Davis* to ‘generally accepted authority,’ ‘legal landscape,’ or persuasive or well-reasoned precedent.”).

## VI. CONCLUSION

The Supreme Court's decision in *Davis* was intended to be a narrow one that, by its terms, only applies when "binding appellate precedent specifically *authorize[d]* a particular police practice" that was later deemed unconstitutional.<sup>213</sup> When confronted with a situation where a widespread police practice—the warrantless installation and monitoring of GPS vehicle trackers—was declared unconstitutional by the Court in *Jones*, the lower courts were forced to determine whether the exclusionary rule applied to evidence obtained from those GPS vehicle trackers. A majority of the circuit courts resolved that issue by applying the "*Knotts* is binding precedent under *Davis* approach." That approach required bending, twisting, and distorting *Davis* to apply in a situation where there was not actually any binding precedent that specifically authorized the officer's conduct. The courts could have (and should have) reached the same end result by applying the general good-faith analysis. Here's hoping that in future cases, like those involving pre-*Riley* searches of cell phones incident to lawful arrest, the courts will resolve the exclusionary rule issue without further muddying the clear holding of *Davis*.

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<sup>213</sup> *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011).