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Evidence Obtained by Unlawful Police Conduct Shall Not Be Excluded if the Government Establishes the Conduct Resulted from a Reasonable, Good Faith Belief that it Was Proper.

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CRIMINAL PROCEDURE—Search and Seizure—Evidence Obtained by Unlawful Police Conduct Shall Not Be Excluded if the Government Establishes the Conduct Resulted From a Reasonable, Good Faith Belief That It Was Proper.

United States v. Williams,
622 F.2d 830 (5th Cir. 1980) (en banc).

On September 28, 1977, Jo Ann Williams, in violation of her travel restriction,[1] flew from Los Angeles to Atlanta. Williams was observed deplaning by special agent Markonni of the Drug Enforcement Administration.[2] The agent, aware of the travel restriction placed upon Williams, approached and questioned her.[3] After ascertaining that Williams had no permission to travel outside the state of Ohio, agent Markonni arrested Williams for violation of her travel restriction. A search incident to the arrest resulted in the seizure of a packet of heroin. A search of Williams' luggage, pursuant to a warrant, resulted in the seizure of a large quantity of heroin.[4] The district court sustained defendant's motion to suppress all

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1. *See* United States v. Williams, 622 F.2d 830, 833 (5th Cir. 1980) (en banc). Williams previously was arrested by Special Agent Markonni in Ohio for possession of heroin. *See id.* at 833. *See generally* 21 U.S.C. § 812(c)(B)(10) (1976) (heroin classified as Schedule I drug); *id.* § 841(b)(1)(A) (penalties for possession of heroin). Pending appeal of her conviction Williams was released on bond. *See* 18 U.S.C. § 3146(b) (1976) (release proper when judicial officer reasonably assured of appearance); *id.* § 3148 (release after conviction when appeal filed). A condition of Williams' release was that she restrict her travel to within the state of Ohio. *See id.* § 3146(a)(2) (provides for travel restrictions).

2. *See* United States v. Williams, 594 F.2d 86, 88 (5th Cir. 1979). Agent Markonni, pursuant to the DEA's Drug Courier Interdiction Program, was monitoring passengers deplaning from flights originating in Los Angeles. The Program involved detention and searches of those individuals fitting a drug courier profile. The profile includes several characteristics including: arrival from or departure to a city identified as a source of drugs; carrying little or no luggage; unusual itinerary; use of an alias; and unusual nervousness. *See id.* at 88. *But see* Reid v. Georgia, ___ U.S. ___, ___ 100 S. Ct. 2752, 2753-54, 65 L. Ed. 2d 890, 894-95 (1980) (drug courier profile does not constitute probable cause).

3. *See* United States v. Williams, 594 F.2d 86, 89 n.6 (5th Cir. 1979) (Markonni informed of restriction by assistant United States Attorney for the Northern District of Ohio); *cf.* United States v. Mendenhall, ___ U.S. ___, ___ 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980) (mere questioning by officer is not seizure for fourth amendment purposes). *See generally* Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). " 'Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.' " *Id.* at 19 n.16.

4. *See* United States v. Williams, 622 F.2d 830, 834 n.8 (5th Cir. 1980) (en banc) (affidavit tended to establish probable cause for issuance of search warrant); *cf.* United States v. Chadwick, 433 U.S. 1, 11 (1977) (search of luggage unreasonable without safeguards provided by judicial warrant).

evidence seized incident to the arrest. On appeal to the United States Court of Appeals for the Fifth Circuit, the panel affirmed the trial court.[5] The court, on its own motion, granted a rehearing en banc. Held—*Reversed.* Evidence obtained by unlawful police conduct shall not be excluded if the government establishes the conduct resulted from a reasonable, good faith belief that it was proper.[6]

In 1914 the United States Supreme Court created the exclusionary rule as a remedy for unlawful intrusions upon the right of personal privacy guaranteed by the fourth amendment.[7] The possibility of the exclusion of evidence simply "because the constable blundered" has, however, led to a detailed analysis of the efficacy of the rule and the right to personal privacy which it protects.[8] The problem with the exclusionary rule lies in the danger of frustrating legitimate law enforcement activities by suppressing evidence at trial because a police officer failed to comply with the law of search and seizure, even though such noncompliance resulted from an honest mistake.[9] In *Mapp v. Ohio*[10] the Court found the possibility of a criminal going free because a constable blundered preferable to the possi-

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5. *See* United States v. Williams, 594 F.2d 86, 96 (5th Cir. 1979).

6. United States v. Williams, 622 F.2d 830, 846-47 (5th Cir. 1980) (en banc).

7. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (exclusionary rule adopted in federal jurisdiction); U.S. CONST. amend. IV. *See also* Mapp v. Ohio, 367 U.S. 643, 653-55 (1961) (exclusionary rule applied to states). The exclusionary rule provides that evidence seized in violation of the constitution is inadmissible at the trial of the accused. *See id.* at 655.

8. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied,* 270 U.S. 657 (1926). *See generally* Wright, *Must The Criminal Go Free If The Constable Blunders?,* 50 TEXAS L. REV. 736, 738 (1972).

9. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 488 (1976); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); Elkins v. United States, 364 U.S. 206, 222-23 (1960). *See generally* W. LAFAVE, SEARCH & SEIZURE § 1.2, at 20-21 (Supp. 1981); Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349 n.593 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 667-68 (1970), Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra,* 69 NW. U.L. REV. 740, 741-48 (1974). *See also* U.S. CONST. amend. IV; ALI MODEL CODE OF PRE-ARRAIGNMENT PRO. § 8.02, at 23 (Tent. Draft No. 4, 1971). The ALI proposal would permit courts to weigh several considerations in determining whether the evidence was seized incident to a substantial violation of the fourth amendment. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PRO. § 8.02, at 23 (Tent. Draft No. 4, 1971).

10. 367 U.S. 643 (1961). Officers went to the Mapp home to question an individual believed to be hiding there. The officers broke into the home after Miss Mapp refused to let them in. A demand to see a search warrant was then made. A paper was produced by an officer which Miss Mapp grabbed and placed in her bosom. A struggle to retrieve the paper from Miss Mapp's bosom then occurred. Thereafter she was handcuffed for her belligerence in resisting the "official rescue" of the paper. A wide ranging search of the premises resulted in the seizure of some obscene materials. At Miss Mapp's trial for possession of obscene materials the government failed to produce a search warrant. *See id.* at 644-45.

bility of law abiding citizens being subjected to unreasonable searches and seizures.[11]

Subsequent to the adoption of the exclusionary rule, the need for exceptions to its application was recognized.[12] In *Terry v. Ohio*[13] the Court admitted evidence obtained in an initial police-suspect confrontation despite the absence of probable cause,[14] when the search was for concealed objects which might be used to assault the police officer.[15] When exigent circumstances foreclose the practicability of obtaining a warrant,[16] the preference for searches pursuant to a warrant may be outweighed.[17] Other

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11. *See id.* at 659. The Court noted that to subject law abiding citizens to unreasonable searches and seizures would result in "contempt for law." *See id.* at 659.

12. *See generally* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting). "[T]he process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Id.* at 408; Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 952-53 (1965).

13. 392 U.S. 1 (1968). *Terry* provides that an officer may search for weapons when a reasonably prudent man in the same circumstances would be warranted in the belief that his safety or that of others was in danger. *See id.* at 27.

14. The test for probable cause is whether at the moment the arrest was made the facts and circumstances within the knowledge of the police officer were sufficient to warrant a reasonably prudent man in believing that the defendant had committed or was committing an offense. *See* Beck v. Ohio, 379 U.S. 89, 91 (1964); Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar v. United States, 338 U.S. 160, 175-76 (1949). The test of probable cause applies to both arrests and searches. *See* Giordenello v. United States, 357 U.S. 480, 485-86 (1958). Probable cause to arrest or search must precede the search or arrest. *See, e.g.*, Sibron v. New York, 392 U.S. 40, 62-63 (1968) (officer had no probable cause to search until search revealed heroin); Henry v. United States, 361 U.S. 98, 104 (1959) (arrest not justified by what subsequent search discloses); Johnson v. United States, 333 U.S. 10, 16-17 (1948) (arrest cannot justify search and at same time search cannot justify arrest).

15. *See* Terry v. Ohio, 392 U.S. 1, 27 (1968); Sibron v. New York, 392 U.S. 40, 65 (1968) (companion case to *Terry*). The arresting officer in *Sibron* had no grounds to believe that defendant was armed and dangerous; therefore, the evidence was seized illegally. *See* Sibron v. New York, 392 U.S. 40, 63-65 (1968). Further, the officer had no probable cause to arrest or search Sibron. *See id.* at 62-63.

16. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Ventresca, 380 U.S. 102, 105-06 (1965); Beck v. Ohio, 379 U.S. 89, 96 (1964). *See generally* Comment, *Warrantless Searches—The Worm Has Turned . . . Again*, 22 BAYLOR L. REV. 39, 40 (1970). To safeguard the reasonableness requirement of the fourth amendment a "neutral and detached magistrate" must draw the inferences necessary to determine probable cause, not an officer "engaged in the often competitive enterprise of ferreting out crime." *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948) (evidence excluded not on basis of lack of probable cause but on failure to procure warrant).

17. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 48-51 (1970) (warrantless search of automobile justified on basis of inherent mobility of automobile and ease of destruction of contraband); Warden v. Hayden, 387 U.S. 294, 297-99 (1967) (search of house subsequent to defendant's flight into house); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (blood test not improper seizure inasmuch as officer was confronted with an emergency which threatened destruction of evidence). If the arrest occurs in a public place an arrest warrant

recognized exceptions are based upon the circumstances surrounding the search[18] and upon procedural considerations.[19]

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is not required. *See* United States v. Santana, 427 U.S. 38, 43 (1976); United States v. Watson, 423 U.S. 411, 427 (1976) (Powell, J., concurring). Search incident to lawful arrest has been expanded to include searches incident to lawful custodial arrests. *Compare* Weeks v. United States, 232 U.S. 383, 392 (1914) (seizure of fruits of crime incident to lawful arrest) *and* Dillon v. Obrien, 16 Cox 245, 247 (Ireland Ex. D. 1887) (arrest pursuant to warrant resulted in seizure of chattels) *with* Gustafson v. Florida, 414 U.S. 260, 266 (1973) (defendant arrested and searched for driving without driver's license) *and* United States v. Robinson, 414 U.S. 218, 220 (1973) (defendant arrested and searched because arresting officer knew his driver's license had been revoked).

> It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search to the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

United States v. Robinson, 414 U.S. 218, 235 (1973). *See generally* Chimel v. California, 395 U.S. 752, 763 (1969) (search incident to valid arrest expanded to area within immediate control of arrestee).

18. These exceptions include:

(1) *Plain View. See, e.g.*, Harris v. United States, 390 U.S. 234, 235-36 (1968) (registration card on floor of car within officer's view); Ker v. California, 374 U.S. 23, 42-43 (1963) (brick of marijuana on floor within view of officer); United States v. Lee, 274 U.S. 559, 563 (1927) (cases of liquor on deck of ship in plain view). The object must appear illegal on its face before the seizure is lawful. *See* DeLao v. State, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977) (red balloon on window sill not evidence of possession of heroin); Nicholas v. State, 502 S.W.2d 169, 172 (Tex. Crim. App. 1973)(negatives of illicit sexual behavior not in plain view of officers inasmuch as they had to be picked up and placed in the light).

(2) *Inevitable discovery. See* Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977) (evidence although seized unlawfully may be admitted upon proof it would have been discovered eventually). *See generally* 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 3.3(b), at 3-14 to -17 (2d ed. 1979).

(3) *Abandonment. See* Michigan v. Tyler, 436 U.S. 499, 505 (1978) (abandonment exception not applicable to search of building by firemen after fire); Abel v. United States, 362 U.S. 217, 240-41 (1960) (seizure of items left in hotel room by defendant after arrest not unlawful).

(4) *Border searches and seizures. See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (fixed checkpoint); United States v. Brignoni-Ponce, 422 U.S. 873, 881-87 (1975) (roving patrol); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (roving patrol). *See generally* Comment, *Almeida-Sanchez and Its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214, 219 (1975). A search warrant or probable cause is not necessary for a valid search at the border. *See* Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 266 U.S. 950 (1961).

(5) *Illegal Police Actions Attenuated with Effect. See* United States v. Ceccolini, 435 U.S. 268, 279 (1978) (substantial time elapsed between illegal search and contact with witness); Wong Sun v. United States, 371 U.S. 471, 488 (1963) (narcotics seized by exploitation of defendant's inadmissible statements). The test of attenuation is whether, granting the primary illegality, the evidence has been discovered as a result of the illegality or instead by means sufficient enough to be "purged of the primary taint." *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963).

(6) *Administrative searches. See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307, 323-24

Just as the United States Supreme Court has limited the situations in which the exclusionary rule is applicable, it has also changed its perception of the purpose for the rule.[20] In *Elkins v. United States*[21] the Court recognized deterrence of police misconduct as the major purpose of the exclusionary rule.[22] A second purpose noted in *Elkins* was the preservation of judicial integrity; specifically, courts cannot allow themselves to become "accomplices in the willful disobedience of a constitution they are sworn to uphold."[23] As Justice Brandeis acknowledged in *Olmstead v. United States*,[24] a distinction between the government as prosecutor and as judge cannot be made; government lawbreaking to convict a criminal breeds contempt for the law.[25] Furthermore, Justice Black in *Mapp* reasoned that the rule was not only justified, but required when the fourth

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(1978) (inspection pursuant to OSHA regulations); See v. Seattle, 387 U.S. 541, 544 (1967) (inspection pursuant to fire code); Camara v. Municipal Court, 387 U.S. 523, 537-38 (1967) (inspection pursuant to housing code). *See generally* 50 U. COLO. L. REV. 231, 233-37 (1979).

(7) *Consent. See* United States v. Mendenhall, ___ U.S. ___, ___, 100 S. Ct. 1870, 1879, 64 L. Ed. 2d 497, 512 (1980) (consent to search freely and voluntarily given); Schneckloth v. Bustamonte, 412 U.S. 218, 234 (1973) (knowledge of right to refuse search determines whether consent voluntary).

(8) *Searches by Private Citizens. See, e.g.*, Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (evidence seized by employer and subsequently given to government officials not protected by fourth amendment); United States v. Seidlitz, 589 F.2d 152, 158-59 (4th Cir. 1978) (use of "spy" attachment to trace telephone calls by telephone company); United States v. Bomengo, 580 F.2d 173, 175-76 (5th Cir. 1978) (search of apartment for source of leak by security director lead to discovery of illegal silencers). The application of the exclusionary rule is also limited by the requirement of standing to suppress the seized evidence. *Compare* Rakas v. Illinois, 439 U.S. 128, 132 (1978) (exclusionary rule available upon showing of legitimate expectation of privacy) *with* Jones v. United States, 362 U.S. 257, 267 (1959) (exclusionary rule automatically available to defendants charged with possessory offense). *But see* United States v. Salvucci, ___ U.S. ___, ___, 100 S. Ct. 2547, 2549, 65 L. Ed. 2d 619, 623-24 (1980).

19. *See* Stone v. Powell, 428 U.S. 465, 493-96 (1975) (federal habeas corpus relief foreclosed); United States v. Calandra, 414 U.S. 338, 351-52 (1974) (refusal to suppress evidence at grand jury proceeding); *cf* Harris v. New York, 401 U.S. 222, 225-26 (1971) (defendant cannot claim protection of the exclusionary rule after taking the stand and committing perjury).

20. *See* United States v. Calandra, 414 U.S. 338, 365-66 (1974) (Brennan, J., dissenting).

21. 364 U.S. 206 (1960).

22. *See id.* at 217 (purpose of rule is to prevent, not repair).

23. *See id.* at 223.

24. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

25. *See id.* at 485 (Brandeis, J., dissenting). "To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Id.* at 485 (Brandeis, J., dissenting).

amendment guarantee of privacy was considered in conjunction with the fifth amendment proscription against self incrimination.[26] The recent trend of authority, however, bases the existence of the exclusionary rule solely on the deterrence of police misconduct, thereby limiting the application of the exclusionary rule to situations where a police officer has acted illegally.[27]

Some members of the Supreme Court advocate an exception to the exclusionary rule in situations where the constable merely blunders.[28] This exception, termed the "good faith exception" by one commentator,[29] provides: "that when an officer acts in the good faith belief that his conduct is constitutional and when he has a reasonable basis for that belief, the exclusionary rule will not operate."[30] The proposed good faith exception actually applies to two separate and distinct situations.[31] The "technical violation" facet applies to a situation in which an officer has acted pursuant to a statute found unconstitutional, a warrant found invalid, or court precedent overruled.[32] The "good faith mistake" facet applies when the officer acts pursuant to a good faith belief that probable cause exists, but due to an error in judgment the officer did not actually have probable cause.[33]

Authority for the technical violation facet is found in *Michigan v. DeFillippo*[34] wherein the defendant was arrested and searched pursuant to an ordinance which made it unlawful to refuse to identify oneself to a

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26. *See* Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (Black, J., concurring); U.S. CONST. amends. IV & V. *But see* Andresen v. Maryland, 427 U.S. 463, 473 (1976) (fifth amendment adheres only to person, not places).

27. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979) (deterrence not furthered when statute found unconstitutional); United States v. Caceres, 440 U.S. 741, 755-56 (1979) (deterence not applicable to regulatory violation); Rakas v. Illinois, 439 U.S. 128, 134 n.3 (1978) (aim of exclusion is deterrence). *But see* United States v. Caceres, 440 U.S. 741, 770 (1979) (Marshall, J., dissenting) (judicial integrity recognized). *See generally* Ball, *Good Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. CRIM. L. C. 635, 649 (1978).

28. *See* Stone v. Powell, 428 U.S. 465, 496, 536 (1976) (Burger, C.J., concurring; White, J., dissenting); Brown v. Illinois, 442 U.S. 590, 611-12 (1975) (Powell, J., concurring); United States v. Peltier, 422 U.S. 531, 535-38 (1975) (Rehnquist, J., writing for the majority).

29. *See* Ball, *Good Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. CRIM. L C. 635, 635 (1978).

30. *Id.* at 653; *see* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting).

31. *See* Stone v. Powell, 428 U.S. 465, 540-41 (1976) (White, J., dissenting); Ball, *Good Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. CRIM. L. C., 635, 635-36 (1978).

32. Ball, *Good Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. CRIM. L. C. 635, 635-36 (1978).

33. *Id.* at 635.

34. 443 U.S. 31 (1979).

police officer.[35] The *DeFillippo* Court found the ordinance to be unconstitutional, but admitted the fruits of the search.[36] In so holding, the Court relied on the Fifth Circuit cases of *United States v. Carden*[37] and *United States v. Kilgen.*[38] The court in *Carden* and *Kilgen* held that an arrest and subsequent search made in good faith reliance upon a statute not yet found unconstitutional is valid notwithstanding the actual constitutionality of the statute.[39]

The technical violation facet is also supported by the decision in *United States v. Wolffs*[40] where the court rejected defendant's allegation that his arrest violated the Posse Comitatus Act.[41] The *Wolffs* court ruled, without actually deciding whether the Posse Comitatus Act was violated, that if the Act was violated it was an isolated instance and not the result of intentional police misconduct.[42] Moreover, in *United States v. Hill*[43] the court rejected defendant's argument that a magistrate cannot with oral testimony rehabilitate a search warrant, deficient on its face.[44] The *Hill* court reasoned that the only error attributable to the procedure followed by the magistrate was a technical one, which in no way justified the exclusion of the evidence.[45] Furthermore, in *United States v. Peltier*[46]

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35. *See id.* at 33. *See also* Brown v. Texas, 443 U.S. 47, 53 (1979) (statute provided for arrest for refusing to identify oneself to police officer).

36. *See* Michigan v. DeFillippo, 443 U.S. 31, 40 (1979). The Court distinguishes *DeFillippo* from cases where there was no probable cause. *See, e.g.,* Torres v. Puerto Rico, 442 U.S. 465, 471 (1979); Almeida-Sanchez v. United States, 413 U.S. 255, 269-72 (1973); Sibron v. New York, 392 U.S. 40, 62-63 (1968).

37. 529 F.2d 443 (5th Cir. 1976) (ordinance against loitering).

38. 445 F.2d 287 (5th Cir. 1971) (vagrancy ordinance).

39. *See* United States v. Carden, 529 F.2d 443, 445 (5th Cir.), *cert. denied,* 429 U.S. 848 (1976); United States v. Kilgen, 445 F.2d 287, 289 (5th Cir. 1971).

40. 594 F.2d 77 (5th Cir. 1979).

41. *See id.* at 85 (exclusionary rule not warranted in isolated violation of Posse Comitatus Act); 18 U.S.C. § 1385 (1976) (no part of the Army or Air Force to be used as *posse comitatus* to execute laws).

42. *See* United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979); *accord,* United States v. Walden, 490 F.2d 372, 377 (4th Cir.), *cert. denied,* 416 U.S. 983 (1974); State v. Danko, 548 P.2d 819, 825 (Kan. 1976).

43. 500 F.2d 315 (5th Cir. 1974), *cert. denied,* 420 U.S. 931 (1975).

44. *See id.* at 320. The *Hill* court found the affidavit plus the oral testimony of the affiant sufficient to satisfy the requirements of probable cause to search. *See id.* at 316-20. The defendant contended that the Federal Rules of Criminal Procedure did not permit the magistrate to cure a defective affidavit with oral testimony. *See id.* at 320; FED. R. CRIM. P. 41(c)(2) (authorizes issuance of warrant on affiant's oral testimony so long as magistrate determines probable cause exists). The *Hill* court rejected defendant's argument on the ground that supplementation was permissible. *See* United States v. Hill, 500 F.2d 315, 321 (5th Cir. 1974), *cert. denied,* 420 U.S. 931 (1975).

45. *See* United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), *cert. denied,* 420 U.S. 931 (1975).

the Court refused to suppress evidence seized pursuant to a statute subsequently determined unconstitutional by officers who did not have knowledge or could not be charged with knowledge that the search they executed was unconstitutional.[47]

Support for the good faith mistake facet is found in Justice White's dissenting opinion in *Stone v. Powell*.[48] Justice White reasoned that when the Supreme Court itself divides five to four on the issue of probable cause, to hold that the arresting officer did not have probable cause would be untenable.[49] Additionally, when an officer acts with a reasonable, good faith, albeit mistaken, belief that he had probable cause to arrest or search, the exclusion of evidence as a result of the search has no deterrent effect,[50] and the public interest of fighting crime is frustrated.[51] In support of the good faith mistake facet Justice White relied on cases which do not hold a policeman or public official liable for actions taken in the furtherance of their official positions when those actions are reasonable and in good faith.[52] *United States v. Janis*[53] further supports the good faith mistake facet. In *Janis* the Court refused to extend the exclusionary rule to a civil case when the seizing officers acted pursuant to a warrant which was defective for lack of probable cause.[54]

In *United States v. Williams*[55] the majority in the first part of a two

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46. 422 U.S. 531 (1975).

47. *See id.* at 542. The *Peltier* Court refused to give retroactive effect to an earlier Supreme Court decision which invalidated warrantless searches on less than probable cause within one hundred miles of the border. *See id.* at 534-35; Alemeida-Sanchez v. United States, 413 U.S. 266, 270 (1973) (statute authorizing warrantless searches within 100 miles of border on less than probable cause found unconstitutional). *See also* Brown v. Illinois, 422 U.S. 590, 611-12 (1975) (Powell, J., concurring) (analysis of good faith and technical violations of fifth amendment).

48. 428 U.S. 465, 536-42 (1976) (White, J., dissenting).

49. *See id.* at 540 (White, J., dissenting).

50. *See id.* at 540 (White, J., dissenting).

51. *See id.* at 542 (White, J., dissenting).

52. *Compare* Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974) (action against the Governor of Ohio for deploying National Guard on the Kent State Campus resulting in death of plaintiffs' decedents) *with* Pierson v. Ray, 386 U.S. 547, 555 (1967) (action against police officer for false arrest). *See also* O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (action against state hospital superintendant for deprivation of constitutional right to liberty); Wood v. Strickland, 420 U.S. 308, 322 (1975) (action against school officials for violating right of due process).

53. 428 U.S. 433 (1976).

54. *See id.* at 335-36 n.1. *See also* Spinelli v. United States, 393 U.S. 410, 414-16 (1969); Aguilar v. Texas, 378 U.S. 108, 114-16 (1964). The *Janis* Court noted the good faith of the seizing officers. *See* United States v. Janis, 428 U.S. 433, 453 (1976); *cf.* Michigan v. Tucker, 417 U.S. 433, 447-48 (1974) (failure to give proper *Miranda* warnings not fatal inasmuch as officers acted in good faith).

55. 622 F.2d 830 (5th Cir. 1980) (en banc).

part opinion[56] found the arresting officer had authority to arrest Williams and, therefore, refused to consider the applicability of the exclusionary rule.[57] The court concluded that Williams' breach of a court order restricting travel constituted criminal contempt pursuant to section 401(3) of title 18 of the United States Code.[58] Recognizing that disobedience of a court order constituted contempt,[59] the court relied on a series of cases which held contempt to be a crime.[60] Finding that the crime of criminal contempt occurs at the time of the contumacious act,[61] the court concluded that agent Markonni had authority to arrest Williams pursuant to section 878(3) of title 21 of the United States Code.[62] Insofar as the arrest of Williams was authorized the court concluded the search incident to the arrest was lawful.[63]

The second part of the two part opinion, without determining whether the agent had lawful authority to arrest Williams, found both facets of the good faith exception to the exclusionary rule applicable.[64] The court

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56. *See id.* at 833. The *Williams* court in an unusual per curiam opinion adopted alternative resolutions, termed Part I and Part II, for the disposition of the instant case. *See id.* at 833.

57. *See id.* at 839. The court also dismissed the *Miranda* issue raised *sua sponte* in the panel's opinion. *See id.* at 839; United States v. Williams, 594 F.2d 86, 92 n.12 (5th Cir. 1979).

58. *See* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc) (punishment for violating lawful court order); 18 U.S.C. § 401(3) (1976) (punishment of contempt by fine or imprisonment).

59. *See* United States v. Williams, 622 F.2d 830, 836 (5th Cir. 1980) (en banc). *See generally* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 124 (1st Am. Ed. 1959).

60. United States v. Williams, 622 F.2d 830, 836-37 (5th Cir. 1980) (en banc); *see, e.g.*, Bloom v. Illinois, 391 U.S. 194, 201 (1968) (petition to admit false will); Green v. United States, 356 U.S. 165, 167-79 (1958) (failure to surrender to U.S. Marshall after violation of Smith Act); Gompers v. United States, 233 U.S. 604, 610-11 (1914) (violation of injunction).

61. *See* United States v. Williams, 622 F.2d 830, 838 (5th Cir. 1980) (en banc); *cf.* United States v. Morales, 566 F.2d 402, 404 (2nd Cir. 1977) (contempt charge initiated by grand jury). *See generally* Pendergast v. United States, 317 U.S. 412, 418 (1943) (limitation statute runs when contumacious act occurs).

62. *See* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc); 21 U.S.C. § 878(3)(A)-(B)(1976). DEA agent can make an arrest without a warrant "for any offense against the United States committed in his presence, or . . . for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony." 21 U.S.C. § 878(3)(A)-(B) (1976). *See also* United States v. Avery, 447 F.2d 978, 979 (4th Cir. 1971) (defendant arrested for violation of travel restriction), *cert. denied*, 405 U.S. 930 (1972).

63. *See* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc). Agent Markonni had to obtain a search warrant to search Williams' luggage. *See* Chadwick v. United States, 433 U.S. 1, 16 (1977).

64. *See* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (Part II majority includes three judges who joined the Part I majority). The technical violation facet

concluded that evidence will not be excluded when it is discovered by agents in the course of actions taken in good faith with the reasonable belief that the conduct was authorized.[65] The court, however, recognized the good faith exception not as a rule separate and distinct from the exclusionary rationale but merely as an exception thereto.[66] Emphasizing that an agent's belief must be held in subjective good faith and grounded in objective reasonableness,[67] the court found the good faith mistake facet applicable inasmuch as agent Markonni had made a factual error[68] concerning an element of the crime of violating a travel restriction.[69] Recognizing that it was reasonable for agent Markonni to rely upon section 3146 of title 18 of the United States Code to arrest Williams, the court concluded the technical facet was applicable.[70] The court justified application of the good faith exception on the premise that the sole basis for excluding evidence is to deter police misconduct.[71]

The effect of the second part of the *Williams* opinion is to establish a new exception to the exclusionary rule in the Fifth Circuit.[72] As defined

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applies to situations when an officer has acted pursuant to a statute found unconstitutional, a warrant found invalid, or court precedent overruled. *See id.* at 841 (quoting Ball, *Good Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. CRIM. L. C. 635, 635 (1978)). The good faith mistake facet applies when an officer has acted pursuant to a good faith belief that probable cause exists but due to an error in judgment the officer did not actually have probable cause. *See* United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980) (en banc) (quoting Ball, *Good Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. CRIM. L. C. 635, 635 (1978)).

65. *See* United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980) (en banc) (quoting Ball, *Good Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. CRIM. L. C. 635, 635 (1978)).

66. *See id.* at 840. Analytically, the court reasoned, whether the good faith rationale was applied as an exception to the exclusionary rule or as a doctrine beyond its reach did not make a difference. *See id.* at 840.

67. *See id.* at 841 n.4. "[T]he belief . . . must . . . be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." *Id.* at 841 n.4a.

68. *See* United States v. Williams, 594 F.2d 86, 94-95 (5th Cir. 1979) (determination of whether defendant violated travel restriction by judicial officer); 18 U.S.C. § 3146 (1976) (travel restrictions).

69. *See* United States v. Williams, 622 F.2d 830, 846 (5th Cir. 1980) (en banc) (violation of travel restrictions occurs only when defendant misses court appearance); 18 U.S.C. § 3146 (1976) (travel restrictions while defendant is free on bond pending appeal of his conviction).

70. *See* United States v. Williams, 622 F.2d 830, 846 (5th Cir. 1980) (en banc); 18 U.S.C. § 3146 (1976). The *panel* construed the statute as providing no authority for a DEA agent to arrest a defendant for violation of travel restrictions. *See* United States v. Williams, 594 F.2d 86, 94 (5th Cir. 1979).

71. *See* United States v. Williams, 622 F.2d 830, 847 (5th Cir. 1980) (en banc).

72. *See id.* at 840. Evidence obtained by unlawful police conduct shall not be excluded if the government establishes the conduct resulted from a reasonable good faith belief the

by the en banc court, however, the exception cannot justifiably be applied to the facts of the instant case.[73] Before an exception to the exclusionary rule is necessary, there must be a determination as to whether the evidence was obtained lawfully.[74] As the lawfulness of Williams' arrest was not doubted by any of the judges on the court,[75] the question of adopting and applying a new exception to the exclusionary rule need never have been reached.[76]

In adopting the good faith exception in *Williams*, the court relied on the fact that four Supreme Court Justices have advocated a similar exception;[77] however, a majority of the Supreme Court has yet to adopt an

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conduct was proper. *Id.* at 840.

73. *See id.* at 837. In the first part of *Williams* the court finds that violation of a travel restriction is a criminal offense. This finding is supported by the weight of authority. *See id.* at 837; *cf., e.g.*, Bloom v. Illinois, 391 U.S. 194, 201 (1968) ("criminal contempt is a crime"); Green v. United States, 356 U.S. 165, 173 (1958) ("bail-jumping" constitutes criminal contempt); Gompers v. United States, 233 U.S. 604, 610-11 (1914) (contempt is a criminal act). A construction of 18 U.S.C. § 3150 which defines penalties for failure to appear before the court as applying to the violation of any lawful court order is justified by a literal reading of 18 U.S.C. § 401(3). *See* Green v. United States, 356 U.S. 165, 173 (1958) ("bail-jumping" constitutes criminal contempt); 18 U.S.C. § 3150 (1976) ($5,000 fine and/or 5 years in prison if released pending appeal of felony); *id.* § 401(3) (court has power to punish disobedience or resistance to a lawful court order). Since the purpose of placing a travel restriction on a defendant pending appeal is to assure his appearance in court, see 18 U.S.C. § 3146(a)(b) (1976), violation of the restriction is a violation of the court order and, therefore, a contumacious act. It is logically consistent to find that contempt occurs at the time of the contumacious act in light of previous decisions which held the statute of limitations runs when the contumacious act is committed. *See also* Pendergast v. United States, 317 U.S. 412, 418 (1943). When agent Markonni determined that Williams had violated her travel restriction, therefore, she had committed an offense against the United States. Agent Markonni had authority to search Williams as an incident to lawful arrest. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (search incident to lawful custodial arrest is reasonable under fourth amendment). *See generally* 21 U.S.C. § 878(3)(A)-(B) (1976) (DEA agent has authority to make arrest without warrant when offense against the United States committed in his presence). Due to the fact Williams was about to board another plane the exigencies of the situation foreclosed obtaining of an arrest warrant. *See* United States v. Williams, 594 F.2d 86, 89 (5th Cir. 1979).

74. *See* United States v. Peabody, 626 F.2d 1300, 1301 n.1 (5th Cir. 1980) (search was authorized); United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc) (arrest authorized; therefore, no need for exclusionary rule rationale).

75. *See* United States v. Williams, 622 F.2d 830, 848 (5th Cir. 1980) (en banc) (Rubin, J., concurring).

76. *See id.* at 839, 848 (Rubin, J., concurring); *cf.* United States v. Peabody, 626 F.2d 1300, 1301 n.1 (5th Cir. 1980) (search authorized; good faith exception unnecessary).

77. United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980) (en banc); *see* Stone v. Powell, 428 U.S. 465, 496, 538 (1976) (Burger, C.J., concurring; White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 611-12 (1975) (Powell, J., concurring); Peltier v. United States, 422 U.S. 531, 535-38 (1975) (Rehnquist, J., writing for the majority).

exception based upon good faith.[78] Furthermore, the *Williams* court justified the adoption of the good faith exception on the premise that the exception is similar to other recognized exceptions.[79] *Williams*, however, focuses on the subjective good faith belief of the agent, whereas other recognized exclusionary rule exceptions are based upon concerns for an efficient system of criminal justice,[80] the circumstances surrounding the arrest or search,[81] or the integrity of the trial.[82]

Even if the good faith exception was a relevant consideration in the second part of *Williams*, the court misapplied both the technical violation and good faith mistake facets in the instant case.[83] The first part of the majority's opinion, which held there was a legal arrest, pretermitted application of the technical violation facet.[84] Although the *Williams* panel found that section 3146 of title 18 of the United States Code did not authorize Williams' arrest, this finding should not have triggered the application of the technical violation facet because the first part of *Williams* determined that section 3146 of title 18 of the United States Code authorized the arrest.[85] Further, there was no technical violation as defined

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78. *See* Stone v. Powell, 428 U.S. 465, 496, 538 (1976) (Burger, C.J., concurring; White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 611-12 (1975) (Powell, J., concurring); Peltier v. United States, 422 U.S. 531, 535-38 (1975) (Rehnquist, J., writing for the majority).

79. *See* United States v. Williams, 622 F.2d 830, 842-43 (1980) (en banc). The court equates the good faith exception to the recognized exceptions of: (1) illegal police actions attenuated with effect; (2) federal habeas corpus relief; (3) grand jury proceedings; and (4) impeachment. *Id.* at 842-43.

80. *Compare* Stone v. Powell, 428 U.S. 465, 494 (1976) (preclusion of habeas corpus relief on basis of promoting "rational system of justice") *and* United States v. Calandra, 414 U.S. 338, 354 (1974) (excluding evidence from grand jury would curtail its investigatory function) *with* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (determination of good faith belief of police officer in his conduct).

81. *Compare* United States v. Ceccolini, 435 U.S. 268, 278-79 (1978) (recognition of important interplay between police officer and arrestee in conjunction with fifth amendment issues of waiver and consent) *with* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (determination of good faith belief of police officer in his conduct).

82. *Compare* Harris v. New York, 401 U.S. 222, 225-26 (1971) (defendant cannot commit perjury and then claim protection of exclusionary rule) *with* United States v. Williams, 622 F.2d 830, 840-41 (5th Cir. 1980) (good faith of police officer).

83. *Compare* Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) (good faith reliance by officer on unconstitutional statute) *and* Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting) (good faith belief in probable cause) *with* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc) (agent's conduct was lawful).

84. *Compare* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc) (arrest was authorized; therefore, no need to apply exclusionary rationale) *with id.* at 846 (technical violation facet of good faith exception applicable).

85. *See* 18 U.S.C. § 3146 (1976) (travel restrictions). *Compare* Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) (reliance on unconstitutional statute) *and* United States v. Williams, 594 F.2d 86, 94-95 (5th Cir. 1979) (section 3146 does not authorize arrest) *with* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc) (section 3146 authorized

by the second part of *Williams* inasmuch as the agent must have relied upon a statute, warrant, or court precedent subsequently modified to make his conduct unauthorized.[86] The good faith mistake facet is also not applicable because the first part of *Williams* found probable cause for the arrest.[87] Moreover, the court in *Williams* did not analyze the subjective good faith and objective reasonableness of the agent's belief,[88] but simply concluded that his mental state at the time of the arrest met these prerequisites.[89] Finally, both facets of the exception are not applicable in *Williams* because *Williams* does not present the situation where an agent acts pursuant to a statute, court precedent, or warrant subsequently modified to render the agent's conduct unlawful, and such acts are taken on the basis of a reasonable, but mistaken belief in probable cause.[90]

Authority cited by *Williams* in support of the technical violation facet only supports the application of this facet in situations where a statute subsequently is found unconstitutional.[91] *Williams*, however, held that

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arrest) *and* United States v. Williams, 622 F.2d 830, 846 (5th Cir. 1980) (en banc) (agent's reliance on section 3146 to authorize arrest). *See also* 18 U.S.C. § 3146 (1976) (travel restrictions).

86. *Compare* Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) (ordinance relied upon by officer unconstitutional) *with* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc) (statute authorized agent's conduct).

87. *Compare* Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting) (good faith belief in probable cause) *with* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc) (agent possessed knowledge that defendant committed offense against United States in the agent's presence). *See* 21 U.S.C. 878(3)(A) (1976) (codification of probable cause).

88. *See* United States v. Williams, 622 F.2d 830, 841 n.4a (5th Cir. 1980) (en banc). "[T]he belief, in addition to being held in subjective good faith, must be grounded in reasonableness." *Id.* at 841 n.4a. "It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained officer to believe that he was acting lawfully." *Id.* at 841 n.4a. *See also* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting) ("good faith belief conduct comported with existing law and reasonable grounds for that belief").

89. *See* United States v. Williams, 622 F.2d 830, 846 (5th Cir. 1980) (en banc). The mental state of the arresting officer would be explored at the suppression hearing. *See id.* at 850-51. (Rubin J., concurring). A reasonable interpretation of section 3146 gives an agent authority to arrest an individual for violating a travel restriction. *See id.* at 846; United States v. Avery, 447 F.2d 978, 979 (4th Cir. 1971) (arrest of defendant prior to judicial determination of contempt), *cert. denied*, 405 U.S. 930 (1972); 18 U.S.C. § 3146(a)(2) (1976) (travel restrictions).

90. *Compare* Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) (good faith reliance by officer on unconstitutional statute) *and* Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting) (good faith belief in probable cause) *with* United States v. Williams, 622 F.2d 830, 839 (5th Cir. 1980) (en banc) (statute authorized agent to make arrest, and probable cause existed for arrest).

91. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 38 (1979) (ordinance gave authority to officers to arrest for refusal to identify oneself); United States v. Peltier, 422 U.S. 531, 542

the technical violation facet is also applicable to situations where judicial precedent is overruled, or a warrant is invalidated, thereby apparently extending the application of the technical violation facet without relying upon prior case law.[92]

The authority cited by *Williams* to support the good faith mistake facet is either distinguishable or actually supports the technical violation facet.[93] The reliance on *Janis* is not justified because the *Janis* court was faced with the issue of extending the exclusionary rule to a civil case, not the issue of the officer's good faith belief in the existence of probable cause.[94] *Williams* also relied on *Hill* for support of the good faith mistake facet.[95] Such reliance is misplaced because *Hill* was concerned with the issue of a technical defect in a warrant and not the issue of an officer's belief in probable cause.[96] *Hill*, therefore, supports the technical violation facet of the good faith exception as it is applied to technical defects in warrants and not the good faith mistake facet as asserted by the second part of *Williams*.[97] Reliance by the majority in *Williams* upon *Wolffs* as

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(1975) (border searches authorized within 100 miles); United States v. Carden, 529 F.2d 443, 444 (5th Cir. 1976) (loitering ordinance); United States v. Kilgen, 445 F.2d 287, 289 (5th Cir. 1971 (vagrancy ordinance). *See generally* United States v. Williams, 622 F.2d 830, 843-44 (5th Cir. 1980) (en banc).

92. *See* United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980) (en banc).

93. *See* Ybarra v. Illinois, 444 U.S. 85, 96 n.11 (1979) (bar patron subjected to full search even though officers purportedly carried out *Terry* search); United States v. Janis, 428 U.S. 433, 434-41 (1976) (extension of exclusionary rule to civil proceedings); Michigan v. Tucker, 417 U.S. 433, 448-49 (1974) (improper *Miranda* warnings); United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979) (violation of Posse Comitatus Act); United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974) (rehabilitating defective warrant with oral testimony), *cert. denied*, 420 U.S. 931 (1975). The *Williams* court itself distinguishes *Ybarra v. Illinois* on the basis that the exclusion of evidence without any probable cause is entirely different from exclusion of evidence based upon a good faith belief in probable cause. *See* Ybarra v. Illinois, 444 U.S. 85, 96 n.11 (1979); United States v. Williams, 622 F.2d 830, 846 (5th Cir. 1980) (en banc). The *Ybarra* Court specifically noted that its decision was not contrary to *DeFillippo*. Ybarra v. Illinois, 444 U.S. 85, 96 n.11 (1979); *see* Michigan v. DeFillippo, 443 U.S. 31, 33 (1979).

94. *Compare* United States v. Janis, 428 U.S. 433, 434-41 (1976) (extending exclusionary rule to civil case) *with* United States v. Williams, 622 F.2d 80, 840 (5th Cir. 1980) (en banc) (agent's good faith belief in presence or absence of probable cause).

95. *See* Williams v. United States, 622 F.2d 830, 845 (5th Cir. 1980) (en banc); United States v. Hill, 550 F.2d 315, 322 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975).

96. *Compare* United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980) (en banc) (good faith mistake exception applies when officer has reasonable good faith belief in probable cause) *with* United States v. Hill, 500 F.2d 315, 316-20 (5th Cir. 1974) (error in rehabilitating deficient warrant was technical), *cert. denied*, 470 U.S. 931 (1975).

97. *See* United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), *cert. denied*, 470 U.S. 931 (1975). The *Hill* court stated in an alternative holding that if there was an error in the procedure followed by the magistrate in rehabilitating a deficient warrant with oral testimony it was a technical one. *See id.* at 322.

support for the good faith mistake facet is also not warranted. The court's refusal to exclude evidence in *Wolffs* was not based on the officer's good faith belief in the existence of probable cause, rather, it was based on the court's finding that a technical violation of the Posse Commitatus Act was insufficient grounds for exclusion.[98]

The effect of the adoption of the technical violation facet at this point in its development, however, is speculative. Legislatures, aware of *Williams,* and in an effort to curtail rising crime, may not be as careful in drafting statutes and ordinances to conform with recognized constitutional guarantees because evidence seized pursuant to such a statute would be admissible at trial until the statute was declared unconstitutional.[99] The lack of the fourth amendment requirement for reasonableness in such legislation may lead a court which had adopted the technical violation facet to reevaluate its holding.[100] In such a situation the court would be concerned with deterring legislative not police misconduct.[101]

Conversely, the mistaken belief facet is without justifiable support. The Supreme Court has defined the reasonableness of a search by the objective test of probable cause.[102] In *Henry v. United States*[103] the Court specifically stated that subjective good faith was not enough.[104] Even evaluated by a standard of reasonableness, the good faith test does not meet the criterion of whether a reasonably prudent man would believe that the defendant had committed or was committing an offense.[105] Moreover,

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98. *Compare* United States v. Williams, 622 F.2d 830, 845-46 (5th Cir. 1980) (en banc) (mistaken belief facet applies to situations where police officer makes judgmental error as to existence of probable cause) *with* United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979) (exclusion of evidence if Posse Comitatus Act violations become widespread).

99. *See* Michigan v. DeFillippo, 443 U.S. 31, 40 (1979) (fruits of search admissible at trial though statute found unconstitutional); *cf.* Brown v. Texas, 443 U.S. 47, 49-53 (1979) (search pursuant to unconstitutional statute revealed no illegality). *See also* Henry v. United States, 361 U.S. 98, 104 (1959) (arrest not justified by what the subsequent search discloses).

100. *Compare* Brown v. Texas, 443 U.S. 47, 49-53 (1979) (search pursuant to unconstitutional statute revealed no illegality) *with* Michigan v. DeFillippo, 443 U.S. 31, 40 (1979) (search pursuant to unconstitutional statute revealed illegality). *See also* Reid v. Georgia, ___ U.S. ___, ___, 100 S. Ct. 2752, 2754, 65 L. Ed. 2d 890, 895 (1980) (conclusion that drug courier profile justified seizure subjects presumably innocent travelers to random searches).

101. *See* Michigan v. DeFillippo, 443 U.S. 31, 45 (1979) (Brennan, J., dissenting) ("legislative legerdemain"); *cf.* Elkins v. United States, 364 U.S. 206, 217 (1960) (major purpose of the exclusionary rule is to deter police misconduct).

102. *See, e.g.,* Beck v. Ohio, 379 U.S. 89, 91 (1964); Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

103. 361 U.S. 98 (1959).

104. *See id.* at 102.

105. *Compare* United States v. Mendenhall, ___, U.S. ___, ___ 100 S. Ct. 1870, 1875, 64 L. Ed. 2d 497, 507 (1980) (requirement that searches and seizures be based upon objective justification) *with* United States v. Williams, 622 F.2d 830, 840-41 (5th Cir. 1980) (en banc)

there is the possibility that adoption of this facet will actually encourage police ignorance of lawful conduct by allowing them to rely on their subjective good faith in the propriety of their conduct.[106] Instead of encouraging this type of situation courts must delineate with more specificity the guidelines of an officer's authority.[107]

The failure of the second part of *Williams* to address the issue of whether the agent had actual, lawful authority to arrest Williams indicates that the court is not adopting an exception to the exclusionary rule as the court states, but a rule separate and distinct.[108] Subsequently, discussing the good faith exception in *United States v. Peabody*,[109] the Fifth Circuit, in dictum, noted that the arresting officers had authority to search and, therefore, the good faith exception adopted in *Williams* need not have been considered.[110] The dictum of *Peabody*, however, is inconclusive as to the issue of whether a court must first determine if there was a lack of authority to arrest or search before a determination can be made as to the applicability of the good faith exception.[111] Jurists, therefore, must await another case to correctly apply the good faith exception adopted in *Williams*.

In cases where there has been a conviction based upon a statute or ordinance found unconstitutional, a court should be cognizant of the possibility these laws were enacted as a ruse to harass, arrest, and convict an undesirable element of society. The technical violation facet, however, is

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(good faith mistake as to whether there was probable cause).

106. *See* United States v. Williams, 622 F.2d 830, 850 n.4 (5th Cir. 1980) (en banc) (Rubin, J., concurring). "A policeman who is in complete subjective good faith is unlikely to stop and ask himself, 'Am I also reasonable?' " *Id.* at 850 n.4.

107. *Cf.* Michigan v. DeFillippo, 443 U.S. 31, 38 (1979) ("enactment of a law forecloses speculation by enforcement officers concerning its constitutionality . . .").

108. *Compare* United States v. Williams, 622 F.2d 830, 833-39 (5th Cir. 1980) (en banc) (agent had authority to arrest; therefore, exclusionary rule not applicable) *with id.* at 840-47 (issue is whether agent had good faith and reasonable belief in authority).

109. 626 F.2d 1300 (5th Cir. 1980).

110. *See id.* at 1301 n.1. The Coast Guard officer boarded defendant's yacht outside the territorial limits of the United States to inspect the safety and documentation of the yacht. *See id.* at 1301 n.1. During the inspection the officer discovered contraband in plain view. *Id.* at 1301 n.1. "Had he taken unauthorized action, his good faith in doing so and the reasonableness of his belief that his actions were authorized, if they occurred today, would be relevant to our inquiry." *Id.* at 1301 n.1; *see* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc). Since the officer's actions were authorized there is no need to examine the officer's good faith. *See* United States v. Peabody, 626 F.2d 1300, 1301 n.1 (5th Cir. 1980).

111. *Compare* United States v. Peabody, 626 F.2d 1300, 1301 n.1 (5th Cir. 1980) (actions authorized; no need to reach good faith issue) *with* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (good faith is issue). Three judges concur in Parts I and II of *Williams*. *See* United States v. Williams, 622 F.2d 830, 833, 840 (5th Cir. 1980) (en banc).

supported by authority and should be expressly adopted by the Supreme Court.[112] One caveat need be added regarding situations involving warrants: if the warrant is defective for lack of probable cause the defect is not technical and the exclusionary rule is applicable.[113] Insofar as the mistaken belief facet does not meet the objective reasonableness requirements of the fourth amendment it should not be adopted at all.[114] To query the reasonable good faith belief of the arresting officer begs the question of whether there was probable cause *ab initio*.[115] If the officer did not have probable cause his actions were unlawful and should not be condoned in an effort to make law enforcement more effective. The warning of Justice Brandeis in *Olmstead* still need be heeded, "to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution."[116] To allow the courts to redefine probable cause is but one step closer to the retribution forewarned by Justice Brandeis.[117]

John W. Berry

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112. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 33 (1979) (ordinance providing for stop and question further provided for arrest upon refusal to comply); United States v. Carden, 529 F.2d 443, 444 (5th Cir.) (ordinance against loitering), *cert. denied*, 429 U.S. 848 (1976); United States v. Kilgen, 445 F.2d 287, 289 (5th Cir. 1971) (vagrancy ordinance).

113. *See, e.g.*, Whiteley v. Warden, 401 U.S. 560, 564-69 (1971); Spinelli v. United States, 393 U.S. 410, 419-20 (1969); Aguilar v. Texas, 378 U.S. 108, 115-16 (1964).

114. *See* Beck v. Ohio, 379 U.S. 89, 91 (1964)(objective test of probable case); Henry v. United States, 361 U.S. 98, 102 (1959)(good faith not enough); Brinegar v. United States, 338 U.S. 160, 175-76 (1949)("the rule of probable cause is a practical nontechnical conception"); U.S. CONST amend. IV (no warrant issued without probable cause).

115. *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 91 (1964); Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

116. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

117. *See* Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

> Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

Id. at 39 (Douglas, J., dissenting).