

**THE DAVIS GOOD FAITH RULE  
AND  
GETTING ANSWERS TO THE QUESTIONS *JONES* LEFT OPEN**

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*The Supreme Court's decision in United States v. Jones clearly established that use of GPS tracking surveillance constitutes a search under the Fourth Amendment. But the Court left many other questions unanswered about the nature and scope of the constitutional privacy right in location data. A review of lower court decisions in the wake of Jones reveals that, rather than beginning to answer the questions that Jones left open, courts are largely avoiding substantive Fourth Amendment analysis of location data privacy. Instead, these courts are finding that officers who engaged in GPS tracking and related surveillance operated in good faith, based on the new exception to the exclusionary remedy that the Supreme Court laid out in the 2011 case of Davis v. United States. When courts narrowly apply the Davis rule, they deny suppression remedies and avoid new Fourth Amendment analysis when binding appellate precedent specifically authorized the investigation. That approach will cease to be controlling as soon as courts consider surveillance investigations taking place after the Jones decision issued. When courts apply the Davis rule broadly, however, they deny the exclusionary remedy based on the culpability of the investigating officer or even*

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*more amorphous criteria. If broad applications persist, it will take a very long time indeed to get answers to the questions Jones left open. During that time, the constitutional right to privacy in location data will remain undeveloped and unprotected.*

## I. INTRODUCTION

When all nine Justices of the Supreme Court disapproved of the Government's use of warrantless Global Positioning System ("GPS") tracking surveillance in *United States v. Jones*,<sup>1</sup> it seemed to be a clear indication that the Court was ready to limit law enforcement's use of new surveillance technologies. Importantly, the Court did not accept the Government's invitation to view the use of hidden GPS tracking devices, which transmit fairly precise geographic information about the real-time location of a target's car to remote monitoring stations, the same as visual surveillance by agents in the field.<sup>2</sup> The Justices also appeared prepared to recognize that the precedents from the 1980s,<sup>3</sup> established in cases in which much more primitive radio beepers had merely indicated to tracking agents that they were getting closer, did not govern the dramatically more sophisticated GPS tracking surveillance at issue in *Jones*.<sup>4</sup> The *Jones* decision seemed to be a significant win for privacy and for Fourth Amendment rights.

But the *Jones* decision was anything but definitive. Because Justice Scalia's majority opinion relied on a trespass theory to find that the GPS tracking surveillance was a search, it provided no rule to govern cases that lacked the physical trespass element.<sup>5</sup> The

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<sup>1</sup> *United States v. Jones*, 132 S. Ct. 945 (2012).

<sup>2</sup> *Id.* at 952; Reply Brief for the United States, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 5094951, at \*5-6.

<sup>3</sup> *See* *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Karo*, 468 U.S. 705 (1984).

<sup>4</sup> *See Jones*, 132 S. Ct. at 951 (rejecting the Government's argument that the reasoning of the "beeper" cases "foreclose[s] the conclusion that what occurred here is a search"); *id.* at 952 n.6 (describing early beeper use as more limited than GPS tracking).

<sup>5</sup> *Id.* at 954 ("It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.").

majority allowed that the reasonable expectation of privacy test would govern GPS surveillance cases that lack the physical attachment of a device such as the one police had installed on Jones's car, but it neither accepted nor rejected the concurrence's prolonged surveillance test.<sup>6</sup> Nor did the majority express an opinion on the mosaic theory that the D.C. Court of Appeals had used to find the surveillance unlawful in the case below.<sup>7</sup> Therefore, as Walter Dellinger explained, the majority's rule was a "temporary solution."<sup>8</sup> As Justice Sotomayor recognized in her concurrence, the majority's trespass approach covers neither location data tracking by use of cell phone tower data, which is now common, nor use of remote access to GPS devices in cars and phones, which is becoming increasingly common.<sup>9</sup> The majority opinion did not even establish whether police need to obtain an order from a judge prior to engaging in GPS tracking surveillance, and if so, whether they need to establish probable cause or some lesser standard such as reasonable suspicion.

By raising at least as many questions as it answered, the *Jones* decision offered a perfect opportunity to develop Fourth Amendment law in the age of modern location tracking. While some commentators excitedly expressed the hope that the Supreme

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<sup>6</sup> The majority opinion did express skepticism about the concurrence's approach. *See infra* note 23.

<sup>7</sup> *See, e.g.,* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 329–354 (2012) (arguing that courts should reject the "mosaic theory" largely because it poses extremely difficult implementation questions); Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL'Y 1 (2012); *see also* *United States v. Jones*, No. 05-0386 (ESH), 2012 WL 6443136, at \*6 & n.11 (D.D.C. Dec. 14, 2012) (discussing the "mosaic theory" and noting its use in lower court decisions that addressed cell site location surveillance prior to *Jones*).

<sup>8</sup> Walter Dellinger, Keynote Address at the *North Carolina Journal of Law & Technology Symposium: U.S. v. Jones: Defining a Search in the 21st Century* (Jan. 25, 2013), available at <http://ncjolt.org/multimedia/symposium-videos>.

<sup>9</sup> *See Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) ("With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory—or owner—installed vehicle tracking devices or GPS-enabled smartphones.").

Court would soon revisit the issues it had raised in *Jones*, cooler heads surely recognized that would not happen until the lower courts had spent some time percolating those issues. After all, the Supreme Court had not addressed location tracking since the 1980s,<sup>10</sup> and it arguably had not engaged the question of new technological surveillance methods since the 2001 *Kyllo v. United States*<sup>11</sup> decision.

Just one year prior to the *Jones* decision, however, the Court had thrown a considerable hurdle in the path of Fourth Amendment law development. In *Davis v. United States*,<sup>12</sup> the Court had announced a new “good faith” exception to the exclusionary rule under which a suppression remedy is not available when officers act in objectively reasonable reliance on binding appellate precedent, even when the Supreme Court later overturns that precedent.<sup>13</sup> Following *Davis*, lower courts are refusing to grant a suppression remedy on appeal to targets of searches that were almost surely unconstitutional under *Jones*. In determining whether to apply the *Davis* rule, lower courts are looking backward to prior appellate case law to see if it provides the basis for reasonable reliance by the investigators who conducted the GPS tracking surveillance, rather than looking forward to apply *Jones*.<sup>14</sup> That in itself represents a missed opportunity for lower courts to apply *Jones* and begin to answer some of the questions it left unanswered. It should cease to be reasonable to rely on pre-*Jones* appellate precedent, however, when defendants begin challenging searches conducted after issuance of the *Jones* decision in January of 2012. The inhibition of Fourth Amendment law development, and the delay in obtaining answers to the questions left open by *Jones*, should be time-limited.

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<sup>10</sup> See *supra* note 3.

<sup>11</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>12</sup> *Davis v. United States*, 131 S. Ct. 2419 (2011).

<sup>13</sup> *Id.* at 2423–24, 2429.

<sup>14</sup> See *infra* Part IV.A. Some courts are analyzing the standing doctrine notwithstanding their application of the *Davis* exception to the exclusionary rule. See *infra* Part V.A.

More troubling for both law development and Fourth Amendment rights are the lower court decisions that read *Davis* more expansively. Many such courts, using language from *Davis* and from *Herring v. United States*,<sup>15</sup> upon which *Davis* relies, are denying an exclusionary remedy and refusing to engage in any meaningful analysis of *Jones* even in the absence of binding appellate precedent in their circuits. Those courts are either looking to precedent in other circuits to justify GPS tracking and related surveillance, or are engaging in a cost-benefit analysis that ties the availability of a suppression remedy to the culpability of the officers' conduct.<sup>16</sup> By untethering their analysis from binding appellate precedent altogether, some courts are using *Davis* to deny both an exclusionary remedy and an analysis of *Jones* in ways that threaten to severely limit *Jones*'s impact far into the future.<sup>17</sup>

When *Davis* was pending in the Supreme Court, Orin Kerr, acting as a lawyer for Davis, argued in his briefs and in an accompanying law review article that the *Davis* rule would shrink the exclusionary remedy, provide a disincentive to bring cases, and stunt the development of Fourth Amendment law.<sup>18</sup> Despite those warnings, and against a dissent that raised the same concerns, when the Supreme Court issued the new good faith rule in *Davis*, it dismissed any concerns about the new rule's impact on the development of Fourth Amendment law.<sup>19</sup> A review of lower court opinions issued in the year since the Supreme Court decided *Jones* shows that Professor Kerr's and the dissent's concerns have been borne out.

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<sup>15</sup> *Herring v. United States*, 555 U.S. 135 (2009).

<sup>16</sup> See *infra* Part IV.B.

<sup>17</sup> See *infra* Part IV.C.

<sup>18</sup> Orin Kerr, *Fourth Amendment Remedies and Development of the Law, A Comment on Camreta v. Greene and Davis v. United States*, CATO SUP. CT. REV., 2010–2011, at 237, 239, 248–61; Reply Brief for the Petitioner, *Davis*, 131 S. Ct. 2419 (No. 09-11328), 2011 WL 805225, at \*15–21. In fact, in an earlier paper as well Professor Kerr had argued in favor of a suppression remedy when agents rely on overturned law. See Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011).

<sup>19</sup> See *infra* Part III.C.

Part II of this Article elaborates on the questions that the *Jones* opinions left unanswered. While *Jones* significantly advanced modern privacy rights, its opinions raised several questions about the scope and application of the Fourth Amendment right to privacy in location data. Part III reviews the Supreme Court's decision in *Davis* and explains how the Court reconciled the denial of a suppression remedy for newly announced rules of constitutional law with current law that purports to accord full retroactivity for such rules to cases pending at the time the rules are announced. It reviews the narrow and broad readings of the *Davis* decision. Part IV describes some of the methods courts are using to avoid analyzing *Jones* based on *Davis*. It illustrates that government litigators are aggressively pushing for a broad reading of the *Davis* exception to the exclusionary rule and achieving considerable success. That is unfortunate for defendants seeking a remedy for the violation of their Fourth Amendment rights as well as for the development of Fourth Amendment law. Part V describes how a very few courts are answering some of the questions raised by the *Jones* decision despite the *Davis* decision and offers a glimpse of what the legal landscape would look like post-*Jones* if the cloud of *Davis* did not hang over it. The Article concludes that a broad reading of the *Davis* rule threatens to keep the decisions answering the questions raised by *Jones* few and far between, potentially long into the future.

## II. QUESTIONS THE JUSTICES LEFT UNANSWERED IN *JONES*

The *Jones* opinions united in their opposition to the warrantless GPS tracking surveillance agents had conducted. Yet the Justices came to no consensus on a rule for future cases involving the surveillance of location data.

### A. *Questions Raised by the Scalia Majority Opinion*

A majority of five Justices found the installation and use of the GPS tracking device to be a search under the Fourth Amendment

on the basis of a previously discredited trespass theory.<sup>20</sup> In doing so, the majority reinvigorated the importance of property rights to the Fourth Amendment analysis, although the car at issue in *Jones* was personal property rather than the real property of a home that had previously been the focal point of the property-rights-based view of Fourth Amendment protections.<sup>21</sup> Although the majority accepted the possibility that a defendant could continue to lodge a Fourth Amendment challenge based on the reasonable expectation of privacy test when the trespass theory would not suffice, it did not elaborate on what that claim would look like or what test should be used.<sup>22</sup> Without offering something better, the majority expressed disapproval of the concurrences' distinction between

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<sup>20</sup> See *United States v. Jones*, 132 S. Ct. 945, 960 (2012) (Alito, J., concurring) (“The premise that property interests control the right of the Government to search and seize has been discredited.” (internal quotation marks omitted)).

<sup>21</sup> See, e.g., Peter Swire, *Katz is Dead, Long Live Katz*, 102 MICH. L. REV. 904, 913 (2004) (describing the focus on the home as part of the property rights approach to Fourth Amendment rights).

<sup>22</sup> *Jones*, 132 S. Ct. at 953 (“Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.” (citing *Katz v. United States*, 389 U.S. 347 (1967))). The author signed onto and helped to draft a brief for law professors that argued that the Court should use a four factor test to decide when there is a reasonable expectation of privacy in location data, which may be subject to surveillance with or without a physical trespass. See Brief of Amici Curiae, Yale Law School Information Society Project Scholars and Other Experts in the Law of Privacy and Technology in Support of the Respondent, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 4614429, at \*34 (citing Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3 (2007); Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681 (2001) [hereinafter Freiwald, *Cell Phone Location Data*]); see also David Gray & Danielle Citron, *A Technology-Centered Approach to Quantitative Privacy* (Aug. 14, 2012) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/paperscfm?abstract\\_id=2129439](http://papers.ssrn.com/sol3/paperscfm?abstract_id=2129439) (putting forth another new test for determining whether an investigative method constitutes a Fourth Amendment search).

short-term and long-term surveillance and its identification of the severity of the offense under investigation as a significant factor.<sup>23</sup>

The majority did not elaborate on how the reasonable expectation of privacy test would apply to claims based on surveillance using cell site location data.<sup>24</sup> Nor did the majority discuss whether defendants could raise claims based on remote trespasses to their physical effects, despite the fact that both concurring decisions raised that issue,<sup>25</sup> and despite the fact that a series of cases have recognized the validity of claims of trespass by electrons in applying the tort of trespass to chattels in the internet age.<sup>26</sup> The majority also failed to dispel concerns that the intricacies and variations of state property law rules would overly complicate its property-based approach. Writing for four concurring Justices, Justice Alito raised those concerns as part of a multi-pronged attack on the majority's trespass-based approach.<sup>27</sup>

Finally, because the Government forfeited the issue by not raising it at trial, the majority did not address what procedural hurdle investigative agents would have to surmount to conduct reasonable searches by GPS tracking surveillance in the future.<sup>28</sup> The majority did not affirmatively hold that agents would have to obtain a warrant by establishing probable cause to a neutral magistrate before engaging in GPS tracking surveillance. In fact,

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<sup>23</sup> *Jones*, 132 S. Ct. at 954 (“What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these ‘vexing problems’ in some future cases . . . but there is no reason for rushing forward to resolve them here.”).

<sup>24</sup> See *infra* Part IV.C for a discussion of a case in which the defendant argued that the *Jones* reasoning applied to cell site location data; see also Brief of Amicus Curiae Susan Freiwald in Support of Affirmance, In re Applications of the United States of America for Historical Cell-Site Data, No. 11-20884 (5th Cir. Mar. 16, 2012), 2012 WL 1029814.

<sup>25</sup> See *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 962 (Alito, J., concurring).

<sup>26</sup> See *id.* at 962 (Alito, J., concurring) (discussing prior cases).

<sup>27</sup> See *id.* at 959–63 (Alito, J., concurring).

<sup>28</sup> *Id.* at 954 (considering the argument “forfeited” that either reasonable suspicion or probable cause, without a warrant, sufficed to make the search reasonable and lawful).

the majority did not explicitly require probable cause at all, which left the door open for government lawyers to argue that merely establishing reasonable suspicion suffices to justify GPS tracking surveillance post-*Jones*, even though such surveillance constitutes a search under the Fourth Amendment.<sup>29</sup>

B. *Questions Raised by the Alito Concurrence*

While Justice Alito's concurrence more explicitly incorporated a reasonable expectation of privacy analysis into its reasoning, it also left several questions unanswered. The Alito concurrence found that the GPS tracking at issue exceeded the scope of Jones' reasonable expectations, but it failed to set forth a test that could easily be used to decide future cases. The concurrence found significant that the GPS tracking proceeded over the course of twenty-eight days, during which time agents were able to "secretly monitor and catalogue every single movement of an individual's car for a very long period."<sup>30</sup> The concurring Justices determined that "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."<sup>31</sup> The concurring Justices did not, however, "identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the four-week mark."<sup>32</sup> The concurrence did not explain which "extraordinary offenses" would fall outside the rule it announced, or the implications of doing so. Presumably, surveillance falling short of prolonged surveillance or conducted to investigate extremely serious offenses might proceed free of the warrant requirement, but perhaps there would be some other procedural hurdle such as reasonable suspicion or even

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<sup>29</sup> Government lawyers have argued in the alternative that agents may install and monitor GPS devices so long as they have probable cause to do so, without the need to obtain a warrant. *See, e.g.,* United States v. Ford, No. 1:11-CR-42, 2012 WL 5366049, at \*7 (E.D. Tenn. Oct. 30, 2012) ("The government . . . urges the Court to adopt the R & R [denying the motion to suppress] on the ground attaching a GPS device to a vehicle with probable cause does not require a warrant.").

<sup>30</sup> *Jones*, 132 S. Ct. at 964 (Alito, J., concurring).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

probable cause but without the need for a prior warrant. Perhaps agents would instead have to justify their search after the fact to a magistrate, at least in some cases, or perhaps the seriousness of the crime under investigation would operate as an exigency sufficient to excuse a pre-investigation warrant but not post-investigation review.<sup>33</sup> The concurrence addressed none of these issues, which would have been dicta had it done so.

That raises the question of how seriously to take the concurrence's reasonable expectation analysis. Because Justice Sotomayor cast her concurring vote with Justice Scalia's majority opinion, Justice Alito's concurrence did not obtain five votes. At the same time, Justice Sotomayor clearly expressed agreement with the concurrence's finding that GPS tracking violates reasonable expectations of privacy.<sup>34</sup> Moreover, Justice Sotomayor's separate concurrence indicated that she would go even further and find that GPS tracking surveillance intrudes upon reasonable expectations of privacy, even when conducted for short intervals. Justice Sotomayor explained that "[i]n cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention."<sup>35</sup> Nonetheless, Justice Alito's concurrence garnered only four votes, plus the majority's recognition that a reasonable expectation of privacy analysis may be used in some future cases, plus Justice Sotomayor's indication that even shorter term surveillance may intrude on reasonable expectations. What does that add up to, and what direction does that provide to lower courts?

Another pending question is whether lower courts will continue to use the mosaic theory to decide cases that do not meet the parameters of the majority's physical trespass approach. The D.C.

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<sup>33</sup> See, e.g., 18 U.S.C. § 2518(7) (2006) (emergency provision under Wiretap Act permitting wiretap order to issue in emergency situation and order to be obtained within forty-eight hours).

<sup>34</sup> See *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) (agreeing with Justice Alito that long-term surveillance of most offenses intrudes on expectations of privacy).

<sup>35</sup> *Id.*

Circuit would have granted Jones's motion to suppress because the GPS tracking surveillance allowed the Government to collect twenty-eight days' worth of information about the totality of defendants' movements that painted a mosaic of their personal lives.<sup>36</sup> While the mosaic theory raises concerns similar to the prolonged surveillance test that Justice Alito's concurring decision proposed, the concurrence did not use the same phrasing.

C. *Questions Raised by the Sotomayor Concurrence*

Finally, there remains the question of what to do with Justice Sotomayor's separate concurrence. In addition to signing on to the majority's property-based opinion and indicating support for finding even short-term GPS-tracking surveillance to violate reasonable expectations of privacy, Justice Sotomayor reached out to criticize the third party rule.<sup>37</sup> According to Justice Sotomayor, "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."<sup>38</sup> In fact, a broad reading of the third party rule presents the largest stumbling block to claims that surveillance based on obtaining records of cell site location data constitutes a search under the Fourth Amendment.<sup>39</sup> The Government has claimed in those cases, with considerable but not universal success, that a target's use of her cell phone, which creates records of her location stored by her third-party service provider, defeats her reasonable expectation of privacy in those records.<sup>40</sup> It is crucial to finding a Fourth Amendment privacy interest in location data records that judges limit the third party rule to the cases in which it arose—involving dialed telephone

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<sup>36</sup> See *United States v. Maynard*, 615 F.3d 544, 563 (D.C. Cir. 2010), *aff'd sub nom. Jones*, 132 S. Ct. at 945.

<sup>37</sup> *Jones*, 132 S. Ct. at 957.

<sup>38</sup> *Id.*

<sup>39</sup> See Freiwald, *Cell Phone Location Data*, *supra* note 22.

<sup>40</sup> See *id.*; see also *In Re Application of the U.S. for Historical Cell Site Data*, 747 F. Supp. 2d 827 (S.D. Tex. 2010), *appeal docketed*, No. 11-20884 (5th Cir. Dec. 14, 2011) (oral argument held on Oct. 2, 2012).

numbers and bank records<sup>41</sup>—and not extend it to modern cell phone location data.<sup>42</sup>

Justice Sotomayor is no doubt correct that an expanded third party rule leads to a contracted view of privacy in location data.<sup>43</sup> But, as Justice Sotomayor surely recognized, *Jones* did not involve third party records.<sup>44</sup> Government investigators obtained Jones's location information by monitoring a GPS device that sent information about Jones's location to their computers in real time.<sup>45</sup> They did not compel the disclosure of records containing location information from third parties—cell phone service providers or others. Justice Sotomayor's statement disapproving of an expanded third party rule was dicta in a one-person concurrence that garnered no other votes. Neither the majority decision nor the Alito concurrence mentioned the third party rule. So will Justice Sotomayor's criticism of the third party rule impact lower courts?

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<sup>41</sup> See *Smith v. Maryland*, 442 U.S. 735 (1979) (finding no reasonable expectation of privacy invaded when pen register divulged telephone numbers dialed); *United States v. Miller*, 425 U.S. 435 (1976) (finding no reasonable expectation of privacy intruded upon when law enforcement agents compelled a bank to disclose its customer's bank records).

<sup>42</sup> See Brief of Amicus Curiae Susan Freiwald in Support of Affirmance, *supra* note 24.

<sup>43</sup> See, e.g., Freiwald, *Cell Phone Location Data*, *supra* note 22, at 733–40; Stephen E. Henderson, *After United States v. Jones, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J.L. & TECH. 431 (2013).

<sup>44</sup> See *Jones*, 132 S. Ct. at 957 (“Resolution of these difficult questions in this case is unnecessary.”). According to Christopher Slobogin, one could view *Jones* as deciding that “if a trespass occurs, the fact that third parties can observe the vehicle is irrelevant,” and thereby implicating a different third party question from that involving third party records. See Slobogin, *supra* note 7; see also *id.* at n.30 (describing the “*knowing exposure doctrine*,” the “*general public use doctrine*,” and the “*assumption of risk doctrine*” as “three doctrines that implement the third party idea”).

<sup>45</sup> See *United States v. Maynard*, 615 F.3d 544, 565 n.\* (2010) (describing how an installed GPS receiver “permits remote real-time tracking of the target from police headquarters” (quoting Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 419 (2007))).

The *Jones* opinions left many questions of Fourth Amendment law unclear. Another important question is how quickly the lower courts will clear up the confusion.<sup>46</sup>

### III. THE *DAVIS* V. *UNITED STATES* EXCEPTION TO THE EXCLUSIONARY RULE

As this Article discusses, lower courts' application of the *Davis* rule will delay answers to the questions *Jones* left open as well as remedies for targets of unconstitutional GPS tracking surveillance. Broad applications of the *Davis* rule may well inhibit the development of Fourth Amendment law and the benefit of *Jones* far into the future. Before turning to the lower courts' application of the *Davis* rule, this Part describes the *Davis* case itself.

#### A. *Rights and Retroactivity in Davis*

When Willie Gene Davis appealed the denial of his motion to suppress evidence in light of an intervening Supreme Court decision that made the search he was subjected to unconstitutional,<sup>47</sup> he stood in the same position as many of the defendants who challenged the evidence obtained by warrantless GPS tracking surveillance in light of *Jones*. Law enforcement agents had obtained incriminating evidence against Davis by searching the passenger compartment of a car Davis had been traveling in, after they had secured Davis and the car's driver in a police car after a routine traffic stop.<sup>48</sup> After the search, while Davis's case was still on appeal, the Supreme Court found unconstitutional the type of search the officers had conducted. The

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<sup>46</sup> See Orin Kerr, *Lifting the "Fog" of Internet Surveillance: How a Suppression Remedy Would Change Computer Crime Law*, 54 HASTINGS L.J. 805 (2003) (arguing that the Electronic Communications Privacy Act's lack of a statutory suppression remedy has inhibited the development of case law interpreting it).

<sup>47</sup> *Davis v. United States*, 131 S. Ct. 2419, 2422 (2011).

<sup>48</sup> *Id.* at 2425. After the traffic stop, Davis gave a false name and the police determined that the car's driver was intoxicated. *Id.* Because Davis was a previously convicted felon, his possession of an unregistered firearm was a crime that subjected him to a sentence of 220 months. *United States v. Davis*, No. 2:07-cr-0248-WKW, 2008 WL 1927377 (M.D. Ala. Apr. 28, 2008).

Supreme Court addressed whether the rule it laid down in *Arizona v. Gant*,<sup>49</sup> which clearly established that officers violated Davis' Fourth Amendment rights when they searched the car after he was secured,<sup>50</sup> would entitle Davis to have the evidence obtained from the search, and also evidence derived from that evidence, suppressed by operation of the exclusionary rule.<sup>51</sup>

The retroactivity rule should have provided an answer to the Supreme Court's question.<sup>52</sup> In *Griffith v. Kentucky*,<sup>53</sup> the Supreme Court had announced that rules of substantive law may be invoked until a conviction becomes final on direct review.<sup>54</sup> For about twenty years prior to *Griffith*, courts had followed the approach set forth in *Linkletter v. Walker*,<sup>55</sup> and applied a new substantive rule of constitutional law retroactively based on a case-by-case analysis.<sup>56</sup> That often meant that only the defendant in the case that established the new rule would have his evidence suppressed, but other defendants whose cases were pending at the time would not benefit from the new rule.<sup>57</sup> Discomfort with treating like defendants differently led the Court to abandon the *Linkletter* approach in *Griffith* and find full retroactivity for new constitutional rules for all pending cases.

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<sup>49</sup> *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>50</sup> *Davis*, 131 S. Ct. at 2428. Under the rule of *Gant*, officers could have searched the car if they had reason to believe that the vehicle contained evidence relevant to the crime of arrest, but apparently they did not. *Id.* at 2425.

<sup>51</sup> *Id.* at 2419.

<sup>52</sup> *See id.* at 2429–30 (“The principal argument of both the dissent and Davis is that the exclusionary rule’s availability to enforce new Fourth Amendment precedent is a retroactivity issue.”).

<sup>53</sup> *Griffith v. Kentucky*, 479 U.S. 314 (1987).

<sup>54</sup> *Id.* at 328.

<sup>55</sup> *Linkletter v. Walker*, 381 U.S. 618 (1965).

<sup>56</sup> *See id.* at 629 (describing retroactivity determinations as depending on the “merits and demerits in each case” and a set of factors that include “the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard operation”).

<sup>57</sup> *Davis*, 131 S. Ct. at 2436 (Breyer, J., dissenting) (noting that, prior to *Griffith*, “the Court would often not apply the new rule to identical cases still pending on appeal”).

Without purporting to overturn *Griffith*, the Supreme Court announced in *Davis* that whether the police had violated Davis's Fourth Amendment rights was a different question from whether he was entitled to a suppression remedy by operation of the exclusionary rule.<sup>58</sup> By reasoning that "[e]xclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search,"<sup>59</sup> the majority reconciled both, granting that Davis's Fourth Amendment rights were violated and denying him the suppression remedy. According to the Court, "[T]he retroactive application of a new rule of substantive Fourth Amendment law *raises* the question whether the suppression remedy applies; it does not answer that question."<sup>60</sup> Justice Breyer, writing for himself and Justice Ginsberg in dissent, called that distinction "highly artificial," and complained that "[l]eaving Davis with a right but not a remedy . . . 'keep[s] the word of promise to our ear' but 'break[s] it to our hope.'"<sup>61</sup> According to the majority's review of the twenty-seven-year expansion of the good faith exception to the exclusionary rule, however, the Court had grown habituated to establishing constitutional rights for which it provided no remedies.<sup>62</sup>

Besides breaking, albeit self-consciously, the link between suffering a Fourth Amendment injury and obtaining a remedy for that injury, the majority in *Davis* dismissed as irrelevant the concern that "applying the good-faith exception to searches

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<sup>58</sup> *Id.* at 2431 (majority opinion) (explaining that "[r]emedies is a separate, analytically distinct issue" from "[r]etroactive application").

<sup>59</sup> *Id.* at 2426 (internal quotation marks omitted). As discussed below, the Court announced that the "sole purpose" of the exclusionary rule is "to deter future Fourth Amendment violations." *Id.*

<sup>60</sup> *Id.* at 2431.

<sup>61</sup> *Id.* at 2437 (Breyer, J., dissenting). Interestingly, one district court, in later applying *Davis* to deny a motion to suppress based on *Jones*, explained that the *Davis* rule made *Jones* "not retroactive." *United States v. Heath*, No. CR 12-4-H-DWM, 2012 WL 1574123, at \*1 (D. Mont. May 3, 2012).

<sup>62</sup> *Davis*, 131 S. Ct. at 2427–28. The majority left unclear at the end of its decision whether the defendant who initially secures a Supreme Court ruling overturning a prior decision will be entitled to a suppression remedy. *Id.* at 2434.

conducted in reliance on binding precedent will stunt the development of Fourth Amendment law.”<sup>63</sup> Professor Orin Kerr, who represented Davis in the Supreme Court, expressed his concerns in a law review article that Fourth Amendment law cannot develop in a “zone of very limited remedies.”<sup>64</sup> The dissenting Justices also expressed concern that a broad reading of the Court’s rule would discourage lower courts from “work[ing] out Fourth Amendment differences among themselves—through circuit reconsideration of a precedent that other circuits have criticized.”<sup>65</sup> The majority opinion gave short shrift to those concerns, reiterating that the “sole purpose of the exclusionary rule is to deter misconduct by law enforcement.”<sup>66</sup>

The majority in *Davis* held that “searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”<sup>67</sup> Applying that holding to Davis himself, the Court found that, because the law enforcement officers acted in accordance with then-binding appellate precedent, they acted in good faith, and therefore the Court affirmed the denial of Davis’s motion to suppress.<sup>68</sup>

The majority’s opinion also included much broader language and expressed considerable discomfort with the exclusionary rule. For example, the majority complained that “[e]xclusion exacts a heavy toll on both the judicial system and society at large.”<sup>69</sup> It further described exclusion as a “bitter pill” which “society must

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<sup>63</sup> *Id.* at 2432.

<sup>64</sup> See Kerr, *supra* note 18, at 239, 248–61; see, e.g., *id.* at 240 (“[T]he exclusionary rule remains the primary means by which Fourth Amendment law develops.”); Reply Brief for the Petitioner, *Davis*, 131 S. Ct. 2419, (No. 09-11328), 2011 WL 805255, at \*15–21.

<sup>65</sup> *Davis*, 131 S. Ct. at 2438 (Breyer, J., dissenting).

<sup>66</sup> *Id.* at 2432 (majority opinion); see also Kerr, *supra* note 18, at 251 (noting that the appellate court responded to this concern by explaining that “the exclusionary rule was about deterrence, not ‘foster[ing] the development of Fourth Amendment law’ ” (quoting *United States v. Davis*, 598 F.3d 1259, 1266 n.8 (11th Cir. 2010))).

<sup>67</sup> *Davis*, 131 S. Ct. at 2423–24.

<sup>68</sup> *Id.* at 2429.

<sup>69</sup> *Id.* at 2427.

swallow . . . only as a ‘last resort.’ ”<sup>70</sup> The majority “reaffirm[ed] . . . that the harsh sanction of exclusion ‘should not be applied to deter objectively reasonable law enforcement activity.’ ”<sup>71</sup>

The question for lower courts would be whether to rely on a narrow or broad reading of the *Davis* decision. Limiting *Davis* to its facts, one would read it as establishing a good faith exception to the exclusionary rule only when binding appellate precedent clearly made constitutional the act later found to be unconstitutional. That describes the situation in which *Davis* found himself. As the next sections describe, however, the *Davis* decision has lent itself to both a narrow reading and a much broader reading based on the language the majority used to criticize the exclusionary remedy.

## B. *Narrow and Broad Readings of Davis*

Lower courts narrowly applying the *Davis* rule deny suppression remedies and usually avoid novel Fourth Amendment analyses when they find binding and authorizing appellate precedents. Reviewing courts that apply the *Davis* rule more broadly deny suppression remedies based on other equivocal criteria such as the culpability of the investigating officers or cost-benefit analyses.

### 1. *Narrow Readings*

Several passages in the majority decision support a narrow reading of the holding. For example, the majority explained that “[t]he search incident to *Davis*’s arrest in this case followed the Eleventh Circuit’s *Gonzalez* precedent to the letter. Although the search turned out to be unconstitutional under *Gant*, all agree that the officers’ conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.”<sup>72</sup> The Court further elaborated that “when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2429 (quoting *United States v. Leon*, 468 U.S. 897, 919 (1984)).

<sup>72</sup> *Id.* at 2428 (“The police acted in strict compliance with binding precedent.”).

and should use that tool to fulfill their crime-detection and public-safety responsibilities.”<sup>73</sup> The question is whether that is the only time the good faith rule the Court announced applies.

Justice Sotomayor’s concurrence largely supports a narrow reading of the decision. Her opinion pointed out that in *Davis*’ case “binding appellate precedent specifically *authorize[d]*” the police practice at issue, and, in addition, that practice was “in accord with the holdings of nearly every other court in the country.”<sup>74</sup> She clarified that the majority’s decision did not apply to cases in which “the law governing the constitutionality of the particular search is unsettled.”<sup>75</sup>

Another part of the majority’s opinion supports a narrow reading of the holding. When the majority dismissed the dissent’s and *Davis*’s concern that the good faith rule it was espousing would prevent review and consideration of lower court’s precedents, the Court clarified that when lower courts uphold a search or seizure later found to be unconstitutional “in jurisdictions in which the question remains open [they] will still have an undiminished incentive to litigate the issue.”<sup>76</sup> That scenario presumes that lower courts will either not apply the *Davis* exception in jurisdictions where there is no binding precedent, or at least that defendants’ lawyers will not be discouraged from litigating by the fear that *Davis* will apply in such “open” jurisdictions.<sup>77</sup>

## 2. *Broad Readings*

In dissent, Justice Breyer offered the broadest interpretation of the majority’s holding by pointing out that “to apply the term

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<sup>73</sup> *Id.* at 2429.

<sup>74</sup> *Id.* at 2435 (Sotomayor, J., concurring).

<sup>75</sup> *Id.* However, Justice Sotomayor went on to reason that in open jurisdictions, whether to apply the exclusionary rule would depend on operation of a cost-benefit analysis. *Id.* at 2436; *see infra* Part III.B.

<sup>76</sup> *Davis*, 131 S. Ct. at 2433.

<sup>77</sup> That there have been so many cases challenging *Jones* in the year since it was decided supports this prediction. However, it is unclear whether litigants will continue to bring claims based on *Jones* if courts continue to reject them based on broad interpretations of *Davis*.

‘binding appellate precedent’ often requires resolution of complex questions of degree.”<sup>78</sup> Justice Breyer asked what would count as binding precedent and what would happen if the defendant’s case had clearly different facts from a rule of the defendant’s circuit or was covered by a rule from a different circuit. Would police reliance on those precedents be sufficient to fall under the majority’s rule?<sup>79</sup> Justice Breyer’s dissent elaborated that officers are not “more culpable where circuit precedent is simply suggestive rather than ‘binding.’”<sup>80</sup> While Justice Breyer offered the broad interpretation as reason to dissent from the majority’s opinion because that opinion would lead the good faith exception to “swallow the exclusionary rule,”<sup>81</sup> lower courts have ironically used the dissent’s language to justify their broad interpretations of *Davis*.<sup>82</sup>

Besides the question of what counts as supportive precedent, the *Davis* majority’s extended criticism of the exclusionary rule and its focus solely on the deterrent rationale sent a strong signal to lower courts that they could look for other ways to expand the exception the decision laid out. At the outset of the opinion, for example, Justice Alito introduced the holding by stating: “Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost both to the truth and the public safety, we hold that . . . .”<sup>83</sup> That introductory language invites lower courts to find a good faith exception to the exclusionary remedy not only when officers rely on binding precedent, but also when the lower court finds no need to deter police misconduct and when operation of the exclusionary remedy would come at too high a cost.

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<sup>78</sup> *Davis*, 131 S. Ct. at 2437 (Breyer, J., dissenting).

<sup>79</sup> *Id.* at 2439.

<sup>80</sup> *Id.* See also Kerr, *supra* note 18, at 255 (discussing the ambiguity of “binding precedent”).

<sup>81</sup> 131 S. Ct. at 2439 (Breyer, J., dissenting).

<sup>82</sup> See, e.g., *United States v. Leon*, 856 F. Supp. 2d 1188, 1194 (D. Haw. 2012); *United States v. Rose*, No. 11-10062-NMG, 2012 WL 4215868, \*5 (D. Mass. Sept. 14, 2012).

<sup>83</sup> *Davis*, 131 S. Ct. at 2423.

The two ideas are related, as the majority in *Davis* made clear that it contemplated a cost-benefit analysis. That analysis requires courts to weigh the cost to granting the suppression remedy to truth and public safety against its benefit—with the latter limited only to a consideration of how much excluding evidence will deter culpable police conduct.<sup>84</sup> As the *Davis* majority explained, “For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.”<sup>85</sup> According to the *Davis* majority, since the *United States v. Leon*<sup>86</sup> decision recognized a good faith exception in 1984, the Court has “recalibrated [its] cost-benefit analysis in exclusion cases to focus the inquiry on the ‘flagrancy of the police misconduct’ at issue.”<sup>87</sup>

In other words, the *Davis* majority encouraged lower courts to focus on the culpability of the individual officers, potentially independently of their reliance on binding precedent.<sup>88</sup> The majority summarized the “basic insight of the [good faith] line of cases” as “the deterrence benefits of exclusion ‘var[y] with the culpability of the law enforcement conduct’ at issue.”<sup>89</sup> It elaborated that “[w]hen the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs,” but “when the police act with an objectively reasonable good faith belief that their conduct is lawful . . . or when their conduct involves only simple, isolated negligence . . .

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<sup>84</sup> *Id.* at 2422–23.

<sup>85</sup> *Id.* at 2427.

<sup>86</sup> *United States v. Leon*, 468 U.S. 897 (1984).

<sup>87</sup> *Davis*, 131 S. Ct. at 2427.

<sup>88</sup> See *Herring v. United States*, 555 U.S. 135, 140, 143 (2009) (discussing police culpability); Kerr, *supra* note 18, at 254 (“*Davis* builds on the Court’s . . . decision in *Herring v. United States*, which introduced the focus on culpability as a key to the application of the exclusionary rule.”);

<sup>89</sup> *Davis*, 131 S. Ct. at 2427 (quoting *Herring v. United States*, 555 U.S. 135, 143 (2009)); see also Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 10–12, 23 (2012) (discussing the ambiguity of how to determine police culpability in the wake of *Herring* and *Davis*).

the deterrence rationale loses much of its force, and exclusion cannot pay its way.”<sup>90</sup>

The dissenting Justices again used the majority’s broad approach as a reason to disagree with its holding. Justice Breyer expressed the concern that by repeating and expanding upon the broad dicta in the *Herring* decision, the majority was “leading lower courts in th[e] direction” of “plac[ing] determinative weight upon the culpability of [the] individual officer’s conduct, and . . . apply[ing] the exclusionary rule only where a Fourth Amendment violation was ‘deliberate, reckless, or grossly negligent.’ ”<sup>91</sup>

#### IV. COURTS USE *DAVIS* TO AVOID ANSWERING QUESTIONS RAISED BY *JONES*

As this Part describes, some courts have taken up the invitation that dissenting Justices feared the *Davis* majority was issuing. They have relied on a broad version of the *Davis* rule to deny a suppression remedy to defendants who were victims of searches that are clearly unconstitutional under *Jones*. Additionally, lower courts have used the *Davis* rule, both in narrow and broad form, to avoid engaging in a meaningful analysis of the questions raised by *Jones*.

##### A. Courts Find *Davis* Applies Because of Binding Appellate Precedent

The Ninth Circuit’s decision in *United States v. Pineda-Moreno*<sup>92</sup> offers an excellent example of how lower courts use even a narrow version of the *Davis* rule to avoid addressing the issues raised in *Jones*. Law enforcement agents had conducted GPS

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<sup>90</sup> *Davis*, 131 S. Ct. at 2427–28 (internal citations and quotation marks omitted).

<sup>91</sup> *Id.* at 2439 (Breyer, J., dissenting); see David A. Moran, *Hanging On By a Thread, The Exclusionary Rule (or What’s Left of It) Lives for Another Day*, 9 OHIO ST. J. CRIM. L. 393 (2011–2012) (arguing that the broad reading of *Davis* is dicta building on dicta, but that it indicates the Supreme Court’s efforts to eviscerate the exclusionary rule).

<sup>92</sup> *United States v. Pineda-Moreno*, 688 F.3d 1087 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 994 (2013).

tracking surveillance of Pineda-Moreno's Jeep in 2007.<sup>93</sup> His case was on appeal to the Supreme Court when the Court issued *Jones*. The Supreme Court remanded Pineda-Moreno's case back to the Ninth Circuit to reconsider his motion to suppress in light of its decision in *Jones*.<sup>94</sup> Instead of analyzing the impact of *Jones* on the GPS tracking surveillance at issue, the Ninth Circuit, on remand, "assume[d], without deciding, that th[e] warrantless searches [conducted by police of Pineda-Moreno] would be 'unreasonable' under the Fourth Amendment after *Jones*."<sup>95</sup> Nonetheless, the court determined that officers, in installing GPS tracking devices on Pineda-Moreno's Jeep and monitoring it for a three-month period without a warrant, "did so in objectively reasonable reliance on then-binding precedent" in the Ninth Circuit.<sup>96</sup> Having determined that, the court explained that it could wait to "address the effect of *Jones* more fully in future cases."<sup>97</sup>

Because the narrow version of the *Davis* rule has the lower courts look to what circuit precedent held at the time of the search at issue, the Ninth Circuit analyzed the applicability of precedent cases from 1999, 1978, and 1976.<sup>98</sup> The Ninth Circuit completely ignored the reasoning of the 2010 decision in which it had first considered Pineda-Moreno's motion before the *Jones* case was decided but after the search of Pineda-Moreno was conducted in 2007.<sup>99</sup> That earlier decision had nothing to say about the circuit precedent that was binding in 2007, at the time of the search.<sup>100</sup> But those 2010 opinions, although ultimately denying Pineda-Moreno's motion to suppress, contained a wealth of analysis about how to update the electronic monitoring precedents to current conditions. They included a scathing dissent from rehearing en

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<sup>93</sup> *Id.* at 1089.

<sup>94</sup> *Pineda-Moreno v. United States*, 132 S. Ct. 1533 (2012).

<sup>95</sup> *Pineda-Moreno*, 688 F.3d at 1090.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1090–91.

<sup>98</sup> *Id.* at 1090; *see also* *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999); *United States v. Miroyan*, 577 F.2d 489 (9th Cir. 1978); *United States v. Hufford*, 539 F.2d 32 (9th Cir. 1976).

<sup>99</sup> *See* *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

<sup>100</sup> *See generally id.*

banc issued by Chief Judge Kozinski, in which he called his colleagues to task for approving of warrantless GPS tracking that would usher in an Orwellian future.<sup>101</sup> Judge Kozinski's argument would surely have stood on a stronger footing had the other judges reconsidered it in light of the Supreme Court's *Jones* opinions. But the *Davis* holding led them to put that off for another day.

A Ninth Circuit decision that engaged the *Jones* reasoning directly could have included significant sophisticated analysis about how to apply *Jones*. The Ninth Circuit has traditionally been at the forefront of Fourth Amendment law development. As a result of its decision in *Theofel v. Farey-Jones*,<sup>102</sup> for example, law enforcement investigators seeking e-mail from electronic storage must obtain a warrant. In other circuits, judges will permit access to open and accessed emails, and emails stored one hundred and eighty days and longer, when law enforcement agents obtain an easier-to-obtain court order under 18 U.S.C. § 2703(d).<sup>103</sup> The Ninth Circuit, again led by Judge Kozinski, has also broken new ground on questions of how to regulate computer searches.<sup>104</sup> Application of the *Davis* rule, even in a narrow form, has delayed meaningful Ninth Circuit input at least until it considers searches conducted after the *Jones* decision issued.

The Seventh Circuit also has binding appellate precedent that would make warrantless GPS tracking surveillance prior to *Jones*

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<sup>101</sup> *United States v. Pineda-Moreno*, 617 F.3d 1120, 1121–26 (9th Cir. 2010) (Kozinski, J., dissenting) (“Some day, soon, we may wake up and find we’re living in Oceania.”).

<sup>102</sup> *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004).

<sup>103</sup> See Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 58 (2004); Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1538–42 (2010) (describing how the Ninth Circuit interprets an ECPA provision pertaining to e-mail surveillance differently from the Department of Justice).

<sup>104</sup> See *United States v. Comprehensive Drug Testing*, 621 F.3d 1162, 1178–80 (9th Cir. 2010) (Kozinski, J., concurring) (providing “guidance about how to deal with searches of electronically stored data in the future so that the public, the government and the courts of our circuit can be confident such searches and seizures are conducted lawfully”).

objectively reasonable.<sup>105</sup> *United States v. Garcia*,<sup>106</sup> decided in 2007, established that GPS tracking surveillance is not a search under the Fourth Amendment and requires no warrant based on probable cause.<sup>107</sup> As it did with *Pineda-Moreno*, the Supreme Court remanded a Seventh Circuit case, *United States v. Cuevas-Perez*,<sup>108</sup> for reconsideration in light of *Jones*.<sup>109</sup> The Seventh Circuit ended up approving a plea agreement in which Cuevas-Perez was released for time served.<sup>110</sup> Had the Seventh Circuit instead issued a decision, it likely would have looked backward to *Garcia* and ignored both the *Jones* opinion and the interesting analyses from the original panel decision issued in 2011. In the 2011 decision, the majority had rejected Cuevas-Perez's motion to suppress because the evidence was gathered during a single trip, but it had offered some support for the mosaic approach when tracking lasts longer than the sixty hours at issue in the case.<sup>111</sup> The dissenting judge would have granted the suppression remedy for an unlawful search because at the time the agents began monitoring the GPS device, they had been doing so for an "indefinite period of time."<sup>112</sup> Judge Flaum concurred in the denial of the motion to suppress on the grounds that Supreme Court precedent foreclosed the question and he also rejected the

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<sup>105</sup> See *United States v. Shelburne*, No. 3:11-cr-156-S, 2012 WL 2344457, at \*3 (W.D. Ky. June 20, 2012) (applying Seventh Circuit law to search conducted in Indiana and finding that binding appellate precedent in the Seventh Circuit made warrantless GPS tracking surveillance lawful in the Seventh Circuit prior to *Jones*).

<sup>106</sup> *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

<sup>107</sup> *Id.* at 997–98 (“GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.”).

<sup>108</sup> *United States v. Cuevas-Perez*, 640 F.3d 272 (7th Cir. 2011).

<sup>109</sup> *Cuevas-Perez v. United States*, 132 S. Ct. 1534 (2012).

<sup>110</sup> *United States v. Cuevas-Perez*, No. 13-40021-GPM (S.D. Ill. Jan. 23, 2013.) (Judgment in a Criminal Case).

<sup>111</sup> *Cuevas-Perez*, 640 F.3d at 274–75.

<sup>112</sup> *Id.* at 294–95 (Wood, J., dissenting) (“To conclude that open-ended, real-time GPS surveillance is not a ‘search’ invites an unprecedented level of government intrusion into every person’s private life.”).

reasoning of the mosaic approach.<sup>113</sup> Judge Flaum went on to suggest that were the court in fact “empowered to examine the questions surrounding GPS monitoring,” one could view long-term GPS tracking as akin to a general warrant; besides being the chief evil the Fourth Amendment was designed to combat, general warrants can “be used arbitrarily or . . . may alter the relationship between citizen and government in a way that is inimical to democratic society.”<sup>114</sup>

Just as in the Ninth Circuit, a full consideration of the *Jones* opinions in the Seventh Circuit could well have inspired the creativity of judges, like the concurring judge in *Cuevas-Perez*, to improve upon the prolonged surveillance test of Justice Alito’s concurrence in *Jones*. And although the plea agreement obviated the question in *Cuevas-Perez*, the likely narrow application of the *Davis* reasoning by the Seventh Circuit would have precluded such analysis.<sup>115</sup>

As soon as defendants begin to challenge GPS tracking surveillance taking place after the *Jones* decision issued, courts will not be able to find reasonable reliance on binding appellate precedent to avoid application of the exclusionary rule and analysis of *Jones*. But a broad application of *Jones*, which the next parts discuss, may persist in putting off consideration of the issues unanswered by *Jones* even beyond that point.

#### B. *Courts Find Davis Applies in the Absence of Binding Appellate Precedent*

Despite Justice Sotomayor’s concurring opinion that the exception to the exclusionary rule set forth in *Davis* applies only when binding appellate precedent specifically authorized the police

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<sup>113</sup> *Id.* at 276–85 (Flaum, J., concurring).

<sup>114</sup> *Id.* at 285.

<sup>115</sup> A court in the Sixth Circuit took just that approach when it applied Seventh Circuit law to address the GPS location tracking at issue because officers had begun their investigation in the Seventh Circuit. *See United States v. Shelburne*, No. 3:11-cr-156-S, 2012 WL 2344457, at \*3 (W.D. Ky. June 20, 2012).

practice at issue,<sup>116</sup> courts have extended *Davis* to apply when precedent from outside the governing jurisdiction supports the practice as well.<sup>117</sup> In *United States v. Leon*,<sup>118</sup> for example, the district court of Hawaii determined that, while binding Ninth Circuit precedent “specifically authorized” the installation of the GPS device on the defendant’s vehicle, “neither Supreme Court nor Ninth Circuit binding precedent in 2009 authorized the agents to continuously monitor the location of the vehicle in public places for a prolonged period of time.”<sup>119</sup> Because the “sole circuit court to consider the use of a GPS device prior to 2009 [the Seventh Circuit in *Garcia*] found no Fourth Amendment violation,” however, the district court of Hawaii denied the defendant’s motion to suppress evidence.<sup>120</sup>

Rather than evaluate whether the defendant had made any new Fourth Amendment arguments that merited reconsideration in light of *Jones*, the *Leon* court, like the *Pineda-Moreno* court, looked backward to the state of the law in 2009 to determine whether to deny the motion to suppress by virtue of the *Davis* exception.<sup>121</sup> Government litigators even conceded that the GPS tracking

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<sup>116</sup> *Davis v. United States*, 131 S. Ct. 2419, at 2435 (2011) (Sotomayor, J., concurring).

<sup>117</sup> See, e.g., *United States v. Ford*, No. 1:11-CR-42, 2012 WL 5366049, at \*11 (E.D. Tenn. Oct. 30, 2012) (denying suppression because officer’s “reliance on three out of four federal circuits to hear the GPS tracking device issue was reasonable . . . [and] insufficiently culpable”); *United States v. Baez*, 878 F. Supp. 2d 288, 294 (D. Mass. 2012).

<sup>118</sup> See *United States v. Leon*, 856 F. Supp. 2d 1188, 1192 (D. Haw. 2012).

<sup>119</sup> *Id.* at 1193. The Ninth Circuit did not consider the prolonged surveillance issue in *Pineda-Moreno*, presumably because the agents monitored over the course of seven discreet installations. *United States v. Pineda-Moreno*, 688 F.3d 1087, 1089 (9th Cir. 2012); see *infra* Part IV.A. Oddly, however, the *Leon* court cited the 2010 *Pineda-Moreno* decision as supporting its finding that it was reasonable for officers in 2007 to believe that warrantless use of a GPS tracking surveillance for a prolonged period was lawful. *Leon*, 856 F. Supp. 2d at 1194 (citing *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010)).

<sup>120</sup> *Leon*, 856 F. Supp. 2d at 1194–95.

<sup>121</sup> *Id.*

surveillance they had engaged in was unconstitutional under *Jones*.<sup>122</sup>

Not surprisingly, in looking to the law of other circuits to determine whether to apply the *Davis* exception to the exclusionary rule, the *Leon* court clearly relied on a broad reading of *Davis*. The court emphasized that the sole purpose of the exclusion of evidence is to deter, invoking the cost-benefit analysis whereby “the deterrence benefit of suppression must outweigh its heavy costs,” and noting that “[d]eterrence benefits vary ‘with the culpability of the law enforcement conduct.’”<sup>123</sup> While the *Leon* court indicated that *Davis* was not “directly controlling”<sup>124</sup> because of the lack of binding appellate precedent, it also indicated that the focus of the “*Davis* standard” is the “culpability of the law enforcement conduct.”<sup>125</sup> The question, therefore, was whether officers “exhibited ‘deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights’ or whether they acted ‘with an objectively reasonable good-faith belief that their conduct [was] lawful.’”<sup>126</sup>

With such open-ended direction, it should not be surprising that some lower courts, in applying the *Davis* exception, have looked farther afield than precedents from other circuits to excuse officers’ conduct. Some courts have explained that they were relying on unsettled law rather than binding precedent from other circuits, and therefore focusing on culpability and the cost-benefit analysis that *Davis* directed them to conduct.<sup>127</sup> Others have indicated that because officers consulted with senior law

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<sup>122</sup> *Id.* at 1191 (“The United States now concedes that *Jones* renders the placement and subsequent use of the GPS device unconstitutional.”).

<sup>123</sup> *Id.* (quoting *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011)).

<sup>124</sup> *Id.* at 1193.

<sup>125</sup> *Id.* at 1192.

<sup>126</sup> *Id.* at 1193 (quoting *Davis*, 131 S. Ct. at 2427).

<sup>127</sup> *See, e.g.*, *United States v. Guyton*, No. 11-271, 2013 WL 55837, at \*3 (E.D. La. Jan. 3, 2013) (explaining that a “case-by-case approach is more appropriate and therefore focuses on the ‘flagrancy of the police misconduct’ at issue” (quoting *Davis*, 131 S. Ct. at 2426)); *United States v. Rose*, No. 11-10062-NMG, 2012 WL 4215868, at \*5 (D. Mass. Sept. 14, 2012) (describing the need to “engag[e] in a rigorous, cost-benefit analysis”).

enforcement officers, their conduct was not sufficiently culpable to justify application of the exclusionary remedy.<sup>128</sup>

C. *Courts Expand the Davis Exception Beyond All Reason*

The Supreme Court granted Jones's motion to suppress the evidence obtained by the warrantless installation and monitoring of a GPS tracking device installed on his wife's car, but did not address the cell site location data that law enforcement officers had compelled Jones's cell site provider to disclose. Aided by amici Center for Democracy and Technology and the Electronic Frontier Foundation,<sup>129</sup> Jones and his lawyers brought a motion to suppress the cell site location information.<sup>130</sup> Although Jones argued that the Supreme Court's decision had significant implications for his location privacy claim, the district court refused to even consider those arguments, declining to "resolve this vexing question of Fourth Amendment jurisprudence, since it conclude[d] that the good-faith exception to the exclusionary rule applie[d]."<sup>131</sup>

Jones claimed that law enforcement agents violated the Stored Communications Act<sup>132</sup> in two ways: (1) acquiring prospective cell site location data using only a court order under 18 U.S.C. § 2703(d) ("D order") and (2) not satisfying the statutory requirement of "specific and articulable facts showing there are reasonable grounds to believe that . . . the records or other

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<sup>128</sup> See, e.g., *United States v. Lopez*, No. 10-cr-67 (GMS), 2012 WL 3930317, at \*10 (D. Del. Sept. 10, 2012) (finding good faith when investigating officer based his decision not to obtain a warrant on prior experience and consultation with senior police officers and advice from the State Attorney General's office).

<sup>129</sup> See Brief of Amici Curiae of the Electronic Frontier Foundation and Center for Democracy and Technology in Support of Antoine Jones' Motion to Suppress Cell Site Data, *Jones*, No. 05-CR-386(1) (ESH), 2012 WL 5994549 (D.D.C. Aug. 13, 2012). The author has worked as amicus curiae alongside these two groups, as well as the ACLU, in recent cases challenging warrantless government access to historical cell site location data. See Freiwald, *Cell Phone Location Data*, *supra* note 22 (describing 3rd Circuit case); Brief of Amicus Curiae Susan Freiwald in Support of Affirmance, *supra* note 24.

<sup>130</sup> *Jones*, No. 05-0386 (ESH), 2012 WL 6443136, at \*1 (D.D.C. Dec. 14, 2012).

<sup>131</sup> *Id.*

<sup>132</sup> 18 U.S.C. §§ 2701–2712 (2006).

information sought, are relevant and material to an ongoing criminal investigation.”<sup>133</sup> As to the first question, the district court recognized that other courts either have required a more demanding warrant based on probable cause for access to prospective cell site location data (information gathered after the order is granted) or have permitted acquisition of such data only when agents have obtained both a less demanding D order and a pen register order (a so-called “hybrid order”).<sup>134</sup> Some courts have permitted D orders to be used to acquire historical cell site data (information already contained in stored records when the order is issued).<sup>135</sup> Whether or not it is constitutionally permissible, the argument that historical cell site data may be obtained with a D order is a reasonable construction of the statutory language that permits D orders to be used to obtain “a record or other information.”<sup>136</sup> But courts have not permitted law enforcement agents to obtain prospective cell site location information, which would not, by definition, be stored in a record, solely through use of a D order.<sup>137</sup>

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<sup>133</sup> *Jones*, 2012 WL 6443136, at \*3 (quoting 18 U.S.C. § 2703(d)).

<sup>134</sup> *Id.* See generally Freiwald, *Cell Phone Location Data*, *supra* note 22; Stephanie Pell & Christopher Soghoian, *Can You See Me Now?: Towards Reasonable Standards for Law Enforcement Access to Location Data that Congress Could Enact*, 27 BERK. TECH. L. J. 117 (2012).

<sup>135</sup> See *Jones*, 2012 WL 6443136, at \*5 & n.9 (collecting cases). Other courts have required a warrant for access to historical cell site location data. See *id.* at n.9; see also Brief of Amicus Curiae Susan Freiwald in Support of Affirmance, *supra* note 24 (describing the author’s involvement as amicus in a case pending in the 5th Circuit in which she argues that access to historical cell site location data requires a warrant based on probable cause).

<sup>136</sup> 18 U.S.C. § 2703(c) (Supp. V 2011); see also Freiwald, *Cell Phone Location Data*, *supra* note 22 (making argument that historical cell site location data is protected by the Fourth Amendment and that the Stored Communications Act is unconstitutional to the extent it allows access to such data with just a D order).

<sup>137</sup> See Steven B. Toeniskoetter, *Preventing a Modern Panopticon: Law Enforcement Acquisition of Real-Time Cellular Tracking Data*, 13 RICH. J.L. & TECH. 17 (2007) (describing how agents apply for hybrid orders to obtain prospective cell site location data). But see Susan Freiwald, *The Vanishing Distinction Between Real-time and Historical Location Data*, CONCURRING OPINIONS, (July 17, 2012, 4:50 PM), <http://www.concurringopinions.com/>

The district court opinion first described, then dismissed without analysis, Jones's statutory claims. Because the Stored Communications Act lacks a statutory suppression remedy, the court opined that it "need not weigh in on th[e] debate" over what type of court order is necessary to obtain prospective cell site data.<sup>138</sup> As for the second claim, "Even assuming the applications lacked sufficient factual support, the Court would be powerless to order the suppression of the evidence that the government had obtained," so the court saw no need to opine.<sup>139</sup>

The court went on to take the same hands-off approach to the Fourth Amendment questions that *Jones* raised. Without taking any position, the court laid out Jones's arguments and the Government's responses and conducted a survey of prior case law.<sup>140</sup> After recognizing "a robust debate over the question of whether the Fourth Amendment applies to cell-site data obtained from a cellular provider," and after speculating that the "issue may someday receive the attention of the Supreme Court," the district court opined that it "need not decide" the constitutional question because of the good faith exception to the exclusionary rule.<sup>141</sup>

In applying the good faith exception, the district court did not explicitly find that officers relied on binding appellate precedent, but rather found they reasonably relied on a defective warrant and an invalid statute.<sup>142</sup> The court's application of those two good faith exceptions was so loose and forgiving of the officer's

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archives/2012/07/the-vanishing-distinction-between-real-time-and-historical-location-data.html (describing how, in a case on appeal to the Fifth Circuit, agents asked for cell site location records to be created in real-time and then stored, and then immediately transmitted to law enforcement agents as soon as they were stored).

<sup>138</sup> *Jones*, 2012 WL 6443136, at \*4.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at \*4–6.

<sup>141</sup> *Id.* at \*7.

<sup>142</sup> *Id.* at n.16. The court disclaimed reliance on the binding precedent rule because it did not want to resolve whether *Smith v. Maryland*, 442 U.S. 735 (1979), was "sufficiently on point to be binding." *Id.*; see Freiwald, *Cell Phone Location Data*, *supra* note 22, at 732–43 (arguing that *Smith v. Maryland* does not apply to historical cell site records).

conduct, however, that a broad reading of the *Davis* decision surely motivated the court's approach. In fact, at the beginning of the court's good faith discussion, it quoted the following expansive language from the *Davis* majority: "[E]xclusion is not required 'when the police act with an objectively reasonable good-faith belief that their conduct is lawful.'" <sup>143</sup>

In applying the exception under which searches conducted in reasonable reliance on statutes that are subsequently invalidated do not justify application of the exclusionary rule,<sup>144</sup> the court engaged in a largely unfocused analysis that did not address the key question: How were the officers interpreting the statute? By relying on 18 U.S.C. § 2703(c), officers were seeking to have Jones's cell phone service provider create information in the future (in the four months after the orders were issued) and send that (cell site location) information to them under a statutory provision designed to obtain access to stored "records."<sup>145</sup> How can that obviously wrong reading of a statute be considered reasonable reliance? The court cited to cases permitting access to prospective cell site location information under a hybrid order,<sup>146</sup> to support the claim that officers could rely solely on a D order.<sup>147</sup> But decisions upholding use of the hybrid order did so because hybrid orders rely on two types of orders, not one.<sup>148</sup> Ultimately, the court excused the officers' conduct because the officers could not "be charged

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<sup>143</sup> *Jones*, 2012 WL 6443136, at \*7 (quoting *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011)).

<sup>144</sup> *Illinois v. Krull*, 480 U.S. 340, 349–50 (1987) ("[L]egislators, like judicial officers, are not the focus of the rule.").

<sup>145</sup> See *Freiwald*, *supra* note 137.

<sup>146</sup> See *supra* notes 134, 137, and accompanying text.

<sup>147</sup> See *Jones*, 2012 WL 6443136, at \*8. The court referred back to a footnote that listed decisions in which other courts had required a warrant for prospective cell site location data (note 5) but probably meant to refer back to the footnote that listed decisions in which courts had permitted access to prospective cell site location data upon presentation of a hybrid order (note 6). The court had cited no decisions that had permitted access to prospective cell site location data merely upon presentation of a D order.

<sup>148</sup> See generally *Toeniskoetter*, *supra* note 137 (describing history of courts' acceptance and rejection of the hybrid theory).

with knowledge that § 2703(c) does not apply to prospective cell-site data” despite its plain language focus on records and its location in a statute dedicated to Stored Communications.<sup>149</sup> Only a court persuaded to give officers the benefit of every doubt could come to such a conclusion.

The Court engaged in similarly strained logic when it purported to apply the good faith doctrine from *Leon*, where the Supreme Court announced that the exclusionary rule does not apply when police conduct a search in “objectively reasonable reliance” on a warrant later held to be invalid.<sup>150</sup> The officers in *Jones* did not rely on a warrant because there was no warrant, defective or otherwise.<sup>151</sup> Instead, officers and agents likely convinced the magistrate judges on duty that a D order was enough to justify use of the new technology. One of the magistrate judges who issued an order subsequently changed his mind and began denying similar requests, likely after learning more about the technology in question.<sup>152</sup> Even after amici brought that to the court’s attention and explained that the magistrate judges likely “rubber stamp[ed]” agents’ requests for court orders without giving it much thought, the court nonetheless found the officers were entitled to rely “on the independent judicial determinations that no warrant was required.”<sup>153</sup>

The court concluded that the officers’ conduct was objectively reasonable because the “unsettled nature of the law” at the time of the search made it “reasonable for them to believe that the Fourth Amendment was not implicated.”<sup>154</sup> Although the court had purported to apply the good faith exceptions based on reasonable

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<sup>149</sup> *Jones*, 2012 WL 6443136, at \*8.

<sup>150</sup> *United States v. Leon*, 468 U.S. 897, 922 (1984).

<sup>151</sup> *Jones*, 2012 WL 6443136, at \*1, \*8; Defendant’s Motion to Suppress Cell Site Data, No. 05-CR-386(1) (ESH), 2012 WL 1576673 (D.D.C. Mar. 29, 2012).

<sup>152</sup> See Kevin S. Bankston, *Only the DOJ Knows: The Secret Law of Electronic Surveillance*, 41 U.S.F. L. REV. 589, 613–14 (2007) (discussing the “magisterial revolution,” when magistrate judges began questioning and then resisting law enforcement efforts to acquire cell site location data and similar information without adequate judicial oversight).

<sup>153</sup> *Jones*, 2012 WL 6443136, at \*9.

<sup>154</sup> *Id.*

reliance on a statute and on a warrant, those exceptions provided such weak justification for a good faith finding that something else must have been going on. That something else seems to be that the court took up the invitation that Justice Breyer worried about in his dissent in *Davis*.<sup>155</sup> It followed the broad language of *Davis* to withhold the exclusionary rule from all but the most egregious cases.<sup>156</sup> By doing so, the court deprived a defendant, ironically Jones himself, of the benefits of the *Jones* case and the rest of us of a developing Fourth Amendment law.<sup>157</sup>

A recent case in the Southern District of Texas provides further evidence that courts will use *Davis* to avoid developing Fourth Amendment law on location data privacy. In *United States v. Muniz*,<sup>158</sup> the court denied the defendant's motion to suppress, which she brought on the ground that officers obtained her historical cell site location data without a warrant.<sup>159</sup> The court used reasoning similar to that in the *Jones* case on remand and relied on a broad view of *Davis*. To avoid the good faith exception to the exclusionary rule, the court required the defendant to establish that the investigating officers "exhibit[ed] deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights."<sup>160</sup> In addition, the court explained at length that it was not necessary to "[d]etermin[e] the proper standard" for access to historical location data; because "[t]he good-faith exception to the exclusionary rule applies, . . . it [is] unnecessary to decide whether

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<sup>155</sup> See *supra* text accompanying note 91.

<sup>156</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2440 (2011) (Breyer, J., dissenting) (expressing concern that majority's approach will lead to "a watered-down Fourth Amendment, offering its protection against only those searches and seizures that are *egregiously* unreasonable").

<sup>157</sup> See *Jones*, 2012 WL 6443136, at \*7; see also *United States v. Hardrick*, No. 10-202, 2012 WL 4883666, at \*5 (E.D. La. 2012) (using similar good faith reasoning and a broad approach to *Davis* to excuse law enforcement's acquisition of cell site location data without a warrant).

<sup>158</sup> *United States v. Muniz*, No. H-12-221, 2013 WL 391161 (S.D. Tex. Jan. 29, 2013).

<sup>159</sup> *Id.* at \*1, \*4.

<sup>160</sup> *Id.* at \*2 (quoting *Davis*, 131 S. Ct. at 2426–27).

obtaining [cell site location information] is a Fourth Amendment search.”<sup>161</sup>

## V. VERY FEW COURTS ANSWER *JONES*'S QUESTIONS DESPITE *DAVIS*

Some post-*Jones* decisions have begun to engage in Fourth Amendment analysis, but when they ultimately deny a suppression remedy based on *Davis*, their analysis is often tentative and dicta. Only when courts refuse to apply *Davis* do they offer a view of what the post-*Jones* world would look like without the *Davis* rule. It is a world in which courts work out the questions that *Jones* left open and develop a meaningful law of location data privacy.<sup>162</sup>

### A. Courts Address Substantive Questions Before Denying a Suppression Remedy Based on *Davis*

Just because a court will go on to deny a motion to suppress does not mean that it has to refuse to engage in an analysis of the substantive questions raised by *Jones* first.<sup>163</sup> However, as one court explained when it declined to address the quantum of

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<sup>161</sup> *Id.* The court went on to note that courts should nonetheless reach Fourth Amendment issues for novel questions of law when necessary to guide law enforcement and magistrates in the future, but determined that was unnecessary here because of the pending Fifth Circuit case. *Id.*

<sup>162</sup> For the author's writings about the emerging law of location data privacy, see Freiwald, *Cell Phone Location Data*, *supra* note 22 (describing how the Fourth Amendment should apply to even historical cell site location data); Susan Freiwald, *The Four Factor Test* (unpublished manuscript 2012), available at [http://works.bepress.com/susan\\_freiwald/11](http://works.bepress.com/susan_freiwald/11) (describing how to apply previously developed four factor test to GPS surveillance).

<sup>163</sup> The author thanks David Gray for bringing to my attention that courts can engage in substantive discussion of Fourth Amendment rights before deciding to deny an exclusionary remedy, and that there was a period when the Supreme Court directed lower courts to do just that. The Supreme Court's decision in *Pearson v. Callahan*, 555 U.S. 223 (2009), overruled its prior requirement, set out in *Saucier v. Katz*, 533 U.S. 194 (2001), that courts determine first whether officers violated petitioners' constitutional rights before determining whether sovereign immunity nonetheless excuses the officers' conduct. See Kerr, *supra* note 18, at 243, 258–59 (discussing the two cases and their impact on Fourth Amendment law development).

suspicion required for GPS tracking surveillance, “[j]udicial restraint compels federal courts to abstain from addressing constitutional issues unless adjudication is unavoidable.”<sup>164</sup> The court went on to explain that “district courts routinely decline to address the open questions in *Jones* when the good faith exception to the exclusionary rule is applicable.”<sup>165</sup> Those courts that do address substantive issues despite applying the *Davis* exception tend to either limit themselves to questions of standing or engage in reasoning that would have to be considered dicta.

For example, in *United States v. Lopez*,<sup>166</sup> the district court of Delaware found that Lopez had standing to bring his motion to suppress GPS tracking surveillance evidence because he had “possession of the vehicles sufficient to satisfy the trespass standing requirements the majority outlined in *Jones*.”<sup>167</sup> The court went on to reach “the same conclusion applying the *Katz*’s reasonable expectation of privacy test supported by the *Jones*’s concurrence.”<sup>168</sup> The court engaged in significant discussion of whether the GPS tracking was sufficiently prolonged, having taken place not over four months but on only seventeen days during that extended period, and whether the warrant requirement applied or instead whether the Government was correct that a “totality of the circumstances” approach based on “reasonable suspicion” was enough.<sup>169</sup> But for those questions as well as others, the court repeatedly declined to offer a definitive analysis in light of its finding that the officers acted in good faith based on *Davis*.<sup>170</sup>

Some courts, though they ultimately find that the *Davis* exception to the exclusionary remedy applies, either based on a

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<sup>164</sup> *United States v. Guyton*, No. 11-271, 2013 WL 55837, at \*3 n.7 (E.D. La. Jan. 3, 2013) (citing *Jean v. Nelson*, 472 U.S. 846, 854 (1985)).

<sup>165</sup> *Id.*

<sup>166</sup> *United States v. Lopez*, C.A. No. 10-cr-67 (GMS), 2012 WL 3930317 (D. Del. Sept. 10, 2012).

<sup>167</sup> *Id.* at \*6.

<sup>168</sup> *Id.* at \*7.

<sup>169</sup> *See id.* at \*8 n.20.

<sup>170</sup> *See id.* at \*8–9 (using a cost-benefit approach to the *Davis* holding rather than finding binding circuit precedent).

broad or narrow reading of *Davis*, nevertheless engage in an analysis of one or more of the *Jones*'s substantive questions. For example, in *United States v. Ford*,<sup>171</sup> the District Court for the Eastern District of Tennessee first rejected the Government's argument that no warrant was required for GPS surveillance, even after *Jones*.<sup>172</sup> The Government had proposed a "totality of the circumstances" approach to justifying GPS surveillance, and argued that such an approach did not require the pre-approval of a warrant.<sup>173</sup> The court found that the automobile exception did not apply to GPS tracking surveillance and that "the traditional warrant requirement" did apply.<sup>174</sup> The court analyzed whether the "totality of the circumstances" factors were met, however, and did not clarify whether traditional probable cause would need to be met in future cases.<sup>175</sup> Because the court ultimately denied the motion to suppress, on a broad reading of *Davis*,<sup>176</sup> any analysis of the proper standard would most likely be considered dicta and so unhelpful to the development of Fourth Amendment law.

#### B. Courts Find *Davis* Not to Apply to the Investigation at Issue

The few cases that have applied *Davis* in a narrow manner found it not to apply and gone on to evaluate the merits of the defendants' motions to suppress in light of the *Jones* decision, give some indication of what the post-*Jones* world would look like without the shadow cast by *Davis*. Those opinions first typically engage in a detailed analysis of why the *Davis* exception to the exclusionary rule should not be extended beyond its facts; in other words, it should not be used to deny a suppression remedy unless binding appellate precedent in the defendant's own jurisdiction

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<sup>171</sup> *United States v. Ford*, No. 1:11-CR-42, 2012 WL 5366049 (E.D. Tenn. Oct. 30, 2012).

<sup>172</sup> *Id.* at \*8.

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

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *See id.* at \*9–11 (applying the *Davis* exception despite the lack of binding appellate precedent).

specifically authorized the conduct at issue.<sup>177</sup> Then, in reasoning that is essential to the holdings, the opinions engage the questions left open by *Jones*.

For example, in *United States v. Ortiz*,<sup>178</sup> a district court in the Eastern District of Pennsylvania engaged in a careful analysis of the Government's argument that reasonable suspicion was sufficient to justify GPS tracking surveillance before rejecting it and requiring a warrant based on probable cause.<sup>179</sup> The *Ortiz* court carefully assessed the "special needs" precedents and decided that they did not apply to GPS tracking surveillance, which falls squarely in the category of "routine law enforcement investigative activity in a criminal context."<sup>180</sup> The court also rejected the applicability of the automobile exception to the warrant requirement, finding that the cases based on that exception relied on an exigency rationale that did not apply in the context of the GPS tracking surveillance at issue where officers had time to apply to the magistrate for a warrant.<sup>181</sup> In the course of its analysis, the court recognized that the Justices in *Jones* had acknowledged that the intrusiveness and technological sophistication of GPS tracking surveillance makes it meaningfully different from the primitive radio beepers that the Supreme Court considered in the 1980s.<sup>182</sup> The court also explained that *Jones* rendered prior precedents that

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<sup>177</sup> See, e.g., *United States v. Robinson*, No. S2-4:11CR00361AGF (DDN), 2012 WL 4893643, \*13–15 (E.D. Mo. Oct. 15, 2012); *United States v. Ortiz*, 878 F. Supp. 2d 515, 539–43 (E.D. Pa. 2012); *United States v. Katzin*, No. 11-226, 2012 WL 1646894, \*7–10 (E.D. Pa. May 9, 2012) (rejecting good faith exception after engaging in analysis of substantive questions).

<sup>178</sup> *United States v. Ortiz*, 878 F. Supp. 2d 515 (E.D. Pa. 2012).

<sup>179</sup> *Id.* at 526–34.

<sup>180</sup> *Id.* at 533.

<sup>181</sup> *Id.* at 534–37.

<sup>182</sup> See *id.* at 531 ("Because technology has evolved in the intervening years, GPS trackers work differently from the beepers the Supreme Court considered in *Knotts* and *Karo*, and GPS trackers have the potential to be significantly more intrusive."); see also *Robinson*, 2012 WL 4893643, at \*15 (coming to a similar conclusion because the beeper cases involved different technology and a different degree of intrusion).

had permitted reasonable suspicion for GPS tracking surveillance inapplicable.<sup>183</sup>

Not all courts that reject the Government's argument that *Davis* should apply in the absence of binding authority based on the "controlling law of the land"<sup>184</sup> end up granting motions to suppress. In *United States v. Robinson*,<sup>185</sup> a district court in Missouri directly addressed the question of whether reasonable suspicion or probable cause was necessary to justify GPS tracking surveillance, having found the *Davis* exception not to apply.<sup>186</sup> The court engaged in the same analysis as had the *Ortiz* court, and concluded that because the GPS tracking surveillance at issue was non-invasive and occurred in public, for a reasonable period of time, reasonable suspicion was sufficient to justify its use.<sup>187</sup> As a result, the *Robinson* court denied the defendant's motion to suppress, recognizing that "[i]t may well be that in a future opinion the Eighth Circuit will modify its approach to the issue in light of *Jones*."<sup>188</sup> That may well be, so long as courts continue to engage in the issues rather than avoid them based on *Davis*.

## VI. CONCLUSION

After the *Jones* decision came down, expectations ran high that the lower courts would soon provide answers to the questions the opinions left unanswered about the scope and application of the Fourth Amendment right *Jones* announced. Even narrow applications of the *Davis* exception to the exclusionary rule will likely delay those answers until searches take place governed only by *Jones* and not by binding appellate precedent that preceded

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<sup>183</sup> *Ortiz*, 878 F. Supp. 2d at 529–30 (explaining that *Jones* dramatically reduced the "persuasive value" of *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010) and *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981)).

<sup>184</sup> *See, e.g., Robinson*, 2012 WL 4893643, at \*13.

<sup>185</sup> *United States v. Robinson*, No. S2-4:11CR00361AGF (DDN), 2012 WL 4893643 (E.D. Mo. Oct. 15, 2012).

<sup>186</sup> *See id.* at \*15.

<sup>187</sup> *Id.* at \*16. Unlike *Ortiz*, the *Robinson* court found that *Jones* did not abrogate *Marquez*. *Id.*

<sup>188</sup> *Id.* at \*17.

*Jones*. However, broad application of the *Davis* rule, according to which courts engage in a cost-benefit analysis of the deterrence value of exclusion and focus on officer culpability, could lead courts to deny suppression remedies in cases involving GPS tracking and related surveillance even after *Jones* makes it unreasonable for officers to rely on binding appellate precedent. A broad interpretation of *Davis* untethers officers' conduct from appellate precedent and may lead courts to excuse that conduct and refuse to engage *Jones*'s questions whenever judges consider the officers' conduct not to be egregious. In that case, not only will the questions left open in *Jones* stay open indefinitely, but courts themselves will be egregiously underenforcing the constitutional right in location data that *Jones* promised.<sup>189</sup>

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<sup>189</sup> See, e.g., Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1180–83 (2012); James J. Tomkovicz, *Davis v. United States: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 396 (2011–2012) (“The supply of Fourth Amendment violations justifying suppression will dwindle to a trickle. Judicial involvement in the enforcement of that fundamental Bill of Rights provision will inevitably wane.”). *But see* Bradley, *supra* note 89, at 13–14 (discussing how Fourth Amendment law will develop in cases where there is no binding precedent or the search was conducted in the wake of the new Supreme Court rule).

