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No Exceptions to Good Faith

U.S. Supreme Court refuses to create an exception to the good-faith exception to the exclusionary rule

By Peter J. Gallagher

Although the U.S. Supreme Court speaks of the need for straightforward, bright-line rules to govern criminal procedure, its decisions often do not yield the desired results. This is not a criticism of the Court so much as a reflection of how difficult it can be to apply even the clearest rules in practice, which often results in the need for the Court to create exceptions to its rules and even exceptions to those exceptions. In a recent decision, *Davis v. United States* (09-11328), the Supreme Court was faced with such a situation, when it refused to adopt an exception to the judicially created good-faith exception to the judicially created exclusionary rule.

The exclusionary rule was created by courts to give teeth to the Fourth Amendment guarantee that all people have the right to be free from unreasonable searches and seizures. Under the exclusionary rule, evidence obtained in a manner that violates the Fourth Amendment is inadmissible. The purpose of the exclusionary rule is not to redress any injury caused by an unconstitutional search, but rather to deter future Fourth Amendment violations.

Recognizing this purpose, the Supreme Court created a "good faith" exception to the exclusionary rule, which provides that evidence seized by law enforcement officers who acted with a good-faith belief that their conduct was lawful is admissible. For example, the exclusionary rule will not preclude evidence seized by law enforcement officers conducting a search in good-faith reliance on a warrant that was valid at the time of the search, but later held invalid. The reasoning behind the good-faith exception is that the deterrent purposes of the exclusionary rule are not served when police officers act in a manner that they reasonably believe to be appropriate.

In *Davis*, the petitioner/defendant asked the Supreme Court to deem evidence that had been seized in compliance with existing precedent inadmissible because this precedent was subsequently overturned by the Supreme Court. In *Davis*, a "routine traffic stop" led to the arrest of both the driver of the car (for driving while intoxicated), and Davis, a passenger in the car (for providing police with a false name). After both were handcuffed and placed in the back of separate patrol cars, the police searched the car and found a gun inside Davis's jacket pocket. In an unsuccessful motion seeking to suppress the gun, Davis acknowledged that the search was valid under then-existing law, but nonetheless raised a Fourth Amendment challenge to "preserve the issue for review on appeal."

At the time of the search, the controlling Supreme Court decision was *New York v. Belton*, 453 U.S. 454 (1981), which held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." While Davis's appeal was pending, however, the Supreme Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), which held that an automobile search incident to a recent occupant's arrest was only permissible if: (1) the arrestee was within reaching distance of the vehicle during the search; or (2) the police believed that the vehicle contained evidence related to the crime for which the occupant was arrested.

Although *Gant* was decided nearly two years after Davis was searched, he nonetheless argued that it should be applied retroactively to his case, and that his conviction should be overturned because the search that led to the discovery of the gun in his jacket was unconstitutional. The U.S. Court of Appeals for the Fourth Circuit agreed with the first part of this argument, but not the second. It applied *Gant* and concluded that the search violated the Fourth Amendment, but refused to apply the exclusionary rule because the court believed that penalizing the arresting officer for following then-existing law was unwarranted since it would do nothing to deter future

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Fourth Amendment violations.

The Supreme Court affirmed. In his majority opinion, Justice Alito emphasized that "society must swallow [the] bitter pill" that results when the exclusionary rule "suppress[es] truth and set[s] the criminal loose in the community without punishment," but it must only do so "as a last resort." In this regard, the majority reiterated that the sole purpose of the exclusionary rule is to deter deliberate police misconduct. This justification could not be furthered by applying the exclusionary rule in *Davis* because all of the parties agreed that the police acted in accordance with Fourth Amendment law as it existed at the time of the search. The Court concluded that it was "this acknowledged absence of police culpability [that] dooms Davis's claim." According to the majority, "[a]bout all that exclusion would deter in [*Davis*] is conscientious police work." Moreover, to exclude the evidence seized in *Davis* would, according to the Court, transform the exclusionary rule into "a strict-liability regime."

Perhaps the most interesting aspect of the case, however, was not the core holding, but the principal argument that Davis raised on appeal. Davis argued that, by not applying the exclusionary rule to cases where a search was based on conduct later deemed unconstitutional, the Supreme Court was removing the incentive for criminal defendants to bring Fourth Amendment challenges to the Supreme Court. Davis claimed that an individual defendant would not gain anything by raising such a challenge because, even if the challenge was successful and changed the law going forward, the individual defendant would see no benefit. Rather, the state would simply raise the good-faith exception to the exclusionary rule and thus avoid exclusion of the evidence. Essentially, unless an individual defendant wanted to be a martyr for the cause, there would be very little incentive for the sort of lengthy and costly challenges that arrive at the Supreme Court and make Fourth Amendment law. As a result, Davis argued, the Fourth Amendment would ultimately lose its vitality unless it was applied retroactively to situations like the one before the Court.

In a dissenting opinion joined by Justice Ginsburg, Justice Breyer expanded on Davis's argument, suggesting that removing the incentives for defendants to aggressively pursue Fourth Amendment challenges would result in fewer challenges in the lower courts as well as the Supreme Court. The dissent questioned why a defendant would seek to overturn questionable precedent within a circuit when it would, at best, result in only a pyrrhic victory: "After all, if the (incorrect) circuit precedent is clear, then if the defendant wins (on the constitutional issue), he loses (on relief)." The lack of challenges in the lower courts would, in turn, make it impossible for the lower courts to "work out Fourth Amendment differences among themselves … through circuit reconsideration of a precedent that other circuits have criticized." This would, the dissent suggested, further stunt the growth of Fourth Amendment law.

The majority rejected the positions advanced by both Davis and the dissenting justices. The Court remarked, somewhat flippantly, that it had "never held that facilitating the overruling of precedent [was] a relevant consideration in an exclusionary-rule case." The Court then concluded that, regardless of its decision, defendants still have "an undiminished incentive" to pursue Fourth Amendment challenges in state courts and the federal courts of appeal, and that the Supreme Court can grant certiorari to review such decisions and prevent the Fourth Amendment law from being "stunted." The majority acknowledged that its holding might make it more difficult to overturn Supreme Court precedent on Fourth Amendment issues, but sought to put this consequence in context by noting that such decisions are rare in the first place — it had been "more than 40 years since the Court last handed down a decision of the type to which Davis refers" — and that there are already "no fewer than eight separate doctrines [that] may preclude a defendant who successfully challenges an existing precedent from getting any relief."

Still, the majority did leave the door open to recognizing a "limited exception to the good-faith exception for a defendant who obtains a judgment overruling one of our Fourth Amendment precedents." It did so begrudgingly though, noting that "[s]uch a result would undoubtedly be a windfall to this one random litigant." Nonetheless, this proposed exception does not address the lack of incentives noted by Davis and the dissent. It seems unlikely that individual defendants will take Fourth Amendment challenges all the way to the Supreme Court on the long odds that they will be able to convince the Court to both overturn precedent and adopt a new exception to the good-faith exception that would allow them to benefit from this change in the law.

It remains to be seen whether Davis's predictions regarding the ossification of Fourth Amendment law will come true, and whether the Supreme Court will be asked to create another exception to the exception that it already created to the exclusionary rule. Either way, if past experience is any indicator, *Davis* will not be the last time that the Court is forced to confront this issue. ■