DAVIS V. UNITED STATES (2011) 131 S. Ct. 2419
Decided June 16, 2011 (7-2 Opinion)

A RIGHT TO RETROACTIVITY WITHOUT A REMEDY: THE SUPREME COURT'S LATEST LIMITATION ON APPLICATION OF THE EXCLUSIONARY RULE

Holding: When law enforcement officers conducted a search in objectively reasonable reliance on binding appellate precedent in effect at the time of the search, the exclusionary rule does not apply even though the search is unconstitutional pursuant to a subsequent Supreme Court decision. In this case, although the post-arrest search of the defendant's car was unconstitutional under *Arizona v. Gant* (2009) 129 S.Ct. 1710 (decided after the search and applied retroactively), it was authorized by then-binding precedent. Thus, the fruits of the search should not be suppressed.

In *Davis*, police officers searched a car occupied by the defendant, following his arrest, and discovered incriminating evidence. This search was conducted before the Supreme Court decided *Gant,* which re-examined its previous rulings and limited the circumstances authorizing a search of a vehicle incident to the arrest of a recent occupant. The Court decided *Gant* while Defendant Davis's appeal was pending before the Eleventh Circuit Court of Appeals. The Eleventh Circuit held that the search of the defendant's vehicle was unconstitutional under the rule of *Gant*, even though it had been authorized by Eleventh Circuit precedent in effect at the time of the search.

Thus, the questions presented in *Davis* were: whether the "new rule" of *Gant* could be applied retroactively to a pre-*Gant* search; and if so, whether the incriminating evidence seized during that unconstitutional search should be subject to the exclusionary rule.

In the three years following the *Gant* decision, state and federal appellate courts sharply divided on this "retroactivity question".[1] With the decision in *Davis*, the United

---

[1] A few cases held that *Gant* applied retroactively to determine the constitutionality of searches conducted prior to its publication date (April 21, 2009), and that evidence seized in violation of *Gant* should be excluded. (See, e.g. *United States v. Gonzalez* (9th Cir. 2009) 578 F.3d 1130; *People v. McCarty* (2010) 229 P.3d 1041 [Colorado Supreme Court].) Other courts held that regardless of whether the *Gant* rules applied retroactively, the good faith exception to the exclusionary rule precluded suppression of the evidence

States Supreme Court resolved this question, but in a manner that could affect other types of searches and seizures, not just post-arrest vehicle searches. Indeed, a recent Ninth Circuit opinion just applied the *Davis* rule to a GPS search conducted prior to the Supreme Court's decision in *United States v. Jones* (2012) 132 S.Ct. 945. (*United States v. Pineda-Moreno* (August 6, 2012) 2012 WL 3156217.)

Davis is the latest in a long line of Supreme Court cases expanding the good faith exception to the exclusionary rule and limiting the application of that rule to situations that purportedly serve its deterrent purpose. This is yet another decision in which the Supreme Court reaffirms Fourth Amendment rights but denies the aggrieved individual a remedy for violation of those rights.[2]

The Majority Opinion in Davis v. United States

Davis was a 7-2 decision. The majority opinion was written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Kagan and Sotomayor. Justice Sotomayor wrote a separate concurring opinion. Justice Breyer filed a dissenting opinion, joined by Justice Ginsburg.

The Underlying Facts

In April 2007 (two years before *Gant*), police officers conducted a routine traffic stop. The officers eventually arrested the car's driver for driving under the influence, as well as the car's passenger, Defendant Davis, for giving a false name to the police. The officers handcuffed both arrestees and placed them in the back of separate police

---

when the officers reasonably relied on established pre-*Gant* precedent which allowed the vehicle search. (See e.g. *United States v. McCane* (10th Cir. 2009) 573 F.3d 1037; *People v. Branner* (2010) 180 Cal. App. 4th 308 [depublished following the California Supreme Court's grant of the defendant's petition for review in March 2010; review dismissed on August 24, 2011, in light of *Davis*].)

[2] For further discussion of the exclusionary rule and specific analysis of Supreme Court cases decided between 1974 and 2009 which have limited the application of that rule, see "THE RISE AND FALL OF THE EXCLUSIONARY RULE: CAN IT SURVIVE *HUDSON, HERRING* & *BRENDLIN*" by Kathryn Seligman (January 2010). For further discussion of the *Gant* decision, see "THE EVOLUTION OF THE SEARCH INCIDENT TO ARREST DOCTRINE: *ARIZONA V. GANT* (2009) 129 S.CT. 1710" by Kathryn Seligman (January 2011). Both sets of materials can be found on the First District Appellate Project website (www.fdap.org)

vehicles. Then, the police searched the vacated car's passenger compartment, including Davis's jacket, which was inside the car. They found a revolver inside the jacket pocket.

Davis was charged in federal district court with unlawful firearm possession. After his motion to suppress was denied, he was convicted for that crime. Davis appealed to the Eleventh Circuit, which affirmed the lower court's denial of the suppression motion. The United States Supreme Court agreed to review the Eleventh Circuit's decision.

Arizona v. Gant Announced a New Rule of Law Governing The Search of a Vehicle Incident to a Recent Occupant's Arrest

The *Davis* majority began its analysis by reviewing the "shift in our Fourth Amendment jurisprudence on searches of automobiles incident to arrests of recent occupants." (*Davis, supra*, 131 S.Ct. at 2424.) In *Chimel v. California* (1969) 395 U.S. 752, the Court had defined the permissible scope of a search conducted by officers immediately following a custodial arrest. To protect the police and prevent evidence destruction, the officers could conduct a warrantless search of the arrestee's person and the area within his immediate control. Twelve years later, in *New York v. Belton* (1981) 453 U.S. 454, the Court resolved a conflict in lower court authority by defining the parameters of "the area within the arrestee's immediate control" when he or she had recently occupied a vehicle. The Court promulgated a straightforward rule to guide police practice, authorizing a post-arrest search of the car's passenger compartment and any containers found therein.

For the next twenty-eight years, most appellate courts read *Belton* as permitting a police search of the entire passenger compartment incident to the arrest of a recent occupant, regardless of whether the arrestee was within reaching distance of the vehicle at the time of the search. If officers arrested an individual who was inside a vehicle at the time of the initial police contact, or immediately prior to that contact, they could search the passenger compartment.[3] The Eleventh Circuit Court of Appeals interpreted *Belton* in this manner. (See *United States v. Gonzalez* (11th Cir. 1996) 71 F.3d 819, 822.)

Nevertheless, a few courts – including the Arizona Supreme Court – held that

[3] This interpretation was confirmed by the Supreme Court's decision in *Thornton v. United States* (2004) 541 U.S. 615 [permitting a *Belton* search of the passenger compartment when the police did not initially contact the defendant until after he had voluntarily walked away from his vehicle and when the defendant was secured in a patrol car at the time of the search].

Chimel and *Belton* did not authorize a post-arrest vehicle search after the arrestee had been handcuffed and locked in the patrol car. At that point, the arrestee could no longer gain access to any weapon or destructible evidence that was inside the vehicle's passenger compartment. (See *State of Arizona v. Gant* (2007) 162 P.3d 640.)

The United States Supreme Court granted certiorari in *Arizona v. Gant*, and affirmed the Arizona court's decision in a 5-4 ruling. (*Gant, supra*, 129 S.Ct. 1710.) The Court re-examined the *Belton* rule. Commensurate with the purposes of a search incident to arrest – to protect the arresting officers and safeguard evidence – the Court held that "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle". **Henceforth, the police may only search the passenger compartment after arresting a recent occupant: 1)when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or 2)when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.**

The *Davis* majority emphasized that the *Gant* holding was a "new rule" contrary to the prevailing interpretation of *Belton* that police officers and the courts, including the Eleventh Circuit, had followed for many years. (*Davis, supra*, at 2425-26.)[4]

Gant Applies Retroactively, And Thus The Search of The Vehicle Occupied by Defendant Davis Was Unconstitutional

In *Davis*, the officers arrested Davis, the passenger, and the driver. The police then searched the car's passenger compartment and discovered Davis's firearm after both arrestees were secured in the back of separate patrol cars. When the search occurred in 2007, this post-arrest search was justified under the prevailing interpretation of *Belton*.

Gant was decided in April 2009, while Defendant Davis's appeal was pending before the Eleventh Circuit. The Court of Appeals applied *Gant*'s new rule and held that the post-arrest vehicle search conducted after the defendant was in the patrol car violated his Fourth Amendment rights. However, because the officers relied on binding appellate precedent, in effect at the time of the search, the Eleventh Circuit declined to apply the exclusionary rule and suppress the defendant's firearm, found inside the vehicle.

---

[4] Justice Alito, who authored the majority opinion in *Davis*, had written the dissenting opinion in *Gant*. His continuing disapproval of the *Gant* majority's new rule is evident. (See *Davis, supra*, at 2425.)

Agreeing with the Eleventh Circuit, the Supreme Court majority held that because the defendant's conviction was not yet final when *Gant* was filed, the *Gant* rule applied retroactively. Davis could invoke the newly announced rule of substantive Fourth Amendment law as a basis for seeking relief. The police officers violated the defendant's constitutional rights when they searched the vehicle after he was secured in the patrol car.

Retroactive Application of the New Rule of Law Does Not Determine the Appropriate Remedy, i.e., Whether the Exclusionary Rule Applies

However, the question of whether this constitutional violation warranted suppression of the evidence found during that search is a separate issue. "[E]xclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred." (*Davis, supra*, at 2531.) Should the gun found during the unconstitutional search be suppressed? Agreeing with the Eleventh Circuit, *Davis* answered no.

The Exclusionary Rule Only Applies When its Deterrent Effect on Police Misconduct Outweighs the Social Costs of Suppressing Evidence

Reiterating the analysis that has dominated the Supreme Court's Fourth Amendment jurisprudence since the mid-1970's, the *Davis* majority emphasized that the exclusionary rule's "sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations." (*Davis, supra*, at 2426.) Therefore, the remedial rule is not applied every time that a violation of an individual's Fourth Amendment rights led to the discovery of incriminating evidence. It is applied only when suppression will yield "appreciable deterrence." (*Ibid*.) Moreover, excluding evidence is only appropriate when the deterrent benefits outweigh the "substantial social costs" of suppressing "reliable trustworthy evidence bearing on guilt or innocence." (*Davis, supra*, at 2427.)

The majority then traced the evolution of the good faith exception to the exclusionary rule from *United States v. Leon* (1984) 468 U.S. 897 [the exclusionary rule does not apply when the searching officer relied in good faith on a subsequently invalidated search warrant] through *Herring v. United States* (2009) 555 U.S. 135 [the rule does not apply when the officer conducting the search reasonably relied on false information resulting from a police employee's isolated negligence].) The principle that emerges from these precedents is that the deterrence benefits of exclusion are directly related to the culpability of the law enforcement conduct at issue. To trigger the exclusionary rule, the error that causes the Fourth Amendment violation must be attributable to the officer conducting the search, and that officer must exhibit a deliberate, reckless or grossly negligent disregard for Fourth Amendment rights. In contrast, when police officers search with "an objectively reasonable good faith belief that their conduct

is lawful", the deterrent effect of excluding seized evidence is minimal and not worth the social costs of suppression. (*Davis, supra*, at 2427-29.)

The Exclusionary Rule Should Not Apply When, as in the Current Matter, the Officer Conducted the Search in Reliance on Binding Appellate Court Precedent in Effect at the Time of the Search

Applying these principles to the facts of *Davis*, the majority noted that the officers who searched the defendant's vehicle after he was arrested and secured in the patrol car, reasonably relied on binding appellate precedent in effect at that time. The officer who conducted the search in reliance on this binding precedent, did "no more than 'act as a reasonable officer would and should act' under the circumstances." (*Davis, supra*, at 2429, citing *Leon, supra*, 468 U.S. at 920.)

Similarly situated officers should not be deterred from such conduct. Society wants to encourage the police to know the prevailing law and to follow it. "It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to governing law." (*Davis, supra*, at 2434, citing *People v. Defore* (1926) 242 N.Y. 13, 21.)

Conformity With Prior Supreme Court Precedents

The good-faith precedent cited by *Davis* which seems most analogous to the present case is *Illinois v. Krull* (1987) 480 U.S. 340. In that case, officers searched an auto wrecking yard and found several stolen cars. The yard's operators were criminally prosecuted. The search had been authorized by a state statute, but soon after the search, the Seventh Circuit Court of Appeals found that this statute violated the Fourth Amendment. The Supreme Court declined to exclude the incriminating evidence discovered during the search because the officers had reasonably relied upon a statute subsequently declared unconstitutional. Excluding the evidence from the criminal prosecution would not deter Fourth Amendment violations by future officers. Society expects law enforcement officers to enforce statutes as written, unless they are clearly unconstitutional. (*Krull*, supra, at 349-50.) The exclusionary rule applies only if the officers' reliance on the subsequently invalidated statute was not objectively reasonable; a reasonable officer would have known that the statute was unconstitutional. (*Id.*, at 355.)

It is surprising that the *Davis* majority did not rely on *United States v. Peltier* (1975) 422 U.S. 531, a case that applied a good faith exception to the exclusionary rule nine years before *Leon* was decided and seems particularly on point. In *Peltier*, the defendant's car was searched by border patrol agents who found marijuana in the

vehicle's trunk. Four months after the search, the Supreme Court decided *Almeida-Sanchez v. United States* (1973) 413 U.S. 266, holding that border patrol agents could not search a car without probable cause. The prosecution conceded that the search of the defendant's car was unconstitutional under *Almeida-Sanchez*. The issue presented was whether *Almeida-Sanchez* should be applied retroactively to cases pending on appeal when it was decided. The Supreme Court reformulated the question to ask whether the exclusionary rule should be applied to the fruits of a search that would be illegal under a subsequent high court decision announcing a new Fourth Amendment principle, when the law enforcement officers who conducted the search relied on then current law.

In a 5-4 decision, the Court declined to apply the exclusionary rule under these circumstances. The key consideration was that the agents stopped and searched the defendant's car in good faith reliance on "a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval" – federal appellate opinions that authorized random searches. (*Peltier, supra*, at 541.) Consequently, suppressing the "illegally seized" evidence would not serve the purpose of the exclusionary rule – i.e. deterring unlawful law enforcement conduct. If an officer reasonably believes, in good faith, that the search he is about to conduct is lawful, he will not be deterred by the prospect of exclusion.

Justice Sotomayor's Concurring Opinion

A Matter of Compulsion

First, Justice Sotomayor explained that she was "compelled" to agree with the majority opinion because of prior Supreme Court precedents holding that "application of the exclusionary rule is unwarranted when it does not result in appreciable deterrence", and because application under the circumstances of this case would not "yield appreciable deterrence." (*Davis, supra*, 131 S.Ct. at 2434-35 [conc. opn. of Sotomayor, J.].)

Emphasizing the Narrowness of the Majority's Ruling - Binding Precedent Versus Unsettled Precedent

Second, responding to the dissent's warning that a broad interpretation of the majority's ruling would further undermine the exclusionary rule, Justice Sotomayor emphasized the narrowness of that ruling. According to Sotomayor, the good faith exception to the rule only applies when the officer conducting the search relied on "unequivocal" binding precedent that is subsequently overruled. Suppression of evidence seized during an unconstitutional search might deter police misconduct -- and the exclusionary should therefore apply -- if the searching officer relied on unsettled

precedent, or if no case law (or other authority) specifically sanctioned the police action.

Application of the Exclusionary Rule is Not Dependent on the Law Enforcement Officer's Culpability

Finally, Justice Sotomayor noted that the question of "whether an officer's conduct can be characterized as 'culpable" does not determine whether the exclusionary rule applies. "We have never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground that the officer's conduct could be characterized as non-culpable." The officer's culpability is merely a relevant consideration in determining whether exclusion would result in appreciable deterrence and whether the benefits of exclusion outweigh the costs. (*Ibid*.)

Justice Breyer's Dissenting Opinion

Justice Breyer's dissent, joined by Justice Ginsburg, identified multiple problems with the majority's opinion in *Davis*. Justice Breyer agreed with the majority's contention that *Gant* defined a new rule of law and that the *Gant* rule applied retroactively to the post-arrest search conducted in *Davis*. However, Breyer contended that the incriminating evidence seized from Defendant Davis's car during the unconstitutional search should have been suppressed. If a new rule of law is retroactive, the remedy should also be retroactive. Breyer criticized the majority for "[l]eaving Davis with a right but not a remedy." (*Davis, supra*, at 2436-37 [dis. opn. of Breyer, J.].)

The Majority's Distinction Between Retroactive Application of the Rule and Retroactive Application of the Remedy is Counter to Griffith v. Kentucky

First, Justice Breyer asserted that the majority's distinction between retroactive application of the new rule and the availability of a remedy runs counter to the prevailing precedent, *Griffith v. Kentucky* (1987) 479 U.S. 314. For two decades prior to the Court's decision in *Griffith*, the governing precedent on retroactivity questions was *Linkletter v. Walter* (1965) 381 U.S. 618. Under *Linkletter*, courts determined a new rule's retroactivity by looking at several factors, including "the degree of reliance by law enforcement authorities on old standards." (*Id.)*

In *Griffith*, the Court concluded that "*Linkletter* had proved unfair and unworkable" and "substituted a clearer approach." (*Davis, supra*, at 2436.) According to *Griffith*, a new rule governing the conduct of criminal prosecutions that constitutes "a clear break with the past" applies retroactively to all cases pending on direct review or not

yet final, without exception. (*Ibid*, quoting *Griffith, supra*, 479 U.S. at 328.)

Justice Breyer reasoned that the *Davis* holding re-created the very problems that led the Supreme Court to abandon the *Linkletter* multi-factor approach in favor of *Griffith*'s straightforward rule. Future courts deciding whether to apply the exclusionary rule retroactively to a Fourth Amendment violation will have to determine: 1)if the previous appellate precedent ostensibly relied upon was actually binding on the officer conducting the search, under the factual circumstances of the case; and 2)whether the officer's reliance on that precedent was truly reasonable.[5]

The Majority's New Good Faith Exception Further Narrows Application of the Exclusionary Rule

Justice Breyer characterized the majority's expansion of the good faith exception as potentially undermining the exclusionary rule and thus creating "a watered-down Fourth Amendment, offering its protection against only those searches and seizures that are egregiously unreasonable." (*Davis, supra*, at 2440.)

According to Breyer, the Supreme Court has historically "deviated from the suppression norm in the name of good faith only a handful of times and in limited, atypical circumstances." (*Davis, supra*, at 2439.) This is important because, in most cases where police officers violate an individual's Fourth Amendment rights, they have acted in objective good faith. Most unconstitutional searches result from carelessness and uncertainty rather than intent or malice. Moreover, if the good faith exception to the exclusionary rule rests solely on the culpability of the officer who conducts the search, it could be applied to any officer who believes, in good faith, that his search complies with the Constitution, as interpreted by some precedent, even if that precedent is not binding.[6]

---

[5] The *Davis* majority rejected the dissent's assertion that the their ruling conflicted with *Griffith*. The majority countered that retroactive application of a new Fourth Amendment rule does not "determine what appropriate remedy (if any) the defendant should obtain". (*Davis, supra*, at 2431, citing *Powell v. Nevada* (1994) 511 U.S. 79, 84.) A court must still determine if the exclusionary rule applies.

[6] The *Davis* majority rejected this contention by emphasizing the narrowness of their ruling. The good faith exception defined in *Davis* --denying the exclusionary rule to officers who reasonably relied on binding precedent that is subsequently overruled -- would apply in an "exceedingly small set of cases", as "[d]ecisions overruling this Court's Fourth Amendment precedents are rare". (*Davis, supra*, at 2433.)

According to Breyer, *Davis* can be read as expanding upon the Court's "broad dicta in *Herring*" suggesting that the exclusionary rule should only apply when the Fourth Amendment violation was "deliberate, reckless or grossly negligent." This interpretation of the good faith exception "will swallow the exclusionary rule." (*Id*., at 2439.)[7]

What Are the Potential Effects of Davis v. United States?

Davis expands the reach of the good faith exception to the exclusionary rule. However, I don't necessarily predict the dire consequences discussed by Justice Breyer in his dissenting opinion. Consider the limited holding of *Davis:* The exclusionary rule does not apply retroactively to a search declared unconstitutional by a subsequent appellate decision if the officer conducted the search in objectively reasonable reliance on binding appellate precedent. (*Davis, supra*, at 2423-24, 2434.)

First, this ruling was neither a surprise nor a departure. It was consistent with exclusionary rule/good faith exception precedents decided in the last 37 years, particularly *United States v. Peltier* (1975) 422 U.S. 531 and *Illinois v. Krull* (1987) 480 U.S. 340

Moreover, just two years earlier, in *Herring v. United States* (2009) 129 S.Ct. 695, the Supreme Court reiterated the principles underlying the *Davis* opinion: 1) The purpose of the exclusionary rule is to deter future police misconduct – "deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (*Herring, supra*, at 702.) 2) Thus, the rule only applies when it will result in "appreciable deterrence" outweighing the social costs, including "letting guilty and possibly dangerous defendants go free." (*Id.,* at 700-01.) 3) The court must focus on the culpability of the law enforcement officer who conducted the unconstitutional search. The exclusionary rule should not apply when the error rendering the search unconstitutional was made by another party, including another police employee. The error made by this other police employee must be deliberate, reckless or grossly negligent. 4) The exclusionary rule should not apply when the officer conducting the search reasonably relied in good faith on this other party's error.

Second, there is language in the majority opinion suggesting that the *Davis* good faith exception to the exclusionary rule should not be broadly applied. The majority

---

[7] Indeed, some federal circuits are already interpreting *Herring* in this manner. (Ibid. at 2439-40, citing *United States v. Julius* (2d. Cir. 2010) 610 F.3d 60, 66-67; *United Stats v. Master* (6th Cir. 2010) 614 F.3d 236, 243.) The *Davis* decision "will doubtless accelerate this trend." (*Id*. at 240 .)

repeatedly states that in order to invoke the *Davis* exception, the officer conducting the search must rely on **binding** appellate precedent that is subsequently overruled, and the officer's reliance must be **objectively reasonable**. Although the majority does not state that the binding appellate precedent must be overruled by the U.S. Supreme Court, it implies that this will usually be the case. (See *Davis, supra*, at 2433 ["Decisions overruling this Court's Fourth Amendment precedents are rare"].) When prosecutors rely on the *Davis* holding to deny the exclusionary rule to a defendant who has been illegally searched, defense advocates can argue that the precedent relied upon was not binding or that the officer's reliance on precedent was not objectively reasonable.

Finally, there are the explicit limitations on the majority's ruling as emphasized in Justice Sotomayor's concurring opinion: 1) The precedent relied on by the searching officer must be binding and unequivocal. The *Davis* exception should not apply if the officer relies on unsettled precedent (e.g. a division of authority) or where there was an absence of case law or other authority specifically sanctioning the police action. 2)The searching officer's culpability is merely a relevant consideration and not the factor determining whether the exclusionary rule applies. Defense advocates can rely on Justice Sotomayor's explicit limitations to resist prosecution efforts to expand the *Davis* good faith exception. (See *Davis, supra*, at 2435-36.)

Cases Following Davis v. United States

Applying Davis to Vehicle Searches Incident to Arrest

Since *Davis* was decided on June 16, 2011, there have been several state and federal appellate court cases applying the ruling to post-arrest searches conducted prior to *Gant*. In each case, the vehicle search was unconstitutional under *Gant* because: 1) the arrestee was secured in custody away from the vehicle by the time the officer commenced the search; and 2) the circumstances did not support a reasonable belief that evidence of the crime of arrest would be found inside the passenger compartment. Nevertheless, the courts held that although *Gant* applied retroactively and the search of each arrestee's vehicle violated the Fourth Amendment, the exclusionary rule did not apply because the officer reasonably relied on binding appellate authority in effect at the time of the search. That authority permitted a vehicle search under the circumstances. (See, e.g., *United States v. Wilks* (4th Cir. 2011) 647 F.3d 520; *State v. Johnson* (2011) 354 S.W.3d 627 [Supreme Court of Missouri, En Banc.]; *State v. Taylor* (2012) 79 So.3d 876 [District Court of Appeal of Florida, Fourth District]; *Narcisco v. State* (2012) 723 S.E.2d 369 [Supreme Court of South Carolina]; *United States v. Madden* (10th Cir. 2012) 682 F.3d 920; *People v. Hall* (Aug. 2, 2011) 2011 WL 3278800 [Unpublished decision, California Court of Appeal, Fifth District]; *People v. Reese* (Sept. 19, 2011) 2011 WL 4347024

[Unpublished decision, California Court of Appeal, Third District].)

Only two cases declined to apply the *Davis* good faith exception to the exclusionary rule to a vehicle search incident to arrest conducted prior to *Gant*. Both of these cases relied on unique provisions of state law.[8]

State v. Oram (2011) 266 P.3d 1227

State v. Oram was decided by the Kansas Court of Appeal in December 2011, six months after *Davis*. In *Oram*, the search producing incriminating evidence occurred a year before *Gant* was decided. Sheriffs deputies conducted a traffic stop and ultimately arrested the vehicle driver (Defendant Oram) for obstruction. They also arrested the passenger on an outstanding warrant. The deputies handcuffed both arrestees and placed them in the back seat of separate patrol cars. The deputies then searched the vehicle and found a bag of marijuana. The defendant was convicted of possession of marijuana and she appealed from the denial of her motion to suppress evidence.

The appellate court applied *Gant* retroactively and held that the vehicle search incident to arrest was unconstitutional under the rule of that case. The defendant was secured in the back of the patrol car at the time of the search, and the deputies did not reasonably believe that evidence of the crime of arrest (obstruction) might be found in the vehicle's passenger compartment.

However, the search was also unreasonable under binding Kansas law in effect at the time of the intrusion. Kansas has a statute defining the parameters of police authority to conduct a search incident to arrest. Under that statute, law enforcement officers may only search the area within the arrestee's "immediate presence" at the time of the search. According to pre-*Gant* cases decided by the Kansas Supreme Court and state appellate courts, "when the arrestee has been handcuffed, removed from near the car and locked inside the patrol car, the car is no longer within the arrestee's immediate presence" and cannot be searched. (*Oram, supra*, at 1234, 1237.)

The Kansas appellate court declined to apply the good faith exception to the exclusionary rule, set forth in *Davis*, because under the statutory "immediate presence" limitation (as defined by the state courts), "well-trained deputes in Kansas would not have

---

[8] In California, all Fourth Amendment questions are governed by federal law. In apparent contrast to Kansas and Georgia, California has no independent state doctrine providing greater constitutional protection.

believed in good faith that they had the authority to search a car after the defendant had been handcuffed, searched and placed in the back of a patrol car on October 2, 2008 [the date of the search]." (*Oram, supra*, at 1237-38.) The officers should have known that their post-arrest search violated constitutional authority as defined by binding appellate precedent then in effect. Applying the exclusionary rule under these circumstances would deter future officers from similarly disregarding the law.

Canino v. State (2012) 725 S.E.2d 782

In *Canino v. State*, decided in March 2012, the Georgia Court of Appeals also declined to apply the *Davis* exception to the exclusionary rule to a pre-*Gant* vehicle search. In August 2008, officers arrested the defendant for driving recklessly. After handcuffing the defendant and pressing him face-first against the driver's side of his car, in the presence of four officers, one officer began searching the vehicle, finding cocaine inside the passenger compartment. The United States Supreme Court decided *Gant* while the defendant's criminal drug prosecution and his motion to suppress evidence were still pending before the trial court.

The appellate court applied the *Gant* rule to this case and held that the defendant was "unsecured and within reaching distance of the passenger compartment at the time of the search." (*Canino, supra*, at 787-88.) Moreover, the police did not reasonably believe that evidence related to the crime of arrest (reckless driving) would be found in the car. The search incident to arrest was unconstitutional.

The appellate court did not apply the *Davis* exception good faith exception to the exclusionary rule. The court noted that a state may impose higher standards on searches and seizures than required by the Federal Constitution. Specifically, the federally-defined good faith exception "is not applicably in Georgia in light of [the state's] legislatively-mandated exclusionary rule." (*Id.*, at 788, fn. 28.)

Applying Davis to Other Fourth Amendment Violations

United States v. Pineda-Moreno (August 6, 2012) 2012 WL 3156217 [Ninth Circuit Court of Appeals]

In *Pineda-Moreno*, the Ninth Circuit applied the *Davis* good faith exception to a police intrusion other than a search incident to arrest. In 2007, officers surreptitiously attached mobile tracking devices to the underside of the defendant's vehicle and used those devices to track the jeep's movements over several months. Almost five years later, while this case was still pending on appeal, the Supreme Court decided *United States v.*

Jones (2012) 132 S.Ct. 945, holding that the installation and use of a GPS tracking device constituted a Fourth Amendment search. **Relying on *Davis*, the Ninth Circuit declined to apply the exclusionary rule – even if the officers' actions constituted an unreasonable search – because the officers' attachment and use of these tracking devices was authorized by binding Ninth Circuit precedent in effect in 2007**.

Drug enforcement officers suspected that Defendant Pineda-Moreno was growing marijuana. To confirm these suspicions, the officers attached mobile tracking devices to the underside of the defendant's jeep on seven different occasions between July and September 2007. They used these devices to monitor the movements of the jeep and learned that on four occasions, the jeep traveled to suspected marijuana grow sites. The specific devices used to monitor these grow-site visits had been surreptitiously installed on the jeep while it was parked on a public street or in a public parking lot. Based on this information, officers stopped the defendant's jeep and obtained his consent to search his mobile home where they found evidence of marijuana production.

During his criminal drug prosecution, the defendant moved to suppress that evidence, arguing that the officers unreasonably searched his vehicle when they installed the tracking devices. After the Ninth Circuit affirmed the district court's denial of the suppression motion (see *United States v. Pineda-Moreno* (9th Cir. 2010) 591 F.3d 1212), the defendant filed a petition for certiorari in the Supreme Court. Before ruling on this petition, the Supreme Court decided *United States v. Jones*, *supra*, 132 S.Ct. at 945, holding that the government's installation of a GPS tracking device to a suspect's vehicle, and its use of that device to monitor the vehicle's movements over an extended period, constituted a search within the meaning of the Fourth Amendment. The Supreme Court then granted Defendant Pineda-Moreno's certiorari petition and directed the Ninth Circuit to reconsider its ruling in light of *Jones*.

Applying the rule of *Jones* to the drug enforcement officers actions in 2007, the Ninth Circuit held that the officers "conducted Fourth Amendment searches when they attached the tracking devices to Pineda-Moreno's jeep and used the devices to monitor the jeep's movements." (*Pineda-Moreno, supra*, at *2.) The court assumed that these warrantless searches were unreasonable and unconstitutional.

However, *Jones* had not been decided when those searches occurred. Binding Ninth Circuit precedent, then in effect, held: 1) that placing an electronic tracking device on the underside of a vehicle was neither a search or seizure under the Fourth Amendment; and 2) that the government did not violate the Fourth Amendment when it used that device to monitor the vehicle's travel on public roads. (*Id*., at *3 [citations omitted].) Consequently, "the agents objectively relied on then-existing binding precedent

when they approached Pineda-Moreno's jeep in public areas, attached tracking devices to it, and used those devices to monitor the jeep's movements." (*Id*., at *4.) Applying the *Davis* good faith exception, the Ninth Circuit ruled that the evidence seized as a result of the agents' conduct would not be excluded – although it violated the Fourth Amendment.

Pineda-Moreno confirms that the *Davis* rule can be applied to searches other than pre-*Gant* vehicle searches incident to arrest. However, the Ninth Circuit still applied the rule under a rather unusual circumstance – when the United States Supreme Court overturns binding appellate precedent to expand Fourth Amendment protection.