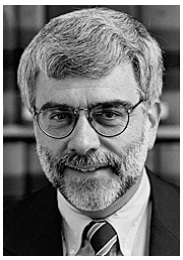
SINCE 1854

Chicago Daily Law Bulletin®

Volume 157, No. 177 Friday, September 9, 2011

Court takes on Fourth Amendment exclusionary rule



Criminal Procedure

By Timothy P. O'Neill

Timothy P. O'Neill is a professor at The John Marshall Law School. He was a finalist for the 2010 "Peter Lisagor Award" for Exemplary Journalism in the area of Commentary. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

Let's talk about "The Biggest Loser."

No, not the TV show. I want to talk about what Linda Greenhouse referred to as "The Biggest Loser" of the 2010 term of the U.S. Supreme Court: the Fourth Amendment.

From a defense perspective, the result was scorched earth. For openers, the government won all three Fourth Amendment cases. Justice Samuel Alito wrote two of the majority opinions and Justice Antonin Scalia wrote the third. And the votes? Try 8-0, 8-1 and 7-2. If you add them up, the total was 23-3. In other words, in the three cases combined the defense only managed a field goal.

The most significant of the three was *Davis v. U.S. 2011* U.S. LEXIS 4560 (decided June 16, 2011). If you are a defense lawyer, read it. If you are a prosecutor, memorize it.

Here's why. Fifty years ago the Warren court expanded the federal Fourth Amendment exclusionary rule to the states. *Mapp v. Ohio.* 367 U.S. 643 (1961). It appeared at that time that the formula was "Fourth Amendment violation equals exclusion."

But beginning in 1969, the Burger court began limiting the scope of the exclusionary rule. First, the Supreme Court began to consistently restrict the rule's use only to criminal trials. See, e.g., *U.S. v. Calandra.* 414 U.S. 338 (1974) (exclusionary rule inapplicable to grand jury proceedings); *U.S. v. Janis.* 428 U.S. 433 (1976) (inapplicable to civil trials); *I.N.S. v. Lopez-Mendoza.* 468 U.S. 1032 (1984) (inapplicable to civil deportation hearings); *Penn. Board of Probation and Parole v. Scott*. 524 U.S. 357 (1998) (inapplicable to parole revocation hearings). The Court prohibited state prisoners from raising Fourth Amendment exclusionary rule claims in federal habeas corpus. *Stone v. Powell*. 428 U.S. 465 (1976).

Second, starting in 1984 the Supreme Court began to refuse to exclude evidence that was the fruit of unconstitutional searches and seizures as long as the police had operated in objective "good faith." Thus, there is no exclusion if the police reasonably rely on a judge's assurance that the warrant they obtained was based on probable cause (*U.S. v Leon.* 468 U.S. 897 (1984); no exclusion if the police reasonably rely on a statute allowing unconstitutional searches (*Illinois v. Krull*. 480 U.S. 340 (1987); no exclusion if the police rely on an invalid arrest warrant where the problem was caused by a clerical error by a court employee (*Arizona v. Evans.* 514 U.S. 1 (1995)).

The new *Davis* case is the last in a Roberts court trilogy that further restricts the exclusionary rule.

In 2006 the Supreme Court refused to apply the exclusionary rule to a police officer's "knock and announce" violation performed while executing an otherwise valid search warrant. *Hudson v. Michigan.* 547 U.S. 586 (2006). Significantly, this marked the first time since *Mapp* that evidence seized pursuant to a Fourth Amendment violation caused solely by improper police behavior was found admissible at a criminal trial.

Scalia's majority opinion in *Hudson* is full of disquieting hints that the exclusionary rule may not be long for the legal world. Scalia emphasizes that, "Suppression of evidence … has always been our last resort, not our first impulse." For criminal defendants trying to use *Mapp,* "the jackpot [is] enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card."

Three years later the Supreme Court had to decide whether the exclusionary rule should apply when the police had relied on an invalid arrest warrant that appeared on a law enforcement data base through police error. *Herring v. U.S.* 555 U.S. 135 (2009). The defense argued that since the purpose of the exclusionary rule was to deter police misconduct, it was clear that it applied in this situation.

The Roberts court disagreed. It held that not just any police error justified use of the exclusionary rule. Exclusion of evidence only "serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence." The court found that the police error in *Herring* was, at worst, simple negligence. Thus, exclusion was not a proper remedy.

This past term, the Supreme Court added another nail to the exclusionary rule's coffin in *Davis v. U.S.* Davis was a passenger arrested during a proper vehicle stop. The police officer proceeded to search the passenger compartment pursuant to the rule in *New York v. Belton.* 453 U.S. 454 (1981) (arrest of a recent occupant of a vehicle entitled police to automatically search passenger compartment). The officer found Davis's revolver, and Davis was subsequently charged with being a felon in possession of a firearm. Yet while Davis's appeal was pending, the Supreme Court greatly narrowed the *Belton* rule in *Arizona v. Gant*. 129 S. Ct. 1710 (2009) (search of vehicle incident to arrest of passenger only appropriate where police have reason to believe that evidence of the offense of arrest might be in the vehicle or if there is danger that the arrestee may re-enter the vehicle). Davis thus contended that the search in his case violated the principles of *Gant* and therefore the evidence should be suppressed.

The Roberts court disagreed. Even assuming the vehicle search violated *Gant,* the court found that use of the exclusionary rule was inappropriate here.

Davis covers some old ground by again

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emphasizing that the exclusionary rule is "not a personal constitutional right," but that its "sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations." And even some deterrent effect is not enough, for deterrence is "a necessary condition for exclusion, but it is not a sufficient one." The court must consider the "substantial social costs" generated by exclusion. The "bottom-line effect" of the exclusionary rule "in many cases is to suppress the truth and set the criminal loose in the community without punishment."

Here the officer relied on the then-binding rule of *Belton.* Thus, there was no police culpability of any kind. "The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case."

Davis then provides prosecutors with this standard: "Indeed, in 27 years of practice under *Leon's* good-faith exception, we have never applied the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct."

What should be particularly disturbing to defense lawyers is the lineup of justices in *Davis*. Both *Hudson* and *Herring* were 5-4 decisions with the predictable pro-defense justices in dissent: John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer. But *Davis* was decided by the replacements for Stevens and Souter — Justices Elena Kagan and Sonia Sotomayor, respectively. And both Kagan and Sotomayor concurred in the pro-prosecution judgment, Kagan unequivocally and Sotomayor with a separate concurrence. Only Ginsburg and Breyer dissented in *Davis.*

So where does this leave Illinois criminal defense lawyers? Remember that Illinois courts have used the exclusionary rule since 1923 — 38 years before *Mapp v. Ohio. People v. Brocamp*. 307 Ill. 448 (1923). And the independent power of the Illinois exclusionary rule was shown when the Illinois Supreme Court refused to follow the U.S. Supreme Court's pro-prosecution decision in *Illinois v. Krull.* See *People v. Krueger.* 175 Ill.2d 60 (1996). It is one of the few areas of search and seizure where Illinois does not follow the U.S. Supreme Court in absolute lockstep. Defense lawyers thus need to vigorously pursue state constitutional arguments.

But it is an entirely different story for federal courts. The next time you see someone carrying a sign that says, "The End Is Near," it may not be referring to the world — it could be referring to the Fourth Amendment exclusionary rule. For criminal defense lawyers, with friends like Sotomayor and Kagan, who needs the Federalist Society?