Davis v. United States: Retroactivity and the Good-Faith Exception to the Exclusionary Rule

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Summary

In *Davis v. United States*, the Supreme Court will consider whether evidence that was seized in violation of the defendant's Fourth Amendment rights is admissible at trial because the police seized the evidence in good-faith reliance on then-controlling case law. The petitioner in that case, Willie Davis, was arrested after a traffic stop. Following his arrest, the police searched the passenger compartment of the car in which he had been riding. At the time of the search, the police were acting in conformity with controlling Eleventh Circuit precedent. However, after Davis was convicted and had filed an appeal, the Supreme Court ruled that this type of search incident to arrest was unconstitutional under the Fourth Amendment. Following that ruling, the Eleventh Circuit held that despite the new standard making the underlying search unconstitutional, the evidence is admissible under the good-faith exception to the exclusionary rule. In similar cases, the Sixth and Tenth Circuits reached the same conclusion, but the Ninth Circuit has held that if a search is deemed unconstitutional under new Supreme Court precedent, the evidence seized during that search must be excluded.

When the exclusionary rule applies, the evidence obtained in an unconstitutional search is suppressed at trial. The exclusionary rule is a pragmatic doctrine intended to deter Fourth Amendment violations, and it only applies when (1) there is no applicable exception to its operability, and (2) the benefits of evidentiary suppression outweigh its burdens on the justice system. The good-faith exception is one of several exceptions to the exclusionary rule's operability. One exception to the exclusionary rule is the good-faith exception, under which unconstitutionally obtained evidence may be introduced at trial if it was seized in "good-faith." That is, such evidence is admissible when its seizure did not constitute deliberate and culpable police misconduct.

On his appeal to the Supreme Court, Davis advanced several theories to explain why the Eleventh Circuit erred in applying the good-faith exception—rather than the exclusionary rule—to the evidence in his case. One theory is that the Eleventh Circuit incorrectly weighed the costs and benefits of applying the exclusionary rule. Namely, Davis contends that the Eleventh Circuit erred by failing to consider that the benefits of the exclusionary rule's application included both the deterrence of unconstitutional police searches and the development of Fourth Amendment law.

Davis also argues that the exclusionary rule's application to his case is mandated by the rule of retroactivity. This rule, also known as the retroactivity doctrine, is based in Article III of the U.S. Constitution, which the Supreme Court has held requires the retroactive application of any new Fourth or Fifth Amendment decision to all cases that were not yet final when it was announced.

Congress has occasionally considered legislation codifying the exclusionary rule or its good-faith exception. The scope of Congress's authority to enact or modify exclusionary rule jurisprudence depends on the extent to which the exclusionary rule is constitutionally required. Although the Supreme Court has repeatedly characterized the exclusionary rule as having no constitutional basis, it has firmly grounded the retroactivity doctrine in Article III of the Constitution. Accordingly, *Davis* presents the Supreme Court with a new opportunity to address the extent to which the exclusionary rule may—or may not—be constitutionally required.

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Introduction

The Fourth Amendment to the U.S. Constitution provides a right against "unreasonable searches and seizures." It secures privacy interests in one's person and property against unreasonable incursions by state and federal officials. However, the parameters of Fourth Amendment protection have significantly changed during the last century and continue to evolve in response to Supreme Court decisions. As the Court's Fourth Amendment jurisprudence shifts, so does its approach to related questions, such as when and how should a court remedy a Fourth Amendment violation and when should it retroactively apply a newly announced rule of Fourth Amendment interpretation.

For example, the courts have struggled to articulate the reach of a legal remedy for Fourth Amendment violations. Although the Supreme Court has often framed civil liberty and the rule of law as requiring that a legal remedy accompany every legal right,[1] the Court did not announce a remedy for Fourth Amendment violations until 1914. Then, in *Weeks v. United States*,[2] the Court held that unconstitutionally obtained evidence could be excluded at trial to remedy a Fourth Amendment violation.[3] This remedy, subsequently termed the "exclusionary rule," initially only applied to Fourth Amendment violations by federal actors,[4] but, in 1961, the Court extended it to violations by state actors as well.[5]

The scope of the exclusionary rule has narrowed since these early decisions. The Supreme Court has, for one, articulated it as a pragmatic doctrine that only applies when the benefits of evidentiary suppression exceed its costs to the justice system. The Court has also articulated several exceptions to the exclusionary rule's applicability. Arguably the most significant of these exceptions is the "good-faith exception," under which the exclusionary rule is inapplicable to evidence that was seized illegally, but in "good-faith," by law enforcement officers.[6] In 2009, the Court appeared to broaden the good-faith exception, holding that it applied to all searches and seizures that were not the product of deliberate and culpable police misconduct.[7]

In *Davis v. United States*, the Supreme Court will consider the scope of the exclusionary rule—and its good-faith exception—yet again. The petitioner in that case, Willie Davis, was arrested after a traffic stop. Following his arrest, the police searched the passenger compartment of the car in which he had been riding.[8] This type of search incident to arrest was permissible under the widely accepted interpretation of the Supreme Court's decision in *New York v. Belton*.[9] Indeed,

[1] *See* Marbury v. Madison, 5 U.S. 137, 163 (1803).

[2] 232 U.S. 383 (1914).

[3] *See id.* at 393 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution.").

[4] Wolf v. Colorado, 338 U.S. 25 (1949).

[5] Mapp v. Ohio, 367 U.S. 643 (1961).

[6] United States v. Leon, 468 U.S. 897, 922 (1984).

[7] United States v. Herring, 555 U.S. 135, 129 S. Ct. 695 (2009).

[8] United States v. Davis, 598 F.3d 1259, 1261 (11th Cir. 2010).

[9] 453 U.S. 454 (1981). The Supreme Court described the view that *Belton* permitted this type of car search as "widely accepted" and the "predominant" interpretation of the federal courts of appeals. Arizona v. Gant, 129 S. Ct. 1710, 1718-19, n.11 (2009).

the police in *Davis* were acting in conformity with controlling Eleventh Circuit precedent. However, after the search was conducted, the Supreme Court ruled that this type of search incident to arrest was unconstitutional under the Fourth Amendment in *Arizona v. Gant*.[10]

Acknowledging that the search of Davis's car was unconstitutional under the new standard, the Eleventh Circuit nevertheless held that the gun seized was admissible evidence under the good-faith exception, and the Supreme Court granted certiorari to review the Eleventh Circuit's decision. The Court's ruling is expected to resolve a split between the circuits. The Sixth and Tenth Circuits have, like the Eleventh Circuit, held that a search may be deemed unconstitutional under a newly announced Fourth Amendment judicial rule without necessitating the exclusion of the evidence in cases arising prior to the new interpretation.[11] However, the Ninth Circuit has reached the opposite conclusion, holding that if a search is deemed unconstitutional under new Supreme Court precedent, the evidence seized during that search must be excluded.[12]

The Exclusionary Rule and Its Good-Faith Exception

The exclusionary rule is used to suppress unconstitutionally seized evidence so as to deter Fourth Amendment violations.[13] It was initially conceived as a constitutionally required remedy for—rather than a deterrent of—illegal searches and seizures, but recent Supreme Court cases have emphasized that the exclusionary rule is a remedy that is not constitutionally required.[14] This shift in judicial thinking may reflect a move toward textualism on the Supreme Court as well as concern that the exclusionary rule impedes the criminal justice system by barring probative evidence of a criminal defendant's guilt from admission at trial.[15]

The Supreme Court has narrowed the reach of the exclusionary rule over the years. Today, the exclusionary rule is applied only if the benefits of its application—primarily its deterrent effect on unconstitutional police conduct—outweigh the costs to law enforcement and the administration of justice.[16] The Court has also articulated several exceptions to the exclusionary rule's operability. Arguably the good-faith exception is the most significant exception to the exclusionary rule. It permits the unconstitutionally obtained evidence to be introduced at trial when it was seized in "good-faith" by law enforcement officers.[17] As it was initially articulated in *United States v. Leon*,[18] the good-faith exception seemed to apply only when the police acted in "objectively reasonable reliance" on the mistake of someone who was *outside* the police force.[19] However, the

[10] 129 S. Ct. 1710 (2009). *See also Davis*, 598 F.3d at 1261-62.

[11] United States v. Buford, No. 09-5737, 2011 U.S. App. LEXIS 2488 (6th Cir. February 10, 2011); United States v. McCane, 573 F.3d 1037 (10th Cir. 2009).

[12] United States v. Gonzalez, 598 F.3d 1259 (9th Cir. 2010).

[13] Herring v. United States, 555 U.S. 135, 129 S. Ct. 695, 700 (2009).

[14] *Id.*

[15] Judge Cardozo, an early and lifelong critic of the exclusionary rule, famously described the rule's effect as "the criminal is to go free because the constable has blundered ... The pettiest peace officer [has] it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious." People v. Defore, 242 N.Y. 13, 24-25 (1926).

[16] United States v. Leon, 468 U.S. 897, 909-13 (1984).

[17] *Id.* at 922.

[18] 468 U.S. 897 (1984).

Supreme Court has since extended the good-faith exception to good-faith reliance on the mistake of a police department employee.[20]

In its most recent decision on the good-faith exception, *United States v. Herring*, the Court held in 2009 that "to trigger the exclusionary rule, police conduct must be sufficiently *deliberate* that exclusion can meaningfully deter it, and sufficiently *culpable* that such deterrence is worth the price paid by the justice system."[21] Supporters of the exclusionary rule criticized the decision for undermining the Fourth Amendment by expanding the good-faith exception to the exclusionary rule. However, the Court wrote that "the flagrancy of the police misconduct" has always "constituted an important step in the calculus" of the exclusionary rule,[22] and it characterized the exclusionary rule's evolution as a series of cases excluding evidence obtained as a result of flagrant or deliberate violations of suspects' rights.[23]

Congress has occasionally considered supplementing the Supreme Court's exclusionary rule jurisprudence with legislation codifying the exclusionary rule or the good-faith exception. For example, in 1968, Congress codified the exclusionary rule to a limited extent with respect to information obtained illegally through interceptions of certain wire or oral communications.[24] More recently, the 104th Congress considered codifying a good-faith exception to the exclusionary rule in the Exclusionary Rule Reform Act of 1995.[25] Notably, Congress would not be able to curtail the exclusionary rule's application in circumstances in which it is constitutionally required. To date, the Supreme Court has not identified circumstances where the exclusionary rule is a constitutionally mandated remedy, which suggests that Congress has broad authority to act. However, the petitioner in *Davis v. United States*[26] argues that the exclusionary rule is constitutionally required by the circumstances presented in that case.

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[19] *See, e.g.*, Illinois v. Krull, 480 U.S. 340, 349-50 (1987) (applying the good-faith exception to evidence obtained in a police search that was authorized by a statute that was found unconstitutional after the search was committed); *Leon*, 468 U.S. at 921 ("Penalizing the *officer* for the *magistrate*'s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." (emphasis added)).

[20] *See* United States v. Herring, 555 U.S. 135, 129 S. Ct. 695 (2009). This ruling was controversial and generated a public debate about the appropriate application of the exclusionary rule. *See, e.g.*, David Stout, *Justices Say Evidence Is Valid Despite Police Error*, N.Y. TIMES A4 (January 15, 2009); Adam Liptak, *Justices Ease Limits on Evidence*, N.Y. TIMES A17 (January 15, 2009) (Late Ed. (East Coast)).

[21] *Herring*, 129 S. Ct. at 702.

[22] *Id.* at 701 (quoting *Leon*, 468 U.S. at 911).

[23] *See id.* at 702 (describing the two foundational cases in exclusionary rule jurisprudence, *Weeks* and *Mapp*, as being cases providing redress to defendants whose rights were flagrantly violated by government officials).

[24] *See, e.g.*, Omnibus Crime Control and Safe Streets Act, P.L. 90-351, § 802 (1968) *codified at* 18 U.S.C. § 2515 ("Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding ... if the disclosure of that information would be in violation of this chapter.") *See also* H.Rept. 106-932, at 15 (2000) (describing 18 U.S.C. § 2515 as the "statutory exclusionary rule" that relieves individuals from having to litigate whether certain information was gathered in an "unreasonable search or seizure under the Fourth Amendment").

[25] Exclusionary Rule Reform Act of 1995, H.R. 666, 104th Cong. (1995) (as passed the House) ("Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the [F]ourth [A]mendment ... if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the [F]ourth [A]mendment").

[26] United States v. Davis, 598 F.3d 1259 (11th Cir. 2010).

Eleventh Circuit's Decision in *United States v. Davis*

In *United States v. Davis*,[27] the Eleventh Circuit held that evidence seized in conformity with then-controlling precedent is admissible at trial under the good-faith exception to the exclusionary rule. The court distinguished between its assessment of whether the defendant's Fourth Amendment rights had been violated and whether the exclusionary rule should be applied to remedy that violation, stating that the two questions are separate and distinct.[28]

The court began its analysis by considering whether the police had violated Davis's Fourth Amendment rights by searching the passenger compartment of the car incident to his arrest.[29] In doing so, it noted that although the police were indeed acting in accordance with controlling Eleventh Circuit precedent when they conducted the search, that precedent had been subsequently overturned. Therefore, under the "retroactivity doctrine," the search was unconstitutional because there could "be no serious dispute" that it violated the "new" Fourth Amendment rule.[30]

The court then quoted the Supreme Court: "[w]hether the exclusionary sanction is appropriately imposed in a particular case," it wrote, "is an 'issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'"[31] From this, the Eleventh Circuit concluded that a new Fourth Amendment rule could be applied "retroactively"—that is, to a case that was not yet final when the new rule was announced—without triggering the exclusionary rule.[32] Accordingly, the court applied *Herring*'s "deliberate" and "culpable" conduct test to determine whether the good-faith exception to the exclusionary rule was applicable.[33]

The Eleventh Circuit could not find sufficient evidence of deliberate culpability by the police and consequently concluded that exclusion would do little to deter similar unconstitutional searches.[34] Rather than a deliberate violation of the law, the court found that the police officer's reliance on controlling Eleventh Circuit precedent was deliberate *adherence* to the law.[35] It expressed concern that exclusion of the evidence seized in these circumstances would, instead of deterring future violations, penalize the police officer for taking the initiative to both understand and comply with precedent.[36]

However, the Eleventh Circuit expressly confined its holding to a police officer's good-faith reliance on clear and unambiguous precedent.[37] The court stated that it was important to maintain an "incentive to err on the side of constitutional behavior" and to discourage police from adopting

[27] 598 F.3d 1259 (11th Cir. 2010).

[28] *Id.* at 1263 (citing *United States v. Leon*, 468 U.S. 897 (1984)).

[29] *Id.* at 1263-64.

[30] *Id.* at 1263.

[31] *Id.* (quoting *Leon*, 468 U.S. at 906 (quoting *Illinois v. Gates*, 462 U.S. 213, 233 (1983))).

[32] *Davis*, 598 F.3d at 1264-65.

[33] *Id.* at 1265.

[34] *Id.*

[35] *See id.* at 1265-66.

[36] *See id.*

[37] *Davis*, 598 F.3d at 1267.

a let's-wait-and-see approach to unsettled questions of Fourth Amendment law.[38] It emphasized that, at the time of the search in *Davis*, the legal validity of the police conduct was "*clear* under precedent."[39] If, however, rather than relying "on a bright-line judicial rule" establishing the search's constitutionality, the police officers had interpreted "ambiguous precedent or relied on their own extrapolations from existing case law," the Eleventh Circuit stated that it would have deemed the evidence inadmissible.[40] This conclusion would be justified, it wrote, because the police are ill-equipped to analyze precedent and answer legal questions on which reasonable minds differ.[41] Therefore, in the Eleventh Circuit's view, a police officer's attempt at such legal analysis is deliberate and culpable conduct that the courts should deter.[42]

Arguments of Petitioner in *Davis v. United States*

Having lost in the Eleventh Circuit, the defendant in *Davis*, Willie Davis, appealed the decision to the Supreme Court. In his petition on the merits, he presents two main arguments.

Benefits of Exclusionary Rule's Application Outweigh Costs

First, Davis contends that the balancing test for the exclusionary rule's operability weighs in favor of suppression of the evidence when a seizure is unconstitutional because of a change in Fourth Amendment jurisprudence. Specifically, he argues that the benefits of applying the exclusionary rule in this case outweigh the costs because its application would, in addition to deterring unconstitutional police searches, facilitate the development of Fourth Amendment law.[43]

This assertion is premised on the theory that deterrence is not the sole benefit of the exclusionary rule. Instead, the exclusionary rule has the added effect of providing an incentive to defendants to challenge police searches and, by doing so, give the courts opportunities to consider the new rule of criminal procedure and "make corrections."[44] Davis contends that this benefit outweighs the costs of excluding the evidence in his case because only exclusion will ensure that police rely on *accurate* Fourth Amendment interpretations.[45]

The government, however, characterizes Davis's argument as a departure from precedent. It argues that Supreme Court decisions on the good-faith exception establish deterrence of police misconduct as the sole function of the exclusionary rule.[46] Moreover, even if the exclusionary rule does assist the development of the law, the government contends that the cost of excluding the

[38] *Id.* at 1266-67 (quoting *United States v. Johnson*, 457 U.S. 537, 562 (1982) (quoting *Desist v. United States*, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting))).

[39] *Id.* (emphasis added).

[40] *Id.*

[41] *Id.*

[42] *Davis*, 598 F.3d at 1266-67.

[43] *See* Brief for Petitioner at 28-29, United States v. Davis No. 09-11328 (December 16, 2010).

[44] *Id.* at 9, 29-30.

[45] *Id.* at 30.

[46] Brief for Respondent at 7, 22, United States v. Davis No. 09-11328 (February 11, 2011).

evidence of Davis's crimes outweighs the value of ensuring judicial consideration of new Fourth Amendment rules.[47]

Exclusionary Rule Is Triggered by the Retroactivity Doctrine

Davis's second argument rests on the rule of retroactivity, which, he claims, mandates the exclusionary rule's application in Davis's case. According to the rule of retroactivity, or the retroactivity doctrine, Article III of the U.S. Constitution requires courts to apply any new rule for the conduct of criminal prosecutions retroactively to *all* cases that are not yet final—even when the new rule constitutes a "clear break" with the past."[48]

This doctrine is relevant in *Davis* because, while the case was on appeal to the Eleventh Circuit, the Supreme Court released *Arizona v. Gant*,[49] which repudiated the Eleventh Circuit's case law on the validity of a warrantless and suspicionless search of a car incident to the arrest of one of its passengers.[50] Under the retroactivity doctrine, the Eleventh Circuit was required to apply the new rule in *Gant*—namely that these sorts of car searches are permissible only if either the arrestee could reach the passenger compartment at the time of the search or it is reasonable to believe the vehicle contained evidence of the arrestee's offense[51]—to *Davis*, even though the *Gant* rule marked a "clear break" with federal circuit precedent. However, Davis contends that the retroactivity doctrine also required the Eleventh Circuit to apply the exclusionary rule.[52]

This argument, unlike Davis's exclusionary rule argument, has roots in the U.S. Constitution.[53] For the past 30 years, the Supreme Court has consistently stated that Article III of the Constitution requires courts to give a new Fourth Amendment rule retroactive effect.[54] In its seminal case on retroactivity, *Griffith v. Kentucky*,[55] the Court found that if courts were not required to apply their best understanding of the current state of the law to all cases on appeal, they would both overstep their bounds and abdicate their responsibilities under Article III.[56] In that case, the Court emphasized the courts, as arbiters of justice, must treat similarly situated defendants the same.[57]

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[47] *See id.* at 7-8.

[48] *Id.* at 328.

[49] 129 S. Ct. 1710 (2009).

[50] *Davis*, 598 F.3d at 1261-62. *See also Gant*, 129 S. Ct. at 1723-24 (declining to overrule *Belton* in its entirety but holding that searches conducted pursuant to a "broad reading" of that decision are unconstitutional).

[51] *Id.* at 1723 (emphasis added).

[52] Brief for Petitioner at 17, United States v. Davis No. 09-11328 (December 16, 2010).

[53] *See id.* at 36.

[54] *See* Griffith v. Kentucky, 479 U.S. 314, 326-27 (1987).

[55] 479 U.S. 314 (1987).

[56] *Id.* at 322-23. According to the Court in *Griffith*, Article III of the Constitution grants the judiciary certain enumerated powers (e.g., the power to adjudicate cases and exercise judicial review) but also restricts the judiciary's authority to the powers that it enumerates. *See id.* The Court wrote that Article III therefore required the judiciary to apply its best understanding of the current state of the law to *all* cases on appeal so as to (1) prevent the lower federal courts from abdicating their responsibility to develop and interpret the law, and (2) reserve for the legislature the sole power to examine the wisdom of applying a particular rule of law to a particular set of facts. *Id.*

[57] *Griffith*, 479 U.S. at 323 ("[S]elected application of new rules violates the principle of treating similarly situated defendants the same. As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is "the *actual inequity* that results when the Court chooses which of many similarly situated (continued...)

Davis contends that the Eleventh Circuit was wrong to distinguish between its assessment of whether the defendant's Fourth Amendment rights had been violated and whether the exclusionary rule should be applied to remedy that violation. He argues that the retroactivity doctrine mandates that both the new Fourth Amendment rule and the remedy for violations of that rule be given retroactive effect.[58] This, his petition states, is "established practice" in the case law on retroactivity[59] and was affirmed by the Supreme Court's 2008 decision in *Danforth v. Minnesota*.[60]

Specifically, Davis quotes the Court's *Danforth* opinion for stating that the retroactivity doctrine "is about remedies, not rights" and can be characterized as a question of "redressability."[61] In his view, if retroactivity is about redress and remedy, then the remedy of exclusion must be applied retroactively *in addition to* the new rule of Fourth Amendment procedure. However, in its petition on the merits of Davis's case, the government contends that Davis misconstrues this language in *Danforth*. The government contends that *Danforth* included this language to emphasize that the retroactivity doctrine determines whether a defendant is *eligible* to seek redress, not whether a defendant is *entitled* to redress.[62] The government also points out that the Supreme Court did not expressly apply the exclusionary rule to the defendant in the case which announced the new Fourth Amendment rule that is being applied in Davis's case.[63]

Implications for Congressional Action

Congress has occasionally debated the need to codify the exclusionary rule, or, alternatively, the good-faith exception to the exclusionary rule.[64] Over the years, some Members have expressed concern that the exclusionary rule substantially interferes with law enforcement and the conviction of criminal defendants against whom there is probative evidence that they have committed a crime.[65] However, congressional efforts to curtail the exclusionary rule's reach have

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defendants should be the chance beneficiary" (quoting *Johnson*, 457 U.S. at 562) (emphasis in original)).

[58] Brief for Petitioner at 17, United States v. Davis No. 09-11328 (December 16, 2010).

[59] *Id.* at 9, 16, 22, United States v. Davis No. 09-11328 (December 16, 2010).

[60] 552 U.S. 264 (2008).

[61] *Id.* at 271, 271 n.5.

[62] Brief for Respondent at 47, United States v. Davis No. 09-11328 (February 11, 2011).

[63] *Id.* at 47-48 (describing the petitioner's view that the Supreme Court's disposition in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), mandates the exclusionary rule's availability to his case is unfounded because the Court had no occasion to address the exclusionary rule in *Gant*). *But see* United States v. Gonzalez, 598 F.3d 1259, 1099-1100 (9th Cir. 2010) (Fletcher, J., concurring) (suggesting that the Supreme Court *did* address—and apply—the exclusionary rule in *Gant*).

[64] *See, e.g.*, Electronic Communications Privacy Act of 2000, H.R. 5018, 106th Cong. (2000) (proposing to amend the "statutory exclusionary rule" to require the exclusion at trial of evidence illegally intercepted electronically); Exclusionary Rule Reform Act of 1995, H.R. 666, 104th Cong. (1995) (proposing to enact a good-faith exception to the exclusionary rule).

[65] *See, e.g.*, 141 Cong. Rec. H1314-15 (daily ed. February 7, 1995) (statement of Rep. Diaz-Balart) (advocating for the enactment of a good-faith exception to the exclusionary rule and describing a case that was thrown out because the search, which yielded 240 pounds of cocaine in the defendant's car, was deemed unconstitutional and the exclusionary rule was applied).

encountered resistance over concerns that, in the name of fighting crime, these efforts will result in the violation of the rights of innocent people.[66]

Congress may always guarantee a greater right than the Constitution demands as a minimum, which means that Congress may always expand or statutorily require the remedy of exclusion. Congress may not, however, curtail or codify exceptions to a legal remedy that is constitutionally required.[67] Over the past several decades, the Supreme Court has characterized the exclusionary rule as having no constitutional basis. In doing so, it has enhanced Congress's authority to curtail the exclusionary rule's reach, which some Members of Congress proposed doing with the Exclusionary Rule Reform Act of 1995.[68] However, the outcome of *Davis v. United States* has the potential to restrict or expand Congress's authority.

Congress's authority will be restricted if the Court agrees with Davis that the Constitution requires the exclusionary rule's application in cases where a new Fourth Amendment rule is being given retroactive effect. This outcome would seem at odds with the Court's exclusionary rule precedents, which suggest that the exclusionary rule has *no* constitutional basis. Accordingly, it may be viewed as complicating the already complex body of case law on the exclusionary rule. It would also prohibit Congress from making the exclusionary rule inoperable in cases where it is to be applied retroactively.

Alternatively, the Court may use *Davis* to abolish the exclusionary rule except in those cases when it is statutorily required.[69] While this outcome would mark significant departure from precedent, it is one that some commentators believe already has the support of at least four Supreme Court justices.[70] Such a decision would give Congress the constitutional authority to bar the exclusionary rule in federal cases (if Congress believed that doing so was still desirable), but legislation along these lines might carry implications for the operability of "state exclusionary rules"[71] and raise questions about whether and how Fourth Amendment violations should be deterred and/or remedied in the future.[72]

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[66] *See, e.g.*, *id.* at H1315 (statement of Rep. Beilenson) (contending that, by enacting a good-faith exception to the exclusionary rule, Congress would "break our Constitution's promise" and eliminate innocent people's primary protection against illegal searches and seizures), H1318 (statement of Rep. Schumer).

[67] *See* Dickerson v. United States, 530 U.S. 428, 444 (2000).

[68] Exclusionary Rule Reform Act of 1995, H.R. 666, 104th Cong. (1995).

[69] Justice Scalia asked a Department of Justice attorney about this option during oral arguments in *United States v. Davis*. He stated "[W]hy don't we just abolish the exclusionary rule? That would be really simple. Whatever evidence tends to prove the truth comes in." Transcript of Oral Argument at 32, United States v. Davis (2011) No. 09-11328, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-11328.pdf.

[70] *See, e.g.*, Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, January 30, 2009 (suggesting that Chief Justice Roberts, Justice Alito, Justice Scalia, and Justice Thomas are all "certain votes" for the elimination of the exclusionary rule).

[71] *See, e.g.*, State v. Cardenas-Alvarez, 25 P.3d 227, 231-32 (N.M. 2001) (finding that section 10 of Article II of the New Mexico Constitution affords greater protection from unreasonable searches and seizures than the Fourth Amendment of the U.S. Constitution and the state exclusionary rule mandated to effectuate that right). *See also* Robert M. Bloom and Hillary Massey, *State Courts: Exclusion of Evidence Obtained Lawfully by Federal Agents*, 79 U. COLO. L. REV. 381 (2008) (discussing the rules of federalism in the context of exclusionary rule jurisprudence).

[72] *See Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961); *Elkins v. United States*, 364 U.S. 206, 217 (1960) (describing the exclusionary rule's deterrent effect as the "only effectively available way" to compel respect for Fourth Amendment rights). There is a substantial body of scholarly literature on the question of whether there are "effectively available" alternatives to the exclusionary rule, and, if so, what they might be. *See, e.g.*, Davis A. Harris, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149 (continued...)

It is also possible that, instead of reaching a decision with significant implications for Congress, the Supreme Court focuses its analysis in *Davis* on the scope of the good-faith exception and the definition of "deliberate" and "culpable" conduct under *Herring*. In doing so, the Court may assess, as the Eleventh Circuit did in *Davis*, what police are expected—and equipped—to accomplish as law enforcement officers.[73] However, as Davis points out in his brief, this outcome could also be characterized as a departure from the case law governing retroactivity. It might also be perceived as complicating the Court's exclusionary rule jurisprudence, which has already been labeled a "Gordian knot" and difficult for police officers, who must make quick decisions about the legality of their actions, to apply in the field.[74]

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(2009); Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L. J. 1509 (2008); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L. J. 1361 (1981); Francis A. Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule*, 66 J. CRIM. L. & CRIMINOLOGY 1 (1975); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443 (2000).

[73] *See supra* notes footnote 37-42 and accompanying text (discussing the Eleventh Circuit's statement that its decision that the police were acting in good-faith rests on the fact that they were applying *clear*, rather than ambiguous, precedent because police are ill-equipped to conduct the legal analysis necessary to apply ambiguous precedent).

[74] *See, e.g.*, Orin Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L. J., 40-42 (forthcoming 2011), *available at* http://ssrn.com/abstract=1675115.