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United States v. Batista

59 N.Y.L. SCH. L. REV. 761 (2014–2015)

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The Fourth Amendment to the U.S. Constitution was designed to protect citizens from unchecked police power to search and seize.¹ A warrantless search of one’s person, house, papers, or effects is considered per se unreasonable,² unless the search is justified under an exception to the warrant requirement.³ While fundamental, Fourth Amendment protection is ultimately illusory⁴ because the text of the amendment identifies neither a mechanism for prevention nor a remedy should a violation occur.⁵ As Justice Robert Jackson once observed: “Since the officers are themselves the chief invaders, there is no enforcement outside of court.”⁶

The U.S. Supreme Court created the exclusionary rule as a means of enforcing the Fourth Amendment.⁷ The great irony of this rule is that the most direct beneficiary of its administration is the individual from whom contraband is retrieved.⁸ Thus, critics insist that the “exclusionary rule” protects only the criminal among us and imposes huge costs on society in the form of lost convictions and overly lenient plea bargains.⁹ However, these criticisms are misdirected. It is the Fourth Amendment, not the exclusionary rule, that restricts police power.¹⁰ The application of the exclusionary rule is simply a means of enforcing the Fourth Amendment guarantee.

Still, beginning in 1984, the U.S. Supreme Court has made great efforts to narrow the application of the exclusionary rule by implementing a set of exceptions.¹¹ In their broadest sense, these exceptions—under the umbrella of what has become known as the “good-faith exception”—state that if police officers have a good-faith belief that

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1. Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL’Y 711, 712 (2000).
 2. See U.S. CONST. amend. IV.
 3. *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” (footnote omitted)).
 4. TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT’S EXCLUSIONARY RULE 1* (2013).
 5. Heather A. Jackson, *Arizona v. Evans: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protection*, 86 J. CRIM. L. & CRIMINOLOGY 1201, 1202 (1996).
 6. MACLIN, *supra* note 4.
 7. *Weeks v. United States*, 232 U.S. 383 (1914); see also *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (incorporating the Fourth Amendment as enforceable against the states through the due process clause of the Fourteenth Amendment and applying the exclusionary rule to exclude evidence illegally obtained by state officers).
 8. As Justice Benjamin N. Cardozo once lamented: Under the exclusionary rule “the criminal is to go free because the constable has blundered.” *Mapp*, 367 U.S. at 659 (citing *People v. Defore*, 242 N.Y. 13, 21 (1926)). While that may often be the case, the Court acknowledged, “there is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than . . . its disregard of the charter of its own existence.” *Id.* (citation omitted).
 9. MACLIN, *supra* note 4, at xii.
 10. *Id.*
 11. See *United States v. Leon*, 468 U.S. 897, 922 (1984) (creating an exception to the exclusionary rule for “evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant”).

they are acting according to legal authority, and that belief is objectively reasonable, then any illegally seized evidence is not subject to the exclusionary rule.¹²

In *United States v. Batista*, the U.S. District Court for the Western District of Virginia expanded the good-faith exception to deny a defendant's motion to suppress illegally obtained evidence.¹³ Specifically, the defendant sought to exclude evidence obtained as a result of a warrantless installation and use of a global positioning system (GPS) on a vehicle in which he was a passenger.¹⁴ At the time the officers installed the device on Batista's car, the Fifth, Seventh, Eighth, and Ninth Circuits had all held that such police conduct did not constitute a search to trigger Fourth Amendment protections.¹⁵ The D.C. Circuit held that it did,¹⁶ and the Fourth Circuit—where the *Batista* court sits—had yet to rule on the issue.¹⁷

During the *Batista* litigation, the U.S. Supreme Court ruled in *United States v. Jones* that a police officer's use of a GPS device does in fact constitute a search.¹⁸ With his prosecution still pending, Batista, relying on *Jones*, moved to suppress the evidence offered against him.¹⁹ In response, the government argued that exclusion was improper because the evidence was obtained in objectively reasonable reliance on the non-binding authority of the Fifth, Seventh, Eighth, and Ninth Circuits.²⁰

In *Davis v. United States*, the Court held that, under the good-faith exception, the exclusionary rule does not apply to an officer's conduct when that officer reasonably relies on binding appellate authority.²¹ In light of *Davis*, the *Batista* court confronted a question of first impression: whether to expand *Davis*'s holding to instances where the constitutionality of the police conduct at issue is unsettled.²² The court ultimately agreed with the government, holding that the evidence obtained from the warrantless search was not subject to the exclusionary rule, and thereby expanded the good-faith exception to encompass an officer's reliance on non-binding out-of-circuit authority.²³

12. *Id.* See also STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 511–41 (9th ed. 2010) for an analysis of the principal U.S. Supreme Court cases dealing with the good-faith exception doctrine.

13. No. 5:12cr11, 2013 WL 782710 (W.D. Va. Feb. 28, 2013).

14. *Id.* at *1.

15. *Id.* at *7.

16. The D.C. Circuit was the first federal court to hold that use of a GPS device is subject to the mandates of the Fourth Amendment. *United States v. Maynard*, 615 F.3d 544, 555–67 (D.C. Cir. 2010).

17. *Batista*, 2013 WL 782710, at *7.

18. 132 S. Ct. 945, 949 (2012). The Court issued the *Jones* opinion on January 23, 2012. The GPS devices in *Batista* were attached to the vehicles on January 4, 2012, and the defendant was arrested on January 6, 2012. *Batista*, 2013 WL 782710, at *3 n.3.

19. *Batista*, 2013 WL 782710, at *1.

20. *See id.* at *2.

21. 131 S. Ct. 2419, 2423–24 (2011).

22. *Batista*, 2013 WL 782710, at *6.

23. *Id.* at *7 (finding that the officers “reasonably relied on the comprehensive body of case law”).

This case comment argues that the *Batista* court erred by concluding that the exclusionary rule does not apply when an officer reasonably relies on non-binding authority, especially when the particular legal issue is unsettled. The court's expansion of the good-faith exception effectively narrows the constitutional protections afforded by the Fourth Amendment, while expanding the government's authority to intrude into the individual's life.²⁴

In early 2011, police officers believed Albert Batista and his brother, Alex Batista, were trafficking heroin between Philadelphia, Pennsylvania and Harrisonburg, Virginia.²⁵ In the course of their investigation, the officers discovered that the Batista brothers were using their personal cars to drive between Pennsylvania and Virginia.²⁶ The officers believed that Albert primarily drove a Toyota Celica and Alex primarily drove a Dodge Intrepid.²⁷ On January 4, 2012, Virginia officers, acting without a search warrant, placed a GPS device on the undercarriage of both vehicles.²⁸

On January 5, 2012, a confidential informant alerted the officers that Alex would be traveling to Philadelphia to pick up heroin.²⁹ The following day, the GPS indicated that the Intrepid was driving southbound from Philadelphia toward Harrisonburg.³⁰ The officers tracking the vehicle asked the Virginia State Police to look out for the Intrepid and conduct a *Carroll* doctrine stop—named after the U.S. Supreme Court case allowing the warrantless search of a vehicle when officers have probable cause to believe that the vehicle contains contraband.³¹ A Virginia State Trooper observed the Intrepid driving southbound on Interstate 81 and performed the *Carroll* stop, whereupon Alex, who was driving the Intrepid, consented to a search of the vehicle.³² The officer discovered eighty bundles of heroin that were stuffed underneath the dashboard near the glove box and arrested both Alex and his brother.³³

In his motion to suppress the heroin as evidence, Albert (the passenger in the vehicle) contended that, under the Supreme Court's recent decision in *Jones*, the placement of the GPS device constituted a search under the Fourth Amendment.³⁴ Since the search was conducted without a warrant, Albert argued that the officers

24. See, e.g., Jackson, *supra* note 5, at 1217–18.

25. *Batista*, 2013 WL 782710, at *1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* See generally *Carroll v. United States*, 267 U.S. 132 (1925). A *Carroll* stop is constitutional under the rationale that it is not practicable to secure a warrant for vehicular searches because a vehicle's mobility enables the suspect to quickly run the vehicle out of the jurisdiction in which the warrant must be sought. *Id.* at 153.

32. *Batista*, 2013 WL 782710, at *1.

33. *Id.*

34. *Id.*; see also *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

violated his Fourth Amendment right to be free from unreasonable searches.³⁵ Given the illegality of the search, he argued that the exclusionary rule should apply and all evidence—both direct and derivative of the illegal tracking—should be suppressed as “fruit of the poisonous tree.”³⁶

On February 19, 2013, the district court held a suppression hearing on the matter.³⁷ The main issue was whether the warrantless GPS search³⁸ violated the Fourth Amendment.³⁹ Specifically, the court considered whether the good-faith exception applies when Fourth Circuit case law had not expressly authorized the warrantless installation of a GPS device.⁴⁰ Essentially, the court had to decide whether the good-faith exception recognized in *Davis* extends to an officer’s reliance on non-binding judicial authority.⁴¹

Jones had yet to be decided in January 2012 when the officers installed the GPS device on the vehicle.⁴² Thus, there was no binding authority in the Fourth Circuit authorizing police officers to place a GPS device on a suspect’s vehicle without first obtaining a search warrant. The Fifth, Seventh, Eighth, and Ninth Circuits, relying in part on the Supreme Court’s holding in *United States v. Knotts*, had concluded that the Fourth Amendment was not implicated by the use of a GPS device to track a vehicle on public roads.⁴³ Conversely, the D.C. Circuit had held that a warrant is

35. *Batista*, 2013 WL 782710, at *1.

36. *Id.* “Fruit of the poisonous tree” was the term the Supreme Court used to describe evidence discovered by police officers via the exploitation of an illegal search or seizure. *See Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). The question before the court in such a case is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *Id.* at 488.

37. At the suppression hearing, the government first argued that defendant Albert Batista lacked standing under the Fourth Amendment to challenge the GPS search. *Batista*, 2013 WL 782710, at *2. The court disagreed and determined that, at the time the officers placed the GPS device on the vehicle, it was reasonable to conclude that it was in the defendant’s possession. *Id.* at *4. He frequently drove the vehicle and it was stationed in the parking lot of his apartment complex. *Id.* Thus, the court concluded that the defendant maintained a reasonable expectation of privacy within the vehicle and therefore had standing to challenge the GPS search. *Id.* at *5.

38. To determine whether a police officer’s conduct constitutes a “search” under the Fourth Amendment, the Supreme Court has adopted the “reasonable expectation of privacy” test, first articulated by Justice John Marshall Harlan II in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See also Smith v. Maryland*, 442 U.S. 735, 740 (1979) (adopting Justice Harlan’s reasonable expectation of privacy test). The test has two prongs, a subjective and an objective requirement. A Fourth Amendment search occurs when: (1) the person searched exhibits an actual expectation of privacy (the subjective requirement); and (2) that expectation is one that society recognizes as “reasonable” (the objective requirement). *Katz*, 389 U.S. at 361.

39. *Batista*, 2013 WL 782710, at *5.

40. *Id.* at *6.

41. *Id.*

42. *See id.* at *3 n.3.

43. *Id.* at *7. In *United States v. Knotts*, visual surveillance from public places along the defendant’s route would have sufficed to reveal the evidence obtained by the police. *See* 460 U.S. 276, 282 (1983). The fact that the officers relied not only on visual surveillance, but also on the use of a beeper to signal the

required if the nature of the surveillance is both prolonged and continuous such that it offends the defendant's reasonable expectation of privacy.⁴⁴

By ruling against excluding the evidence, the *Batista* court created an unprecedented and flawed expansion of the good-faith exception, allowing officers to rely on non-binding authority when the constitutionality of the search is unsettled. Specifically, the *Batista* court erred in three ways. First, it ignored the relevance of identifying the errant party—the police or an attenuated third-party—when deciding whether the exception applies. Second, the court created an unworkable expansion of the good-faith exception beyond the limits imposed by prior case law. Finally, the *Batista* court's expansion of the good-faith exception recognized in *Davis* disincentivizes police officers from complying with the Fourth Amendment.

The magnitude and error of *Batista's* expansion can only be truly understood by analyzing the origin and progression of the good-faith exception, which originates from the 1984 Supreme Court case *United States v. Leon*.⁴⁵ In *Leon*, officers obtained evidence in reliance on a search warrant that was later determined to be unconstitutional.⁴⁶ Although the officers' conduct was invalid, it was in reliance on a magistrate judge's decision, which, as it turned out, had been rendered in error.⁴⁷ The Court reasoned that the Fourth Amendment protects against the actions of police officers "engaged in the often competitive enterprise of ferreting out crime"—not against the neutral and detached magistrate.⁴⁸ Following this rationale, the Court held that the exclusionary rule did not apply because there was no police misconduct to deter.⁴⁹

In 1987, the Court followed *Leon's* template in *Illinois v. Krull*, and expanded the good-faith exception to encompass an officer's good-faith reliance on a statute subsequently declared unconstitutional.⁵⁰ Since the error in *Krull* was primarily that of the legislature, and hence there was no police misconduct to deter,⁵¹ the Court held that the exclusionary rule did not apply.⁵² In 1995, the Court further expanded the good-faith exception in *Arizona v. Evans* to include an officer's reliance on the mistake of a court employee.⁵³

presence of defendant's vehicle to the police receiver, did not trigger the Fourth Amendment. *Id.* "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them . . ." *Id.*

44. *United States v. Maynard*, 615 F.3d 544, 562–63 (D.C. Cir. 2010).

45. 468 U.S. 897 (1984).

46. *Id.* at 903.

47. *Id.*

48. *Id.* at 913–14; *see also* *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

49. *Leon*, 468 U.S. at 926.

50. 480 U.S. 340, 359–60 (1987).

51. *Id.* at 349–51.

52. *Id.* at 359–60.

53. 514 U.S. 1, 3–4 (1995).

In *Leon*, *Krull*, and *Evans*, the Court's application of the good-faith exception turned on whether excluding illegally obtained evidence would deter police misconduct.⁵⁴ Since the error in each of these cases was attributable to an attenuated third-party, and not the police officers conducting the search, the Court consistently ruled that the exclusionary rule would not serve to deter police misconduct and should not apply.⁵⁵ This rationale is inconsistent with *Batista*, where the court admitted evidence whose exclusion would otherwise deter police misconduct.

The most recent constriction⁵⁶ of the exclusionary rule occurred in 2011 when the Supreme Court further expanded the good-faith exception in *Davis v. United States*.⁵⁷ In *Davis*, the Court applied the exception to immunize an unconstitutional search effected in reasonable reliance on binding judicial authority that was subsequently overruled.⁵⁸ The Court reasoned that the officer who conducted the search did no

54. See *United States v. Leon*, 468 U.S. 897, 918 (1984) (“If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments.”); *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987) (“[B]ecause the purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment, evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.” (internal quotation marks omitted)); *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (“The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.”); see also SALTZBURG & CAPRA, *supra* note 12 (discussing *Leon*, *Krull*, and *Evans*).

55. “[W]hether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence.” *Krull*, 480 U.S. at 360 n.17. In *Leon*, *Krull*, and *Evans*, the relevant actors were magistrates, legislatures, and court employees, respectively—not police officers. See *Leon*, 468 U.S. at 917 (“Judges and magistrates are not adjuncts to the law enforcement team; [they are] neutral judicial officers The threat of exclusion thus cannot be expected significantly to deter them.”); *Krull*, 480 U.S. at 350 (“Penalizing the officer for the [legislature’s] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” (alteration in original)); *Evans*, 514 U.S. at 14 (“[T]he exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees.”).

56. In *Herring v. United States*, the Supreme Court held that exclusion was unwarranted in the context of an illegal arrest that was made in objectively reasonable reliance on another police department’s erroneous recordkeeping. 555 U.S. 135, 145–48 (2009). While *Herring* appears, at first blush, inconsistent with the *Leon-Krull-Evans* line of cases, it is nevertheless reconcilable with the deterrence rationale underlying the exclusionary rule’s application in those cases. Because the error in *Herring*, on which the arresting officer relied, was attributable to the negligent recordkeeping of a separate and independent police department, the Court held that the exclusionary rule did not apply. See *id.* After all, the exclusionary rule was designed to “alter the behavior of individual law enforcement officers or the policies of their departments” and cannot logically serve as a deterrent to improve the policy or recordkeeping system of a separate and autonomous police department. See *Leon*, 468 U.S. at 918. Nonetheless, *Herring* represents a significant shift from its predecessor cases insofar as it heightens the deterrence threshold for applying the exclusionary rule; post-*Herring*, exclusion is justified only if it results in “appreciable deterrence.” *Herring*, 555 U.S. at 141 (emphasis added); see also *id.* at 144 n.4 (“We do not quarrel with Justice [Ginsburg’s] claim that ‘liability for negligence . . . creates an incentive to act with greater care,’ and we do not suggest that the exclusion of this evidence could have no deterrent effect.” (alteration in original) (citation omitted)).

57. 131 S. Ct. 2419 (2011).

58. *Id.* at 2423–24.

more than “ac[t] as a reasonable officer would and should act’ under the circumstances.”⁵⁹ Thus, the deterrent effect of exclusion in such a case can only be to discourage officers from performing their duties.⁶⁰ Writing for the Court, Justice Samuel Alito echoed Justice Benjamin N. Cardozo’s criticism of the exclusionary rule: “It is one thing for the ‘criminal to go free because the constable blundered.’ It is quite another to set the criminal free because the constable has scrupulously adhered to governing law.”⁶¹

Although further narrowing the exclusionary rule, *Davis*’s holding follows logically from *Leon*, *Krull*, and *Evans*. The error relied on by the officers in *Davis* was the blunder of a neutral and detached third-party, namely an appellate judicial panel—just like the magistrate in *Leon*, the legislature in *Krull*, and the court employee in *Evans*. Consistent with this rationale, the *Davis* Court refused to exclude the evidence because exclusion would not yield a deterrent effect.⁶²

The *Batista* court, as a purportedly natural extension of *Davis*, refused to apply the exclusionary rule to evidence illegally obtained based on the officer’s reliance on non-binding judicial authority that was subsequently overruled.⁶³ The court could not discern any clear deterrent value in applying the rule to the police conduct and, thus, purported to adhere to the deterrence rationale articulated in *Leon*.⁶⁴ Additionally, the *Batista* court, citing *Davis*, noted that the exclusionary rule’s application would require it to ignore evidence bearing on the defendant’s guilt.⁶⁵

In her concurring opinion in *Davis*, Justice Sonia Sotomayor expressly warned against applying the good-faith exception to cases like *Batista*: “[W]hether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations *when the governing law is unsettled*.”⁶⁶ Clearly, the *Batista* court ignored Justice Sotomayor’s warning.

When the good-faith exception was applied to warrants later found invalid,⁶⁷ statutes later declared unconstitutional,⁶⁸ erroneous information in databases of outstanding warrants,⁶⁹ and binding appellate authority that is later overturned,⁷⁰

59. *Id.* at 2429 (quoting *Leon*, 468 U.S. at 920).

60. *Id.*

61. *Id.* at 2434 (citation omitted) (quoting *People v. Defore*, 242 N.Y. 13, 21 (1926)).

62. *See id.*

63. *United States v. Batista*, No. 5:12cr11, 2013 WL 782710 (W.D. Va. Feb. 28, 2013).

64. *Id.* at *7.

65. *Id.* (citing *Davis*, 131 S. Ct. at 2427).

66. *Davis*, 131 S. Ct. at 2436 (emphasis added).

67. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984).

68. *See, e.g.*, *Illinois v. Krull*, 480 U.S. 340 (1987).

69. *See, e.g.*, *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1 (1995).

70. *See, e.g.*, *Davis*, 131 S. Ct. 2419.

some legal authority in the relevant jurisdiction provided authorization for the search.⁷¹ The deterrence rationale underlying the exclusionary rule's application "loses much of its force' in these contexts because police must rely on legal authorities, even when those authorities are ultimately incorrect."⁷²

Yet, when an officer conducts a search in reliance on non-binding judicial authority, especially in the face of contrary and equally binding judicial authority (as was the case in *Batista*), it is the officer, not an attenuated third-party, that is making the mistake. The officer is then guessing at what the law might be.⁷³ In such instances, the potential of evidentiary suppression acts as a deterrent for the officer who, under *Batista*, would simply pick and choose which law to follow, essentially forum shopping for legal authority to support otherwise illegal actions.⁷⁴ Thus, under the *Batista* court's expansive application of the good-faith exception, officers have "little incentive to err on the side of constitutional behavior."⁷⁵

Furthermore, in each application of the good-faith exception, there was some specificity in the authority upon which police reliance was deemed objectively reasonable.⁷⁶ In *Leon*, the exception was applied in the context of police reliance on a single warrant issued by a magistrate.⁷⁷ In *Krull*, the exception was applied in the context of police reliance on a single statute.⁷⁸ In *Evans*, on a single court employee's clerical error,⁷⁹ and in *Davis*, on circuit precedent within the officer's jurisdiction.⁸⁰

To broaden the good-faith exception to encompass cases such as *Batista* would make the exception wholly unworkable given the sheer variance of authority on which an officer may "reasonably" rely.⁸¹ Rather than one specific authority, officers

71. *United States v. Lee*, 862 F. Supp. 2d 560, 568 (E.D. Ky. 2012).

72. *Id.* (quoting *Leon*, 468 U.S. at 919).

73. *See United States v. Batista*, No. 5:12cr11, 2013 WL 782710, at *7 (W.D. Va. Feb. 28, 2013); *see also United States v. 15324 Cnty. Highway E.*, 332 F.3d 1070, 1076 (7th Cir. 2003) (warning that extension of the good-faith exception to officers' reasonable reliance on non-binding judicial authority would serve as "an implicit invitation to officers in the field to engage in the tasks—better left to the judiciary and members of the bar more generally—of legal research and analysis").

74. *See Batista*, 2013 WL 782710, at *7.

75. *United States v. Johnson*, 457 U.S. 537, 561 (1982); *see also United States v. Katzin*, No. 11-226, 2012 WL 1646894, at *9 (E.D. Pa. May 9, 2012) ("The risk of institutionalizing a policy of permitting reliance on non-binding authority, particularly in the face of other, contrary non-binding authority . . . would encourage law enforcement to beg forgiveness rather than ask permission in ambiguous situations involving the basic civil rights."), *rev'd*, 769 F.3d 163 (3d Cir. 2014).

76. *See Davis v. United States*, 131 S. Ct. 2419 (2011) (relying on binding circuit precedent); *Arizona v. Evans*, 514 U.S. 1 (1995) (mistake by court employee); *Illinois v. Krull*, 480 U.S. 340 (1987) (statutory authority); *United States v. Leon*, 468 U.S. 897 (1984) (magistral mistake).

77. 468 U.S. at 905.

78. 480 U.S. at 358.

79. 514 U.S. at 15.

80. 131 S. Ct. at 2429.

81. One would be mistaken to assume that the reasonable reliance standard would in any meaningful way cabin officers' abuse of the good-faith exception. The standard is materially similar to the standard of

under *Batista* would have their pick of law from any one of the twelve regional circuit courts. In effect, *Batista* creates an exception with no discrete parameters, allowing it to swallow a constitutional rule that it was merely meant to except.

Such an expansion creates, yet leaves unanswered, many pressing questions. The *Batista* court was quick to note that “the D.C. Circuit broke with the majority of other circuits” when it held that the warrantless use of a GPS device violated a defendant’s reasonable expectation of privacy.⁸² However, this language borders on deception. The D.C. Circuit broke from a majority of the circuit courts that had decided the issue, not a majority of *all* other circuits. Thus, *Batista* effectively poses the question of how many circuits must support a police practice before officers may rely on that support in good faith.⁸³ The answer may be four, as was the case here—or it may not. A majority of circuits may be necessary.⁸⁴ The question of whether greater weight should be accorded to the judgment of more renowned circuit court judges remains as well.⁸⁵

Perhaps courts could establish a “quantum and quality” standard of the non-binding authority required before the good-faith exception kicks in. However, such a standard would be nothing more than an arbitrary and constantly shifting framework,⁸⁶ adding another layer to an already complex set of judicial rules governing police conduct. *Davis*’s framework, on the other hand, in requiring binding appellate authority, provides a simple, tangible, and principled limitation on the good-faith exception to the exclusionary rule.⁸⁷

It is reasonable to infer that officers, in performing searches, are familiar with the binding decisions of the U.S. Supreme Court and the circuit court in their jurisdiction.⁸⁸ This reasonable inference supports limiting the good-faith exception to binding appellate authority.⁸⁹ Under such a standard, officers need only know one

qualified immunity (applicable in damages actions against federal agents for constitutional violations). SALTZBURG & CAPRA, *supra* note 12, at 522. Indeed, as interpreted by the Supreme Court, the reasonable reliance standard is far less demanding than a mere reasonableness test since exclusion will not lie so long as the officer’s mistake was “reasonably unreasonable”—whatever that means. *See Anderson v. Creighton*, 483 U.S. 635, 643 (1987); *see also id.* at 659 (Stevens, J., dissenting) (criticizing the Court for “apply[ing] a double standard of reasonableness” because “an official search and seizure cannot be both ‘unreasonable’ and ‘reasonable’ at the same time” (quoting *Leon*, 468 U.S. at 960)).

82. *United States v. Batista*, No. 5:12cr11, 2013 WL 782710, at *7 (W.D. Va. Feb. 28, 2013).

83. *See United States v. Lee*, 862 F. Supp. 2d 560, 570 (E.D. Ky. 2012) (“How many circuits must support a practice before an officer can rely on it in good faith? Two? Four? A majority? What if the judges on one panel are particularly well-respected . . . ? Allowing officers to rely on non-binding authority raises all of these questions, but answers none of them.”).

84. *Id.*

85. *Id.*

86. *Id.* (“Such a [standard] would be nothing more than an arbitrary rule, plucked from thin air.”).

87. *Id.*

88. *Id.*

89. *Id.*

set of concrete and readily administrable rules that governs their conduct.⁹⁰ To expand the exception to encompass non-binding appellate authority eliminates any assurance that police officers will conduct themselves in accordance with their jurisdiction's governing law.⁹¹

In *United States v. Katzin*, the U.S. District Court for the Eastern District of Pennsylvania further highlighted the dangers presented by such an expansion.⁹² "The risk of institutionalizing a policy of permitting reliance on non-binding authority, particularly in the face of other, contrary non-binding authority," creates the very real potential for abuse and "systemic negligence."⁹³ Affording police officers "the shelter of the good-faith exception" in cases where the issue is unsettled would encourage them "to beg forgiveness rather than ask permission."⁹⁴ By moving so far beyond *Davis's* holding, the *Batista* court "sharpen[ed] the instruments that can effectively eviscerate the exclusionary rule entirely."⁹⁵

Eliminating the exclusionary rule would impose social costs that cannot be understated. Without the rule, the protections provided by the Fourth Amendment would be lost entirely, leaving no significant deterrent to the unconstitutional acts of overzealous police officers.⁹⁶ Officers interviewed in a Chicago study highlighted the dangers of living in a society devoid of the deterrence provided by the exclusionary rule.⁹⁷ As one officer noted: "In the old days if we knew something was in the house . . . we would just knock down the door. Now we use a search warrant."⁹⁸ Another officer acknowledged that abolishing the exclusionary rule would essentially "turn[] the police department loose."⁹⁹ This, he suggested, would create a military state due to the breadth of potential Fourth Amendment violations.¹⁰⁰

It is true that application of the exclusionary rule often results in the dismissal of charges against unquestionably guilty defendants. During his time on the Court of Appeals of New York, Justice Cardozo suggested that it was a fallacy to allow the criminal to go free merely "because the constable has blundered."¹⁰¹ To this, Justice

90. *Id.* ("Limiting the good-faith exception to binding appellate precedent also promotes the 'essential interest in readily administrable rules' to govern police." (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001))).

91. *See id.*

92. *See* No. 11-226, 2012 WL 1646894, at *9-10 (E.D. Pa. May 9, 2012).

93. *Id.* at *9.

94. *Id.*

95. *Id.*

96. MACLIN, *supra* note 4, at xii.

97. Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051-54 (1987).

98. *Id.* at 1052 (alteration in original).

99. *Id.* at 1051.

100. *See id.*

101. *People v. Defore*, 242 N.Y. 13, 21 (1926).

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Tom C. Clark later responded that “[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”¹⁰²

Under *Batista*, officers may rely on any non-binding legal authority when conducting a search or seizure, which opens the door for future courts to broaden the good-faith exception to almost limitless bounds. Ultimately, this effectively creates an unworkable expansion of the good-faith exception—one that could potentially narrow the exclusionary rule to the point where it could no longer truly deter illicit police conduct. Unlike the officers in *Davis*, who “scrupulously adhered to governing law,”¹⁰³ the officers in *Batista* acted without firm authority.¹⁰⁴ Such an expansion fosters the elimination of the exclusionary rule and thereby reduces the fundamental rights afforded by the Fourth Amendment to mere rhetoric.

102. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

103. *Davis v. United States*, 131 S. Ct. 2419, 2434 (2011).

104. *United States v. Batista*, No. 5:12cr11, 2013 WL 782710, at *7 (W.D. Va. Feb. 28, 2013).