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

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August 10, 2011

Congressional Research Service
7-....
www.crs.gov
R41774

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In *Davis v. United States*, the Supreme Court held that evidence seized in violation of the defendant's Fourth Amendment rights is admissible at trial when the police seized the evidence in good-faith reliance on "binding appellate precedent." The petitioner in that case, Willie Davis, was a passenger in a car that was stopped by police for a traffic violation. The police arrested the driver for driving while intoxicated and Davis for giving a false name. After handcuffing Davis and placing him in the back of a patrol car, the police searched the passenger compartment of the car in which Davis had been riding. The police found a revolver inside Davis's jacket, and Davis was convicted of possessing a firearm as a convicted felon.

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 vehicle search incident to arrest was unconstitutional under the Fourth Amendment. Nevertheless, when Davis's appeal reached the Court, it held that even though the search was unconstitutional, the gun it produced was admissible under the good-faith exception to the exclusionary rule.

The exclusionary rule bars evidence obtained in an unconstitutional search from being introduced at trial. The rule is a pragmatic doctrine intended to deter Fourth Amendment violations. It traditionally applies when (1) no exception, such as the good-faith exception, bars its operability; (2) exclusion will achieve "appreciable deterrence" of Fourth Amendment violations; and (3) the benefits of evidentiary suppression outweigh its burdens on the justice system.

In 2009, the Supreme Court broadened the good-faith exception when it announced in *Herring v. United States* that unconstitutionally obtained evidence is admissible at trial unless the evidence was the product of "deliberate" and "culpable" police misconduct. *Davis* was the first Supreme Court case to apply the *Herring* standard. The case furthers the impression that police culpability is now the sole relevant factor in determining whether the exclusionary rule applies. The Court rejected Davis's contentions that other relevant factors include whether the exclusionary rule's application would facilitate the development of Fourth Amendment law and whether a recently announced Fourth and Fifth Amendment rule applies retroactively. Two Justices dissented from the Court's opinion. One Justice concurred in the judgment but rejected the Court's view that police culpability is the dispositive factor in an assessment of whether the exclusionary rule applies.

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. The Supreme Court in *Davis* emphasized that the exclusionary rule's application is not constitutionally mandated by either the Fourth Amendment or the retroactivity doctrine. Accordingly, *Davis* supports the view that Congress has substantial authority to mandate the exclusionary rule's applicability or inapplicability in federal court cases.

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Introduction

Willie Davis was a passenger in a car stopped by police in Greenville, Alabama, for a traffic violation.[1] The police arrested Davis for giving a false name. After handcuffing him and placing him in the back of a patrol car, the police searched the passenger compartment of the car in which Davis had been riding. The police found a gun inside Davis's jacket, and Davis was convicted of possessing a firearm as a convicted felon.

At the time of the search, the police were acting in conformity with Eleventh Circuit precedent. The Eleventh Circuit had adopted the widely accepted interpretation of the Supreme Court's decision in *New York v. Belton*,[2] which entitled police to conduct a warrantless and suspicionless search of a vehicle's passenger compartment after arresting one of its passengers. After Davis was convicted, however, the Supreme Court held in *Arizona v. Gant*[3] that this type of suspicionless vehicle search incident to arrest violated the Fourth Amendment to the U.S. Constitution.

The Fourth Amendment 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 courts should remedy 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,[4] the Court did not announce a remedy for Fourth Amendment violations until 1914. Then, in *Weeks v. United States*,[5] the Court held that unconstitutionally obtained evidence could be excluded at trial to remedy a Fourth Amendment violation.[6] This remedy, subsequently termed the "exclusionary rule," initially only applied to Fourth Amendment violations by federal actors,[7] but, in 1961, the Court extended it to violations by state actors as well.[8]

The scope of the exclusionary rule has narrowed since these early decisions. The exclusionary rule, for example, is no longer treated as a constitutional doctrine. Instead, the Supreme Court has described the rule 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

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[1] Davis v. United States, 564 U.S. __, 131 S. Ct. 2419, 2421 (2011), *aff'g* United States v. Davis, 598 F.3d 1259 (11th Cir. 2010).

[2] 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).

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

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

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

[6] *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.").

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

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

exceptions to the exclusionary rule's applicability. The "good-faith exception," which renders the exclusionary rule inapplicable to evidence that the police obtained illegally but in "good-faith," is arguably the most significant of these exceptions.[9]

Today, the good-faith exception applies in such a wide number of circumstances that its application appears to be the norm from which evidentiary exclusion is the exception. Under recent Supreme Court jurisprudence, the good-faith exception applies to all illegally obtained evidence that was not seized as a result of "deliberate" and "culpable" police misconduct.[10] The Court emphasized this standard in its decision in *Davis*, confirming that police culpability is now the dispositive factor in determining the exclusionary rule's applicability. [11]

The Exclusionary Rule and Its Good-Faith Exception

Courts apply the exclusionary rule to deter Fourth Amendment violations by suppressing unconstitutionally seized evidence.[12] The rule 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 neither rooted in nor required by the U.S. Constitution.[13] 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.[14]

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.[15] 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.[16] As it was initially articulated in *United States v. Leon*,[17] the good-faith exception seemed to apply only when the police acted in "objectively reasonable reliance" on the legal error of an authority *other than* the police.[18] These authorities

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

[10] Herring v. United States, 555 U.S. 135, 144 (2009).

[11] *See* Davis v. United States, 564 U.S. __, 131 S. Ct. 2419, 2428 (2011). *See also Herring*, 555 U.S. at 144 ("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.").

[12] *Davis*, 131 S. Ct. at 700.

[13] *Id.*

[14] 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).

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

[16] *Id.* at 922.

[17] 468 U.S. 897 (1984).

[18] *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)).

included state legislatures and magistrate judges.[19] However, the Supreme Court subsequently extended the good-faith exception to good-faith reliance on a clerical error within the police department—namely, a mistake in a police database file regarding the status of the suspect's arrest warrant.[20]

In *Herring v. United States*, 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's applicability. 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]

United States v. Davis[24] was the first case in which the Supreme Court was asked to apply the *Herring* standard and determine whether particular police conduct was "culpable." Prior to the Supreme Court's opinion, the federal circuit courts of appeals had reached conflicting decisions about the admissibility of evidence seized in an unconstitutional search that, at the time it was conducted, complied with precedent. The Supreme Court held that this evidence is admissible because police do not act culpably by conducting an unconstitutional search that conformed with "binding appellate precedent." The case confirms that, under the *Herring* test, police culpability is now the sole relevant factor in determining whether the exclusionary rule applies.

United States v. Davis

Opinion of the Court

In *United States v. Davis*,[25] Davis contended that police culpability was only one relevant factor in determining whether the exclusionary rule applies. He contended that the exclusionary rule can also apply for other reasons, including (1) if doing so is constitutionally mandated under the retroactivity doctrine, which requires courts to apply recently announced Fourth and Fifth Amendment rules retroactively to certain cases on direct review, and (2) if its application would facilitate the development of Fourth Amendment law by incentivizing future appeals.

[19] *See Krull*, 480 U.S. at 349-50; *Leon*, 468 U.S. at 921.

[20] *See* Herring v. United States, 555 U.S. 135, 129 S. Ct. 695 (2009) (5-4 decision). 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*, 555 U.S. at 144.

[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] Davis v. United States, 564 U.S. __, 131 S. Ct. 2419 (2011).

[25] *Id.*

As discussed below, the Court rejected Davis's approach and assessed the exclusionary rule's applicability solely with reference to the culpability standard prescribed in *Herring*. The Court determined that the police had not acted wrongfully by complying with appellate precedent, and it therefore held that the exclusionary rule did not apply. One Justice concurred in the judgment and two dissented.

Exclusionary Rule and the Retroactivity Doctrine

As to Davis's first argument, the Supreme Court drew a distinction between retroactively applying a new judicial rule for the conduct of criminal prosecutions and deciding how to remedy a violation of that rule. According to the retroactivity doctrine, Article III of the U.S. Constitution requires the retroactive application of a new Supreme Court precedent on criminal procedure to all cases not yet final. Davis relied on this doctrine to argue that, when a new Fourth Amendment rule is announced, both the new rule and the method of redress used to remedy the wrong suffered by the defendant in that case should *both* be applied retroactively on appeal. He drew support from language in the Supreme Court's opinion in *Danforth v. Minnesota*[26] describing retroactivity as "about remedies, not rights" and a question of "redressability."[27] However, the Court rejected Davis's contention as mischaracterizing the retroactivity jurisprudence so as to conflate it with the case law applying the good-faith exception.[28] The Court wrote that the retroactivity doctrine and its case law determine "whether a new rule is available on direct review as a *potential* ground for relief ... [not] what 'appropriate remedy' (if any) the defendant should obtain."[29]

Exclusionary Rule and the Development of Fourth Amendment Law

Having defined the retroactivity doctrine as a determining the appropriate rule and the exclusionary rule as a determining the appropriate remedy in a given case, the Court considered whether the exclusionary rule was applicable in *Davis*. Davis contended that the appropriate test for the exclusionary rule's application balanced the benefits of applying the exclusionary rule's application with its costs. Davis further argued that the benefits *outweighed* the costs because its application would, in addition to deterring unconstitutional police searches, facilitate the development of Fourth Amendment law.[30] While the two dissenters found this argument persuasive, the Court held that it could not be reconciled with exclusionary rule precedent. Ensuring that defendants have incentives to challenge erroneous lower-court case law is not, the Court wrote, a relevant consideration in an exclusionary rule case.[31] The Court emphasized that the exclusionary rule has only one purpose, deterring culpable police conduct, and it neither applies nor should apply for any other reason.[32] However, the Court also left open the possibility that, in a future case, it "could, if necessary, recognize a limited exception to the good-faith

[26] 552 U.S. 264 (2008).

[27] Brief for the Petitioner at 9, 16, 22, United States v. Davis, 564 U.S. __, 131 S. Ct. 2419 (2011).

[28] *Davis*, 131 S. Ct. at 2430-31.

[29] *Id.* (emphasis added)

[30] *Id.* at 2432.

[31] *Id*.

[32] *Id.*

exception for a defendant who obtains a judgment overruling ... Fourth Amendment precedents."[33]

Exclusionary Rule and Police Compliance with Appellate Precedent

Instead of following Davis's approach, the Court assessed the exclusionary rule's applicability solely with reference to the culpability standard prescribed in *Herring*. Under this standard, a defendant benefits from the exclusionary rule's application only if his Fourth Amendment rights were violated "deliberately, recklessly, or with gross negligence" or as a result of "recurring or systemic negligence" by law enforcement.[34] The Court found that Davis had not met this high standard because the police had "acted in strict compliance with binding precedent."[35] Applying the exclusionary rule in this case, the Court wrote, would transform the exclusionary rule into "a strict liability regime" that penalizes police officers for unintentional constitutional violations.[36] Accordingly, the Court determined that the exclusionary rule was inapplicable.[37]

Concurrence

Supreme Court Justice Sotomayor found that *Davis* did not determine whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.[38] In its earlier opinion in *Davis*, the Eleventh Circuit had reached a similar conclusion, but it had adopted a different rationale than the one Justice Sotomayor put forth in her concurrence.

The Eleventh Circuit confined its holding in *Davis* to a police officer's good-faith reliance on clear and unambiguous appellate precedent because, in its view, police officers engage in deliberate and culpable conduct when they try to conduct legal analysis.[39] According to the Eleventh Circuit, police are ill-equipped to analyze precedent and answer legal questions, and therefore their attempts to perform this type of legal reasoning should be viewed as culpable conduct.[40] The Eleventh Circuit also stated that requiring police to engage in more limited police action pending decisive judgments from the U.S. Supreme Court maintains a necessary "incentive to err on the side of constitutional behavior."[41]

In contrast, Justice Sotomayor stated in her concurrence that the Court's opinion in *Davis* would not control cases in which police had relied on ambiguous precedent because the facts in *Davis* did not present the Court with the opportunity to determine whether exclusion in those circumstances would be warranted. Justice Sotomayor did not adopt the Eleventh Circuit's view that a police officer's attempt at legal analysis is, necessarily, deliberate and culpable conduct. Moreover, unlike the Eleventh Circuit, she rejected the view that an officer's culpability is

[33] *Davis*, 131 S. Ct. at 2434.

[34] *Id.* at 2428.

[35] *Id.* at 2428-29

[36] *Id.* at 2429.

[37] *Id.*

[38] *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring).

[39] *Id.* at 1267.

[40] *Id.*

[41] *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))).

dispositive of the exclusionary rule's applicability.[42] She wrote that she reads the exclusionary rule precedents as requiring evidentiary exclusion when it would "appreciably deter Fourth Amendment violations."[43] While she said she had found that exclusion in *Davis* would not appreciably deter future Fourth Amendment violations, this did not determine "whether exclusion would appreciably deter Fourth Amendment violations when the government law is unsettled."[44]

Dissent

Justice Breyer, joined by Justice Ginsburg, dissented from the majority opinion. The dissent criticized the majority for engaging in a formalistic and ultimately unworkable analysis, violating important principles of constitutional adjudication, and vitiating the exclusionary rule.

First, the dissent contended that by distinguishing between the applicable rule of criminal procedure and the applicable remedy, the majority engaged in an overly formalistic analysis that would prove unworkable in practice.[45] *Davis* will burden courts with the responsibility for determining when appellate precedent is sufficiently "binding" for police officers to have acted reasonably by complying with it.[46] While this may be a simple analysis in *Davis* because the petitioner conceded the point, the dissent suggested that, in the future, it will be much more difficult for courts to assess whether a previous case was "binding."[47] By way of illustration, the dissent wondered whether a case would be "binding" if its facts were readily distinguishable or its holding expressly limited to the facts presented in that particular case.[48] Because the definition of "binding" is difficult to reduce to a single bright-line rule, the dissent argued lower courts' application of *Davis* is likely to confuse and confound police operations.[49]

Second, the dissent expressed concern for the justice of the majority's opinion. The dissent pointed out that the defendant in *Davis* suffered the same legal wrong as the defendant in *Gant*, and, therefore, principles of fairness entitled the defendant in *Davis* to benefit from the same legal remedy as the defendant in *Gant*.[50] It recognized that the majority had suggested that this unfairness could be avoided in the future by refusing to apply the exclusionary rule to the defendant in the case in which the new rule was announced. However, the dissent argued that this approach would have even more harmful effects.[51] It would, the dissent contended, vitiate the appellate function of the federal circuit courts and the U.S. Supreme Court in Fourth Amendment cases by eliminating the sole incentive for defendants to appeal lower court decisions.[52] This

[42] *Id.* at 2435 ("Whether an officer's conduct can be characterized as 'culpable' is not itself dispositive.").

[43] *Davis*, 131 S. Ct. at 2436.

[44] *Id.* at 2436.

[45] *See id.* at 2437.

[46] *Id.*

[47] *Id*. at 2437.

[48] *See Davis*, 131 S. Ct. at 2437.

[49] *See id*.

[50] *Id.* at 2437-38.

[51] *Id.*

[52] *See id.*

would threaten the role of the U.S. Supreme Court in harmonizing constitutional law across the circuits by essentially eliminating Fourth Amendment cases from its docket.[53]

Finally, the dissent criticized the Court's adherence to the culpability standard for the exclusionary rule. The exclusionary rule, it argued, does not—and was not intended to—punish police officers for violating a defendant's Fourth Amendment rights, and, therefore, an officer's culpability should not determine the exclusionary rule's applicability.[54] If, as the majority strongly suggested, the culpability standard is dispositive, then the good-faith exception effectively swallows the exclusionary rule.[55] In turn, the dissent warned, "ordinary" Americans would lose their primary source of protection against unreasonable searches and seizures.[56]

Implications for Congressional Action

Congress has occasionally considered supplementing the Supreme Court's exclusionary rule jurisprudence with legislation codifying the exclusionary rule or the good-faith exception.[57] Over the years, some Members have expressed displeasure 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.[58] However, congressional efforts to curtail the exclusionary rule's reach have encountered resistance over concerns that, in the name of fighting crime, these efforts will result in the violation of the rights of innocent people.[59]

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.[60] More recently, the 104th Congress considered codifying a good-faith exception to the exclusionary rule in the Exclusionary Rule Reform Act of 1995.[61]

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[53] *See Davis*, 131 S. Ct. at 2437-38 ("To what extent then could this Court rely upon lower courts to work out Fourth Amendment differences among themselves—through circuit reconsideration of a precedent that other circuits have criticized?").

[54] *See id.* at 2439.

[55] *Id.*

[56] *Id.* at 2439-2440.

[57] *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).

[58] *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).

[59] *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).

[60] *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").

[61] Exclusionary Rule Reform Act of 1995, H.R. 666, 104th Cong. (1995) (as passed the House) ("Evidence which is (continued...)

Notably, Congress would not be able to curtail the exclusionary rule's application in circumstances in which it is constitutionally required.[62] However, the Supreme Court has consistently emphasized that the rule has no constitutional basis. It is therefore widely accepted that Congress has broad authority to bar (or require) the exclusionary rule in federal cases, and the Court's opinion in *Davis* supports this position. Nevertheless, legislation *barring* the exclusionary rule might carry implications for the operability of "state exclusionary rules"[63] and raise questions about whether and how Fourth Amendment violations should be deterred and/or remedied in the future.[64]

Conclusion

Davis v. United States was the first case in which the Supreme Court applied the "deliberate" and "culpable" *Herring* standard for the good-faith exception's application. The Supreme Court held that evidence seized in an unconstitutional search that, at the time it was conducted, complied with precedent is admissible because police do not act culpably when they conform with "binding appellate precedent." The case also suggests that police culpability is the sole relevant factor in determining whether the exclusionary rule applies.

Although the majority and dissent in *Davis* disagreed over whether the holding would dramatically limit the number of cases in which the exclusionary rule applies,[65] *Davis* fits within a body of case law that, as a whole, narrows the rule's applicability. On one hand, this trend suggests that the exclusionary rule's opponents may no longer be motivated to reform the rule legislatively, and therefore any push to codify the exclusionary rule will originate with the rule's supporters. However, legislative reform may not only be motivated by a desire to see the exclusionary rule apply—or not apply—to remedy Fourth Amendment violations, it may also be motivated by a perceived need to provide clarity and predictability to police operations.

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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").

[62] *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (stating that Congress may not legislatively supersede or otherwise curtail the application of a constitutionally required rule or remedy).

[63] *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).

[64] *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 (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).

[65] *See Davis*, 131 S. Ct. at 2440 (Breyer, J., dissenting) (disagreeing with the majority's assessment that *Davis* will only affect "an exceedingly small set of cases").

Exclusionary rule jurisprudence has been described as so "severely contorted" and "complicated" as to be nearly impossible for police officers, who need to make quick decisions about the legality of their actions, to apply in the field.[66] Drawing on this concern, the dissent in *Davis* suggested that the Court's decision would confound police operations by further complicating this jurisprudence and requiring courts and police to make difficult distinctions between "binding" and non-binding appellate precedent. However, supporters of the Court's opinion in *Davis* would presumably disagree with this assessment and contend that *Davis clarified* the exclusionary rule jurisprudence by restricting the rule's application to only the most flagrantly violative searches.

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[66] Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669, 676 (1998).