


5-13-2015

## Limited Faith in the Good Faith Exception: The Third Circuit Requires a Warrant for GPS Searches and Narrows the Scope of the Davis Exception to the Exclusionary Rule in *United States v. Katzin*

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### Recommended Citation

Clare Hanlon, *Limited Faith in the Good Faith Exception: The Third Circuit Requires a Warrant for GPS Searches and Narrows the Scope of the Davis Exception to the Exclusionary Rule in United States v. Katzin*, 56 B.C.L. Rev. E. Supp. 33 (2015), <http://lawdigitalcommons.bc.edu/bclr/vol56/iss6/4>

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# LIMITED FAITH IN THE GOOD FAITH EXCEPTION: THE THIRD CIRCUIT REQUIRES A WARRANT FOR GPS SEARCHES AND NARROWS THE SCOPE OF THE *DAVIS* EXCEPTION TO THE EXCLUSIONARY RULE IN *UNITED STATES. v. KATZIN*

**Abstract:** On October 22, 2013, in *United States v. Katzin*, the U.S. Court of Appeals for the Third Circuit held that police and federal agents must obtain a warrant prior to attaching a GPS device on a vehicle. In doing so, the Third Circuit became the first federal appeals court to add a warrant requirement to the practice of GPS tracking by the police. The court also held that the good faith exception did not excuse the warrantless use of a GPS device, and that law enforcement's reliance on out-of-circuit or distinguishable authority alone was insufficient to support a finding of good faith. This Comment argues that the Third Circuit took a mistakenly narrow view of the good faith exception, and failed to further the purpose of the exception as determined by the U.S. Supreme Court. This Comment contends that on rehearing en banc, the Third Circuit conducted a superior good faith analysis of the law enforcement conduct in *Katzin*, and correctly reversed the district court's decision to apply the exclusionary rule.

## INTRODUCTION

As developing technology has led to significant advancements in law enforcement surveillance, courts have become increasingly divided over the constitutionality of tracking devices in regard to the Fourth Amendment right against unreasonable searches and seizures.<sup>1</sup> The U.S. Supreme Court

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<sup>1</sup> See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . ."); see also Priscilla J. Smith et al., *When Machines Are Watching: How Warrantless Use of GPS Surveillance Technology Violates the Fourth Amendment Right Against Unreasonable Searches*, 121 YALE L.J. ONLINE 177, 181–88 (2011), <http://www.yalelawjournal.org/forum/when-machines-are-watching-how-warrantless-use-of-gps-surveillance-technology-violates-the-fourth-amendment-right-against-unreasonable-searches>, archived at <http://perma.cc/N5YE-GSTE> (discussing how, as challenges to law enforcement's warrantless uses of GPS surveillance technology have increased, courts have begun to split, and are now looking for direction from the Supreme Court); Robert Barnes, *Supreme Court Restricts Police GPS Tracking*, WASH. POST, Jan. 24, 2012, at A1, available at [http://www.washingtonpost.com/politics/supreme-court-warrants-needed-in-gps-tracking/2012/01/23/gIQAx7qGLQ\\_story.html](http://www.washingtonpost.com/politics/supreme-court-warrants-needed-in-gps-tracking/2012/01/23/gIQAx7qGLQ_story.html), archived at <http://perma.cc/HY2E->

recently held that the attachment of a GPS tracker to a vehicle constitutes a search under the Fourth Amendment.<sup>2</sup> Yet the Supreme Court left open the question of whether warrantless use of GPS devices would be lawful under the Fourth Amendment where officers have both reasonable suspicion and probable cause to execute such searches.<sup>3</sup>

In 2013, in *United States v. Katzin (Katzin I)*, the U.S. Court of Appeals for the Third Circuit provided an answer to this issue, holding that the police must obtain a warrant prior to attaching a GPS device onto a vehicle.<sup>4</sup> The court further concluded that the good faith exception to the exclusionary rule did not apply to excuse the warrantless use of the GPS.<sup>5</sup> The Third Circuit held that there was no binding precedent upon which the officers in *Katzin* could have relied, and that reliance by law enforcement solely on out-of-circuit or distinguishable authority was not sufficient to support the good faith exception.<sup>6</sup>

This Comment argues that the Third Circuit's failure to apply the good faith exception was based on a mistakenly narrow view of the exception and its purpose, and that the Third Circuit, sitting en banc, properly reversed the decision.<sup>7</sup> Part I of this Comment introduces the development of Fourth Amendment jurisprudence in light of evolving surveillance technology, the exclusionary rule, and applications of the good faith exception.<sup>8</sup> Part I also provides the factual and procedural background of *Katzin I*.<sup>9</sup> Part II then discusses the Third Circuit panel's reasoning behind requiring a warrant for GPS searches, as well as its decision to limit the good faith exception to binding appellate precedent.<sup>10</sup> Finally, Part III explores the purpose of the good faith exception, and examines whether the panel's ruling actually furthered this purpose.<sup>11</sup> Part III also examines the decision made by the Third Circuit, sitting en banc, to reverse the district court's application of the ex-

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CMBX (discussing the decision in *United States v. Jones* and society's expectation of privacy in the digital age). See generally *United States v. Jones*, 132 S. Ct. 945, 949–53 (2012) (reviewing past cases that have dealt with tracking technology and the Fourth Amendment).

<sup>2</sup> See *Jones*, 132 S. Ct. at 949 (holding that physically occupying private property through use of a GPS to obtain information was a search under the Fourth Amendment).

<sup>3</sup> See *id.* at 954 (stating that since the Government did not raise this argument in front of the D.C. Circuit, it was forfeited and the Court would not address it).

<sup>4</sup> See 732 F.3d 187, 204–05 (3d Cir. 2013), *rev'd en banc*, 769 F.3d 163 (3d Cir. 2014).

<sup>5</sup> See *id.* at 214. The good faith exception allows for the admission of illegally obtained evidence at trial in cases where the police acted with an objectively reasonable good faith belief that their conduct was lawful. See *id.* at 205.

<sup>6</sup> See *id.* at 213–14.

<sup>7</sup> See *infra* notes 13–98 and accompanying text.

<sup>8</sup> See *infra* notes 13–36 and accompanying text.

<sup>9</sup> See *infra* notes 37–47 and accompanying text.

<sup>10</sup> See *infra* notes 48–63 and accompanying text.

<sup>11</sup> See *infra* notes 70–85 and accompanying text.

clusionary rule, and argues that the en banc opinion offers a superior interpretation of the good faith exception and its purpose.<sup>12</sup>

## I. LEGAL LANDSCAPE BEHIND GPS SEARCHES AND THE GOOD FAITH EXCEPTION

As tracking technology has continued to evolve, courts have grappled with how to reconcile the need of law enforcement to utilize such devices with the court's duty to protect Fourth Amendment rights.<sup>13</sup> Section A discusses the Supreme Court's adaptation of Fourth Amendment principles to address law enforcement's use of advancing technology.<sup>14</sup> Section B explains the nature and application of the exclusionary rule, which prevents evidence discovered pursuant to an illegal search from being used to establish a defendant's guilt.<sup>15</sup> Section C introduces the factual and procedural history of *Katzin*.<sup>16</sup>

### *A From Beepers to GPS: Evolving Technology and the Fourth Amendment*

The Fourth Amendment protects the right of the American people to be free from unreasonable searches and seizures of their persons, homes, and property.<sup>17</sup> Courts determine whether a particular search is unreasonable by balancing the extent of the search's intrusion against its promotion of legitimate governmental interests.<sup>18</sup> When striking this balance in criminal cases, the majority of courts favor the procedures delineated by the Warrant Clause of the Fourth Amendment.<sup>19</sup> Consequently, warrantless searches and seizures are per se unreasonable under the Fourth Amendment, except for

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<sup>12</sup> See *infra* notes 86–98 and accompanying text.

<sup>13</sup> See *Jones*, 132 S. Ct. at 949–53 (discussing how past cases have handled the constitutionality of tracking technology with regard to the Fourth Amendment); *United States v. Karo*, 468 U.S. 705, 711–17 (1984) (examining the constitutionality of beeper tracking of a vehicle and inside a private residence); *United States v. Knotts*, 460 U.S. 276, 281–84 (1983) (analyzing the constitutionality of beeper tracking of a vehicle).

<sup>14</sup> See *infra* notes 17–29 and accompanying text.

<sup>15</sup> See *infra* notes 30–36 and accompanying text.

<sup>16</sup> See *infra* notes 37–47 and accompanying text.

<sup>17</sup> U.S. CONST. amend. IV.

<sup>18</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (holding that ultimate measure of a search's constitutionality is its reasonableness, which is judged by a balancing test).

<sup>19</sup> See U.S. CONST. amend. IV (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989) (holding that a search or seizure is not reasonable unless accomplished in accordance with a judicial warrant issued on probable cause except for in specific well-defined circumstances); *United States v. Place*, 462 U.S. 696, 701 (1983) (stating that in ordinary cases, a seizure of personal property is unreasonable under the Fourth Amendment unless accomplished with a warrant).

certain limited exceptions.<sup>20</sup> For example, the Supreme Court has recognized such exceptions in special needs cases, or in “stop and frisk” situations.<sup>21</sup> Courts have also permitted warrantless searches under the “automobile exception,” which allows for the warrantless search of a vehicle when there is probable cause to believe the vehicle contains evidence of a crime.<sup>22</sup> Nevertheless, courts still mandate that a warrantless search of a car be based on probable cause, and the exception is only allowed in a limited number of cases.<sup>23</sup>

As technology has progressed, courts have become increasingly divided over how to reconcile the Fourth Amendment with advancements in tracking technology used by the police.<sup>24</sup> In 1983, in *United States v.*

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<sup>20</sup> *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Warrantless searches are those conducted outside the judicial process, without prior approval by a court. *See Katz*, 389 U.S. at 357. Since deciding *Terry v. Ohio* in 1968, the U.S. Supreme Court has identified various law enforcement actions that qualify as Fourth Amendment searches and seizures, but may be conducted without a warrant or probable cause. *See* 392 U.S. 1, 30 (1968); *see also Katzin I*, 732 F.3d at 197–201 (discussing types of searches and seizures that may be conducted without warrant or probable cause).

<sup>21</sup> *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (explaining that the Supreme Court has allowed exceptions to the warrant requirement when special needs reaching beyond the normal need for law enforcement make requiring a warrant and probable-cause impractical); *Terry*, 392 U.S. at 19, 22–27 (holding that a police officer can “stop” an individual on the street for questioning and then “frisk” him to determine if he’s carrying weapons without a warrant); *see also Skinner*, 489 U.S. at 634 (holding that alcohol and drug tests of railroad employees are reasonable even in the absence of a warrant or reasonable suspicion); *O’Connor v. Ortega*, 480 U.S. 709, 726 (1987) (holding that government employers and supervisors may conduct warrantless, work-related searches of employees’ desks and offices without probable cause); *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985) (holding that school officials may conduct warrantless searches of some student property without probable cause).

<sup>22</sup> *See United States v. Ross*, 456 U.S. 798, 825 (1982) (holding that if probable cause justifies search of a vehicle, then every part of the vehicle and its contents that could conceal the object in question may be searched); *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (explaining that the treatment of automobiles is based in part on the fact that a vehicle’s inherent mobility often makes procuring a warrant impractical); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (holding that the Fourth Amendment recognizes the difference between the invasion of a house or structure for which a warrant could easily be obtained, and that of an automobile, where it is less practical because the vehicle could be easily moved out of the jurisdiction where the warrant is sought); *United States v. Burton*, 288 F.3d 91, 100 (3d Cir. 2002) (holding that warrantless searches of an automobile are permitted if there is probable cause to believe it contains contraband); *United States v. McGlory*, 968 F.2d 309, 343 (3d Cir. 1992) (finding the warrantless search of an automobile with probable cause to be constitutional under the “automobile exception”).

<sup>23</sup> *See Katzin I*, 732 F.3d at 198 (stating that the difference between automobiles and other dwellings still requires that a warrantless search of a car be based on probable cause, and even then, only in a highly limited number of cases); *see also Ross*, 456 U.S. at 825 (holding that the automobile exception is still unquestionably a “specifically established and well delineated” one); *Coolidge v. New Hampshire*, 403 U.S. 443, 461–62 (1971) (stating that “the word ‘automobile’ is not a talisman whose presence dissipates the Fourth Amendment”).

<sup>24</sup> *See Katzin I*, 732 F.3d. at 194; *see also Catherine Crump, Supreme Court GPS Ruling: Bringing the 4th Amendment into the 21st Century*, ACLU BLOG OF RIGHTS (Jan. 26, 2012, 2:05 PM), <https://www.aclu.org/blog/technology-and-liberty/supreme-court-gps-ruling-bringing-4th-amendment->

*Knotts*, the U.S. Supreme Court addressed the constitutionality of using tracking devices, and held that concealing a beeper inside of a container that was then loaded onto a target's vehicle did not constitute a search.<sup>25</sup> Revisiting the issue in 1984, in *United States v. Karo*, the U.S. Supreme Court reaffirmed that hiding a beeper inside a container to track a vehicle was not a search, but held that monitoring the container in a private residence was unconstitutional.<sup>26</sup>

After technological advances led to law enforcement's use of GPS devices, in 2010, in *United States v. Jones*, the U.S. Supreme Court ruled that magnetically attaching a GPS device to a suspect's automobile constituted a search for purposes of the Fourth Amendment.<sup>27</sup> The Court concluded that the attachment of a GPS to a target car was a physical intrusion upon the vehicle owner's private property, and that the Government physically occupying private property in order to obtain information is a search under the Fourth Amendment.<sup>28</sup> *Jones* left open, however, the question of whether warrantless use of GPS devices would be considered reasonable under the

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21st-century, archived at <https://perma.cc/P72Z-5LW4?type=pdf> (discussing how surveillance cameras and GPS tracking have removed the technical barrier to mass surveillance of Americans' movements, making legal barriers even more critical).

<sup>25</sup> See 460 U.S. at 285. The Court explained that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281–82 (holding that when defendant travelled over public streets he voluntarily conveyed that he was travelling over certain roads in a particular direction, which stops he made, and his final destination when he left public roads and traveled onto private property). But the Court warned that if police began utilizing twenty-four hour "dragnet type law enforcement practices," different constitutional principles could apply. See *id.* at 283–84.

<sup>26</sup> See 468 U.S. at 712–14 (explaining that unlike in *Knotts*, the information obtained by monitoring the beeper inside of a private residence gave the DEA information that could not be visually verified).

<sup>27</sup> See 132 S. Ct. at 949. In reaching this conclusion, the Court overruled decisions from the Seventh, Eighth, and Ninth Circuits, which had all held that attaching a GPS device to a target car was not a constitutional violation. See *United States v. Marquez*, 605 F.3d 604, 609–10 (8th Cir. 2010) (holding that police do not need a warrant to install a non-invasive GPS tracking device to a vehicle in a public place); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1214–15 (9th Cir. 2010) (holding that attaching a mobile tracking device to a vehicle parked on a public street did not violate the Fourth Amendment); *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (holding that attaching a GPS device to a target vehicle merely substituted for following a car on a public street); *United States v. McIver*, 186 F.3d 1119, 1127 (9th Cir. 1999) (concluding that because the defendant had no reasonable expectation of privacy in the exposed undercarriage of his vehicle, installing a GPS device there was not a search under the Fourth Amendment).

<sup>28</sup> See *Jones*, 132 S. Ct. at 949. Justice Samuel Alito concurred in the judgment, joined by Justice Ruth Bader Ginsburg, Justice Stephen Breyer, and Justice Elena Kagan, but argued that the appropriate Fourth Amendment analysis was the "reasonable expectation of privacy" inquiry. See *id.* at 958 (Alito, J., concurring). The concurrence reasoned that society's expectation has been that law enforcement would and could not "secretly monitor and catalogue every single movement of an individual's car for a very long period." See *id.* at 964.

Fourth Amendment where officers have reasonable suspicion and probable cause to execute such searches.<sup>29</sup>

### *B. The Exclusionary Rule and the Good Faith Exception*

Although the Fourth Amendment protects people from unreasonable searches and seizures, the Amendment does not speak to the suppression of evidence acquired by law enforcement in violation of this directive.<sup>30</sup> The U.S. Supreme Court, however, created the exclusionary rule, which generally prohibits the admission of evidence obtained during an unlawful search in a criminal trial.<sup>31</sup> The rule aims to deter unlawful searches and seizures by removing any incentive for the police to disregard the Fourth Amendment.<sup>32</sup> Nonetheless, the U.S. Supreme Court has repeatedly rejected the argument that application of the exclusionary rule is a necessary consequence of a Fourth Amendment violation, and has made clear that exclusion should be a last resort.<sup>33</sup>

Consequently, the U.S. Supreme Court has recognized the existence of a “good faith” exception to the exclusionary rule in cases where law enforcement acted with an objectively reasonable good-faith belief that their conduct was lawful.<sup>34</sup> The good faith belief must be based on some absolute legal authority or information that justified law enforcement’s actions.<sup>35</sup> In

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<sup>29</sup> See *id.* at 954 (explaining that this was not an issue the court currently needed to address).

<sup>30</sup> See U.S. CONST. amend. IV; *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (stating that the exclusionary rule is not designed to rectify damage caused by an unconstitutional search); *United States v. Leon*, 468 U.S. 897, 906 (1984) (noting that the Fourth Amendment does not include any provision proscribing the introduction of illegally seized evidence).

<sup>31</sup> See *Herring v. United States*, 555 U.S. 135, 139 (2009); *United States v. Calandra*, 414 U.S. 338, 347 (1974); *Weeks v. United States*, 232 U.S. 383, 398 (1914).

<sup>32</sup> *Calandra*, 414 U.S. at 347; see *Elkins v. United States*, 364 U.S. 206, 217 (1960) (explaining that the rule compels deference to the Fourth Amendment’s guaranty in the only effective means available).

<sup>33</sup> See *Herring*, 555 U.S. at 140–41; *Arizona v. Evans*, 514 U.S. 1, 13–14 (1995) (explaining that courts have rejected a reflexive application of the exclusionary rule); *Leon*, 468 U.S. at 906 (stating the Fourth Amendment does not have a provision expressly excluding the use of illegally obtained evidence). Not every Fourth Amendment violation triggers the exclusionary rule. See *Herring*, 555 U.S. at 140; see also *Illinois v. Gates*, 462 U.S. 213, 223 (1983) (holding that whether the exclusionary rule’s remedy is appropriate is separate from whether the Fourth Amendment rights of the party trying to invoke the rule were violated). The rule is not a personal constitutional right, but a judicially created remedy meant to defend Fourth Amendment rights through deterrence. See *Calandra*, 414 U.S. at 348.

<sup>34</sup> See *Davis*, 131 S. Ct. at 2427–28. The Court in *Davis* explained that excluding evidence in those types of cases would not actually deter police misconduct but would inflict considerable social costs. See *id.* at 2434. The Court held that the exclusionary rule does not apply when police reasonably rely on binding appellate precedent to conduct a search. See *id.*

<sup>35</sup> See *id.* at 2429 (holding that police reasonably relied on later-reversed binding appellate precedent); *Herring*, 555 U.S. at 147–48 (concluding that the exclusionary rule should not apply because of an undiscovered error in a police-maintained database); *Leon*, 468 U.S. at 922 (holding

determining whether the good faith exception applies, the Court balances the value of deterring police misconduct through the exclusionary rule against the cost of excluding the evidence, such as permitting a guilty defendant to go free.<sup>36</sup>

### C. *Factual and Procedural History of United States v. Katzin*

In 2013, in *Katzin I*, the U.S. Court of Appeals for the Third Circuit decided that police and federal agents must obtain a warrant prior to attaching a GPS device on a vehicle.<sup>37</sup> After a wave of pharmacy burglaries in Delaware, Maryland, and New Jersey, state and federal officials began a joint investigation in which Harry Katzin and his brothers emerged as the primary suspects.<sup>38</sup> After consulting with the U.S. Attorney's office, but without obtaining a warrant, the FBI affixed a "slap-on" GPS tracker to the exterior of Katzin's van.<sup>39</sup> Although the police did not appear to have a set time limit for using the tracker, within several days the tracker indicated that the van had traveled to the immediate vicinity of a pharmacy.<sup>40</sup> The police confirmed the pharmacy in question had been burglarized, and subsequently stopped the vehicle.<sup>41</sup> After discovering Katzin and his brothers in the van, as well as merchandise and equipment from the pharmacy, the police impounded the van and arrested the brothers.<sup>42</sup>

The Katzin brothers moved to suppress the evidence obtained as a result of the warrantless use of the GPS device.<sup>43</sup> The U.S. District Court for the Eastern District of Pennsylvania held in favor of the brothers and suppressed all evidence found in the van, a decision the Government subse-

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that the purpose of the exclusionary rule would not be served where officers relied on a subsequently invalidated search warrant).

<sup>36</sup> See *United States v. Tracey*, 597 F.3d 140, 151 (3d Cir. 2010) (quoting *Herring*, 555 U.S. at 144) (holding that the exclusionary rule only applies when police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" (internal quotation marks omitted)); see also *Davis*, 131 S. Ct. at 2429 (explaining that an officer who conducts a search in reliance on binding appellate precedent is acting as a reasonable officer should, and noting that an exclusion would only discourage the officer from doing his duty). Accordingly, the exclusionary rule applies when police conduct is "deliberate, reckless, or grossly negligent," or when it will deter "recurring or systemic negligence." See *Herring*, 555 U.S. at 144.

<sup>37</sup> See 732 F.3d at 191.

<sup>38</sup> See *id.* Katzin became a suspect after police received various reports of him being seen around Rite Aid pharmacies, as well as footage of a van resembling Katzin's parked outside of a recently burglarized Rite Aid. See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 193.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*



quently appealed.<sup>44</sup> On appeal, a divided panel of the Third Circuit held that police must obtain a warrant prior to attaching a GPS device on a vehicle, and that reliance by law enforcement personnel on out-of-circuit or distinguishable authority was insufficient to support a per se finding of good faith.<sup>45</sup> The U.S. Department of Justice petitioned the Third Circuit to rehear en banc the good faith exception decision, which the Third Circuit granted.<sup>46</sup> In *Katzin II*, the en banc court, on October 1, 2014, reversed the decision of the district court, and held that the good faith exception to the exclusionary rule should apply in.<sup>47</sup>

## II. THE THIRD CIRCUIT PANEL'S REASONING BEHIND THE WARRANT REQUIREMENT AND LIMITATION OF THE GOOD FAITH EXCEPTION

In 2013, in *United States v. Katzin (Katzin I)*, the U.S. Court of Appeals for the Third Circuit panel determined that the police's warrantless GPS search was unlawful, and the evidence obtained was subject to the exclusionary rule.<sup>48</sup> Section A discusses the Third Circuit's examination and ultimate rejection of various justifications for the warrantless search.<sup>49</sup> Section B explores the court's decision not to apply the good faith exception based on the court's belief that the police did not reasonably rely on binding precedent.<sup>50</sup>

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<sup>44</sup> See *United States v. Katzin*, No. 11-226, 2012 WL 1646894, at \*11 (E.D. Pa. May 9, 2012), *rev'd en banc*, 769 F.3d 163 (3d Cir. 2014). The Government appealed on the grounds that a warrant was not required for use of a GPS tracker; the police acted in good faith when installing the GPS device; and Katzin's brothers lacked standing to challenge the search because they did not own the van. See *Katzin I*, 732 F.3d at 193.

<sup>45</sup> See *Katzin I*, 732 F.3d at 191; see also *supra* notes 34–36 and accompanying text (discussing the good faith exception to the exclusionary rule in cases where law enforcement acted with an objectively reasonable good-faith belief that their conduct was lawful). The Third Circuit also found that the defendant passengers of the illegally stopped vehicle had standing to challenge the stop and seek suppression of the evidence. See *Katzin I*, 732 F.3d at 191.

<sup>46</sup> See *United States v. Katzin*, No. 12-2548, 2013 WL 7033666, at \*1 (E.D. Pa. Dec. 12, 2013) (granting petition for en banc rehearing).

<sup>47</sup> See *United States v. Katzin (Katzin II)*, 769 F.3d 163, 167 (3d Cir. 2014) (en banc).

<sup>48</sup> See *United States v. Katzin (Katzin I)*, 732 F.3d 187, 199–205 (3d Cir. 2013), *rev'd en banc*, 769 F.3d 163. *Katzin I* was the first federal appeals court since the U.S. Supreme Court's 2012 decision in *United States v. Jones* to hold that GPS tracking of a vehicle required a warrant. See *id.* The U.S. Supreme Court in *Jones* held that using a GPS device constitutes a search, but chose not to address the search's lawfulness based on reasonable suspicion or probable cause. See 132 S. Ct. 945, 954 (2012).

<sup>49</sup> See *infra* notes 51–57 and accompanying text.

<sup>50</sup> See *infra* notes 58–63 and accompanying text.

*A. An Ongoing Endeavor: Why Warrantless Searches Using GPS Are Not Justifiable Based on Reasonable Suspicion or Probable Cause*

In deciding *Katzin I*, the Third Circuit panel first considered whether the warrantless use of a GPS device based on less than probable cause is a valid constitutional search.<sup>51</sup> The court considered three general categories of warrantless searches that are permitted based on less than probable cause: “special needs” cases, circumstances in which individuals have lessened privacy interests, and “stop and frisk” progeny.<sup>52</sup> The Third Circuit ultimately determined that none of these exceptions to the probable cause requirement applied to the law enforcement conduct in *Katzin*.<sup>53</sup>

The Third Circuit also rejected the Government’s argument that a warrantless GPS search is similar to an automobile search, which may be constitutional in the absence of a warrant, if supported by probable cause.<sup>54</sup> The

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<sup>51</sup> See 732 F.3d at 198.

<sup>52</sup> See *id.*; see also *United States v. Knights*, 534 U.S. 112, 121 (2001) (holding that probationer suspected of criminal conduct has significantly diminished privacy interests); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 634 (1989) (holding that a diminished expectation of privacy attaches to information related to the fitness of railroad employees); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that a warrantless stop of an individual on the street by a police officer was permissible based on less than probable cause if a police officer observed conduct that led to the reasonable conclusion that criminal activity may be occurring); *supra* notes 19–23 and accompanying text (discussing various law enforcement actions that qualify as Fourth Amendment searches and seizures, but may still be conducted without a warrant or probable cause according to the Supreme Court).

<sup>53</sup> See *Katzin I*, 732 F.3d at 199–200. The court determined the search did not qualify under the “special needs” doctrine because the Government could not specify a particular purpose for the GPS tracking, and the primary goal of a “special needs” search cannot be to simply find evidence for law enforcement purposes. See *id.* at 199; see also *Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2001) (holding that to qualify for “special needs” exception, the primary purpose of the search cannot be to produce evidence); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (finding that search did not qualify where its primary aim could not be differentiated from a general interest in crime control). The court next rejected the diminished privacy argument, holding that *Katzin* had the full extent of privacy interests guaranteed to him by the Constitution when the police executed their GPS search. See *Katzin I*, 732 F.3d at 200. The court also noted that although the U.S. Supreme Court has recognized that individuals have a lowered expectation of privacy in their cars, police still need probable cause to search a vehicle absent certain circumstances that were not present in the case. See *id.*; see also *California v. Acevedo*, 500 U.S. 565, 579–80 (1991) (establishing one rule to govern all automobile searches). Lastly, the Third Circuit distinguished a “stop and frisk” search, which is limited to a specific instance in time, from the warrantless GPS search, which the court held was an ongoing and much broader venture. See *Katzin I*, 732 F.3d at 200 (noting that the search in *Terry* was also limited to determining whether the individual was armed or posed a danger); see also *Terry*, 392 U.S. at 30; *Berger v. New York*, 388 U.S. 41, 59 (1967) (reasoning that eavesdropping for two-month period is the equivalent of a series of intrusions, searches, and seizures).

<sup>54</sup> See *Katzin I*, 732 F.3d at 203 (holding that attaching and monitoring a GPS tracker is different from a traditional automobile exception search because it establishes an ongoing police presence in order to discover evidence that may come into existence); see also *United States v. McGlory*, 968 F.2d 309, 343 (3d Cir. 1992) (finding warrantless search of an automobile with

court distinguished a GPS search from the automobile exception: although the automobile exception permits police to physically intrude into a vehicle to retrieve or examine already existing evidence, a GPS search deals with future evidence the police suspect could be discovered by using the GPS.<sup>55</sup> The court reasoned that a GPS search extends the police intrusion of the vehicle far beyond the time and scope of a traditional automobile search under the exception.<sup>56</sup> Therefore, the Third Circuit concluded that the Government requires a warrant when intending to intrude upon a vehicle longer than is necessary to locate and verify already-existing evidence of criminal activity.<sup>57</sup>

### *B. Limiting the Good Faith Exception to Binding Precedent*

After concluding that the search violated the Fourth Amendment, the Third Circuit panel held that the evidence against Katzin and his brothers was properly suppressed under the exclusionary rule.<sup>58</sup> The Government urged the court to apply the good faith exception, arguing that law enforcement personnel had relied on a majority consensus among the circuit courts, guidance from Supreme Court decisions, and the advisement of the U.S. Attorney's Office.<sup>59</sup> The Third Circuit, however, rejected these arguments and refused to apply the good faith exception, determining that the legal authorities the police relied upon did not constitute binding precedent.<sup>60</sup>

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probable cause to be constitutional under "automobile exception"); *supra* notes 22–23 and accompanying text (discussing searches allowed under the "automobile exception," which permits the warrantless search of a vehicle when there is probable cause to believe the vehicle contains evidence of a crime).

<sup>55</sup> See *Katzin I*, 732 F.3d. at 203.

<sup>56</sup> See *id.* (explaining that the exception is "limited to a discreet moment in time" to permit the police to enter and search a vehicle to determine whether it contains the evidence suspected to be inside); see also *United States v. Ross*, 456 U.S. 798, 825 (1982) (holding that the automobile exception has specifically established and well delineated contours).

<sup>57</sup> *Katzin I*, 732 F.3d at 204; see *Delaware v. Prouse*, 440 U.S. 648, 662–63 (1979) (holding that if an individual was subjected to "unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed").

<sup>58</sup> See *Katzin I*, 732 F.3d at 205; see also *United States v. Tracey*, 597 F.3d 140, 151 (3d Cir. 2010) (quoting *Herring v. United States*, 555 U.S. 135, 141 (2009)) (holding that the exclusionary rule only applies when police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" (internal quotation marks omitted)); *supra* notes 30–33 and accompanying text (discussing the exclusionary rule, which generally prohibits the admission of evidence obtained during an unlawful search in a criminal trial, as well as the rule's limitations).

<sup>59</sup> See *Katzin I*, 732 F.3d at 206; see also *United States v. Karo*, 468 U.S. 705, 712–14 (1984); *United States v. Knotts*, 460 U.S. 276, 285 (1983); *infra* note 76 and accompanying text (discussing sister circuit courts that previously held police did not need to obtain a warrant to install a GPS tracking device).

<sup>60</sup> See *Katzin I*, 732 F.3d at 209–10. The court reasoned that it is not the duty of law enforcement personnel for purposes of the exclusionary rule to analyze and weigh the decisions of sister courts in an effort to predict how the court in their own circuit would decide if faced with a similar

Furthermore, the court held that the U.S. Supreme Court's 2011 decision in *Davis v. United States* extends good faith protection only to acts explicitly authorized by clear and well-established precedent, and determined that the U.S. Supreme Court's 1983 decision in *United States v. Knotts* and 1984 decision in *United States v. Karo* did not qualify.<sup>61</sup>

The Third Circuit further concluded that extending the rationale from *Davis* to cover reliance on out-of-circuit precedent would contradict the principle of the good faith exception and undermine the concept that clear and well-settled precedent should control.<sup>62</sup> Ultimately, the court held that the police had recklessly relied on a self-derived constitutional principle, and concluded that the exclusion of the evidence would incentivize police to "err on the side of constitutional behavior" and help prevent future Fourth Amendment violations.<sup>63</sup>

### III. A NARROW VIEW OF THE GOOD FAITH EXCEPTION AND THE EN BANC COURT'S PROPER GOOD FAITH ANALYSIS

Although the Third Circuit panel's decision that the police were required to obtain a warrant was not in dispute, the court's unnecessarily limited view of the good faith exception was challenged and subsequently vacated on the en banc rehearing.<sup>64</sup> In 2013, the U.S. Court of Appeals for the Third Circuit panel's analysis of the good faith exception in *United States v. Katzin* (*Katzin I*) was improperly focused on determining that the U.S. Supreme Court beeper cases and out-of-circuit holdings on GPS searches could not suffice as binding precedent, rather than examining the culpability

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factual situation. *See id.* at 209. Yet, at the same time, the court held that law enforcement officials should have been on notice once another circuit court had suggested that GPS searches violated the Fourth Amendment. *See id.* at 213 n.24.

<sup>61</sup> *See id.* at 207 (noting the lack of a physical intrusion in *Knotts* and *Karo*, as well as "marked technological differences" between beepers and GPS trackers). The court reasoned that the conduct in *Knotts* and *Karo* did not qualify as binding precedent because both cases involved the police placing the beeper inside of a container that was then loaded onto a vehicle, and therefore did not involve a physical trespass like in *Katzin*. *See id.*; *see also Karo*, 468 U.S. at 712; *Knotts*, 460 U.S. at 285; Orin Kerr, *Does Using a GPS Device to Track a Suspect Constitute a Fourth Amendment Search?*, SCOTUSBLOG (Oct. 21, 2011, 3:09 PM), <http://www.scotusblog.com/2011/10/does-using-a-gps-device-to-track-a-suspect-constitute-a-fourth-amendment-search/>, archived at <http://perma.cc/Y4MB-KL2K> (examining the reasoning behind the *Knotts* and *Karo* decisions and finding the *Jones* approach set a more amorphous standard).

<sup>62</sup> *See Katzin I*, 732 F.3d at 208; *see also supra* notes 34–36 and accompanying text (discussing recognition of the good faith exception for the purpose of allowing evidence in cases where law enforcement had a reasonable good-faith belief that their conduct was lawful).

<sup>63</sup> *See Katzin I*, 732 F.3d at 212 (determining that law enforcement personnel had assumed that the Third Circuit would find with the majority of sister circuits).

<sup>64</sup> *See United States v. Katzin (Katzin II)*, 769 F.3d 163, 169 (3d Cir. 2014) (en banc).

of the police conduct.<sup>65</sup> This Part argues that the Third Circuit's narrow view of the good faith exception failed to recognize the exception's purpose, and the Third Circuit, sitting en banc, was correct to reverse the decision to apply the exclusionary rule in *Katzin II*.<sup>66</sup> Section A contends that the court should have found that the police in *Katzin* did reasonably rely on binding precedent.<sup>67</sup> Section B asserts that, even if the court did not find past precedent to suffice, the officers' conduct still does not rise to the level of reckless, negligent conduct that the exclusionary rule is meant to discourage.<sup>68</sup> Section C argues that the en banc court conducted a superior interpretation of the good faith exception and its purpose, and properly reversed the district court's application of the exclusionary rule.<sup>69</sup>

### A. Ignoring Good Faith for Binding Precedent

The Third Circuit, sitting en banc to rehear arguments on the application of the exclusionary rule in *Katzin II*, was correct to decide not to uphold the panel's limited view of the good faith exception.<sup>70</sup> The U.S. Supreme Court has held that the standard for the good-faith exception is objective: would a reasonably well-trained officer have known the search was illegal in light of all of the circumstances.<sup>71</sup> Yet the majority's argument in *Katzin I* implies that the main criterion for the exception is whether the officers relied upon binding appellate precedent.<sup>72</sup> Consequently, the Third Circuit's analysis of the officers' good faith is unduly influenced by the

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<sup>65</sup> See *United States v. Katzin (Katzin I)*, 732 F.3d 187, 210–11 (3d Cir. 2013) (acknowledging that the good faith balancing test inquiry requires more than whether the police's reliance on out-of-circuit authority is sufficient, but then stating that the court remains extremely disconcerted by the lack of binding appellate guidance), *rev'd en banc*, 769 F.3d 163 (3d Cir. 2014); *id.* at 220 (Van Antwerpen, J., concurring in part and dissenting in part) (arguing that the majority's decision to first address whether the sister circuit cases qualified as binding appellate precedent later infects the more general good-faith analysis).

<sup>66</sup> See *infra* notes 70–98 and accompanying text.

<sup>67</sup> See *infra* notes 70–78 and accompanying text.

<sup>68</sup> See *infra* notes 79–85 and accompanying text.

<sup>69</sup> See *infra* notes 86–98 and accompanying text.

<sup>70</sup> See 769 F.3d at 169–70; Orin Kerr, *Third Circuit Requires Warrant for GPS Monitoring and Limits Good-Faith Exception in United States v. Katzin*, VOLOKH CONSPIRACY (Oct. 23, 2013 3:30 AM), <http://www.volokh.com/2013/10/23/third-circuit-requires-warrant-gps-monitoring-limits-good-faith-exception-united-states-v-katzin/>, archived at <http://perma.cc/L7DL-TSUZ> (discussing how the Third Circuit took a different, more narrow view of *Davis* than other circuits).

<sup>71</sup> *Herring v. United States*, 555 U.S. 135, 145 (2009); *United States v. Leon*, 468 U.S. 897, 919–20 (1984); see *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011) (stating that “the harsh sanction of exclusion should not be applied to deter objectively reasonable law enforcement activity”).

<sup>72</sup> See 732 F.3d at 209–11 (conducting an extensive analysis on the binding precedent inquiry, coming to a conclusion, and then performing the culpability and deterrence analysis as somewhat of an afterthought); *id.* at 220 (Van Antwerpen, J., concurring in part and dissenting in part) (contending that the majority's analysis of the good faith balancing test is fragmented by discussion of whether the officers relied on binding appellate precedent).

court's belief that the officers lacked binding precedent to rely on, resulting in the court's failure to recognize the rule's ultimate purpose.<sup>73</sup>

Furthermore, the court should have determined that the officers reasonably relied on the binding precedent of the U.S. Supreme Court's decisions in *United States v. Knotts* and *United States v. Karo*, which both held that concealing a beeper inside of a vehicle as a tracking device did not constitute a search under the Fourth Amendment.<sup>74</sup> The Court in *Knotts* even went so far as to state that a person traveling in a vehicle on public roads has no reasonable expectation of privacy in his movements from place to place.<sup>75</sup> At the time the search in *Katzin* occurred, every circuit court to consider the GPS issue except one had concluded that police did not need to obtain a warrant to install a GPS tracker in light of *Knotts* and *Karo*.<sup>76</sup> Additionally, the Third Circuit panel admonished law enforcement for looking to non-binding authorities like sister circuits' decisions, but also claimed the police acted in the face of unsettled law because one sister Court of Appeals

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<sup>73</sup> *Id.* (Van Antwerpen, J., concurring in part and dissenting in part) (arguing that the majority's analysis does not comply with Supreme Court precedent, which stresses that the criterion for the good faith exception is whether a reasonable officer would have known the search was illegal, not whether the officer relied on binding precedent).

<sup>74</sup> See *United States v. Karo*, 468 U.S. 705, 712–13 (1984) (holding that transfer of unmonitored beeper onto a vehicle was not a search because the transfer did not convey information, and therefore did not encroach on any privacy interest); *United States v. Knotts*, 460 U.S. 276, 284 (1983) (holding that complaints that scientific devices like tracking devices enable law enforcement to be more effective in detecting crime have no constitutional foundation, and that the Court has “never equated police efficiency with unconstitutionality”); *United States v. Aguiar*, 737 F.3d 251, 261–62 (2d Cir. 2013) (finding the beeper technology used in *Knotts* was similar enough to GPS technology and concluding that officers relied in good faith on *Knotts* when deciding to place the GPS device); *United States v. Sparks*, 711 F.3d 58, 66 (1st Cir. 2013) (holding that “*Knotts* clearly authorized the agents to use a GPS-based tracking device in the place of a beeper”); *United States v. Andres*, 703 F.3d 828, 834–35 (5th Cir. 2013) (finding any possible technological differences between a beeper and GPS device insufficient to make the government's pre-*Jones* reliance on a Fifth Circuit beeper precedent unreasonable for good-faith purposes).

<sup>75</sup> 460 U.S. at 281; see *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (holding that “one has a lesser expectation of privacy in a motor vehicle because its function is transportation,” it has “little capacity for escaping public scrutiny,” and it travels public roads, putting its occupants and contents in plain sight).

<sup>76</sup> See *United States v. Marquez*, 605 F.3d 604, 609–10 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216 (9th Cir. 2010); *United States v. Garcia*, 474 F.3d 994, 997–98 (7th Cir. 2007); *United States v. McIver*, 186 F.3d 1119, 1126–27 (9th Cir. 1999); see also *supra* note 26 and accompanying text (discussing decisions prior to *Katzin* from the Seventh, Eighth, and Ninth Circuits, which all held that attaching a GPS device to a target car was not a constitutional violation). The one exception was in 2010, in *United States v. Maynard* where the D.C. Circuit found that GPS surveillance constituted a search that required a warrant. See 615 F.3d 544, 555–56 (D.C. Cir. 2010), *aff'd in part sub nom.*, *United States v. Jones*, 132 S. Ct. 945 (2012). See generally Eli R. Shindelman, *Time for the Court to Become “Intimate” with Surveillance Technology*, 52 B.C. L. REV. 1909, 1925–28 (2011) (examining the reasoning behind *Maynard*'s holding and its representation of society's changing expectations of privacy due to surveillance technology).

had ruled the opposite way on GPS tracking.<sup>77</sup> Despite the court's assertion in *Katzin I*, the police did not apply a "self-derived" rule in order to take the Fourth Amendment inquiry "into [their] own hands," but acted in reasonable reliance on guidance from binding precedent.<sup>78</sup>

### B. A Lack of Culpable Conduct in *Katzin*

Even if the Third Circuit panel could not find that law enforcement reasonably relied on binding precedent, the police conduct was still far from a reckless disregard for *Katzin*'s rights.<sup>79</sup> The U.S. Supreme Court has repeatedly affirmed that the exclusionary rule is a remedy of last resort, to be applied only when law enforcement personnel have shown a deliberate or grossly negligent disregard for Fourth Amendment rights as a means of deterring future misconduct.<sup>80</sup> When the police have a reasonable good faith belief that their conduct is lawful, or their action involves just isolated negligence, there is little to deter.<sup>81</sup>

Contrary to the opinion of the Third Circuit panel, law enforcement personnel in *Katzin* were not attempting to circumvent the Fourth Amendment in their installation of a GPS tracker.<sup>82</sup> The police conduct in *Katzin* was not like the purposeful, reckless disregard of Fourth Amendment rights that the exclusionary rule aims to prevent.<sup>83</sup> Enforcing such a strict scope of

<sup>77</sup> See *Katzin I*, 732 F.3d at 209, 213 n.24 (holding that it is not the job of law enforcement to examine the decisions of sister circuits in order to predict what a court would say, but later stating that once the D.C. Circuit had split on the issue, law enforcement should have been "on notice" that GPS devices could implicate Fourth Amendment rights).

<sup>78</sup> See *id.* at 211–12; see *supra* note 74 and accompanying text (discussing Supreme Court and circuit court precedent).

<sup>79</sup> See *Katzin I*, 732 F.3d at 211; see also *Davis*, 131 S. Ct. at 2427 (holding that when police recklessly disregard Fourth Amendment rights there is great benefit to exclusion).

<sup>80</sup> See *Davis*, 131 S. Ct. at 2429 ("[T]he harsh sanction of exclusion should not be applied to deter objectively reasonable law enforcement activity." (quoting *Leon*, 468 U.S. at 919) (internal citations omitted)); *United States v. Tracey*, 597 F.3d 140, 151 (3d Cir. 2010) (quoting *Herring*, 555 U.S. at 141) (holding that the exclusionary rule only applies when police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" (internal quotation marks omitted)).

<sup>81</sup> See *Davis*, 131 S. Ct. at 2426–28 (stating that the exclusionary rule's singular purpose is to deter future Fourth Amendment violations); see also *Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 909) (holding that the exclusionary rule applies only where it results in "appreciable deterrence"); *Elkins v. United States*, 364 U.S. 206, 217 (1960) (holding that the exclusionary rule is calculated to prevent and deter, not repair).

<sup>82</sup> Compare *Katzin II*, 769 F.3d at 182 (holding that officers acted with good faith belief that their conduct was lawful based on a wide range of authority), with *Katzin I*, 732 F.3d at 213 (holding that police disregarded possibility that warrantless GPS search could be a Fourth Amendment violation).

<sup>83</sup> See *Katzin I*, 732 F.3d at 192. Not only did the police believe they were acting in accordance with binding precedent regarding GPS searches, but they also consulted with the U.S. Attorney's Office prior to beginning GPS surveillance in an effort to ensure their actions were constitu-

the good faith exception will not induce police to err on the side of constitutional behavior, particularly given that the officers in *Katzin* believed they were already doing so.<sup>84</sup> Furthermore, this limitation on the exception could actually inhibit police officers from taking action, for fear that their conduct has not been explicitly sanctioned by precedent in their circuit and could result in the future exclusion of critical evidence.<sup>85</sup>

### C. A Proper Good Faith Analysis of the *Katzin* Conduct

Fortunately, in *Katzin II*, the U.S. Court of Appeals for the Third Circuit chose to rectify the panel's misguided application of the exclusionary rule, and in doing so provided a good faith analysis of the police conduct in *Katzin* that remained true to the purpose of the exception.<sup>86</sup> After granting a rehearing of the exclusionary rule holding, the Third Circuit, sitting en banc, recognized good faith where the panel refused to, and ruled that the exception did apply to the law enforcement conduct in *Katzin*.<sup>87</sup> The en banc court concluded that the U.S. Supreme Court's decisions in 1983 in *Knotts*, and in 1984 in *Karo*, both constituted binding appellate precedent that the officers in *Katzin* could have reasonably relied on at the time of their conduct.<sup>88</sup> Additionally, the court held that under the Supreme Court's more general good faith test, the exclusionary rule still should not apply because the agents acted with a good faith belief that their conduct was lawful.<sup>89</sup>

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tional. *See id.* Yet the panel stated that a government attorney's approval, standing alone, cannot and should not suffice to demonstrate good faith. *See id.* at 212 n.23; *see also Davis*, 131 S. Ct. at 2429 (holding that the exclusionary rule does not aim to deter conscientious police work); *Herring*, 555 U.S. at 143–44 (explaining that past abuses that have warranted the exclusionary rule featured intentional conduct that was clearly unconstitutional); *Katzin II*, 769 F.3d at 181 (holding that the court has previously considered reliance on government attorneys in the good faith calculus, and that such reliance plays a part in whether a reasonable officer would believe a search was valid).

<sup>84</sup> *See Katzin I*, 732 F.3d at 214 (holding that excluding the evidence in this case will deter police from assuming that the court will find their conduct constitutional, even if the police believed they were relying on a constitutional principle).

<sup>85</sup> *See Davis*, 131 S. Ct. at 2429 (determining that in a case where an officer was only acting as a reasonable officer would and should act, the deterrent effect of exclusion would only discourage the officer from doing his job); *Leon*, 468 U.S. at 920 (same).

<sup>86</sup> *See Katzin II*, 769 F.3d at 177–82 (holding that the Supreme Court has ordered the suppression of evidence to only occur in “unusual” circumstances, and that applying the exclusionary rule just because law enforcement did not adequately rely on binding appellate precedent would be far beyond this directive).

<sup>87</sup> *See id.*

<sup>88</sup> *See id.* at 174–77 (holding that what is important in finding *Knotts* and *Karo* to be binding precedent is that “the agents’ nearly identical conduct [in *Katzin*] fits squarely within the rationale of those decisions”); *see also Karo*, 468 U.S. at 712–13; *Knotts*, 460 U.S. at 281–82.

<sup>89</sup> *See Katzin II*, 769 F.3d at 177–82.



The Third Circuit en banc determined that the U.S. Supreme Court's holding in 2011 in *Davis v. United States* was much broader than both the district court's and Third Circuit panel's interpretations.<sup>90</sup> The en banc court acknowledged that the facts of *Katzin* were not the same as *Knotts* and *Karo*, but reasoned that is essentially always true in case comparisons, and held that the foundation of those Supreme Court decisions clearly sanctioned the *Katzin* agents' conduct.<sup>91</sup> Furthermore, unlike the Third Circuit panel, the en banc court took into consideration the holdings of its sister circuits in concluding that the technological distinctions between beepers and GPS devices are irrelevant when determining good faith.<sup>92</sup>

More importantly, the Third Circuit en banc recognized that the district court, and subsequently the Third Circuit panel, had improperly elevated the holding in *Davis*.<sup>93</sup> The en banc court held that it was not its duty to solely determine whether *Davis* applied or if its holding should be extended, but rather to consider the totality of the circumstances to determine whether a reasonably well-trained officer would have known the search in question was illegal.<sup>94</sup> In coming to its decision, the en banc court considered the "panoply of authority" that appeared to authorize the police conduct in *Katzin*, including well-settled principles of Fourth Amendment law, a near-

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<sup>90</sup> See *id.* at 176 (explaining that reliance on binding precedent may be reasonable when the conduct at issue falls within the precedent's rationale authorizing similar conduct).

<sup>91</sup> See *id.* at 174–77 (holding that it was "objectively reasonable for law enforcement to conclude, prior to *Jones* and in reliance on *Karo*, that [attaching and monitoring a GPS device to a vehicle] was not a search because it infringed no privacy interest"); see also *Karo*, 468 U.S. at 712–13; *Knotts*, 460 U.S. at 284; *United States v. Rose*, 914 F. Supp. 2d 15, 23 (D. Mass. 2012) (asserting that if police had to wait until their own circuit weighed in on issues like GPS tracking, they could be "forced to wait decades to implement new technology or risk suppression even where, as here, the warrantless use of the technology was universally considered to be constitutionally permissible").

<sup>92</sup> See *Katzin II*, 769 F.3d at 176; *Katzin I*, 732 F.3d at 209 (holding that any law enforcement officer who primarily relies on Fourth Amendment decisions of sister circuits does so "at his own peril" in regard to the exclusionary rule); see also *United States v. Fisher*, 745 F.3d 200, 205 (6th Cir. 2014) (concluding that in-circuit beeper cases were binding appellate precedent for sporadic GPS use); *Aguiar*, 737 F.3d at 261 (concluding that the beeper used in *Knotts* was sufficiently similar to the GPS device employed); *Sparks*, 711 F.3d at 66 (holding that *Knotts* clearly authorized law enforcement's use of a GPS device instead of a beeper). The court also noted that at least one circuit has rejected the Third Circuit panel's opinion that a case must be from within the same circuit and be fact specific in order to constitute binding appellate precedent. See *Katzin II*, 769 F.3d at 177; see also *Aguiar*, 737 F.3d at 260–61 (holding that, before *Jones*, the decisions in *Knotts* and *Karo* were binding appellate precedent under *Davis* for purposes of GPS installation and surveillance of a vehicle on public roads).

<sup>93</sup> See *Katzin II*, 769 F.3d at 177 (holding that although *Davis* was the most closely related Supreme Court decision to the facts in *Katzin*, the good faith exception could still be applied even if *Davis* did not order it); see also *United States v. Knights*, 534 U.S. 112, 117 (2001) (rejecting the questionable logic that because an opinion finds a particular search to be constitutional, any search unlike it is then unconstitutional).

<sup>94</sup> See *Katzin II*, 769 F.3d at 177.

unanimity of U.S. Courts of Appeals applying these principles to the same conduct, and the advice of an Assistant U.S. Attorney pursuant to a policy adhered to by the U.S. Department of Justice.<sup>95</sup>

The en banc court held that law enforcement believing their conduct is lawful based on a “constitutional norm,” rather than binding appellate precedent, is not like the deliberate and culpable conduct for which the exclusionary rule was created.<sup>96</sup> Furthermore, the court declared that regardless of whether law enforcement officers unreasonably rely on non-binding authority one day, the court still had a present duty to determine whether the particular law enforcement conduct in *Katzin* warranted the exclusionary rule.<sup>97</sup> The Third Circuit en banc correctly ruled that the exclusionary rule would be inappropriate in *Katzin II*, and in doing so, conducted a good faith analysis superior to the Third Circuit panel’s narrow interpretation.<sup>98</sup>

### CONCLUSION

The Third Circuit panel’s decision in *United States v. Katzin (Katzin I)* was a significant ruling in applying the Fourth Amendment protection against search and seizure to the continued advances in surveillance technology of law enforcement. As tracking devices have become increasingly enhanced, it is unsurprising that courts have become more vigilant in limiting the warrantless technological searches of individual’s persons and property, as the Third Circuit did in *Katzin I*. Yet what was troubling about the Third Circuit panel’s holding was its own unwarranted limitation of the scope of the good faith exception articulated in *Davis v. United States*, and how it could have affected applications of the exclusionary rule and police conduct in the future. The Third Circuit panel’s ruling failed to serve the purpose of the good faith exception as mandated by the Supreme Court, and the en banc court was correct to reverse the decision and apply the exception in *Katzin II*. The Third Circuit en banc aptly recognized that the exclu-

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<sup>95</sup> See *id.* at 181 (noting also that the Assistant U.S. Attorney’s advice was given pursuant to a U.S. Department of Justice-wide policy that the agents’ conduct did not require a warrant).

<sup>96</sup> See *id.* at 183–84 (holding the wide array of non-binding authority allowing a warrantless GPS search to establish a “constitutional norm”); see also *United States v. Peltier*, 422 U.S. 531, 542 (1975) (stating that unless the Court held that parties could not rely on legal declarations from sources outside the Court, they cannot find parties culpable who conform their conduct to a “prevailing constitutional norm”); Kyle Robbins, *Davis, Jones, and the Good-Faith Exception: Why Reasonable Police Reliance on Persuasive Appellate Precedent Precludes Application of the Exclusionary Rule*, 82 MISS. L.J. 1175, 1192–95 (2013) (arguing that officers who reasonably rely on persuasive authority cannot be deterred by exclusion because they are not any more culpable than officers who rely on binding appellate authority).

<sup>97</sup> See *Katzin II*, 769 F.3d at 187 (stating that “future decisions may reveal that applying the good faith exception to reliance on non-binding authority should be extremely rare,” but that was not a question the court currently needed to answer).

<sup>98</sup> See *id.* at 177–84; see also *Katzin I*, 732 F.3d at 206–14.

sionary rule has no place in a case where law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful.

CLARE HANLON

Preferred Citation: Clare Hanlon Comment, *Limited Faith in the Good Faith Exception: The Third Circuit Requires a Warrant for GPS Searches and Narrows the Scope of the Davis Exception to the Exclusionary Rule in United States v. Katzin*, 56 B.C. L. REV. E. SUPP. 33 (2015), <http://lawdigitalcommons.bc.edu/bclr/vol56/iss6/3>.