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Evidence: The Good Faith Exception to the Exclusionary Rule

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EVIDENCE: THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE—*United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 946 (1981).

INTRODUCTION

The Fifth Circuit Court of Appeals, in *United States v. Williams*,[1] strictly limited the scope of the exclusionary rule in criminal proceedings by announcing acceptance of the good faith exception.[2] The exclusionary rule has its roots in the protection of rights guaranteed by the fourth amendment to the United States Constitution.[3] The first case to expound on these fourth amendment rights was *Boyd v. United States*.[4] The more concrete origins of the exclusionary rule, however, came from the United States Supreme Court's opinion in *Weeks v. Unites States*.[5]

The *Weeks* Court refused to sanction the federal government's use of illegally obtained evidence at trial.[6] The Court stated: "The tendency of those who execute the criminial laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the constitution."[7] Justice Day's majority opinion strongly

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1. 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 946 (1981).

2. The court's holding in Part II of the opinion was:

> [W]e now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in a reasonable, though mistaken, belief that they are authorized.

Id. at 840. The exclusionary rule prohibits the use of evidence seized in violation of a defendant's fourth amendment rights. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

3. The fourth amendment provides:

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

U.S. CONST. amend. IV. For an in-depth commentary on the fourth amendment *see*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

4. 116 U.S. 616 (1886). In *Boyd*, the federal government initiated proceedings for the forfeiture of goods alleged to have been illegally imported. The Supreme Court banned the compulsory production of the defendant's private books and papers because such a production was the equivalent of compelled self-incrimination and unreasonable search and seizure, violations of the fourth and fifth amendments. *Id.* at 634-35.

5. 232 U.S. 383 (1914).

6. *Id.* at 398.

7. *Id* at 392. This rationale gave rise to a purpose of the exclusionary rule which was later termed "the imperative of judicial integrity" in Elkins v. United States, 364

implies the exclusionary remedy is part and parcel of fourth amendment guarantees even though the amendment makes no such explicit provisions.[8] Under Justice Day's interpretation, however, the exclusionary provision applied only to be federal government and its agencies; the Court did not apply it to activities of the states.[9]

In *Wolf v. Colorado*[10] the Supreme Court enforced core fourth amendment rights against the states through the Due Process Clause of the fourteenth amendment.[11] The states were not, however, required to adopt the exclusionary rule.[12] States were left free to determine appropriate safeguards for fourth amendment rights. The Court soon found itself confronted, however, with several cases of serious fourth amendment violations by state officers.[13] Under a theory of "increas-

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U.S. 206 (1960). The use of judicial integrity as a significant purpose for the exclusionary rule has since diminished. *See* note 58 and accompanying text *infra*. For a thorough analysis of the judicial integrity rationale, *see*, Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973).

8. 232 U.S. 393-94, 398. Whether the exclusionary rule is of constitutional status has been addressed by many authors. *See, e.g.*, Cann and Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 HOW. L.J. 299 (1980); Kamisar, *Is the Exclusionary Rule an Illogical or Unnatural Interpretation of the Fourth Amendment?*, 62 JUD. 66 (1978); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUD. 214 (1978).

9. 232 U.S. at 398. This refusal to circumscribe the activities of state officials began the operation of what was termed the "silver platter doctrine" in Lustig v. United States, 338 U.S. 74, 78-79 (1949). In essence, the silver platter doctrine legitimatized the use of illegally obtained evidence in federal courts, so long as the evidence was illegally seized by state police only. The silver platter doctrine was finally rejected by the Court in Elkins v. United States, 364 U.S. 206 (1960).

10. 338 U.S. 25 (1949), *overruled*, 367 U.S. 643, 655 (1961).

11. The Court termed the security of privacy against arbitrary instrusions by police to be at the core of the fourth amendment, basic to a free society, and, therefore, implicit in the concept of ordered liberty. *Id.* at 26 (citing, Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

12. The *Wolf* Court was impressed that even after the *Weeks* decision a majority of states had not adopted the exclusionary rule. The Court thought it best to allow the states to decide how to enforce the right against unreasonable search and seizure; especially since the exclusionary rule was a matter of "judicial implication." 338 U.S. at 28-29. The same day *Wolf* was decided, the Court approved the silver platter doctrine in *Lustig v. United States, see* note 9 *supra*.

13. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (in which the Court reversed the District Court of Appeals and excluded evidence obtained by state officers who had forced the defendant to have his stomach pumped); Irvine v. California, 347 U.S. 128 (1954) (in which the Court affirmed the lower court's decision to allow the use of evidence obtained from repeated illegal entries of state officers into defendant's home to install and relocate a secret microphone); Breithaupt v. Abram, 352 U.S. 432 (1957) (in which the Court affirmed a lower court's admission of evidence obtained when state police took a blood sample from an unconscious person who had been involved in a fatal auto accident).

ing misery,"[14] the harsh results of these cases forced the Court to reasses state application of the exclusionary rule.

The Supreme Court began this reassessment in *Elkins v. United States*.[15] Though still not enforcing the exclusionary rule on the states, the Court rejected the silver platter doctrine[16] because it frustrated states' efforts "to assure obediance to the Federal Constitution."[17] The *Elkins* court advanced two primary purposes for the exclusionary rule: (1) to deter violations of constitutional guarantees by removing the incentive to disregard them,[18] and (2) to further "another consideration - the imperative of judicial integrity."[19]

The next major case to reconcile disparities between State and Federal application of the exclusionary rule was *Mapp v. Ohio*.[20] In *Mapp*, the Court overruled *Wolf*, holding the exclusionary rule applied to the states through the Due Process Clause of the fourteenth amendment.[21] A basis for the holding was the Court's view that the exclusionary rule was an essential part of both the fourth and fourteenth amendments.[22] The *Mapp* Court relied on deterrence as the major justification for the exclusionary rule,[23] but also recongized the imperative of judicial integrity in such proceedings.[24]

The constitutional backing of the exclusionary rule was later withdrawn by the Court in *United States v. Calandra*.[25] In *Calandra*, the Court held a grand jury witness may not refuse to answer questions on the ground that the questions are based on evidence obtained from an unlawful search and seizure.[26] The Court noted the exclusionary rule "is

14. *See*, Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621, 629; Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1,7.

15. 364 U.S. 206 (1960).

16. *See* note 9 *supra*.

17. 364 U.S. at 221-24.

18. *Id.* at 217.

19. *Id.* at 222. A later decision advanced a third purpose: "assuring the people - all potential victims of unlawful government conduct - that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). This not a statement of the deterrent function because the focus is on the effect of exclusion upon the public rather than the police. 1 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT §1.1(f) (1978).

20. 367 U.S. 643 (1961).

21. *Id.* at 655.

22. *Id. See* note 8 *supra*.

23. *Id.* at 656.

24. *Id.* at 660.

25. 414 U.S. 338 (1974).

26. *Id.* at 338, 342-55.

a judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[27] The Court viewed the rule's prime purpose as deterrence of future unlawful police conduct.[28]

The interest in the purposes of the exclusionary rule is more than pedagogical concern. The courts' perception of the purposes of the rule will determine its future scope and application. The *Williams* court used the sole purpose of deterrence as established in *Calandra* and subsequent cases[29] for the basis of its decision. Consequently, the Fifth Circuit has severely restricted the scope and application of the exclusionary rule.

FACTS AND DECISION

In 1977, Jo Ann Williams was indicated in the Northern District of Georgia on two counts of possession of heroin with intent to distribute.[30] Williams moved to suppress all evidence of the heroin.[31] She contended her arrest was unlawful,[32] therefore, evidence of the heroin

27. *Id.* at 348. If the exclusionary rule is not a constitutional right, there is some question whether it may be imposed on the states as a remedial rule. By categorizing the rule as a judicially created remedial device, it may be argued that the states should be free to substitute their own remedies. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 650-51 (1978).

28. 414 U.S. at 347.

29. *E.g.*, Michigan v. DeFillippo, 443 U.S. 31 (1979) (in which the Court admitted evidence seized in a good faith arrest for violation of a law later declared unconstitutional); Stone v. Powell, 428 U.S. 465 (1976) (in which the Court admitted evidence unlawfully seized by a state criminal enforcement officer in a federal civil proceeding); United States v. Peltier, 422 U.S. 531 (1975) (in which the Court admitted evidence seized in a good faith border search under a statutory construction that was subsequently held unconstitutional); Michigan v. Tucker, 417 U.S. 433 (1974) (in which the Court admitted evidence obtained in good faith but without proper Miranda warnings). These cases will be discussed in light of the *Williams* court's reliance on them in the ANALYSIS section of this Note.

30. 622 F.2d at 833. Williams was indicted for violating the Controlled Substances Act, 21 U.S.C. § 841(a)(1). One count was based on the heroin found on Williams' person and the other was on the heroin found in her luggage. 622 F.2d at 835.

31. 622 F.2d at 835.

32. *Id.* Williams based her argument that her arrest was invalid on 21 U.S.C. § 878(3), which describes the power of Drug Enforcement Agency personnel to make warrantless arrests. 622 F.2d at 835.

The circumstances prompting Williams' arrest stemmed from her past conviction for possession of heroin. In 1976, agent Markonni, the same DEA agent involved in the present case, arrested Williams in Toledo, Ohio for possession of heroin. Williams was convicted, but released on bond pending an appeal. She was to remain in Ohio as a condition of the order releasing her. In 1977, Markonni, on assignment at the Atlanta International Airport, recognized Williams as she departed a nonstop flight from Los Angeles. Being aware of the court order restricting Williams to Ohio, Markonni con-

seized from her person during the search made incident to that arrest should be suppressed.[33]

A magistrate heard the motion and concluded the arrest was lawful, the search incident to the arrest was proper, the search warrant was appropriately issued, and the luggage search was legal.[34] The District Court rejected the magistrate's recommendations and sustained Williams' motion, suppressing all evidence of heroin.[35] The Fifth Circuit panel affirmed.[36]

On rehearing *en banc* the Fifth Circuit reversed, holding in two parts[37] that: (1) Williams' arrest was legal and the heroin found on her person and in her luggage was lawfully seized,[38] and (2) evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized.[39]

ANALYSIS

The decision of the Fifth Circuit in *Williams* was divided into two parts.[40] The majority in Part I[41] concluded Williams' arrest for violation of court-imposed travel restrictions was legal,[42] the search of her person incident to that arrest was proper and the heroin found in her

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firmed her identification, asked her if she had permission to travel outside Ohio (to which Williams admitted she did not) and then arrested her for violating the travel restriction of her release order from the Ohio court. A search of her person made incident to the arrest uncovered a packet of heroin in her coat pocket. Williams was arrested for violation of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* Markonni then obtained a search warrant for Williams' luggage, in which he found a large quantity of heroin. 622 F.2d at 833-35.

33. 622 F.2d at 835. Williams also contended the search warrant for her luggage was invalid because its issuance was based in critical part on the information about the heroin found on her person. Accordingly, she argued, evidence of the heroin found in her luggage should be suppressed. *Id.*

34. *Id.*

35. *Id.*

36. 594 F.2d 86 (5th Cir. 1979).

37. The court termed the two dispositions "alternate resolutions", each of which had the support of a majority of the court. 622 F.2d at 833.

38. *Id.* at 839.

39. *Id.* at 840.

40. *See* note 37 and accompanying text *supra*.

41. The opinion in Part I was written by Circuit Judge Politz and concurred in by Chief Judge Coleman and Judges Godbold, Roney, Tjoflat, Rubin, Kravitch, Frank M. Johnson, Jr., Garza, Henderson, Reavley, Hatchett, Anderson, Randall, Tate and Thomas A. Clark, 622 F.2d at 833.

42. The court concluded willfull breach of a court order restricting travel, entered as a condition of release pending appeal, constitutes criminal contempt under 18 U.S.C. § 401(3), and is an offense against the United States as that term is used in 21 U.S.C. § 878(3) (Controlled Substances Act). 622 F.2d at 839.

coat pocket was lawfully seized.[43] The Part I majority also found the search warrant for Williams' luggage was validly issued and, therefore, the heroin found was the product of a lawful search and seizure.[44] Having made the foregoing findings, the majority in Part I prudently deemed it unnecessary to consider the applicability of the exclusionary rule.[45]

The thirteen judge majority in Part II[46] of the decision took the opposite tack, however, directing inquiries specifically to the applicability of the exclusionary rule.[47] The Part II majority held evidence is not to be suppressed under the exclusionary rule when it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief they are authorized.[48]

This dual holding is the initial deficiency in the court's disposition of *Williams*. The only issue, as properly addressed in Part I, is whether the Drug Enforcement Agency (DEA) agent could lawfully arrest Williams. The court unanimously agreed the arrest was lawful.[49] The Part II majority, though, continued its inquiry to decide the case even if the arrest were *not* legal. This extra step created a hypothetical issue which should not have been addressed under traditional theories of judicial self-restraint.[50]

In its justification of the good faith exception to the exclusionary rule the *Williams* court noted the rule is not coextensive with the

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43. The court concluded DEA agent Markonni was empowered to validly arrest Williams pursuant to 21 U.S.C. § 878(3). 622 F.2d at 839.

44. 622 F.2d at 839.

45. *Id.*

46. The opinion in Part II was written by Circuit Judges Gee and Vance and concurred in by Chief Judge Coleman and Judges Brown, Ainsworth, Charles Clark, Roney, Tjoflat, Hill, Fay, Garza, Reavley and Sam D. Johnson. *Id.* at 840. Judges Coleman, Roney, Tjoflat, Garza and Reavley also concurred in the Part I opinion. *See* note 41 *supra.*

47. The court stated:

> It is our view, however, that the drugs suppressed as evidence by the trial judge and by our panel should not have been and that to suppress them was wrong, whether or not Williams' violation of a bond condition was such a crime as warranted her arrest and the consequent search of her person that revealed their presence.

Id. at 840.

48. *Id.*

49. *Id.* at 848 (Rubin, J., concurring).

50. This line of criticism was argued by Judge Rubin in his special concurrence at 622 F.2d 848. Judge Rubin argued that since the court agreed the arrest was lawful there was no reason to consider whether the evidence would have been admissible had the arrest been illegal. *Id.* Judge Hill, however, argued that Judge Rubin's reasoning was backwards. Hill argued that if evidence is admissible without regard to the legality of the arrest, the court should decline to reach and decide the latter. *Id.* at 847 (Hill, J., concurring).

fourth amendment and not a requirement of the Constitution.[51] Instead the exclusionary rule is a judge-made rule crafted to enforce constitutional requirements.[52] This interpretation is reasonable in light of recent Supreme Court decisions limiting the rule.[53]

The *Williams* court further adopted the position that the only purpose of the rule is its deterrence of future police misconduct; therefore, the rule should not be applied where the deterrence value is not present.[54] Applying this purpose to the facts in *Williams*, the court reasoned there would be no effective deterrence of future police misconduct by excluding the evidence obtained from agent Markonni's good-faith arrest.[55] Therefore, the exclusionary rule was not applied. To further support its analysis, the court compared the potential deterrent effect of excluding fruits of good-faith arrests with the deterrent effect of exclusion in the differing circumstances present in recent Supreme Court decisions in which the exclusionary rule was not applied.[56] The court

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51. *Id.* at 841.

52. *Id.*

53. The court relied on a series of recent Supreme Court decisions: Michigan v. DeFillippo, 443 U.S. 31 (1979) (Court admitted evidence seized in good faith arrest for violation of a law later declared unconstitutional); United States v. Caceres, 440 U.S. 741 (1979) (Court admitted evidence obtained in violation of I.R.S. regulation prohibiting electronic surveillence); United States v. Ceccolini, 435 U.S. 268 (1978) (Court admitted evidence from live witness testimony); Stone v. Powell, 428 U.S. 465 (1976) (Court held state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial); United States v. Janis, 428 U.S. 433 (1976) (Court admitted evidence unlawfully seized by a state criminal enforcement officer in a federal civil proceeding); United States v. Peltier, 422 U.S. 531 (1975) (Court admitted evidence seized in a good faith border search under a statutory construction that was subsequently held unconstitutional); Michigan v. Tucker, 417 U.S. 433 (1974) (Court admitted evidence obtained in good faith but without proper Miranda warnings); United States v. Calandra, 414 U.S. 338 (1974) (Court refused to extend the scope of the exclusionary rule to grand jury proceedings).

54. 622 F.2d at 841-42.

55. *Id.* at 842. The *Williams* court utilized the argument made by Judge Clark in his dissent to the panel opinion. 594 F.2d 86 (5th Cir. 1979). Judge Clark stated:

> No proper deterrent effect is accomplised by the suppression of the evidence in this case. . . . Since the officer whose future actions are to be affected will not realize his actions are wrongful when he is compelled to make a quick decision in an apparently valid arrest situation which complicated legal analysis may later establish to be invalid, we cannot expect him to be deterred.

Id. at 97.

56. The court compared exclusion in good faith arrests to exclusion in police actions that are attenuated in effect, United States v. Ceccolini, 435 U.S. 268 (1978); in habeas corpus petition on fourth amendment grounds, Stone v. Powell, 428 U.S. 465 (1976); in grand jury deliberations, United States v. Calandra, 414 U.S. 338 (1974); of testimony to impeach a witness, Harris v. New York, 401 U.S. 222 (1971). 622 F.2d at 842-43.

concluded the good faith exception in *Williams* was similar to these Supreme Court decisions and, hence, exclusion was not appropriate.[57]

The *Williams* court's reliance on deterrence as the sole purpose of the exclusionary rule, however, goes beyond these Supreme Court decisions. Deterrence is evolving as the primary justification for the exclusionary rule, but the imperative of judicial integrity is still considered by the Court,[58] even if relegated to a mere footnote.[59]

Empirical studies on the deterrent effect of the exclusionary rule reach no clear conclusions.[60] Yet the *Williams* court resolutely maintained that even if Williams' arrest was illegal, little, if any, deterrent effect would result from exclusion of the evidence of heroin.[61] Even, assuming, *arguendo*, Williams' arrest was illegal and the court excluded evidence of the heroin, clearly agent Markonni would reasonably be deterred from making similar illegal arrests in the future. Moreover, other police officers, after learning of the illegal arrest and subsequent exclusion, would also reasonably be deterred from making those types of illegal arrests. Exclusion in this instance, then, would reasonably result in a deterrent effect and encourage police to keep aware of the present state of the law.

The *Williams* court properly recognized two categories of good faith violations. A "good faith mistake" exists where an officer makes a judgmental error concerning the existence of facts sufficient to constitute probable cause.[62] A good faith "technical violation" exists

57. 622 F.2d at 843.

58. *See, e.g.,* United States v. Peltier, 422 U.S. 531 (1975). "Decisions of this Court applying the exclusionary rule to unconstitutionally seized evidence have referred to the 'imperative of judicial integrity' . . . although the Court has relied principally upon the deterrent purposes served by the exclusionary rule." *Id.* at 536 (citations omitted).

59. *See,* United States v. Janis, 428 U.S. 433, 458 n.35 (1976).

60. "The literature produced in consequence is more remarkable for its volume than its cogency." Allen, *supra* note 14, at 33. The problems encountered developing an empirically valid study range from properly designing an empirical test of the deterrent effect to the proper interpretation of the findings. Geographical, cultural, and administrative inconsistencies also increase the difficulty of reaching a valid general conclusion. It is no wonder that judges have "explained their decisions by asserting the deterrent effect of the (exclusionary) rule, and then have supported that effect by recourse to polemic, rhetoric and intuition." Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 754-55 (1970). *See also,* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 J. LEGAL STUDY 243 (1973); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of Spiotto Research and United States v. Calandra,* 69 NW. L. REV. 740 (1974); Canon, *The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police?,* 62 JUD. 398 (1979); Schlesinger, *The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?,* 62 JUD. 404 (1979).

61. 622 F.2d at 842 (quoting 594 F.2d at 97-98 (Clark, J., dissenting)).

62. 622 F.2d at 841 (quoting Ball, *supra* note 27, at 638-39).

when an officer relies upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled.[63] The *Williams* court subtly, but significantly, expanded the technical violation facet to include a law enforcement officer's reasonable interpretation of a statute that is later construed differently.[64]

To support this expanded definition of the technical violation facet of the good faith exception, the *Williams* court relied primarily[65] on *Michigan v. DeFillippo*[66] and *United States v. Peltier*.[67] In *DeFillippo*, the United States Supreme Court admitted evidence seized in a good faith arrest pursuant to a law later declared unconstitutional. The *DeFillippo* Court noted that, under the circumstances, an officer should not have been required to anticipate that a court would later hold the ordinance unconstitutional.[68] The officer in *DeFillippo* relied on a presently valid statute which was later declared unconstitutional by the United States Supreme Court. In *Williams* the officer relied on *his* interpretation of a presently valid statute which was *not* later declared unconstitutional. *DeFillippo* is a classic example of a technical violation because of the subsequent invalidity of the original empowering statue. *Williams* does not meet the *DeFillippo* standard for technical violations,[69] nor, interestingly enough, does *Williams* meet

63. 622 F.2d at 841 (quoting Ball, *supra* note 27).

64. 622 F.2d at 843.

65. The court also used two Fifth Circuit cases, United States v. Carden, 529 F.2d 443 (5th Cir. 1976) (in which the court sustained the admission of evidence derived from a good-faith arrest made pursuant to a statute subsequently declared unconstitutional); and United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971) (in which the court admitted evidence obtained from a good-faith arrest pursuant to a statute later declared invalid).

66. 443 U.S. 31 (1979). DeFillippo was arrested for violation of an ordinance allowing a police officer to stop and question an individual if he has reasonable cause to believe the individual's behavior warrants further investigation. The ordinance further provided that it was unlawful for any person so stopped to refuse to identify himself. In a search incident to the arrest, drugs were discovered on DeFillippo's person. *Id.* at 33-34.

67. 422 U.S. 531 (1975). Peltier was stopped in his automobile seventy miles from the Mexican border by a roving border patrol pursuant to the Immigration and Nationality Act of 1952. The Act authorized warrantless searches within a reasonable distance from any external boundary of the United States. Regulations were promulgated fixing the reasonable distance at within one hundred air miles of the United States border. In the time between the initial search and the final determination of *Peltier*, the Court invalidated the existing definition of reasonable distance in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). 422 U.S. at 532-33, 541-42.

68. 443 U.S. at 37-38.

69. The two Fifth Circuit cases relied on by the *Williams* court, *Carden* and *Kilgen*, are also examples of the technical violation facet and involve the subsequent invalidity of the original empowering statute. *See* note 65 *supra*. For the same reasons as with *DeFillippo*, these cases do not provide support for *Williams* to be classified in the technical violation facet of the exclusionary rule.

the subtly expanded definition for technical violations proposed by the same court.[70]

Crucial distinctions also exist between *Williams* and *Peltier*. In *Peltier*, the Court admitted evidence seized in a warrantless, yet good-faith, border search under a statutory constuction that was subsequently held unconstitutional. At the time of their actions, the enforcement officials were acting in accordance with administrative regualtions which had been *judicially* approved.[71] In *Williams*, agent Markonni acted on *his own* interpretation of a federal statute, not in accordance with administrative or federal court interpretations.

In both *DeFillippo* and *Peltier* the initial arrests were legal under existing law. In *Williams*, under the hypothetical posed by the Part II majority,[72] the legality of the arrest was blithely overlooked. By refusing to apply the exclusionary rule "whether or not Williams' violation of a bond condition was such a crime as warranted her arrest"[73] the court implicitly sanctioned potentially illegal police conduct. This distinction harkens back to the imperative of judicial integrity as a purpose of the exclusionary rule. In *Peltier* the Supreme Court considered the threat to judicial integrity, noting there would be no taint if the officer's conduct was in compliance with "then prevailing constitutional norms."[74] Thus, the legality of the initial arrest, which did not concern the Part II majority in *Williams*, is an integral aspect of the good-faith technical violation facet. The court's reliance on *DeFillippo* and *Peltier* to bring *Williams* within the scope of the technical violation facet is severely misplaced.[75]

To support the good faith mistake facet of the exclusionary rule,[76] the *Williams* court relied primarily on *United States v. Janis*[77] and

70. *See* note 64 and accompanying text *supra*. The *Williams* court attempted to fit the facts of *Williams* into the technical violation facet by expanding the definition to include a reasonable interpretation of a statute that is later construed differently. The statute in *Williams* was *not*, however, later construed differently. The arrest (and, hence, agent Markonni's interpretation of the statute) was declared valid by the court. *See* notes 38 and 44 and accompanying text *supra*.

71. 422 U.S. at 541 (emphasis added).

72. *See* note 50 and accompanying text *supra*.

73. 622 F.2d at 840.

74. 422 U.S. at 536.

75. For a similar analysis of the distinctions between *Williams*, and *DeFillippo* and *Peltier see* Note, EXCLUSIONARY RULE: GOOD FAITH EXCEPTION - THE FIFTH CIRCUIT'S APPROACH IN UNITED STATES v. WILLIAMS, 15 GEORGIA L. REV. 487, 499-500 (1981).

76. *See* note 62 and accompanying text *supra* (for the definition of the good faith mistake facet of the exclusionary rule).

77. 428 U.S. 433 (1976). State police had seized wagering records and cash from Janis. A state court invalidated the search warrant, suppressing the evidence. The

Michigan v. Tucker.[78] In *Janis*, the Court admitted evidence unlawfully seized by a state criminal enforcement officer in a federal *civil* proceeding. The Court noted "in the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state."[79] The *Janis* Court clearly addressed exclusion in civil proceedings only; thus, it provides no direct support for exclusion in federal criminal proceedings.

In *Tucker*, the Court admitted testimony of a witness located as the result of statements made by the accused during police interrogation administered in good faith, but without proper *Miranda* warnings. The *Williams* court focused on the relationship between good faith and the deterrence rationale delineated in *Tucker*, but stated "where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."[80] The Court's decision in *Tucker* however, relied on several factors in addition to good faith.[81] The Court also relied on the voluntariness of the defendant's statement and the reliability of the derivative evidence.[82] Moreover, the decision in *Tucker* possibly could have rested on retroactivity principles instead.[83] The decision in *Williams*, which relied solely on good faith, goes beyond the exception delineated in *Tucker*.

To further support the good faith mistake facet of the exclusionary rule the *Williams* court relied on *United States v. Hill*[84] and *United States v. Wolffs*.[85] In *Hill* the court admitted evidence obtained in a search pursuant to an allegedly improper warrant. In its decision the court found the searches "viable."[86] Therefore, the police in *Hill* had relied on a valid warrant from the beginning;[87] there was no good faith reliance on a defective warrant. The *Hill* court's extremely brief consideration of the exclusionary rule was incidental to the main decision

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I.R.S. assessed Janis for excise taxes on wagering and levied on the seized cash. Janis filed a refund suit and moved to suppress the evidence. *Id.* at 434-38.

78. 417 U.S. 433 (1974). The police questioned Tucker after his arrest without giving full *Miranda* warnings (*Miranda* had not yet been decided). Tucker voluntarily gave information which led police to a witness who later testified against Tucker. Tucker moved to suppress the witness' statements on the ground that his identity was obtained in the improper interrogation. (Tucker's trial occurred after *Miranda* was decided) *Id.* at 435-38.

79. 428 U.S. at 447.

80. 622 F.2d at 845 (quoting 417 U.S. at 447).

81. *See* Ball, *supra* note 27, at 651-52.

82. *Id.*

83. *Id.*

84. 500 F.2d 315 (5th Cir. 1974).

85. 594 F.2d 77 (5th Cir. 1979).

86. 500 F.2d at 316.

87. *Id.* at 322.

and did not involve a significant reference to the good faith mistake facet.

In *Wolffs* the court admitted evidence obtained through collaboration of federal and state agents in violation of the Posse Comitatus Act.[88] The court refused to apply the exclusionary rule because this was an isolated violation. The *Wolffs* court was prepared to apply the exclusionary rule if there were repeated violations of the Act.[89] The issue of good faith was not addressed by the *Wolffs* court. Neither the *Hill* nor the *Wolffs* decision significantly considered the good faith mistake facet of the exclusionary rule. The *Williams* court's reliance on *Hill* and *Wolffs*, as well as *United States v. Janis* and *Michigan v. Tucker*, does not provide adequate support for adoption of the good faith mistake exception to the exclusionary rule.[90]

Aside from analytical deficiencies, the decision in *Williams* creates practical difficulties as well. Most notably, the *Williams* decision provides no clear guidelines on how to apply the good faith exception. The *Williams* court defined the good faith exception as "when an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief, the exclusionary rule will not operate."[91] The court stressed the officer's good faith belief must be grounded in objective reasonableness.[92] To demonstrate the function of objective reasonableness, though, the court used an oversimplified example[93] which provides no standard guidelines for other courts to follow. Exactly what constitutes objective reasonableness in less clear-cut situations quickly becomes a subjective determination.[94]

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88. 18 U.S.C. § 1385 (1976). The Act states: Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both. *Id.*

89. 594 F.2d at 85.

90. This same conclusion was reached in Note, EXCLUSIONARY RULE: GOOD FAITH EXCEPTION - THE FIFTH CIRCUIT'S APPROACH IN UNITED STATES V. WILLIAMS, *supra* note 75, at 501.

91. 622 F.2d at 840 (quoting Ball, *supra* note 27, at 638-39).

92. 622 F.2d at 841 n.4a. In his dissent, Judge Rubin argues that to require the officers good faith belief to be grounded in objective reasonableness suggests uneasiness with the reliability of a good faith test. *Id.* at 850 n.4.

93. *Id.* at 841 n.4a. The court used the example of how "a series of broadcast break-ins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify." *Id.* The problem with this example is that it provides no help toward determining objective reasonableness in less obvious good faith situations.

94. One need only look at appropriate court decisions with dissenting opinions to realize objective reasonableness will be subjectively determined by each judge. *See, e.g.*, United States v. Caceres, 440 U.S. 741 (1979) (Marshall, J., dissenting). *See also,*

Moreover, in implementing the good faith exception the *Williams* court would speak to the exclusion issue without addressing the ultimate issue of the legality of the police activity.[95] The police, then, would never know if their activity was illegal, but would assume the evidence was excluded only because the individual officer did not meet the "good faith belief grounded in objective reasonableness" standard.[96] The court's refusal to examine the constitutional issue could virtually "stop dead in its tracks judicial development of Fourth Amendment rights."[97]

CONCLUSION

By viewing the facts in a hypothetical analysis the *Williams* court, in Part II of the decision, surreptitiously established the good faith exception to the exclusionary rule in the Fifth Circuit.[98] So long as evidence is obtained by reasonable, good faith actions, it does not matter whether the evidence was obtained unconstitutionally. Most alarming about this is that there seems little likelihood for continued judicial review of fourth amendment guarantees in the Fifth Circuit.[99]

The *Williams* court talked about the high price society has to pay for the exclusionary rule.[100] In one sense this is true, especially since the rule "operates only after incriminating evidence has already been obtained. As a result, it flaunts before us the costs we must pay for

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Theis, *"Good Faith" As a Defense to Suits for Police Deprivation of Individual Rights,* 50 MINN. L. REV. 991, 1005 (1974-75).

Professor Kaplan also states:

> Nor would it suffice further to modify the rule and require that the police error be reasonable as well as inadvertent. While such a standard would motivate a police department to insure that its officers made only reasonable mistakes, it is hard to determine what constitutes a reasonable mistake of law.
>
> So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level.

Kaplan, *supra* note 8, at 1044-45.

95. *See* note 47 *supra* (for the language of the court in Part II). *See also* note 50 *supra* (for Judge Hill's view of refraining from reaching the constitutional issue).

96. This is contrary to Judge Hill's view that the good faith exception "encourages learning". 622 F.2d at 848 (Hill, J., concurring).

97. 422 U.S. at 554 (Brennan, J., dissenting). Brennan noted that even opponents of the exclusionary rule concede the rule's "usefulness in forcing judges to enlighten our understanding of Fourth Amendment guarantees." *Id.* at 554-55. "The advantage of the exclusionary rule - entirely apart from any direct deterrent effect - is that it provides an occasion for judicial review, and it gives credibility to the constituional guarantees." *Id.* at 555 (quoting Oaks, *supra* note 60, at 756).

98. *See* note 2 *supra* (for the court's holding in Part II).

99. *See* note 97 and accompanying text *supra.*

100. 622 F.2d at 847.

fourth amendment guarantees."[101] There is reason to believe, however, that the "cost" of the exclusionary rule is much lower than commonly assumed.[102]

The *Williams* court's view that its decision affects only the exlcusionary rule[103] is narrow-minded. The good faith exception should be judged by its effect on the standards defining citizen protection against governmental intrusion.[104] "The admission of unconstitutionally seized evidence is . . . the linchpin of a functioning system of criminal law administration that produces incentives to violate the fourth amendment."[105] Until a better safeguard is designed and put into effective operation, the exclusionary rule is the only method by which to honor the spirit of the Constitution.[106]

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101. Kaplan, *supra* note 8, at 1037.
102. *See* LAFAVE, *supra* note 19, at §1.2(a) n.9 (supplement 1981). For one study cited by LaFave, in only 1.3% of 2,804 defendant cases was evidence excluded as a result of a fourth amendment suppression motion. *Id.* Moreover, over half of the defendants whose motions were granted in whole or in part were convicted nonetheless. *Id.*
103. 622 F.2d at 847.
104. *See* Ball, *supra* note 27, at 655.
105. Amsterdam, *supra* note 3, at 432.
106. *See id.* at 433.