

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)
	) On Appeal from the Court of Appeals
Plaintiff-Appellee,	) Twelfth Appellate District Butler County, Ohio
	) Case No.: CA 2012-11-235
vs.	)
	) Trial Case No: CR 2008-11-1919
SUDINIA JOHNSON,	)
	)
Defendant-Appellant.	) CASE NO.: 13-1973

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## STATEMENT OF FACTS

Over the course of six months in 2008, Butler County Sheriff's Deputy Hackney ("Hackney") gathered information that indicated Sudinia Johnson ("Mr. Johnson") was involved in the trafficking of cocaine. (Tr. 34, 46) On October 23, 2008, another informant told Hackney Mr. Johnson was due to acquire more cocaine in the future. (Tr. 10, 46) The informant did not provide the date of the future trafficking offense or any details as to who was involved or the manner in which it would happen - only that it might involve Chicago. (Tr. 30) Based solely upon the foregoing information, Hackney went to Mr. Johnson's home in the middle of the night of October 23, 2008, armed with a description of his vehicle and a GPS tracking device. Despite the absence of exigent circumstances, Hackney made no effort to obtain a search warrant prior to this visit. (Tr. 39) Without benefit of a warrant, Hackney surreptitiously placed the GPS tracking device on the undercarriage of Mr. Johnson's vehicle. (Tr. 26, 48-49)

According to Hackney, he did not believe he needed a warrant to place a GPS tracking device on Mr. Johnson's vehicle. (Tr. 27-28, 39-40) He had spoken with an assistant county prosecutor on this issue in 2006 or 2007, who told him a warrant was not necessary. (Tr. 27) Although Hackney believed he may have consulted with others about the need for a warrant before placing a GPS device on a suspect's vehicle, he could not recall their names. Hackney claimed some of his training had "touched on GPS", and "it was common knowledge among drug units" that placement of a GPS device did not require a warrant. (Tr. 28, 40) Hackney's conduct did not comply with that of federal agents in Ohio; proceed with caution and request a warrant until the issue is firmly decided by a binding court.<sup>1</sup>

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<sup>1</sup> Before *Jones*, the Justice Department advised agents to seek a warrant for placement of GPS tracking devices, even though they believed one was not necessary, because "anything less presents significant risks of suppression." [www.cdt.org/blogs/greg-nojeim/1708tracking-big-foot-why-gps-location-requires-warrant](http://www.cdt.org/blogs/greg-nojeim/1708tracking-big-foot-why-gps-location-requires-warrant).

By virtue of the GPS tracking device affixed to Mr. Johnson's vehicle, the Butler County Sheriff's office was able to track the vehicle's position as it left Ohio and traveled to a Chicago suburb. At that point, deputies engaged retired law enforcement to take up visual surveillance in a Chicago mall parking lot. (Tr. 14) The deputies learned of another car traveling with Mr. Johnson. (Tr. 16) Through information generated by the GPS tracking device, the deputies monitored the two vehicles from Illinois to Ohio. (Tr. 16-17) At the Ohio state line, the deputies and cooperating police agencies took up visual surveillance, until they were able to make "traffic stops" of Mr. Johnson and the other car in Butler County. (Tr. 19) The Butler County Sheriff found cocaine<sup>2</sup>, information and evidence, including a statement from Mr. Johnson<sup>3</sup>; all as a direct result of placing a GPS tracking device on Mr. Johnson's vehicle.

Following his arrest by Butler County Sheriffs, the grand jury indicted Mr. Johnson in November 2008, on a number of drug-related charges. Mr. Johnson filed several pre-trial motions; a Motion to Sever, a Motion to Suppress Statements and a Motion to Suppress Evidence. He supplemented his Motion to Suppress Evidence to include as an additional basis, the warrantless placement of a GPS device on the vehicle he was driving when the sheriff arrested him. Following an evidentiary hearing on Mr. Johnson's Motions to Suppress, the trial court denied, *inter alia*, his Motion to Suppress Evidence. The court noted the issue of warrantless placement of GPS tracking devices was one of first impression in Ohio. As such, there was no binding law to follow on the issue. In denying Mr. Johnson's Motion to Suppress Evidence, the trial court found a warrant was not necessary for law enforcement to place a GPS tracking device on his vehicle. Mr. Johnson entered a plea of no contest to the trafficking and possession charges; the trial court sentenced him to 15 years in prison.

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<sup>2</sup> Mr. Johnson's van contained no cocaine. (Tr. 21)

<sup>3</sup> (Tr. 22-24)

Mr. Johnson appealed the trial court's decision, arguing the Butler County Sheriff violated his Fourth Amendment Rights by placing a GPS tracking device on his vehicle without a warrant. The Twelfth District Court of Appeals held Mr. Johnson did not have an expectation of privacy in the undercarriage of his vehicle, and therefore, the placement of the GPS tracking device on Mr. Johnson's vehicle was not a search. *State v. Johnson*, 2010-Ohio-5808 (12th Dist.). Mr. Johnson appealed the Twelfth District's decision to this Court, which accepted review of the case. After the parties had briefed and argued the case, the United States Supreme Court issued its decision in *United States v. Jones*, 565 U.S. \_\_\_, 132 S.Ct. 945, 181 L. Ed. 2d 911 (2012). Based on *Jones*, this Court vacated the Twelfth District's decision and remanded the case to the trial court for application of *Jones*. *State v. Johnson*, 131 Ohio St.3d 301, 2012-Ohio-975 (*"Johnson I"*).

At the second hearing on Mr. Johnson's Motion to Suppress, the parties stipulated to the transcript and exhibits from the first hearing. In October 2012, the trial court issued its decision. Applying *Jones*, the trial court found the Butler County Sheriff's warrantless placement of the GPS tracking device on Mr. Johnson's vehicle violated his Fourth Amendment rights. Regarding the issue of exclusion of the evidence seized through the use of the GPS tracking device, the trial court determined the Sheriff had acted in good faith, and the exclusionary rule did not apply. The trial court considered the holding in *United States v. Davis* (564 U.S. \_\_\_, 131 S.Ct. 2419 (2011)), but found it inapplicable because of the absence of binding precedent in Ohio to guide the officers' actions. The trial court then determined the benefit of excluding the evidence did not outweigh the heavy cost on society by excluding the evidence at trial. Mr. Johnson entered a plea of no contest to the drug charges and received a 10 year sentence to the Ohio Department of Corrections.

Mr. Johnson appealed the trial court's decision to the Twelfth District Court of Appeals, arguing *Davis* requires application of the exclusionary rule to suppress the evidence seized as a result of the Butler County Sheriff's warrantless use of the GPS tracking device. The court of appeals found there was no binding precedent in Ohio at the time Hackney placed the GPS tracking device on Mr. Johnson's vehicle. *State v. Johnson*, 2013-Ohio-4865 (*Johnson II*). It further noted three appellate courts in Ohio had already decided the issue before it and applied *Davis*, finding the good faith exception to the exclusionary rule did not apply.<sup>4</sup> *Id.* All three Ohio appellate courts had ordered the seized evidence excluded because there was no binding precedent in Ohio authorizing police to use a GPS tracking device without a warrant. (*See* footnote two.) The Twelfth District, however, found *Davis* did not require binding precedent for the good faith exception to excuse the Sheriff's failure to seek a warrant. *Id.* On November 4, 2013, the Twelfth District affirmed the trial court's decision. It is important to note, the Twelfth District did not apply *Davis* at all. *Id.*

We believe that a case-by-case approach examining the culpability and conduct of law enforcement is more appropriate given the preference expressed in *Davis* for a cost-benefit analysis in exclusion cases as opposed to a "reflexive" application of the doctrine to all cases involving a Fourth Amendment violation. *Davis*, 131 S.Ct. at 2427 ("We abandoned the old, 'reflexive' application of the [exclusionary] doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits").

In analyzing whether the Butler County Sheriff's Office acted with a "deliberate," "reckless," or "grossly negligent" disregard for Johnson's Fourth Amendment rights, we find that in addition to examining the specific actions taken by Detective (sic) Hackney and the sheriff's office, it is also necessary to examine the legal landscape as of October 23, 2008, the date the GPS device was placed on Johnson's vehicle.

*Johnson II*, 2013-Ohio-4865 at ¶¶ 23, 24.

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<sup>4</sup> *State v. Allen*, 2013-Ohio-4188 (8th Dist.); *State v. Allen*, 2013-Ohio-434 (11th Dist.); *State v. Henry*, 2012-Ohio-4748 (2nd Dist.).

On December 16, 2013, Mr. Johnson appealed the decision of the Twelfth District Appellate Court, asking this Court to accept jurisdiction of the case, to resolve the conflict among the district courts of appeal in Ohio on the application of the good faith exception to the exclusionary rule, when no binding precedent is available. On March 12, 2014, this Court accepted jurisdiction of Mr. Johnson's appeal.

## ARGUMENT

In *Katz v United States*, the United States Supreme Court announced a simple, straightforward constitutional rule that warrantless searches "are *per se* unconstitutional under the Fourth Amendment--subject to only a few specifically established and well delineated exceptions." *Katz*, 389 U.S. 347, 357 (1967); *See also Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("police must, **whenever practicable**, obtain advance judicial approval of searches and seizures through the warrant procedure") (emphasis added). Here, Hackney, who had all the time in the world to present his case to a judge, decided his conversation with one prosecutor (one to two years prior) and the "general knowledge" of his police community was sufficient authority to conclude did not need to seek judicial approval.<sup>5</sup> (Tr. 27, 28, 40)

Hackney's action violated the Fourth Amendment. Fourth Amendment violations are excused only when authorized by narrow exceptions created by the United States Supreme Court. To date, the United States Supreme Court has not included Hackney's actions within the good faith exception to the exclusionary rule. *Davis*, 131 S.Ct. 2419.

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<sup>5</sup> At the March 3, 2009 hearing, Hackney specified that he had talked to Dave Kash about a "[y]ear and a half [to] two years" ago about the legality of using a GPS device without a warrant. Hackney explained "it was kind of common knowledge among other drug units or talking to other drug units that as long as the GPS is not hard wired, as long as it is placed on -- in a public area, removed in a public area, it is basically a tool or an extension of surveillance." *Johnson II*, 2013-Ohio-4865, at ¶25.

**FIRST PROPOSITION OF LAW: WHEN NO BINDING APPELLATE PRECEDENT EXISTS TO AUTHORIZE A POLICE OFFICER'S WARRANTLESS USE OF A GPS TRACKING DEVICE, UNITED STATES V. DAVIS DOES NOT AUTHORIZE APPLICATION OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE**

The exclusionary rule is used to deter future Fourth Amendment violations. *Davis*, 131 S.Ct. 2419 (Sotomayor, J., concurring). Under the exclusionary rule, police are responsible for their violations of constitutional law; evidence seized through a Fourth Amendment violation could not be used at trial. *United States v. Leon*, 468 U.S. 897 (1984) Since the United States Supreme Court decision in *Davis*, five Ohio appellate courts have decided whether the good faith exception to the exclusionary rule, as set forth in *Davis*, 131 S.Ct. 2419 (2011), excused the officers' failure to secure a warrant before conducting a search. *Allen*, 2013-Ohio-4188; *Allen*, 2013-Ohio-434; *Henry*, 2012-Ohio-4748; *State v. Sullivan*, 2014-Ohio-1443 (10<sup>th</sup> Dist.); See also *State v. Kosla*, 2014-Ohio-1381 (10<sup>th</sup> Dist.) (a 1936 Ohio Supreme Court case holding the exclusionary rule did not apply to searches and seizures found to be in violation of the Ohio Constitution was not binding precedent); and *Johnson II*. Four of those courts applied *Davis* and rendered decisions consistent with its mandate. See *Allen*, 2013-Ohio-4188; *Allen*, 2013-Ohio-434; *Henry*, 2012-Ohio-7481; and *Sullivan*, 2014-Ohio-1443.

Referencing the italicized portion of the *Davis* opinion, the *Henry* court concluded the good faith exception "has no application in a situation, like the one before us, where the jurisdiction in which the search was conducted has no binding judicial authority upholding the search." *Henry*, 2012-Ohio-7481. Following *Henry*, the Eleventh District Court of Appeals held, "[o]nly binding appellate precedent can be cited to support a good faith argument." *Allen*, 2013-Ohio-434, at ¶ 6. That court held because the Supreme Court of Ohio, the Sixth Circuit Court of Appeals, and the Eleventh District had never addressed the GPS issue prior to the *Jones* decision,

"there was no binding precedent in this jurisdiction concluding that the employment of a GPS tracking device does not constitute a 'search,' making a warrant unnecessary." *Id.* at ¶ 32.

Accordingly, the court concluded the good faith exception was not available. *Id.*

In *Allen*, the Eighth District Court of Appeals rejected the state's proposal that it adopt a broad reading of *Davis*—one permitting application of the exclusionary rule based upon non-binding judicial precedent from other jurisdictions. *Allen*, 2013-Ohio-4188, at ¶ 32. The court noted at the time of the GPS monitoring, "no court of appeals in this jurisdiction had approved the practice of attaching GPS tracking devices, and there was no controlling precedent to the contrary." *Id.* The Eighth District Court of Appeals declared, "[u]ntil the United States Supreme Court addresses questions left unanswered by *Jones*, specifically, what is the proper remedy when the governing law is unsettled, we will adopt a strict reading of *Davis* and apply the exclusionary remedy to suppress evidence gathered from a warrantless GPS initiative, because no binding precedent exists in our jurisdiction prior to *Jones*." *Id.* at ¶ 33.

Most recently, the Tenth District Court of Appeals concurred with the decisions of its sister districts in *Henry*, *Allen* and *Allen*. *Sullivan*, 2014-Ohio-1443, at ¶79. In a thoughtful and extensive analysis of the law, the *Sullivan* court held, "[I]n the absence of 'binding appellate precedent' authorizing the warrantless installation and monitoring of a GPS device [on January 14, 2010], the good faith exception to the exclusionary rule does not apply." *Id.* ([N]one of the cases cited by the State constituted "binding appellate precedent" applicable to the case, having not been decided by the United States Supreme Court, the Supreme Court of Ohio, or the Tenth District Court of Appeals.)

Despite the holdings of the Second, Eighth and Eleventh Districts in *Henry, Allen, and Allen*<sup>6</sup>, the Twelfth District Appellate Court chose not to apply the holding in *Davis*, and instead, engaged in a fact-intensive, cost-benefit analysis to determine whether Hackney's conduct demonstrated a deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights. *Johnson II*. After a tortured analysis of the facts and law, the Twelfth District concluded the good faith exception should be expanded to include warrantless searches in the absence of binding precedent. *Id.* Interpreting *Davis* this broadly gives the police incentive to avoid presenting their case for judicial approval of a search and to conduct constitutionally questionable searches and seizures; constitutionally questionable because they cannot point to binding authority supporting their conduct.

For the reasons articulated by the Second, Eighth, Tenth and Eleventh Districts in *Henry, Allen, Allen and Sullivan*, this Court should conclude the good faith exception to the federal exclusionary rule does not apply, and therefore, any evidence obtained as a result of the unlawful search in this case must be suppressed.

### **The Good Faith Exception to the Exclusionary Rule**

The United States Supreme Court created the good faith exception to the exclusionary rule in 1984. *Leon*, 468 U.S. at 899 (officer reasonably relies on a warrant which is later found to be invalid). In *Leon*, Justice White wrote, "[T]he warrant itself "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" 468 U.S. at 914 citing *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)), we have expressed a strong

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<sup>6</sup>*State v. Allen*, 2013-Ohio-4188; *State v. Allen*, 2013-Ohio-434; *State v. Henry*, 2012-Ohio-4748.

preference for warrants and declared that "in a doubtful or marginal case, a search under a warrant may be sustainable where without one it would fall."

Over the next 25 years, the United States Supreme Court expanded the good faith doctrine to apply where law enforcement officers adhere to statutes later found unconstitutional (*Illinois v. Krull*, 480 U.S. 340 (1987)); the clerk of court erroneously reports a warrant for the suspect's arrest was still outstanding (*Arizona v. Evans*, 514 U.S. 1 (1995)); and police obtain a warrant based on erroneous information negligently entered into a police database (*Herring v. United States*, 129 S. Ct. 695 (2009)). In each of the cases where the Court found the good faith exception to the exclusionary rule should apply, law enforcement had secured a warrant prior to conducting their search and seizure of a defendant. Just two years later, for the first time in the 30-year history of litigation involving the good faith exception to the exclusionary rule, the United States Supreme Court has held the good faith exception extends, in certain circumstances, to warrantless searches. *Davis*, 131 S. Ct. 2419.

In 2011, the United States Supreme Court considered what remedies are available when appellate courts hand down Fourth Amendment rulings expanding Fourth Amendment rights beyond the state of prior case law. *Davis*, 131 S. Ct. 2419. When that happens, the officer may have taken steps that were thought to be lawful at the time but later held to be unlawful. In a seven to two decision, the United States Supreme Court broadened the good faith exception to the exclusionary rule holding, "[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Davis*, 131 S.Ct. at 2434. Judge Alito, delivering the Opinion, states,

Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules. When **binding appellate precedent** specifically authorized a particular police practice, well-trained officers will and should use that tool to

fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance **on binding appellate precedent** does no more than ‘act as a reasonable officer would and should act’ under the circumstances.

*Id.* at 2429 (internal citations omitted) (emphasis added).

Although the United States Supreme Court had not specifically addressed this issue before its ruling in *Davis*, several courts had, by application of the good faith exception, found “the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on . . . **well settled precedent**, even if that precedent is subsequently overturned.” *United States v. Buford*, 632 F.3d 264, 276 n.9 (6th Cir. 2011) quoting *United States v. Davis*, 598 F.3d 1259, 1266 (11th Cir. 2011) (emphasis added). In *Buford*, the Sixth Circuit stated, “exclusion is not the appropriate remedy when an officer reasonably relies on a United States Court of Appeals’ well-settled precedent prior to a change of that law” but emphasized that “precedent on a given point must be unequivocal to suspend the exclusionary rule.” *Id.* at 276 n.9 quoting *Davis*, 598 F.3d at 1266; *See also United States v. McCane*, 573 F.3d 1037, 1045 n.6 (10th Cir. 2009) (applying the good faith exception because “the Tenth Circuit jurisprudence supporting the search was settled”); *United States v. Jackson*, 825 F.3d 853, 866 (5th Cir. 1987) (the exclusionary rule “should not be applied to searches which relied on Fifth Circuit law” that was subsequently overturned); *cf. United States v. Real Prop. Located at 15324 Cnty. Highway E*, 332 F.3d 1070, 1075-76 (7th Cir. 2003).

Several courts have confronted the question of whether to apply the good faith exception since *Jones*. In the Ninth Circuit, where **binding circuit precedent** authorized warrantless GPS monitoring, three district courts have applied the good faith exception to defeat the defendants’ motions to suppress. *United States v. Aquilar*, 2012 WL 1600276, at \*2 (D. Idaho, 2012); *United States v. Leon*, 2012 WL 1081962, at \*3 (D. Haw., 2012); *United States v. Nwobi*, 2012 WL

769746, at \*3 (C.D. Cal., 2012) (emphasis added). A district court in the Eighth Circuit did the same, holding that the officer's reliance on binding circuit precedent triggered the good faith exception. *United States v. Amaya*, No. CR-11-4065-MWB, 2012 WL 1188456, at \*7-8 (N.D. Iowa Apr. 10, 2012).

In the Third Circuit, however, where there was no binding precedent on warrantless GPS tracking, the district court relied on *Davis* and refused to extend the good faith exception. *United States v. Katzin*, 732 F.3d 187, 208 (3<sup>rd</sup> Cir. 2013) (applying the good faith exception in the absence of binding appellate precedent "would effectively eviscerate the notion that clear and well-settled precedent should control, and thus contradicts the basic principles of *stare decisis*"), reh'g granted *en banc*, \_\_\_\_ F.3d \_\_\_\_ (3<sup>rd</sup> Cir. 2013) If law enforcement could "rely on non-binding authority, particularly in the face of other, contrary non-binding authority," officers would "beg forgiveness rather than ask permission in ambiguous situations involving . . . basic civil rights." *Id.*

Although not even mentioned by the Sixth Circuit in *Fisher*<sup>7</sup>, the reasoning of *United States v. Lee*, 862 F.Supp.2d 560 (2012) bears consideration. In *Lee*, the Task Force Officer physically invaded Lee's property when he placed the GPS tracker on Lee's car. *Id.* As the Court held in *Jones*, that physical invasion was a trespass, and that trespass continued while the device transmitted information to the DEA agents. *Jones*, 132 S.Ct. 945, but see *United States v. Knotts*, 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (officers did not commit a search when they tracked a "beeper" in a container of chemicals with the owner's consent) and *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) (officers did not commit a search when they installed a beeper onto a container with the owner's consent). *Jones* expressly

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<sup>7</sup> The Sixth Circuit has recently issued a decision, finding police had an objectively reasonable good faith belief that their warrantless placement of a GPS device was lawful, and thus, the exclusionary rule does not apply. *United States v. Fisher*, Case No. 13-1623 (6<sup>th</sup> Cir. 2014) (not recommended for full publication).

distinguished those cases because they did not involve a physical trespass. *Jones*, 132 S.Ct. at 952. Even though the Butler County Sheriff could have determined Mr. Johnson’s location through cell phone data under *Forest*<sup>8</sup>, they could not obtain that same information through an illegally placed GPS device under *Jones*. As a result, Hackney could not have relied on *Knotts* or *Karo* as binding appellate precedent to trigger the good-faith exception.

Extending the good faith exception would give police “little incentive to err on the side of constitutional behavior.” *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring) (quoting *United States v. Johnson*, 457 U.S. 537, 561 (1982)). If a police officer conducts a search based on a non-binding judicial decision—that is, an opinion by a trial court or a published opinion by another circuit’s court of appeals—he is guessing at what the law might be, rather than relying on what a binding legal authority tells him it is. When a police officer follows binding law, suppression can only “discourage the officer from doing his duty.” *Davis*, 131 S Ct. at 2429 quoting *Leon*, 468 U.S. at 920. But suppression might deter the officer who picks and chooses which law he wishes to follow. *Cf. Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring) ([W]hen police decide to conduct a search or seize evidence in the absence of case law or other authority, specifically sanctioning such action by excluding the evidence obtained may deter Fourth Amendment violations.).

Limiting the good faith exception to binding appellate precedent also promotes the “essential interest in readily administrable rules” to govern police. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). When carrying out searches, federal officers need only know the binding decisions of the Supreme Court and their circuit’s court of appeals. Conversely,

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<sup>8</sup> *United States v. Forest*, 355 F.3d 942, 951 (6th Cir.2004), *abrogated on other grounds by United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *Forest* only approved the warrantless use of data from cell phone towers to track movements on public highways. In that case, DEA agents repeatedly dialed the defendant's cell phone, causing the phone to transmit its location to cell phone towers. *Forest*, 355 F.3d at 947.

expanding the exception to non-binding authority raises a host of questions. How many circuits must support a practice before an officer can rely on it in good faith? Two? Four? A majority? What if the judges on one panel are particularly well-respected? What if others are not? What if several district courts, but no courts of appeals, support a practice? Allowing officers to rely on non-binding authority raises all of these questions, but answers none of them. *Lee*, 862 F.Supp.2d at 570.

In theory, courts could impose a minimum quantity of non-binding authority before the good faith exception applied—say, half of the courts of appeals. But why are seven courts of appeals necessarily more persuasive than six? Such a minimum would be nothing more than an arbitrary rule, plucked from thin air. *Cf. Maryland v. Shatzer*, 130 S. Ct. 1213, 1228 (2010) (Thomas, J., concurring) (“[A]n otherwise arbitrary rule is not justifiable merely because it gives clear instruction to law enforcement officers.”). “Binding appellate precedent, on the other hand, is a simple limit that hews to the Supreme Court’s *Davis* decision.” *Lee*, 862 F.Supp.2d at 570.

Unlike the officers in *Davis*, who “scrupulously adhered to governing law,” there is no evidence Hackney relied on any precedent, binding or otherwise. Neither this Court, nor the Twelfth District Court of Appeals had spoken on the issue of GPS surveillance when Hackney placed the GPS tracking device on Mr. Johnson’s vehicle. Although a few courts had addressed the constitutionality of warrantless GPS tracking, there is no evidence Hackney knew of them, much less that he relied upon them. *See Jackson*, 825 F.3d at 866; *United States v. McIver*, 186 F.3d 1119, 1127 (9th Cir. 1999); *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).<sup>9</sup> According to his own testimony, Hackney’s erroneous belief he could attach a GPS tracking device to Mr. Johnson’s vehicle was based solely upon a conversation he had with an assistant

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<sup>9</sup> Even assuming Hackney had relied on these decisions, neither *McIver* nor *Garcia* sanctioned Ohio law enforcement’s use of GPS devices without a warrant.

prosecutor one or two years prior to placing the GPS tracking device on Mr. Johnson's vehicle. (Tr. 27, 28, 40) That prosecutor guessed, *albeit* incorrectly, at how the Supreme Court might resolve the unsettled question of Fourth Amendment law. In the absence of any evidence Hackney acted in objective reasonable reliance on anything other than an unsupported personal opinion, his warrantless use of the GPS tracking device does not fall within the confines of the good faith exception.

### **The Twelfth District Created a New Exception to the Exclusionary Rule**

The United States Supreme Court "created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation". *Davis*, 131 S.Ct. at 2423. The good faith exceptions to the exclusionary rule are limited to those the United States Supreme Court has created. The United States Supreme Court has never announced a test for lower courts to apply when considering the application of the good faith exceptions to the exclusionary rule. Rather than apply the law as it exists, the Twelfth District has charged Mr. Johnson with the burden of proving Hackney acted in "bad faith", in order to trigger the application of the exclusionary rule. *Johnson II*. This new rule of law is not authorized by any binding court in Ohio or by the United States Supreme Court. Absent a recognized exception to the exclusionary rule created by the United States Supreme Court, evidence obtained in violation of the Fourth Amendment must be excluded. *Leon*, 468 U. S. at 905

Lower courts should not legislate and create a new exceptions to the exclusionary rule in cases of police negligence. For lower courts to make such sweeping a change to the law, on the basis of facts very different from any United States Supreme Court case, is unacceptable. The sensible course is for courts is to apply the law as announced by the Court, and if unsatisfactory

to a party, let the party appeal to the United States Supreme Court, for an expansion of the exceptions to the exclusionary rule. This is the path taken by prosecutors in *Davis, Leon* and *Nix*.<sup>10</sup> If *Davis* is extended to include searches conducted in reliance on non-binding precedent, it can occur only through the United States Supreme Court, not the Twelfth District Court of Appeals. *Leon*, 468 U. S. at 905.

Any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessary is a provisional one. The assumptions on which we proceed today cannot be cast in stone. They will be tested in the real world of state and federal law enforcement, and **this Court will attend to the result**. If it should emerge from experience that, contrary to our expectations, the good faith exceptions to the exclusionary rule result in a material change in police compliance with the Fourth Amendment, **we shall have to reconsider what we have undertaken**.

*Leon*, 468 U.S. at 928 (J. Blackmon concurring) (emphasis added).

The United States Supreme Court may decide to expand the good faith exception, to include reliance on non-binding authority in the coming years. But unless it does so, courts are bound to apply the traditional remedy of exclusion when the government seeks to introduce evidence that is the “fruit” of an unconstitutional search. *Leon*, 468 U. S. at 905. In *Leon*, the Court addressed the appellate court’s compliance with the then law of the land,

In its view, the affidavit included no facts indicating the basis for the informants' statements concerning respondent Leon's criminal activities, and was devoid of information establishing the informants' reliability. Because these deficiencies had not been cured by the police investigation, the District Court properly suppressed the fruits of the search. The Court of Appeals refused the Government's invitation to recognize a good faith exception to the Fourth Amendment exclusionary rule.

*Id.*

Like the Ninth Circuit Court of Appeals in *Leon*, this Court should reject the government’s invitation to expand the good faith exception to the exclusionary rule. To do otherwise violates Mr. Johnson’s constitutional rights as defined by the United States Supreme

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<sup>10</sup> *Nix v. Williams*, 467 U.S. 431 (1984).

Court. *Davis*, 131 S Ct. at 2429 quoting *Leon*, 468 U.S. at 920 (when a police officer follows binding law, suppression can only “discourage the officer from doing his duty”); *Real Prop. Located at 15324 Cnty. Highway E*, 332 F.3d 1075-76 (such expansion of the good faith exception would have undesirable, unintended consequences).

### CONCLUSION

In every exception to the exclusionary rule, the officer is an innocent actor. The officer is not acting with discretion. The mistake which invalidates the search was made by a third party and beyond the control of the acting officer; a magistrate validating a warrant, a clerk stating a warrant is still valid, etc. Here, it was not a disinterested third party who made a mistake. It was the acting officer, Hackney, who erred. It was his actions the United States Supreme Court declared a violation of Mr. Johnson’s Fourth Amendment rights. *Jones*, 132 S.Ct. 945. It is Hackney, as well as all members of law enforcement throughout the state of Ohio, who can be deterred from future unconstitutional conduct, and there is value in enforcing the application of the exclusionary rule.

While the *Davis* Court weighed the societal costs and benefits associated with suppression, it did not announce this as a test for lower courts to apply when faced with a similar question. Instead of providing a balancing test for other courts to apply, the United States Supreme Court provided a specific test to apply – whether the law enforcement officer acted in strict compliance with existing binding precedent. The phrase “binding precedent” is repeated throughout the opinion. The Court never considered whether the officer believed he was acting correctly, spoke to a prosecutor or attended some training on the issue underlying the search. The Court does not announce a police officer’s actions may trigger the application of the good faith exception if he acts in accordance with an identifiable trend in the law, or a general

understanding of the law. In fact, the majority in *Davis* noted its decision might have been different if it were a "jurisdiction in which the question remains open." *Davis*, 131 S. Ct. at 2432.

This Court is now asked to provide guidance to all Ohio courts. The Butler County Sheriff's deputy performed an illegal search when he installed a GPS tracking device on Mr. Johnson's vehicle without a warrant. *Jones*, 132 S.Ct. 945. The subsequent stop of Mr. Johnson's vehicle by the Butler County Sheriff, the search of Mr. Johnson's vehicle, and his ensuing statement were all tainted by the illegal placement of the GPS tracking device. *Id.* Because the deputy did not rely on binding appellate precedent, the good faith exception cannot apply. *Davis*, 131 S. Ct. at 2432.

Respectfully Submitted,



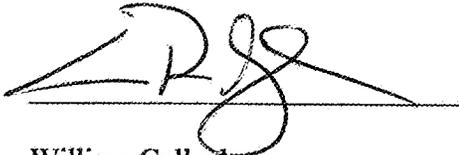
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**Certificate of Service**

I certify that on 6<sup>th</sup>, 2014, a copy of the foregoing Appellate Brief of Defendant-Appellant, Sudinia Johnson, was served *via* ordinary U.S. mail and e-mail to:

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William Gallagher

IN THE SUPREME COURT OF OHIO

COPY

STATE OF OHIO  
Appellee,

: CASE NO: CA 2012 11 235  
: TRIAL CASE NO: CR 2008-11-1919

vs.

SUDINIA JOHNSON,  
Appellant,

13-1973

APPEAL FROM THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT

NOTICE OF APPEAL

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FILED  
DEC 16 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

APX-1

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

FILED

2012 NOV -4 PM 3:09

MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

STATE OF OHIO,

Plaintiff-Appellee,

FILED BUTLER CO.  
COURT OF APPEALS

NOV 04 2013

MARY L. SWAIN  
CLERK OF COURTS

CASE NO. CA2012-11-235

- vs -

JUDGMENT ENTRY

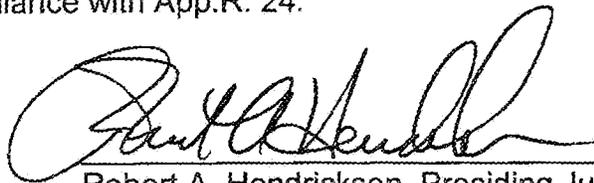
SUDINIA D. JOHNSON,

Defendant-Appellant.

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.



Robert A. Hendrickson, Presiding Judge



Stephen W. Powell, Judge



Robert P. Ringland, Judge

APX-2

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : CASE NO. CA2012-11-235  
 :  
 - vs - : OPINION  
 : 11/4/2013  
 :  
 SUDINIA D. JOHNSON, :  
 :  
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR2008-11-1919

Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

William R. Gallagher, The Citadel, 114 East Eighth Street, Cincinnati, Ohio 45202, for defendant-appellant

**HENDRICKSON, P.J.**

{¶ 1} Defendant-appellant, Sudinia Johnson, appeals from his convictions for trafficking in cocaine and possession of cocaine following his plea of no-contest in the Butler County Court of Common Pleas. Johnson argues that the trial court erred in overruling his motion to suppress evidence obtained through the warrantless attachment and subsequent use of a GPS tracking device on the exterior of his vehicle. Because suppression of the

**APX-3**

evidence would not yield appreciable deterrence and law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful, we find that the trial court did not err in denying Johnson's motion to suppress. For the reasons set forth below, Johnson's convictions are affirmed.

### I. FACTUAL BACKGROUND

{¶ 2} The following facts were originally set forth in *State v. Johnson*, 190 Ohio App.3d 750, 2010-Ohio-5808 (12th Dist.) (hereafter, *Johnson I*), and are hereby incorporated in full:

Detective Mike Hackney, a supervisor in the drug-and-vice-investigations unit for the Butler County Sheriff's Office, received information from three separate confidential informants that Johnson was trafficking in cocaine. Specifically, Hackney was informed that Johnson had recently dispersed multiple kilos of cocaine, that Johnson was preparing to acquire seven more kilos, and that Johnson moved the cocaine in a van. Hackney testified at the motion-to-suppress hearing that he had been familiar with Johnson's possessing and driving a white Chevy van at the time the informants gave him the information.

[On October 23, 2008] Hackney and two other agents performed a trash pull at Johnson's residence, and while there, they attached a GPS device to Johnson's van, which was parked on the east side of the road opposite the residences. Hackney testified that he attached the GPS device to the metal portion of the undercarriage of the van. Hackney stated that the device was "no bigger than a pager" and was encased in a magnetic case so that the device did not require any hard wiring into the van's electrical systems.

\* \* \*

After attaching the device, the agents intermittently tracked the GPS through a secured website. The Tuesday after installation, the GPS indicated that the van was located in a shopping center around Cook County, Illinois. Hackney began making arrangements with law enforcement in Chicago to verify the location of Johnson's van. \* \* \* Rudy Medellin, \* \* \* a retired Immigration and Customs officer, \* \* \* agreed to go to the shopping center and verify the location of Johnson's van.

Medellin arrived at the Chicago shopping center and confirmed the van's location and that the van matched the description and license-plate number of the van Johnson was known to possess and drive. \* \* \* Medellin then followed the van from the shopping center to a residence in the Chicago area, where he saw \* \* \* two men exit the van and enter the residence.

Medellin saw one man, later identified as Johnson, exit the residence carrying a package or box, and enter the van. Medellin saw the other man, later identified as Otis Kelly, drive away in a Ford that had Ohio plates. Medellin followed Johnson's van and the Ford until they reached the Butler County area and communicated with Hackney via cell phone during the surveillance.

Hackney continued to contact law-enforcement officials throughout Ohio, readying them to assist once Johnson and Kelly entered Ohio from Indiana. Hackney drove toward Cincinnati and, after coming upon Johnson's van, began to follow him. Hackney advised law-enforcement officers to stop the van and Ford "if they were able to find probable cause to make a stop." Deputy Daren Rhoads, a canine handler with the Butler County Sheriff's Office, initiated a stop after Johnson made a marked-lane violation.

\* \* \*

By the time Rhoads initiated the traffic stop, other officers were also in the position to offer back-up. Officers directed Johnson to exit his vehicle and then escorted him onto the sidewalk so that Rhoads could deploy his canine partner. The canine made a passive response on the driver's side door and on the passenger's side sliding door. After the canine walk-around, Johnson gave his consent to have the van searched.

Rhoads and other officers performed a preliminary sweep of Johnson's van for narcotics, but did not find any drugs or related paraphernalia in the vehicle. During this time, police vehicles and Johnson's van were situated on the road. After the initial search, officers moved Johnson's van approximately one-tenth of a mile to the location where police had pulled over the Ford driven by Otis Kelly. Officers there had also deployed two canine units around Kelly's Ford, and the canines detected the presence of narcotics. The officers ultimately located seven kilos of cocaine within a hidden compartment in the Ford's trunk and arrested Kelly for possession of cocaine. (Footnote omitted).

Once the van was situated at the second location, Rhoads continued his search with the help of an interdiction officer for the Ohio State Highway Patrol. The two concentrated on the undercarriage of the van and looked for any hidden compartments that Rhoads may have missed during his preliminary search. No drugs were recovered from the van.

\* \* \* Officers later seized Johnson's keys and discovered that one of the keys on Johnson's key ring opened the hidden compartment in the Ford that contained the seven kilos of cocaine seized from Kelly's vehicle. [The evidence was seized and Johnson was arrested.]

*Johnson I* at ¶ 2-13.

{¶ 3} Johnson was indicted in November 2008 on one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2), one count of possession of cocaine in violation of R.C. 2925.11, and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3). Following his indictment, Johnson filed numerous motions to suppress evidence obtained by law enforcement as well as a motion to sever the charge of having weapons while under disability from the trafficking and possession charges. Johnson's motion to sever was granted, a bench trial was held, and Johnson was acquitted of having weapons while under disability.

{¶ 4} An evidentiary hearing on Johnson's motions to suppress was held on March 3, 2009. At this time, the trial court considered Johnson's "Supplemental Motion to Suppress as to GPS Issue," in which Johnson sought to suppress all evidence obtained "directly or indirectly" from searches and seizures of himself and his property as "said searches and seizures were conducted with the unmonitored, unbridled use of a GPS device" in violation of his constitutional rights. The trial court denied Johnson's motion to suppress as to the GPS issue. Thereafter, Johnson entered a plea of no-contest to the trafficking and possession charges, and he was sentenced to 15 years in prison.

{¶ 5} Johnson appealed, arguing that "[t]he trial court erred in denying the motion to suppress when it ruled police did not need a search warrant to place a GPS tracking device on Mr. Johnson's car." *Johnson I*, 2010-Ohio-5808 at ¶ 18. In *Johnson I*, this court concluded that Johnson did not have a reasonable expectation of privacy in the undercarriage of his vehicle and that the placement and subsequent use of the GPS device to track the vehicle's whereabouts did not constitute a search or seizure under either the Fourth Amendment to the United States Constitution or Section 14, Article I of Ohio's Constitution. *Id.* at ¶ 18-47.

{¶ 6} Johnson appealed to the Ohio Supreme Court, which accepted review of the case. *State v. Johnson*, 128 Ohio St.3d 1425, 2011-Ohio-1049. While the matter was pending before the Ohio Supreme Court, the United States Supreme Court issued a decision in *United States v. Jones*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 945, 948 (2012), holding that the government's "installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the context of the Fourth Amendment. (Footnote omitted). Thereafter, the Ohio Supreme Court vacated our holding in *Johnson I*, and remanded the case back to the trial court for application of *Jones*. *State v. Johnson*, 131 Ohio St.3d 301, 2012-Ohio-975, ¶ 1.

{¶ 7} The trial court permitted both parties to file supplemental briefs addressing the impact that *Jones* had on Johnson's motion to suppress. At a hearing on September 12, 2012, Johnson and the state stipulated to the trial court's consideration of the transcript and exhibits from the March 3, 2009 evidentiary hearing. The parties further agreed that no additional evidence was necessary for the trial court to rule on the motion to suppress. At a hearing held on October 19, 2012, the trial court issued a decision denying Johnson's motion to suppress. Although the court found a clear violation of Johnson's Fourth Amendment right in the warrantless placement of the GPS device on Johnson's vehicle, the court concluded

that exclusion of the evidence obtained from the use of the GPS device was not warranted under the facts of the case. Relying on *Davis v. United States*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2419 (2011), the trial court concluded that "the deterrence benefit exclusion in this case of non-culpable, non-flagrant police conduct does not outweigh the heavy costs of exclusion to society and the judicial system. \* \* \* The Court finds that the officers acted in good faith \* \* \* and the evidence will be admitted at trial."

{¶ 8} Following the denial of his motion to suppress, Johnson entered a plea of no-contest to the trafficking and possession charges. The possession charge was merged with the trafficking charge for sentencing purposes, and Johnson was sentenced to ten years in prison.

{¶ 9} Johnson now appeals, challenging the trial court's denial of his motion to suppress.

## II. ANALYSIS

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY THE EXCLUSIONARY RULE AND SUPPRESS ALL EVIDENCE AND INFORMATION OBTAINED BY POLICE AFTER IT DETERMINED A WARRANT WAS NECESSARY TO PLACE A GPS DEVICE ON MR. JOHNSON'S CAR IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

{¶ 12} In his sole assignment of error, Johnson argues the trial court erred in denying his motion to suppress on the basis of the "good faith exception" to the exclusionary rule. Johnson argues that the good faith exception set forth in *Davis* is limited in application to those situations in which there is a "binding appellate procedure authoriz[ing] a particular police practice." As there was no binding case law in effect at the time the Butler County

Sheriff's Office placed the GPS device on his car, Johnson argues that the police were not acting in good faith. Johnson, therefore, argues that *Davis* and *Jones* require suppression of the evidence obtained through the use of the GPS device.

{¶ 13} The state argues for a broader reading of *Davis*. The state contends that Johnson's motion to suppress should be denied on the basis of the good faith doctrine as law enforcement acted with an objectively reasonable good faith belief that their conduct in attaching and monitoring the GPS device without the authorization of a warrant was lawful. The state argues that "binding" judicial precedent is not necessary under *Davis*' good faith exception to the exclusionary rule. Rather, the state contends, the focus under *Davis* is on the culpability of the police. Because officers from the Butler County Sheriff's Office did not act with a deliberate, reckless, or grossly negligent disregard for Johnson's Fourth Amendment rights, the state argues that exclusion of the evidence is not required under the facts of this case.

#### A. Standard of Review

{¶ 14} Our review of a trial court's denial of a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. Butler No. CA2005-03-074, 2005-Ohio-6038, ¶ 10. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

#### B. The Exclusionary Rule and the Good Faith Doctrine

{¶ 15} 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. *Davis*, 131 S.Ct. at 2426, citing *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437 (1960). The Supreme Court has "repeatedly held" that the exclusionary rule's "sole purpose \* \* \* is to deter future Fourth Amendment violations." *Id.* Courts should not "reflexive[ly]" apply the exclusionary rule, but rather, should limit application of the doctrine "to situations in which this purpose [of deterring future Fourth Amendment violations] is 'thought most efficaciously served.'" *Id.*, quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613 (1974). Accordingly, "[w]here suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly \* \* \* unwarranted.'" *Id.* at 2426-2427, quoting *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021 (1976).

{¶ 16} Deterrent value alone, however, is insufficient for exclusion because any analysis must also "account for the substantial social costs generated by the rule," since exclusion "exact[s] a heavy toll on both the judicial system and society at large." (Internal citations omitted.) *Id.* at 2427. As suppression "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence," the "bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Id.* "[S]ociety must swallow this bitter pill \* \* \* only as a 'last resort.'" (Emphasis added). *Id.*, quoting *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159 (2006). Accordingly, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.*

{¶ 17} "[T]he deterrence benefits of exclusion 'vary with the culpability of the law enforcement conduct' at issue." *Id.*, quoting *Herring v. United States*, 555 U.S. 135, 143, 129 S.Ct. 695 (2009). "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends

to outweigh the resulting costs. \* \* \* But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful \* \* \* or when their conduct involves only simply 'isolated' negligence \* \* \* the 'deterrence rationale loses much of its force' and exclusion cannot 'pay its way.'" *Id.* at 2427-2428, quoting *United States v. Leon*, 468 U.S. 897, 908-909, 104 S.Ct. 3405 (1984) and *Herring* at 143-144.

{¶ 18} In *Davis*, the petitioner, Davis, sought to exclude evidence obtained in a search following a routine traffic stop. *Id.* at 2425. After Davis had been arrested, placed in handcuffs, and put in the back of a patrol car, the police searched the vehicle Davis had been riding in and found a revolver. *Id.* At the time the search was conducted, officers were acting in compliance with *New York v. Belton*, 453 U.S. 454, 459-460, 101 S.Ct. 2860 (1981), which held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile." Davis was convicted on one count of possession of a firearm, but he appealed his conviction arguing that the search was unconstitutional. *Davis* at 2426. While his appeal was pending, the United States Supreme Court adopted a new test in *Arizona v. Gant*, 556 U.S. 332, 343, 129 S.Ct. 1710 (2009), holding that an automobile search incident to a recent occupant's arrest is constitutional if (1) the arrestee is within reaching distance of the vehicle during the search or (2) the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest.

{¶ 19} The issue the United States Supreme Court faced in *Davis* was whether to apply the exclusionary rule to suppress evidence obtained by police officers who, at the time of the search, were acting in compliance with binding precedent that was later overruled. *Davis* at 2423. The Court ultimately concluded that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.* at 2423-2424. The Court's holding was predicated on a determination that "suppression

would do nothing to deter police misconduct in these circumstances" and "would come at a high cost to both the truth and the public safety." *Id.* at 2423.

### C. Application of the Good Faith Doctrine to GPS Cases

{¶ 20} Following the Supreme Court's decision in *Jones*, courts across the country have addressed the propriety of applying *Davis* to cases in which GPS monitoring began before *Jones* was decided. "These decisions may be generally divided in two groups: (1) [courts] with pre-*Jones* binding appellate precedent sanctioning the warrantless installation and use of GPS devices, and (2) [courts] with no such binding appellate authority." *United States v. Guyton*, E.D.La. No. 11-271, 2013 WL 55837, \*3 (Jan. 3, 2013).

{¶ 21} Courts falling within the first category have had no problem applying *Davis* to deny the suppression of evidence. See *State v. Rich*, 12th Dist. Butler No. CA2012-03-044, 2013-Ohio-857 (relying on *Johnson I* as binding appellate precedent within the Twelfth District Court of Appeals); *United States v. Smith*, D.Nev. No. 2:11-cr-00058-GMN-CWH, 2012 WL 4898652 (Oct. 15, 2012) (relying on binding appellate precedent in the Ninth Circuit); *United States v. Amaya*, 853 F. Supp.2d 818 (N.D. Iowa 2012) (relying on binding appellate precedent in the Eighth Circuit); *United States v. Nelson*, S.D.Ga. No. CR612-005, 2012 WL 3052914 (July 25, 2012) (relying on binding appellate precedent in the Eleventh Circuit).

{¶ 22} Courts falling within the second category, however, are divided on how *Davis* should be applied. Some courts have construed *Davis* narrowly and hold that the good faith exception is inapplicable in the absence of binding appellate precedent. See *State v. Allen*, 8th Dist. Cuyahoga Nos. 99289 and 99291, 2013-Ohio-4188; *State v. Allen*, 11th Dist. Lake No. 2011-L-157, 2013-Ohio-434; *State v. Henry*, 2d Dist. Montgomery No. 11-CR-829, 2012-Ohio-4748; *United States v. Katzin*, E.D.Pa. No. 11-226, 2012 WL 1646894 (May 9, 2012);

*United States v. Lee*, 862 F.Supp.2d 560 (E.D.Ky. 2012); *United States v. Lujan*, N.D.Miss. No. 2:11CR11-SA, 2012 WL 2861546 (July 11, 2012). Other courts interpret *Davis* to require a case-by-case inquiry into whether law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful. See *Guyton*, 2013 WL 55837; *United States v. Oladosu*, 887 F.Supp.2d 437 (D.R.I. 2012); *United States v. Baez*, 878 F.Supp.2d 288 (D.Mass. 2012); *United States v. Leon*, 856 F. Supp.2d 1188 (D.Haw. 2012); *United States v. Rose*, 914 F.Supp.2d 15 (D.Mass. 2012); *United States v. Lopez*, 895 F.Supp.2d 592 (D.Del. 2012).

{¶ 23} The question before this court is whether the *Davis* good faith exception applies here, where prior to our decision in *Johnson I* there was no Ohio Supreme Court or Twelfth District case law authorizing the warrantless installation and monitoring of a GPS device. We believe that a case-by-case approach examining the culpability and conduct of law enforcement is more appropriate given the preference expressed in *Davis* for a cost-benefit analysis in exclusion cases as opposed to a "reflexive" application of the doctrine to all cases involving a Fourth Amendment violation. *Davis*, 131 S.Ct. at 2427 ("We abandoned the old, 'reflexive' application of the [exclusionary] doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits").

{¶ 24} In analyzing whether the Butler County Sheriff's Office acted with a "deliberate," "reckless," or "grossly negligent" disregard for Johnson's Fourth Amendment rights, we find that in addition to examining the specific actions taken by Detective Hackney and the sheriff's office, it is also necessary to examine the legal landscape as of October 23, 2008, the date the GPS device was placed on Johnson's vehicle.

{¶ 25} At the March 3, 2009 hearing, Hackney testified that the GPS device was placed on Johnson's vehicle without first attempting to obtain a warrant. Hackney explained that he had previously installed GPS devices on suspects' vehicles in other cases without

having obtained a warrant. Prior to placing such GPS devices, Hackney had consulted with assistant prosecutor Dave Kash about the legality of using GPS devices.<sup>1</sup> Hackney further stated that he had talked with his fellow officers, his supervisors, and with other law enforcement agencies about the use of GPS devices. He explained that "it was kind of common knowledge among other drug units or talking to other drug units that as long as the GPS is not hard wired, as long as it is placed on -- in a public area, removed in a public area, it is basically a tool or an extension of surveillance."

{¶ 26} Hackney's belief that a warrant was unnecessary was not unfounded given the legal landscape that existed at the time the GPS device was placed on Johnson's car. As of October 23, 2008, no court had ruled that the warrantless installation and monitoring of GPS devices on vehicles that remained on public roadways was a violation of the Fourth Amendment. Courts that had considered the issue of electronic monitoring determined that the United States Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983) controlled. In *Knotts*, the Supreme Court held that there was no Fourth Amendment violation where officers used an electronic beeper, which had been hidden inside of a chemical container prior to the container coming into the defendant's possession, to track a defendant's movements as he traveled on public roads with the container in his car. The Supreme Court held that a defendant "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281.<sup>2</sup>

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1. At the March 3, 2009 hearing, Hackney specified that he had talked to Dave Kash about a "[y]ear and a half [to] two years" ago about the legality of using a GPS device without a warrant.

2. Compare *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983), with *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296 (1984), where the Supreme Court determined that the monitoring of an electronic beeper in a *private* residence constitutes a search requiring a warrant as the location of the beeper was not open to visual surveillance.

{¶ 27} Subsequent to the United States Supreme Court's decision in *Knotts*, the Ninth Circuit determined in *United States v. McIver*, 186 F.3d 1119, 1126-1127 (9th Cir.1999), that the placement of a magnetic electronic tracking device on the undercarriage of a vehicle did not violate the Fourth Amendment. In *McIver*, law enforcement placed a magnetized tracking device on the undercarriage of the defendant's vehicle while the vehicle was parked in the defendant's driveway. *Id.* at 1123. The transmitter sent a signal to a monitoring unit used by police officers that informed officers when the transmitter was nearby and in what direction the transmitter was traveling. *Id.* The defendant challenged the constitutionality of using the tracking device, arguing the use of the device constituted both an illegal search and seizure. *Id.* at 1126. The Ninth Circuit disagreed, finding that no search occurred as the defendant failed to produce evidence demonstrating that he intended to shield the undercarriage of his vehicle from inspection by others or that placing the device permitted officers to pry into a hidden or enclosed area. *Id.* at 1127. The court further concluded that a seizure had not occurred as the defendant was not deprived of dominion and control of his vehicle and there was no evidence that use of the tracking device caused any damage to the electric components of the vehicle. *Id.*

{¶ 28} Thereafter, in 2007, the Seventh Circuit issued a decision in *United States v. Garcia*, 474 F.3d 994 (7th Cir.2007), addressing the warrantless placement and subsequent monitoring of a GPS device on a defendant's motor vehicle. In *Garcia*, the Seventh Circuit found the use of GPS devices analogous to the Supreme Court's sanction of beeper technology in *Knotts*. *Id.* at 996-997. The court concluded that the Fourth Amendment "cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth" and concluded that scientific enhancement allowing police to monitor a suspect on a public road was not a search requiring the authorization of a warrant. *Id.* at 998.

{¶ 29} Following the placement of the GPS device on Johnson's vehicle and the Seventh Circuit's decision in *Garcia*, numerous other courts upheld the warrantless attachment and monitoring of a GPS device on a suspect's vehicle prior to the United States Supreme Court's decision in *Jones*. See *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir.2010); *United States v. Marquez*, 605 F.3d 604 (8th Cir.2010); *United States v. Hernandez*, 647 F.3d 216 (5th Cir.2011). It was not until August 6, 2010, more than 21 months after the GPS device was placed on Johnson's vehicle, that the D.C. Circuit Court broke with the majority of other jurisdictions by holding that the use of a GPS tracking device for 28 days violated a defendant's reasonable expectation of privacy and was a violation of the defendant's Fourth Amendment rights. *United States v. Maynard*, 615 F.3d 544 (D.C.Cir.2010).

{¶ 30} Given that, at the time Hackney attached the GPS device to Johnson's car, the United States Supreme Court had sanctioned the use of beeper technology without a warrant in *Knotts*, at least one circuit court had applied the rationale expressed in *Knotts* and determined that the warrantless placement and subsequent monitoring of a GPS device on a vehicle was not a violation of a defendant's Fourth Amendment rights, and Hackney acted only after consulting with fellow officers, other law enforcement agencies, and a prosecutor, we find that the Butler County Sheriff's Office acted "with an objectively 'reasonable good-faith belief' that their conduct [was] lawful." *Davis*, 131 S.Ct. at 2427, quoting *Leon*, 468 U.S. at 909. Taking into account the steps taken by law enforcement and the legal landscape that existed at the time the GPS device was attached to Johnson's vehicle, we find that law enforcement did not exhibit a deliberate, reckless, or grossly negligent disregard for Johnson's Fourth Amendment rights in attaching and monitoring the GPS device without the authorization of a warrant. Suppression under the facts of this case would therefore fail to yield appreciable deterrence. As such, the deterrence value does not outweigh the social

costs exacted by application of the exclusionary rule, which would require the court "to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Id.*

{¶ 31} We therefore find that the good faith exception to the exclusionary rule applies in this case. The evidence obtained from the attachment and subsequent use of the GPS device is not subject to exclusion.

### III. CONCLUSION

{¶ 32} Having 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.

{¶ 33} Johnson's sole assignment of error is overruled.

{¶ 34} Judgment affirmed.

S. POWELL and RINGLAND, JJ., concur.

## FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

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

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Fourteenth Amendment to the United States Constitution Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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