

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,  
Appellee,  
v.  
SUDINIA JOHNSON,  
Appellant.

CASE NO. 2013-1973

On Appeal from the Court of Appeals of Butler County,  
Case No. CA2012-11-235.

MEMORANDUM OF APPELLEE, STATE OF OHIO,  
IN OPPOSITION OF JURISDICTION

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## TABLE OF CONTENTS

	<i>Page</i>
REASONS WHY LEAVE TO APPEAL SHOULD BE DENIED	1-2
STATEMENT OF THE CASE AND FACTS	3-5
ARGUMENT	
<u>Proposition of Law No. 1:</u> <i>When officers act in good faith, suppression is unwarranted as there is no underlying deterrent value.</i>	5-15
CONCLUSION	15
PROOF OF SERVICE	15

## REASONS WHY LEAVE TO APPEAL SHOULD BE DENIED

In the case at bar, on an appeal brought by the Appellant, the Twelfth District Court of Appeals affirmed the trial court's decision denying the motion to suppress based upon the good faith exception. *State v. Johnson*, 12<sup>th</sup> Dist. No. CA2012-11-235, 2013-Ohio-4865. Rejecting the exact argument now raised, the court below cited, *inter alia*, to hold that “[h]aving found that suppression of the evidence would not yield appreciable deterrence and that law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful, we find no error in the trial court's denial of Johnson's motion to suppress.” *Johnson*, 2013-Ohio-4865, ¶ 32. As such, the Twelfth District based its decision on well settled principles of law from the United States Supreme Court, as well as its interpretation of the good faith exception according to *Davis v. United States*, 564 U.S. - -, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). See, also *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). While the Appellant argues for a much stricter reading of *Davis* and the good faith exception, the present case does not raise a substantial constitutional question that would require a resolution from this Court.

Even if this Court were to query whether the balancing approach or a strict interpretation of the *Davis* decision is correct, this case is **NOT** the case that would decide that issue. The reason is that not only did the Twelfth District utilize a balancing test, but it also had caselaw that would allow the good faith exception to pass muster under even the strict interpretation approach of *Davis*.

First, the *Knotts* decision would be the precedent that using a device to monitor a person's movements in a car on a public road does not implicate the Fourth Amendment. See, *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), See, also, *United States v. Sparks*, 711 F.3d 58, (1<sup>st</sup> Cir.2013) (finding *Knotts* satisfies the role of binding precedent for GPS cases).

Secondly, the Twelfth District stated in *State v. Payne*, 104 Ohio App.3d 364, 386, 662 N.E.2d 60 (12<sup>th</sup> Dist. 1995) that “[u]nder a Fourth Amendment analysis, the fact that a police officer may have technically trespassed outside the curtilage is not relevant. However, suppression is inevitable when the trespass breaks the close of the curtilage.” *See, also, State v. Paxton*, 83 Ohio App.3d 818, 615 N.E.2d 1086 (6<sup>th</sup> Dist. 1992)(“The court concluded that, even if the government's intrusion upon an open field is a trespass at common law, it is not a search in the constitutional sense, since property rights protected by the common law of trespass have little or no relevance to the application of the Fourth Amendment.”) Thus, the police, inside of the Twelfth District's territorial jurisdiction, had reasonable grounds to believe that the binding precedent from the United States Supreme Court coupled with precedent from the Twelfth District would not have found that there was a trespass of Constitutional magnitude when a magnetic GPS was placed on Appellant's car when the car was on a public road.

As such, even if this Court were to concluded that binding appellate precedent is necessary, the State believes that the combination of *Knotts* and *Payne* satisfy this standard and provide that the police acted in good faith. Thus, to accept this case would not even equate to answering the question that Appellant desires to have answered of whether binding precedent is necessary under *Davis*.

This case can be decided on narrow grounds that would not reach the rest of Ohio. Therefore, it is not one of great public importance that would provide any guidance to the other counties, courts and police agencies. This Court should deny jurisdiction.

## STATEMENT OF THE CASE AND FACTS

This appeal is from the judgments of the Court of Common Pleas of Butler County and the Twelfth District Court of Appeals, wherein defendant-appellant Sudinia Johnson pled no contest to Trafficking in Cocaine and Possession of Cocaine. (See *Judgment of Conviction*, filed December 8, 2009).

Detective Mike Hackney of the Butler County Sheriff's Office received multiple phone calls from a confidential informant regarding the Appellant, Mr. Sudinia Johnson, and his alleged trafficking of cocaine. (T.p. 10, 37) The informant revealed Appellant had recently distributed several kilograms of cocaine and was preparing to acquire at least seven more kilograms of cocaine. (*Id.*) Police received additional information from the informant that Appellant was using a van during the transporting process. (T.p. 11)

The evening of October 23, 2009, officers responded to 3609 Benninghoffen Avenue, Appellant's residence. (*Id.*) Since it was trash night, officers removed Appellant's curbside trash, which revealed BP gas station transactions from the Cincinnati and Chicago areas on the same date. (T.p.11,13) Police also located the van parked on the street, on the opposite side of the residence, and attached a battery-powered magnetic global positioning system (GPS) device to the undercarriage of the van and exited the area. (T.p. 11) The police did not hard-wire the GPS device, but rather affixed magnets on the pager-sized device to the underside of the van. (T.p. 11-12)

Police monitored the GPS through a secured website for the next six days. (T.p. 14) Between October 23 and October 28, the GPS showed the van had only moved to an address on Palmetto Drive in Fairfield, Ohio. (*Id.*) On Tuesday, October 28, the GPS showed the van had moved from the Benninghoffen address to 171<sup>st</sup> Street in Calumet City, Cook County, Illinois; and then proceeded

to a shopping center in Cook County by approximately 3:00 p.m. (*Id.*)

Thereafter, Detective Hackney came in contact with Bob Medellin, retired Immigration and Customs officer, a resident of the Chicago area; both Bob and his brother, Rudy Medellin, were familiar with the shopping area. Rudy Medellin then proceeded without his brother to the shopping center and located the vehicle. (T.p. 15) Medellin confirmed it was the same van to which police had attached the GPS and identified the occupants as two black men. (*Id.*)

The vehicle then returned to the Chicago residence. One occupant, later identified as Appellant, exited the residence carrying a package and re-entered the van, placing the package in the vehicle. The garage opened and the other occupant, Otis Kelly, emerged driving a car registered in Ohio. (*Id.*) Medellin followed the two vehicles on I-65 southbound into Butler County. (*Id.*)

Not knowing whether the drivers would travel on I-70 or I-74, Hackney contacted Officers Smart and Simms, who cover the I-70 and I-74 area, respectively. (T.p. 17) The police continued to monitor the output from the GPS on the computer to locate the vehicle. (*Id.*) Medellin kept in constant communication, reporting that the van and the car stayed together, each taking turns leading and following. (T.p. 18) Medellin kept eye contact on the car driven by Kelly whereas Hackney and Sergeant Langmeyer continued the surveillance of the van, following it from I-275 to the Hamilton Avenue/127 exit. (*Id.*) Hackney made contact with marked vehicles in the area, informing the officers of the drug investigation and requesting the officers to stop the vehicles if they found probable cause to stop the van and car. (T.p. 19)

Deputy Darren Rhoads stopped the van by Pleasant Avenue and Nilles Road for a marked lanes violation. (T.p. 75) After the stop, Rhoads and other units removed Appellant from the car and transported him to the sidewalk next to the other deputies. (T.p. 77) In accordance with his training,

Rhoads was required to remove and position the driver away from the vehicle as quickly as possible when a stopped vehicle is possibly loaded with narcotics. (T.p. 80) The officers deployed a narcotics canine, which alerted to the driver's side door and the rear-side cargo door; officers then asked and received consent to search the vehicle. Despite the canine's alert, a search of the vehicle did not reveal any narcotics. Rhoads and the other deputies then transported the van and Appellant to a parking lot approximately one-tenth of a mile down the road where the car driven by Kelly had been stopped. (T.p. 20) At the parking lot, a deployed canine had alerted to the trunk of Kelly's car where police located seven kilograms of cocaine. (T.p. 21-22)

## ARGUMENT

### PROPOSITION OF LAW I

*When officers act in good faith, suppression is unwarranted as there is no underlying deterrent value.*

In Appellant's proposition of law he argues that the only way the good faith exception applies, is when the police have acted in conformity with binding appellate precedent. The State agrees that the good faith exception will apply in those situations, but disagrees that the good faith exception is that narrow in its application.

In the present case, all parties are bound to agree, based upon the United States Supreme Court's decision in *United States v. Jones*, --- U.S. ---, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), that there was a search conducted in the present case. Because the officers in the present case did not obtain a search warrant before placing the GPS device on the vehicle, Appellant argues that a Fourth Amendment violation occurred. Additionally, based upon his interpretation of *Davis v. United States*, 564 U.S. ---, 131 S.Ct. 2419 (2011), Appellant argues that the good faith exception cannot

apply to this case because there was no binding appellate precedent that the police relied upon when utilizing the GPS. As such, the foundations, reasons for creation, and parameters of the exclusionary rule and the good faith doctrine must be explored. Upon such exploration, the Appellant's arguments should be overruled.

A.     Binding Precedent

Even if this Court were to hold that the State must have binding appellate precedent for the good faith exception to apply, the State believes that such precedent exists. In *Jones*, the Supreme Court, decided that the attachment of a GPS device “to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.” *Jones*, 132 S.Ct. 945, 948. Justice Scalia, relying on pre-*Katz* tort law, based the Court's decision on the fact that the government had committed a common law physical trespass. *Id.*, at 950. Justice Scalia explained that the “*Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.” *Id.*, at 952.

However, the majority opinion in the Supreme Court also pointed out that “our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century” and that “[o]ur later cases, of course, have deviated from that exclusively property-based approach.” *Id.*, at 949-950. With the concurrence by Justice Sotomayor stating that “[w]hen the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.” *Id.*, at 955.

Thus what becomes clear is that even the United States Supreme Court deviated from this precedent, and needed to reaffirm this position. *See, also, Kelly v. State*, 208 Md.App. 218, 248, 56

A.3d 523 (Md.App.,2012) (Discussing the reaffirmation of the common-law trespassory test “In addition, as was true of many courts, including apparently the four dissenting members of the Supreme Court, this Court, in *Stone*, assumed that the expectation of privacy test was the prevailing legal standard.”)

As such, when the Supreme Court has itself stated that it has deviated from this trespass test, and that it needed reaffirmation, how can the police be found to not have followed the precedent that the Supreme Court was utilizing at the time, which by their own admissions, did not include a trespass test. *See, Jones*, at 949-950, 955; *See, also, United States v. Karo*, 468 U.S. 705, 712–13, 104 S.Ct. 3296 (1984)(“At most, there was a technical trespass on the space occupied by the beeper. The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation.”); *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 1743-1744 (1984)(property rights protected by the common law of trespass have limited relevance to the application of the Fourth Amendment).

If this Court were to state that the police should have known that the trespassory test was still applicable, then there was still case law which would support their actions. First, the *Knotts* decision would be the precedent that using a device to monitor a person’s movements in a car on a public road does not implicate the Fourth Amendment. *See, United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), *See, also, United States v. Sparks*, 711 F.3d 58, (1st Cir.2013) (finding *Knotts* satisfies the role of binding precedent for GPS cases).

Secondly, the police had Twelfth District precedent from *State v. Payne*, 104 Ohio App.3d 364, 386, that “[u]nder a Fourth Amendment analysis, the fact that a police officer may have

technically trespassed outside the curtilage is not relevant. However, suppression is inevitable when the trespass breaks the close of the curtilage.” See, also, *State v. Paxton*, 83 Ohio App.3d 818, 615 N.E.2d 1086 (6<sup>th</sup> Dist. 1992)(“The court concluded that, even if the government's intrusion upon an open field is a trespass at common law, it is not a search in the constitutional sense, since property rights protected by the common law of trespass have little or no relevance to the application of the Fourth Amendment.”) Thus, the police had reasonable grounds to believe that the binding precedent from this Court, and other Ohio appellate court’s, would not have found that there was a trespass of Constitutional magnitude when a magnetic GPS was placed on Appellant’s car when the car was on a public road.

What is more, in *United States v. Aguiar*, --- F.3d ----, 2013 WL 6509196 (C.A.2 (Vt.)), the Second Circuit court found that *Knotts* and *Karo* alone were sufficiently reliable precedent to allow law enforcement to utilize the good faith exception with GPS. As such, even if this Court were to conclude that binding appellate precedent is necessary, the State believes that the combination of *Knotts* and *Payne* satisfy this standard and provide that the police acted in good faith.

B. Good Faith / Exclusionary Rule

“The exclusionary rule is a ‘prudential doctrine’ that was created by the United States Supreme Court to ‘compel respect for the constitutional guaranty’ expressed in the Fourth Amendment.” *State v. Widmer*, 12<sup>th</sup> Dist. No. CA2011-03-027, 2012-Ohio-4342, ¶ 55, citing *Davis*, 131 S.Ct. 2419, 2426, citing *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437 (1960). As such, “[t]he exclusionary rule is not a personal right or a means to redress constitutional injury; rather, it is used to deter future violations.” *State v. Hoffman*, 6<sup>th</sup> Dist. No. L-12-1262, 2013-Ohio-1082, ¶ 23, citing *Davis*, 131 S.Ct. 2419. “Indeed, the purpose of the exclusionary rule

is to deter deliberate, reckless, and grossly or systematically negligent police conduct, rather than to remedy such past violations. See *Davis*, 131 S.Ct. 2419, 2426–27. To this end, the Supreme Court has clarified that the exclusionary rule does not apply when ‘police act with an objectively reasonable good faith belief that their conduct is lawful.’ See *id.* at 2427.” *United States v. Lopez*, No. 10–cr–67 (GMS), 895 F.Supp.2d 592, 604, 2012 WL 3930317 (D.Del. Sept. 10, 2012).

As the *Lopez* court noted, the rationale for the application of this rule was espoused in *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695 (2009) and *Davis*, when the High Court recognized that:

suppression imposes a “costly toll upon truth-seeking and law enforcement objectives” by “letting guilty and possibly dangerous defendants go free.” See *Herring*, 555 U.S. at 141–42, 129 S.Ct. 695. In light of this consideration, the Supreme Court has instructed district courts tasked with assessing exclusionary rule suppression issues to exclude evidence only when “the benefits of deterrence ... outweigh the costs.” See *id.*; see also *Davis*, 131 S.Ct. at 2427 (“For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.”). *Lopez*, 895 F.Supp.2d 592, 604.

However, in light of the clear directives from the Supreme Court that the exclusionary rule and the good-faith doctrine must contemplate a balance of the benefits of deterrence as opposed to the costs, Appellant now wants this Court to interpret the good faith doctrine to mandate that if there is no binding appellate precedent, then the balancing test and all the language about such test is of no application. Appellant calls on this Court to opine that the good faith doctrine is now a strict and inflexible doctrine that does not contemplate the benefits of deterrence as opposed to the weight of the costs. This interpretation cannot withstand scrutiny, and does not pay deference to the full body of case law governing the good faith doctrine.

Specifically, in crafting a narrow and unwieldy rule, Appellant relies only upon the most

narrow reading of the *Davis* decision. However, the adoption of this extreme position would be inappropriate by this Court for two reasons. First, the *Davis* decision must be read in conjunction with, and not in exclusion of the *Herring* decision. Secondly, even the *Davis* decision alone does not support such a narrow holding.

1. *Davis & Herring*

In a number of judicial decisions subsequent to the *Davis* decision, courts have found that both *Davis* and *Herring* must be properly evaluated before the correct rules governing the application of both the exclusionary rule and the good faith doctrine can be applied. One such case is that of the *United States v. Ford*. The relevant portions of the *Ford* case begin with a report and recommendation by Magistrate Lee. See, *United States v. Ford*, 2012 WL 5366359, (E.D. Tenn. Sept. 12, 2012) (Lee, Mag. J.).

In authoring the recommendations to deny Ford's motion to suppress, Magistrate Lee began by noting that courts without binding precedent are now grappling with the issues concerning the application of the exclusionary rule and the good faith doctrine to evidence obtained by the use of GPS technology prior to the *Jones* decision. In evaluating these issues, Magistrate Lee noted that:

On the issue of warrantless use of GPS tracking technology, *Herring*—another fairly recent Supreme Court opinion addressing the good faith exception—has not received as much attention in the post-*Jones* cases as *Davis*. In *Herring*, the Court rejected the application of the exclusionary rule where an “officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee.” *Herring*, 555 U.S. at 137. Analogizing to its decisions in *Leon*, 468 U.S. at 922 (exclusionary rule inapplicable where police act on objectively reasonable reliance on a warrant issued by a neutral magistrate) and *Evans*, 514 U.S. at 14–15 (exclusionary rule inapplicable where police acted in reasonable reliance on a court database which mistakenly indicated that a warrant was outstanding), the Court concluded that any deterrent effect of applying the exclusionary rule in *Herring* was outweighed by the costs to society. *Herring*, 555 U.S. at 140–43, 147–48.

The Sixth Circuit interpreted the impact of *Herring* on Fourth Amendment violations in *United States v. Master*, 614 F.3d 236, 241–43 (6th Cir.2010), a case arising from this district. In *Master*, a case involving a defective warrant, the Sixth Circuit read *Herring* as “effectively creat[ing] a balancing test by requiring that in order for a court to suppress evidence following the finding of a Fourth Amendment violation, ‘the benefits of deterrence must outweigh the costs.’ ” *Master*, 614 F.3d at 243 (quoting *Herring*, 555 U.S. at 141). The Sixth Circuit reasoned that “the *Herring* Court's emphasis seems weighed more toward preserving evidence for use in obtaining convictions, even if illegally seized, than toward excluding evidence in order to deter police misconduct unless the officers engage in ‘deliberate, reckless, or grossly negligent conduct.’ ” *Id.* (quoting *Herring*, 555 U.S. at 144). See also *United States v. Godfrey*, 427 F. App'x 409, 412 (6th Cir.2011) (quoting *Master*). *Id.*, at \*14-15.

The report and recommendation went on to find that “[u]nder *Herring*, as applied in *Master*, evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’ *Herring*, 555 U.S. at 143 (quoting *Krull*, 480 U.S. at 348–49) (internal quotation marks omitted); accord *Master*, 614 F.3d at 241–43.” *Id.*, at \*16. Based upon the aforementioned, the Magistrate concluded “that a bright-line rule rejecting the application of the exclusionary rule under *Davis* simply because there was no binding precedent in the Sixth Circuit, as urged by Defendant, does not pay due regard to *Herring* and *Master*. Applying the *Herring* balancing test, as I believe I must under *Master*, and considering the benefits of deterrence against the costs, I FIND that even though there was a Fourth Amendment violation in this case, suppression is not an appropriate remedy.” *Id.*

Thereafter, the report and recommendation in *Ford* went before Judge Collier, who accepted and adopted it. See, *United States v. Ford*, No. 1:11–CR–42, 2012 WL 5366049 (E.D.Tenn. Oct.30, 2012). In so adopting the report, Judge Collier noted that:

**The Court believes the government has the better argument.** Defendant's points

are well taken, and indeed the Court believes there may be some instances of police reliance on non-binding precedent that do not satisfy the good-faith exception. **However, the Court believes a rule limiting *Davis* to binding precedent ignores the underlying rationale in *Davis and Herring*.** The Court did not simply hold law enforcement acted reasonably by relying on binding law, but also acknowledged the officer's reasonable reliance rendered his conduct inculcable. *Davis*, 131 S.Ct. at 2427 (“The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion ‘var[y] with the culpability of the law enforcement conduct’ at issue.”) (quoting *Herring*, 555 U.S. at 143). The costs imposed on the judicial system by the exclusionary rule outweigh the value of deterrence when police conduct is not culpable. *Davis*, 131 S.Ct. at 2429; *Herring*, 555 U.S. 147–48; see also *United States v. Master*, 614 F.3d 236, 243 (6th Cir.2010) (“The Supreme Court has effectively created a balancing test by requiring that in order for a court to suppress evidence following the finding of a Fourth Amendment violation, ‘the benefits of deterrence must outweigh the costs.’”) (quoting *Herring*, 555 U.S. at 141). *Id.*, at \*10-11. (internal footnote omitted)(Emphasis added).

What is more, in *United States v. Batista*, 2013 WL 782710, (W.D.Va. Feb. 28, 2013), the Court began by identifying “[t]he principal cost of applying the [exclusionary] rule is, of course, letting guilty and possible dangerous defendants go free-something that offends basic concepts of the criminal justice system, and the application of the rule is only proper where its deterrence benefits outweigh its substantial social cost.” *Id.*, at \*5, quoting *Herring*, 555 F.3d at 141 (internal citations omitted). After recognizing the difficulty that courts have had in interpreting the parameters of the exclusionary rule in light of the decision in *Jones*, the *Batista* court stated that:

The court believes, given the purpose of the exclusionary rule as laid out by the Supreme Court in *Herring* and *Davis*, the question of whether the good faith exception applies is a case specific and fact dependent analysis analyzing the specific actions of the law enforcement official and the ensuing need for deterrence.FN6 Indeed, “the *Davis* majority rejected a restrictive and reflexive application of the doctrine in favor of a ‘rigorous weighing of its costs and deterrence benefits,’ with a focus on the ‘flagrancy of the police misconduct.’” *United States v. Rose*, CRIM. 11-10062-NMG, 2012 WL 4215868, at \*4 (D.Mass. Sept. 14, 2012) (quoting *Davis*, 131 S.Ct. at 2426–27). In determining whether or not deterrence is needed in a particular situation, the court looks at the culpability of the law enforcement conduct.

FN6. Limiting the application of *Davis* to situations in which there is only

**binding precedent would necessarily subvert the clear instruction by the Supreme Court to weigh the social costs against the deterrent value of exclusion when determining whether to apply the exclusionary rule.** Like the court in *United States v. Rose*, CRIM. 11-10062-NMG, 2012 WL 4215868 (D.Mass. Sept.14, 2012), the court believes such a bright line rule is unworkable in practice and would require courts to shift their focus from the particular facts of the case before it to an academic determination of whether the situation is “sufficiently analogous to a previous case to be considered ‘binding.’” *Id.* at \*5. Furthermore, the majority opinion in *Davis* clearly believed that suppression turned on the culpability of the officer. As noted by the court in *Rose*. Justice Breyer pointed out in his dissent in *Davis* that an officer is no more culpable if he believes the search he has conducted is within the bounds of the Fourth Amendment than if he follows “binding precedent” that is subsequently overturned. *Id.* , at \*6. (Emphasis added).

As such, while relying on binding appellate precedent will clearly lead to a finding that officers acted in good faith, the proper balancing of the cost benefit analysis is still the proper standard of law as espoused by the United States Supreme Court’s jurisprudence on this issue.

## 2. *Davis Alone*

A number of courts have also found that even when *Davis* alone is analyzed, the narrow reading that binding appellate precedent is required to invoke the good faith exception is unsupportable. In one such decision, a Federal District Court in Louisiana took note of the legal landscape of emerging decisions on this issue. *See, United States v. Guyton*, 2013 WL 55837 (E.D.La. Jan. 03, 2013). In depicting this landscape, the *Guyton* court noted that while some “courts read *Davis* narrowly and hold that the good faith exception is inapplicable in the absence of binding appellate precedent. Other courts interpret *Davis* to mandate a case-by-case inquiry in which the relevant inquiry is whether police act with an objectively reasonable good faith belief that their conduct is lawful.” *Id.*, at \*3 (internal footnotes omitted). The court then held that it believed that the “interpretation adopted by the former line of cases is inconsistent with both the language in *Davis*

as well as the Supreme Court's evolving jurisprudence on the good faith exception.” *Id.*

The *Guyton* court then identified and expounded on the proper scope of *Davis* by finding that “[t]o understand and apply *Davis*, it is necessary to view the opinion as a logical extension of the Supreme Court's jurisprudence on the good faith exception to the exclusionary rule. See *Oladosu*, 2012 WL 3642851 at \*6. Much like the Court in *Herring*, the *Davis* Court discussed the precepts of law undergirding the exclusionary rule before applying those precepts to the facts.” *Id.*, at \*5.

The court then completely eviscerated the arguments made by the Appellant, finding:

Some courts argue, as do Moving Defendants, that *Davis* be read narrowly to prevent suppression only where officers reasonably rely on binding appellate precedent. **This inflexible approach is untenable for three reasons. First**, and most importantly, a rigid interpretation of *Davis* “does not jibe with the majority's pronouncement that suppression is required only where an officer acts culpably.” *Rose*, 2012 WL 4215868 at \*5. As Justice Breyer and Justice Ginsburg note in dissent, “an officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside of the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous ‘binding precedent.’” *Davis*, 131 S.Ct. at 2339 (Breyer, J., dissenting). “Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct,” the relevant inquiry is not whether the precedent upon which officers rely is legally binding but whether it was objectively reasonable to rely on that precedent. See *id.*

**Second**, a narrow reading of *Davis* does not comport with the Court's previous good faith jurisprudence. Regardless of the factual circumstances in which the good faith exception has been applied, the Court has consistently required that “the deterrence benefits of suppression.. outweigh its heavy costs.” *Id.* at 2427; see further *Leon*, 468 U.S. at 922 (“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.”); *Krull*, 480 U.S. at 351–52 (“When we indulge in such weighing, we are convinced that applying the exclusionary rule in this context is unjustified.”); *Herring*, 555 U.S. at 702 (“[W]e conclude that when police mistakes are the result of negligence such as that described here ... any marginal deterrence does not ‘pay its way.’”) (quoting *Leon*, 468 U.S. at 907–08 n. 6). Thus, *Leon* and its progeny require that courts weigh the deterrence benefits of suppression against the costs of exclusion in each case. Interpreting *Davis* to require a per se finding of unreasonableness when officers do not rely on legally binding appellate precedent is

inconsistent with this mandate.

**Third**, the Court appeared to anticipate that the principles of *Davis*—with a focus on police culpability—would be worked out by lower courts. See *Oladosu*, 2012 WL 3642851 at \*6; *Baez*, 2012 WL 2914318 at \*6; *Leon*, 856 F.Supp.2d at 1194. In her concurrence, Justice Sotomayor noted that the majority opinion does not address whether the exclusionary rule applies “when the governing law is unsettled.” *Davis*, 131 S.Ct. at 2436 (Sotomayor, J., concurring) (emphasis added). Justice Breyer noted in dissent that the majority’s mandate that courts focus on police culpability will affect “a very large number of cases, potentially many thousands each year.” *Id.* at 2439–40 (Breyer, J., dissenting). Ultimately, “[t]he Supreme Court in *Davis* ... engaged in ... a cost-benefit analysis and effectively directed lower courts to do likewise in the developing case law.” *Baez*, 2012 WL 2914318 at \*8.

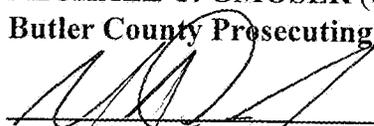
For the foregoing reasons, this Court interprets *Davis* to require that decisions regarding the suppression of evidence be made on a case-by-case basis. The “absence of police culpability” is dispositive: “when police act with an objectively ‘reasonable good-faith belief that their conduct is lawful,’ exclusion is inappropriate. *Davis*, 131 S.Ct. at 2427–28 (quoting *Leon*, 468 U.S. at 909). *Id.*, at \*5-6. (Emphasis added)

As such, *Davis* should not be read so narrowly, and this Court need not accept Jurisdiction.

### CONCLUSION

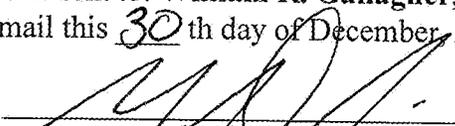
For the foregoing reasons, this Court should deny Jurisdiction.

Respectfully submitted,  
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### PROOF OF SERVICE

This is to certify that a copy of the foregoing was sent to: **William R. Gallagher**, 114 East 8<sup>th</sup> Street, Cincinnati, Ohio 45202, by U.S. ordinary mail this 30th day of December, 2013.

  
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