

2011

## Waiting for Davis v. United States -- or Not Waiting

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### Repository Citation

Bruhl, Aaron-Andrew P., "Waiting for Davis v. United States -- or Not Waiting" (2011). *Popular Media*. 371.  
[https://scholarship.law.wm.edu/popular\\_media/371](https://scholarship.law.wm.edu/popular_media/371)

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**THURSDAY, MAY 12, 2011**

## **Waiting for Davis v. United States -- or not waiting**

One interesting Supreme Court case still awaiting decision this term is *Davis v. United States*. The case presents the question whether the good-faith exception to the exclusionary rule applies in a situation in which a search was legal when conducted but becomes illegal based on a new rule announced while the case is pending on direct appeal. The new rule at issue in *Davis* is *Arizona v. Gant* (2009), which concerned vehicular searches; the search in *Davis* took place before *Gant* and was legal under pre-*Gant* circuit law, but then *Gant* was decided while the case was pending before the court of appeals. The court of appeals held that *Gant* provided no remedy, essentially reasoning that the point of the exclusionary rule is to deter police misconduct; if that is the purpose, then evidence should not be excluded when the police acted in accordance with law that was valid at the time.

*Davis* is interesting for all sorts of reasons involving the exclusionary rule and, more broadly, the retroactivity of judicial decisions. My particular interest has to do with appellate case-management. Defendant Davis is hardly the only person whose case involves the question whether the good-faith exception should apply to pre-*Gant* searches. Whenever the Supreme Court grants review on a recurring issue like this, there will be plenty of other litigants at various places in the appellate pipeline whose cases involve the same issue. What should lower courts do with these potentially affected cases?

Here is what the Fifth Circuit said in a recent changed-law/exclusionary rule case that happened to come to my attention: "We are aware that the Supreme Court granted certiorari in *Davis* to address precisely this question. Unless and until the Court instructs otherwise, we are bound to apply this Circuit's binding precedent [i.e. that the good-faith exception applies in changed-law scenarios]." *United States v. Curtis* (March 11, 2011). It went on to affirm the defendant's conviction.

Now, the court's statement is true enough. A mere grant of certiorari does not change circuit law. But there is another option, right? Namely, the court of appeals could just wait about three months and see how *Davis* turns out. To be clear, I'm not saying that delaying decision is, all things considered, the right call in this case. The question of whether to hold cases in abeyance when the Supreme Court has granted certiorari is surprisingly complicated and does not admit of across-the-board rules, or so I've argued [elsewhere](#). Sometimes courts decide to wait for a forthcoming potential change in law, sometimes they decide not to wait, and sometimes (as here) they act as if no choice is available to them. But whatever the court does, it is making a choice.

Bonus question: If you are the attorney for someone like Curtis, what is your next move?

Posted by Aaron Bruhl on May 12, 2011 at 09:39 AM in [Civil Procedure](#), [Criminal Law](#), [Judicial Process](#) | [Permalink](#)

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