No. 09-11328

In The

Supreme Court of the United States

WILLIE GENE DAVIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the exclusionary rule applies to an unconstitutional search on direct review if precedents at the time of the search incorrectly deemed such searches constitutional.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is *United States v. Davis*, 598 F.3d 1259 (11th Cir. 2010). It appears in the Joint Appendix beginning at J.A. 107. The Magistrate Judge's Report and Recommendation and the order of the District Court for the Middle District of Alabama are available together as *United States v. Davis*, 2008 WL 1927377 (M.D. Ala. 2008). The District Court order appears in the Joint Appendix beginning at J.A. 96. The Report and Recommendation appears in the Joint Appendix beginning at J.A. 99.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit entered judgment on March 11, 2010. J.A. 107. The Eleventh Circuit denied rehearing on April 14, 2010. J.A. 124. The petition for certiorari was filed on June 8, 2010, and the Court granted the petition on November 1, 2010. *Davis v. United States*, 2010 WL 2398383 (2010).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involves an automobile search similar to that ruled unconstitutional in *Arizona v. Gant*, 129 S.Ct. 1710 (2009). On April 27, 2007, Corporal Curtis Miller of the Greenville Police Department joined a traffic stop initiated by Officer Kenneth Hadley in a residential area of Greenville, Alabama. While Officer Hadley spoke to the driver, Corporal Miller walked around to the passenger side and asked the occupant for his name. The passenger paused for a moment and then responded that his name was "Ernest Harris." J.A. 24. The passenger appeared nervous, and Miller suspected that he had provided a false name. After Officer Hadley arrested the driver of the car for drunk driving, Corporal Miller asked the passenger to step out of the car. J.A. 108.

The passenger exited the vehicle. As he did so, he removed his jacket and placed it on the passenger seat. A crowd of bystanders had gathered by this point, and Miller asked the crowd if anyone recognized the passenger. One of the bystanders knew the passenger and correctly identified him as Willie Gene Davis. J.A. 27. Miller arrested Davis for providing

false information to an officer, and he put Davis in the back of Miller's police car. Miller then searched the stopped car beginning with the jacket Davis had left on the passenger seat. Miller found a revolver inside one of the jacket's pockets. J.A. 30.

Davis was indicted for being a felon in possession of a firearm. J.A. 8. On April 1, 2008, Davis moved to suppress the firearm on Fourth Amendment grounds. J.A. 10. Davis acknowledged that Miller's search was constitutional according to Eleventh Circuit precedent. J.A. 15. The motion to suppress explained that the Supreme Court had recently granted certiorari in *Arizona v. Gant*, No. 07-542, and that *Gant* would reconsider when automobiles can be searched incident to arrest. Because *Gant* would decide the lawfulness of the search in Davis's case, Davis objected to the search and requested a suppression hearing to preserve the issue for review pending the outcome in *Gant*. J.A. 15.

The Magistrate Judge held a suppression hearing on the motion. At the outset, the Magistrate Judge acknowledged that the only purpose of the hearing was to create a record for review when the Supreme Court decided *Gant*. J.A. 18-19. Counsel for Davis agreed, noting that "if we were to lose the case and the case was on appeal at the time [*Gant* is handed down], there would need to be a record made" for Davis to benefit from any new rule announced in *Gant*. J.A. 20.

Miller then took the stand. Miller testified that he had searched the car for two reasons. First, he was conducting an inventory search that required him to safeguard the property inside the car before it was impounded. J.A. 29. Second, Davis's suspicious activity caused Miller to suspect there may be a "safety concern" in the car. *Id*. Two days after the hearing, the Magistrate Judge filed a Report recommending that the motion to suppress be denied because "[b]oth parties agree that current law squarely covers these facts and requires this Court to recommend denial of the pending motion to suppress." J.A. 103.

On April 29, 2008, the District Court denied the motion to suppress. J.A. 96. The District Court recognized that the motion had been brought only to preserve the issue pending the outcome of *Arizona v. Gant*. Because *Gant* was still pending, however, the District Court denied the motion based on then-current Eleventh Circuit law that allowed a routine search of the passenger compartment of the car after an arrest of the driver or a passenger. J.A. 97. (citing *United States v. Gonzales*, 71 F.3d 819, 825 (11th Cir. 1996)). The case proceeded to trial, and the revolver was admitted. The jury returned a verdict of guilty. On November 6, 2008, the District Court sentenced Davis to serve 220 months in prison. J.A. 5.

A few months later, on April 21, 2009, the Supreme Court finally handed down *Arizona v. Gant*, 129 S.Ct. 1710 (2009). *Gant* overturned the circuit court case law that had taken a broad interpretation of *New York v. Belton*, 453 U.S. 454 (1981). The

lower-court decisions had permitted the police to search the passenger compartment of a car as a routine matter after arresting a recent occupant. In the place of the *Belton* rule adopted by lower courts, including the Eleventh Circuit, *Gant* announced a new rule: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 129 S.Ct. at 1723.

On appeal before the Eleventh Circuit, Davis argued that *Gant* required his conviction to be overturned. The Court of Appeals agreed that *Gant* applied. Under *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), new rules of criminal procedure apply to all cases not yet final when the new rule was announced. "Because Davis's case was pending on direct appeal when *Gant* was decided, the rule announced in that decision applies to his case." J.A. 112. The Court of Appeals also agreed that applying *Gant* required holding that Davis's Fourth Amendment rights had been violated: "There can be no serious dispute that the search here violated Davis's Fourth Amendment rights as defined in *Gant*." *Id*. The Court of Appeals nonetheless affirmed the conviction on the ground that whether the Fourth Amendment "applied" was distinct from whether it afforded Davis a remedy. J.A. 113.

According to the Court of Appeals, the remedy of the exclusionary rule was unavailable because "the

exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned." J.A. 114. The exclusionary rule was unavailable because the sole purpose of the exclusionary rule is to deter police misconduct. A police officer who "reasonably relied on well-settled precedent" was not at fault, however, and therefore could not be deterred by suppression of evidence:

> Miller did not deliberately violate Davis's constitutional rights. Nor can he be held responsible for the unlawfulness of the search he conducted. At the time of the search, we adhered to the broad reading of *Belton* that the Supreme Court later disavowed in *Gant*, and a search performed in accordance with our erroneous interpretation of Fourth Amendment law is not culpable police conduct. Law enforcement officers in this circuit are entitled to rely on our decisions, and penalizing the officer for the court's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

J.A. 118 (internal quotations and citations omitted).

The Court of Appeals analogized police reliance on circuit precedent to reliance on defective warrants in *United States v. Leon*, 468 U.S. 897 (1984), reliance on defective statutes in *Illinois v. Krull*, 480 U.S. 340 (1987), and reliance on police bookkeeping errors in *Herring v. United States*, 129 S.Ct. 695 (2009). Just as the exclusionary rule did not apply in those cases,

neither should it apply here. J.A. 119-20. The Court of Appeals recognized that its holding would mean that new Fourth Amendment rules would have only prospective effect, and that this "may weaken criminal defendants' incentive to urge 'new' rules on the courts." J.A. 119 n.8. But the court reasoned that this was irrelevant because "the exclusionary rule is designed to deter misconduct, not to foster the development of Fourth Amendment law." *Id*.

SUMMARY OF THE ARGUMENT

This is a case about the role of the Supreme Court in the development of Fourth Amendment law. The Supreme Court occasionally must correct a mistaken precedent and set Fourth Amendment law on its proper course. When this happens, the Court has always retained the power to enforce its new decision through the exclusionary rule. For example, in the famous case of *Katz v. United States,* 389 U.S. 347 (1967), the Court overturned *Olmstead v. United States*, 277 U.S. 438 (1928), and recognized that the Fourth Amendment prohibits wiretapping phone calls without a warrant. The Court did not merely announce its new decision in an advisory opinion. Instead, the Court reversed Katz's conviction. The exclusionary rule applied despite the Government's reliance on overturned law.

This case considers whether the Court should adhere to its traditional role or instead should embark

on a new experiment. Under the approach embraced by the Court of Appeals, new Fourth Amendment decisions could apply only prospectively. When correcting erroneous precedent, the Supreme Court would make its decision but not enforce it. The Court would issue an advisory opinion and then affirm the conviction because the officers acted in reliance on the precedent overturned.

The Court should decline to embark on this experiment for three reasons. First, the decision below upsets long-established practice and precedent. A simple rule governs the scope of the exclusionary rule for new decisions: The exclusionary rule applies in the decision announcing the new rule and in all other cases not yet final but does not apply on collateral review. The Court adopted this rule in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), a case that finally closed the jurisprudential Pandora's Box opened by *Linkletter v. Walker*, 381 U.S. 618 (1965). The decision below offers a return to the discredited *Linkletter* regime with a new label of "good faith" instead of the old label of "retroactivity." The Court should adhere to *Griffith* and hold that the exclusionary rule applies.

Second, the rule adopted by the Court of Appeals ignores the limits of the judicial power under Article III. If the exclusionary rule does not apply, the Supreme Court cannot review Fourth Amendment challenges brought by criminal defendants to settled precedents. The Government would always win such cases. If the Court agreed with the precedent it would rule for the Government on the merits, and if the

Court overturned the precedent it would rule for the Government under the good-faith exception. The absence of any genuine controversy would deny Article III standing to defense challenges and require courts to engage in prospective decisionmaking that the Constitution forbids.

Third, a new exception to the exclusionary rule for reliance on overturned decisions should be rejected because the exclusionary rule provides the only realistic way for the Court to correct mistakes. The exclusionary rule triggers defense challenges, and those challenges enable reconsideration of circuit and Supreme Court caselaw. Without the exclusionary rule, the direction of Fourth Amendment law would become a one-way street in favor of expanded government power. The exclusionary rule therefore deters constitutional violations by ensuring that the police have accurate rules to enforce. Good-faith cases including *United States v. Leon*, 468 U.S. 897 (1984), *Illinois v. Krull*, 480 U.S. 340 (1987), and *Herring v. United States*, 129 S.Ct. 695 (2009), are distinguishable because they deal with the enforcement of existing law rather than the law's proper development.

Finally, the costs of the exclusionary rule for reliance on overturned precedents are modest. The exclusionary rule is already full of holes: The fact that it is available does not mean it will be applied often. A defendant must successfully navigate a long trail of doctrines before courts actually grant relief. Those doctrines include inevitable discovery, independent source, attenuated basis, standing, plain error, and

harmless error. By sharply limiting the exclusionary remedy in practice, these doctrines have greatly reduced its cost. The exclusionary rule therefore pays its way and should be retained.

ARGUMENT

I. WHEN THE SUPREME COURT OVERTURNS FOURTH AMENDMENT PRECEDENT, THE EXCLUSIONARY RULE IS AVAILABLE FOR THE CASE ANNOUNCING THE NEW RULE AND ALL OTHER CRIMINAL CASES NOT YET FINAL.

The rule adopted by the Court of Appeals represents a dramatic departure from the established precedent of this Court. Over dozens of decisions in the last fifty years, the Court has established a clear and simple test for the scope of the exclusionary rule when new decisions reinterpret Fourth Amendment rights. According to those precedents, the exclusionary rule is available in the case announcing a new rule and all other cases on direct review, while the exclusionary rule is not available in collateral challenges such as habeas proceedings.

"[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring). As a result, the starting point in this case must be understanding how the rule adopted below departs from the Court's

precedents on the scope of the exclusionary rule for new Fourth Amendment decisions.

(A) The Exclusionary Rule Is Available In The Case Announcing The New Rule.

It is well-established that the exclusionary rule is available to enforce the new rule in the decision in which it is announced. *See Stovall v. Denno*, 388 U.S. 293, 301 (1965). This principle is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Id.* Applying the exclusionary rule in the case announcing a new rule of criminal procedure has two major functions. First, it ensures that the Court "resolve[s] issues solely in concrete cases or controversies." *Id*. Second, it provides the "incentive of counsel to advance contentions requiring a change in the law." *Id.*

A few examples demonstrate the point. In the famous case of *Katz v. United States*, 389 U.S. 347 (1967), federal agents investigating unlawful betting placed a monitoring device on a public phone booth without a warrant. Agents used the monitoring device to eavesdrop on the suspect's calls. The eavesdropping was lawful under two precedents, *Olmstead v. United States*, 277 U.S. 438 (1928), and *Goldman v. United States*, 316 U.S. 129 (1942). The *Katz* Court overruled *Olmstead* and *Goldman* and held that the monitoring required a warrant. *See Katz,* 389 U.S. at 353. The Court then rejected the government's argument that the fruits of surveillance should be

admitted because the officers "relied upon the decisions in *Olmstead* and *Goldman*." *Id*. at 356. Refusing to "retroactively validate [the agents'] conduct," *id*., the Court overturned the conviction because no warrant had been obtained: "Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed." *Id*. at 359.

The Court followed the same approach in *Arizona v. Gant*, 129 S.Ct. 1710 (2009). The officer in *Gant* had relied on Ninth Circuit precedent allowing officers to arrest a driver, handcuff him, secure him in a locked squad car, and then search the passenger compartment of the car incident to arrest. After holding that such searches were unconstitutional, the Court affirmed the judgment of the Arizona Supreme Court that had vacated Gant's conviction. *See id.* at 1724. The Court gave Gant the benefit of the rule announced in his case. *See id. See also State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007) (ruling that no exception to the exclusionary rule applied, and thus that "[t]he evidence obtained as a result of the unlawful search must therefore be suppressed.").

This rule has been followed consistently in other Fourth Amendment decisions that overturned clear circuit precedent. *See, e.g., Steagald v. United States,* 451 U.S. 204, 223, 207 n.1 (1981) (announcing new rules on when warrants are required to enter a home, and then reversing and remanding to give the petitioner the benefit of the new rule despite prior circuit precedent clearly permitting such searches); *Chimel*

v. California, 395 U.S. 752, 768 (1969) (announcing new rules on the "search incident to arrest" exception, and then reversing state court decision to give the petitioner the benefit of the new rule despite prior Supreme Court precedent permitting such searches).

(B) The Exclusionary Rule Is Available In All Cases On Direct Review At The Time Of The New Decision.

The Court has embraced the same rule for other cases on direct review at the time of the new decision. The exclusionary rule is available in all cases not yet final on the date the new rule is announced. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception"). This rule has generally been understood as a rule on the "retroactivity" of new decisions: New decisions are retroactive, and therefore the exclusionary rule applies, to cases on direct review when the new decision was announced. *See Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) ("When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review.") (citing *Griffith*).

Powell v. Nevada, 511 U.S. 79 (1994), is a helpful example. Powell was arrested and detained for four days before he received a probable cause hearing to determine the lawfulness of his detention. Two years

later, this Court ruled that the Fourth Amendment requires a post-arrest probable cause hearing within 48 hours of arrest. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Because Powell's conviction was not yet final, Powell argued that his conviction should be overturned under *McLaughlin*. The Nevada Supreme Court disagreed, ruling that Powell should not be able to benefit from the new rule of *McLaughlin* because of the harmful consequences of applying its new rule to arrests made before the decision. *See Powell v. State*, 838 P.2d 921, 924 n.1 (1992). The Supreme Court vacated and remanded. *See Powell*, 511 U.S. at 85. Under the retroactivity rule of *Griffith*, Powell was entitled to "rely on *McLaughlin* for this simple reason: Powell's conviction was not final when *McLaughlin* was announced." *Powell*, 511 U.S. at 84. Although this did not necessarily mean that Powell would be set free, it did mean that Powell had the opportunity to argue that his conviction should be overturned. *See id*. at 84-85.

The application of the exclusionary rule to other cases still on direct review is also reflected in the Court's decisions to grant, vacate, and remand (GVR) nine pending cases in light of *Arizona v. Gant* in the weeks following that decision. All nine cases were brought by defendants challenging searches made in reliance on the *Belton* rule that *Gant* rejected. *See, e.g., Megginson v. United States*, 129 S.Ct. 1982 (2009); *Grooms v. United States*, 129 S.Ct. 1981 (2009); *Dunson v. United States*, 129 S.Ct. 2155 (2009); *Booker v. United States*, 129 S.Ct. 2155 (2009);

Meister v. Indiana, 129 S.Ct. 2155 (2009); *Owens v. Kentucky*, 129 S.Ct. 2155 (2009); *Quintana v. United States*, 129 S.Ct. 2156 (2009); *Casper v. United States*, 129 S.Ct. 2156 (2009); *Carter v. North Carolina*, 129 S.Ct. 2158 (2009). The GVRs enabled lower courts to enforce *Gant* on remand using the exclusionary rule. *See, e.g., United States v. Megginson*, 340 Fed.Appx. 856 (4th Cir. 2009) (applying *Gant* on remand and vacating the conviction due to *Gant* violation); *State v. Carter*, 682 S.E.2d 416 (N.C.App. 2009) (same).

The record in this case reflects the same expectation. In the District Court, Davis moved to suppress the gun because the Supreme Court had recently granted certiorari in *Gant*. J.A. 10-16. In the motion to suppress and at the hearing, Davis candidly acknowledged that then-existing circuit precedent deemed the search constitutional. J.A. 15 ("The defendant would not prevail under existing Eleventh Circuit precedent."); J.A. 19. The only purpose of the suppression hearing was to establish a record so that the forthcoming decision in *Gant* could be applied to Davis on direct review in the event of a conviction. J.A. 19.

Although the Fourth Amendment's exclusionary rule is available on direct review, a different rule applies after the conviction is final. The suppression remedy for Fourth Amendment violations is not available in habeas or other collateral review proceedings. *See Stone v. Powell*, 428 U.S. 465, 482 (1976). After a conviction is final, the marginal deterrent effect of the exclusionary rule is modest because the

exclusionary rule is available on direct review. *See id.* at 493. At the same time, the costs of the exclusionary rule for collateral review proceedings are quite substantial because it would potentially free inmates whose convictions have become final over many years. *Id*. at 494. Weighing those costs and benefits, the exclusionary rule is available on direct review but not in collateral review proceedings. *Id*. at 493-94. *Cf. Teague v. Lane*, 489 U.S. 288 (1989) (adopting very limited retroactivity on collateral review for criminal procedure rules outside the Fourth Amendment).

(C) The Exception To The Exclusionary Rule Created By The Court Of Appeals Reopens The Pandora's Box Of Retroactivity Law That The Court Closed In *Griffith v. Kentucky*.

The rule adopted by the Court of Appeals would be a dramatic break from this established practice. Under its decision, the exclusionary rule never applies when the police rely on "unequivocal" but incorrect circuit precedent. J.A. 120. The Court of Appeals believed that its approach was consistent with prior caselaw because it imagined two distinct inquiries. The first question was whether a new decision "applies" in an abstract sense, which the Court of Appeals saw as a question of retroactivity law. The second question was whether a remedy exists, which the Court of Appeals saw as a separate question of the scope of the exclusionary rule. J.A. 116.

The Court of Appeals was incorrect because retroactivity is about remedies, not rights. The retroactivity of criminal procedure rules determines the scope of the exclusionary rule when law changes:

> [T]he source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the "retroactivity" of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

Danforth v. Minnesota, 552 U.S. 264, 271 (2008). *See also id.* n.5 (noting that "retroactivity" is a misnomer, as the issue is the redressability of violations based on newly recognized rules). The Constitution *always* applies. Retroactivity defines remedies, not rights.

Because the exclusionary rule is the only means of overturning a conviction based on a Fourth Amendment violation, cases on the retroactivity of Fourth Amendment decisions define the scope of the exclusionary rule when the Court hands down new decisions. The law of "retroactivity" is simply a specific application of the usual balancing test for the scope of the exclusionary rule in the context of new caselaw. *See, e.g., United States v. Peltier*, 422 U.S. 531, 538 (1975) (noting the "interrelation" and "harmony" between retroactivity caselaw specifically and decisions

on the scope of the exclusionary rule generally); *Stone v. Powell*, 428 U.S. 465, 489 n.26 (1976) ("Cases addressing the question whether search-and-seizure holdings should be applied retroactively also focused on the deterrent purpose served by the exclusionary rule, consistently with the balancing analysis applied generally in the exclusionary rule context."); *United States v. Leon*, 468 U.S. 897, 912-14 (1984) (noting the similarity between retroactivity law and cases expressly on the scope of the exclusionary rule).

The rule adopted by the Court of Appeals is particularly ironic in light of the history of retroactivity law. As the Court detailed recently in *Danforth*, 552 U.S. at 271-75, there have been several distinct periods of retroactivity law for criminal procedure decisions. Before 1965, the exclusionary rule always applied retroactively to enforce new legal decisions. From 1965 to 1987, however, the exclusionary rule was often applied only prospectively. The exclusionary rule always applied in the case announcing the new interpretation. *Stovall*, 388 U.S. at 301. In other cases, however, the Court decided whether the exclusionary rule applied retroactively using a case-by-case balancing test that weighed the deterrent impact of the exclusionary rule against the cost of setting criminals free. *See Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965) (adopting balancing test for application of the exclusionary rule to enforce new decisions in habeas cases); *Stovall,* 388 U.S. at 301 (adopting *Linkletter* balancing test to other cases on direct review).

During this period from 1965 to 1987, the exclusionary rule applied to other cases not yet final only if it would serve "the deterrent purpose of the exclusionary rule" for each specific new decision in light of the fact that retroactive application would "overturn convictions based on fair reliance upon [overruled] decisions." *Desist v. United States*, 394 U.S. 244, 253 (1969). This case-by-case balancing approach created a "confused and confusing" patchwork of decisions with "strikingly divergent results." *Danforth*, 552 U.S. at 271, 273. Justice Harlan offered particularly devastating critiques of the balancing approach that "laid the groundwork for the eventual demise of the *Linkletter* standard." *Id.* at 274 (citing *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part)).

The Court rejected the *Linkletter* balancing approach in three steps. First, in 1982, the Court ruled that all Fourth Amendment cases were retroactive so long as the new decisions were not a "clear break" from prior precedent. *See United States v. Johnson*, 457 U.S. 537, 562 (1982). Next, in 1987, the Court rejected the balancing approach entirely and adopted a bright-line rule that the exclusionary rule is available to all cases on direct review whether or not the new decision is a clear break. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The opinion in *Griffith* focused on the need to treat like cases alike, rather than costs and benefits, but the Court later noted that *Griffith* implicitly rejected reasonable

reliance on precedent as a justification for prospective decisionmaking on direct review. *See American Trucking Associations v. Smith*, 496 U.S. 167, 198 (1990). Finally, in 1989, the Court rejected the *Linkletter* balancing test on collateral review. *See Teague v. Lane*, 489 U.S. 288 (1989).

With this background, it becomes clear that the decision of the Court of Appeals reopens the Pandora's Box of retroactivity law on direct review that this Court was thought to have slammed shut in *Griffith*. The rule adopted by the Court of Appeals is characterized as a decision on the good-faith exception to the exclusionary rule. J.A. 123. But the Court of Appeals' rule is simply a modified version of the discredited *Linkletter* retroactivity test. Just like *Linkletter*, it weighs reliance interests against deterrence interests to determine when the exclusionary rule applies. If anything, the rule adopted below goes beyond *Linkletter* in that it avoids suppression even in the case announcing the new rule.

The sense of déjà vu becomes particularly strong if you compare the rule adopted below with the rule rejected in *United States v. Johnson*, 457 U.S. 537 (1982). *Johnson* considered whether the exclusionary rule applied to other cases on direct review when the Supreme Court handed down a new Fourth Amendment rule in *Payton v. New York*, 445 U.S. 573 (1980). In its brief to this Court, the United States argued that *Linkletter* retroactivity doctrine should be read to create a good-faith exception to the exclusionary rule for reliance on then-existing law on direct review.

"[W]here law enforcement officers obtained . . . evidence in good faith compliance with then-prevailing constitutional norms," the United States argued, "neither the deterrent purpose of the rule nor the imperative of judicial integrity justified the suppression of highly probative evidence." Brief of the United States in *United States v. Johnson* at 9 (citing *United States v. Peltier*, 422 U.S. 531 (1975)). This exception to the exclusionary rule was appropriate, the United States asserted, because the police could not be deterred if they "did not know, and could not reasonably be charged with knowing, that their actions were proscribed by the Fourth Amendment." *Id.* at 10.

The *Johnson* Court rejected the Government's proposed good-faith exception on grounds that it would reduce retroactivity to "an absurdity" and essentially "eliminate *all* Fourth Amendment rulings from consideration for retroactive application." *Johnson*, 457 U.S. at 560 (emphasis in original). The Court instead used *Johnson* as a "first step" towards applying the exclusionary rule to all cases on direct review – a journey later completed in *Griffith*. *Id.* at 562. Johnson was therefore entitled to invoke the exclusionary rule to benefit from the new rule of *Payton*. *Id.*

The argument of the United States in this case recycles its failed argument in *Johnson*. Granted, the label has changed. In *Johnson*, the United States sought a good-faith exception to the exclusionary rule for new legal decisions under the cost/benefit balancing test required by retroactivity doctrine. In this

case, the United States seeks a good-faith exception to the exclusionary rule for new legal decisions under the cost/benefit balancing test required by exclusionary rule doctrine. Aside from the label, though, the territory is familiar. This case is a retroactivity case in disguise. And it is a thin disguise, the legal equivalent of Groucho Marx glasses with a funny nose.

II. IF THE EXCLUSIONARY RULE DOES NOT APPLY, ARTICLE III WILL PROHIBIT THE SUPREME COURT FROM REVIEWING CHALLENGES TO CIRCUIT COURT OR SUPREME COURT FOURTH AMENDMENT DECISIONS IN CRIMINAL CASES.

The established practice that the exclusionary rule applies to cases announcing new rules and to all other cases on direct review is not only deeply ingrained in existing caselaw. It is also required by Article III of the United States Constitution. The judicial power recognized by Article III does not permit the Supreme Court to review cases and resolve questions of law when its decision would not have any actual impact on the case before it or on any other case.

Creating an exception to the exclusionary rule for searches consistent with overturned precedents would render the Supreme Court unable to provide relief to criminal defendants who brought such challenges. As a result, Article III would leave the Court

unable to review challenges to circuit court or Supreme Court Fourth Amendment precedents in criminal cases. This result can be reached under either of two closely-related constitutional doctrines: first, the prohibition on prospective decisionmaking; and second, the requirement of Article III standing.

(A) The Decision Below Would Require Courts To Engage In Prospective Decisionmaking That The Constitution Forbids.

The decision below permits new Fourth Amendment decisions to be applied only prospectively. So long as erroneous circuit precedent clearly permitted the challenged search, new rules expanding constitutional protection would not apply either to the case announcing the rule or in other cases on direct review. J.A. 121-23. The Constitution forbids such a rule, however. "[P]rospective decisionmaking is quite incompatible with the judicial power," and "courts have no authority to engage in the practice." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 106 (1993) (Scalia, J., concurring).

The judicial power is the power to interpret the law, "not the power to change it." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment). This fundamental principle requires judges to "discern[ ] what the law *is,* rather than decree[ ] what it is today *changed to,* or what it will *tomorrow* be." *Id.* (emphasis in original).

A rule that the Court can announce a decision one day that has no effect on actual cases is not permitted by the judicial power recognized by Article III. Justice Harlan expressed the point memorably:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

Griffith, 479 U.S. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in part and dissenting in part)).

The requirement of retroactive application therefore is "one of the understood checks upon judicial law-making" that is necessary to maintain "the assigned balance of responsibility and power among the three branches." *James B. Beam Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring in the judgment). "[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322.

The decision below violates this fundamental principle. According to the Court of Appeals, police compliance with "well-settled" circuit precedent frees

the Supreme Court to craft a purely prospective new rule that does not apply either in the case in which it was announced or in other cases not yet final. J.A. 123. This portends a regime of rule-creation by advisory opinion. It would allow the Court to act like a legislature, pick a rule, and then enforce it only in future cases. The federal courts have no such power. *See St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (per curiam) ("A federal court is without power . . . to give advisory opinions which cannot affect the rights of the litigants in the case before it.").

The Court deviated in part from this timeless principle for a "brief period" during the *Linkletter* regime from 1965 to 1987. *Harper*, 509 U.S. at 104 n.1 (Scalia, J., concurring). But that deviation has been recognized as both a jurisprudential error and a practical blunder. *See Danforth*, 552 U.S. at 271-75; *Griffith*, 479 U.S. at 320-28. The Court should not repeat the same mistake under the guise of "good faith."

(B) Under The Decision Below, The Supreme Court Could Not Review Challenges To Circuit Court Or Supreme Court Precedent Because The Good-Faith Exception Would Eliminate Article III Standing.

The rule adopted by the Court of Appeals would also eliminate review of challenges to circuit court and Supreme Court precedent because such challenges would lack Article III standing. Article III standing requires a likelihood "that a favorable

judicial decision will prevent or redress the injury." *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1149 (2009). Article III standing operates on a claim-by-claim basis: The party bringing the challenge "must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Further, a party seeking to appeal an adverse ruling must establish standing for the issue appealed. *See Diamond v. Charles*, 476 U.S. 54, 66-67 (1986); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997).

Under the decision below, a criminal defendant will be unable to establish Article III standing to challenge a circuit court or Supreme Court precedent. If the good-faith exception applies whenever a search is authorized under clear circuit precedent, the outcome of any legal challenge to that precedent will always be the same. The Government must always win. If the Court agrees with the Government on the Fourth Amendment issue, the Court will rule for the Government on the merits. If the Court instead agrees with the defendant on the Fourth Amendment issue, the Court will rule for the Government on the good-faith exception. The good-faith exception would deny the Court the power to redress the defendant's injury, eliminating Article III standing to adjudicate the merits of the case.

Because the defendant bringing the challenge would have no prospect of success, the appeal would be impermissibly "placed in the hands of concerned bystanders . . . who would seize it as a vehicle for the

vindication of value interests" rather than parties with a genuine "stake in the outcome." *Arizonans for Official English*, 520 U.S. at 64-65 (quoting *Diamond*, 476 U.S. at 62). The good-faith exception would operate much like an independent and adequate state ground in that it would block federal court review of federal constitutional questions. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991) ("When this Court reviews a state court decision on direct review . . . , it is reviewing the *judgment;* if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do."); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Under the rule adopted below, the direction of Fourth Amendment law would become a one-way street in favor of expanded government power. The Government could challenge adverse precedents and immediately gain the benefit of the new decision. But defendants could not: The limits of Article III would block criminal defendants from raising such challenges.

III. THE GOOD-FAITH EXCEPTION DOES NOT APPLY BECAUSE THE EXCLUSIONARY RULE ENSURES THE PROPER DEVELOPMENT OF FOURTH AMENDMENT LAW NEEDED TO DETER CONSTITUTIONAL VIOLATIONS.

The Court of Appeals based its holding on the good-faith exception to the exclusionary rule. According to the Eleventh Circuit, a good-faith exception

applies when the police conduct a search "in reasonable reliance on well-settled precedent" that is subsequently overturned. J.A. 123. At first blush, this conclusion makes some intuitive sense. An officer who follows existing law likely has acted in good faith. Surely he cannot know that the law may change some day. Because he is not at fault, he cannot be deterred and should not be punished by the exclusionary rule. Such an argument may even seem initially plausible in a case, like this one, where the officer who conducted the search did not actually rely on the circuit precedent later overturned. J.A. 29. Although Corporal Miller did not subjectively rely on the Eleventh Circuit precedent overturned by *Gant*, his search did comply with that circuit precedent. It therefore seems plausible, at first blush, that Miller's compliance with precedent should justify a good-faith exception.

This line of thinking has intuitive appeal, but it is wrong. It reflects a basic misunderstanding of the good-faith exception. When understood properly, the good-faith exception cannot extend to searches that are consistent with subsequently overturned appellate court precedents. The good-faith exception requires an objective cost-benefit analysis into when the exclusionary rule is needed to enforce compliance with existing law. *See Herring v. United States*, 129 S.Ct. 695, 703 (2009); *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987). Contrary to its name, the good-faith exception does not concern subjective good faith. *See Herring*, 129 S.Ct. at 701, 703. Rather, cases on the good-faith exception recognize that the Fourth

Amendment imposes too many requirements for every constitutional violation to justify suppression. The good-faith exception thus distinguishes minor violations of the Fourth Amendment that do not require suppression from major violations of the Fourth Amendment that do. *See Hudson v. Michigan*, 547 U.S. 586, 596-99 (2006). Under the good-faith exception, the exclusionary rule applies only if the deterrent benefits of the exclusionary rule in a particular setting outweigh the social cost of lost criminal cases. *See Herring,* 129 S.Ct at 700. The exclusionary rule must "pay its way." *Id.* at 704 (quoting *United States v. Leon,* 468 U.S. 897, 907-08 n.6 (1984)).

The good-faith exception does not apply to searches that comply with subsequently-overturned precedent for two related reasons. First, the exclusionary rule "pays its way" by ensuring that the precedents the police follow are themselves correct. Constitutional enforcement requires two steps: The courts must correctly interpret the Constitution, and the police must properly follow the judiciary's instructions. The process breaks down if either side errs. If the good-faith exception is applied to reliance on overturned law, such a rule would eliminate the mechanism for defense counsel to argue for changes in the law that are necessary for the Supreme Court to set the proper direction of the law. Defendants will not challenge erroneous precedents knowing that they cannot benefit. If no challenges are brought, the Court will have no opportunity to make corrections.

The proper exercise of the judicial power therefore hinges on availability of the exclusionary rule. The exclusionary rule plays a critical role in deterring constitutional violations by making sure that the caselaw police enforce accurately interprets the Fourth Amendment.

Second, prior decisions on the good-faith exception are distinguishable because they all concern the use of the exclusionary rule to enforce existing law rather than to ensure the proper development of the law. Cases like *Leon*, *Krull,* and *Herring* properly limit the scope of the exclusionary rule when suppression is not needed to enforce existing law. Use of the exclusionary rule to develop the law works differently. There is no police "error." The police are simply doing their job. As a result, the exclusionary rule is not needed to ensure police compliance with existing law. The exclusionary rule applies in such settings for a different reason: It applies not to "punish" the police but to enable the adversary process upon which courts rely to interpret the Constitution correctly.

(A) Enforcing New Decisions Using The Exclusionary Rule Is Necessary For The Proper Exercise Of Judicial Power Needed To Deter Constitutional Violations.

The development of Fourth Amendment law relies on the adversary process. The Fourth Amendment requires reasonableness, which requires courts to

balance public safety interests articulated by the government with civil liberties interests articulated by the defense. *See United States v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975). Courts then "say what the law is," declaring what the Constitution requires so the police can follow it. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Constitution is followed when the two branches of government perform their proper roles. The courts first must accurately say what the law is, and the police then must accurately enforce the law within the zone of power authorized by the courts.

The Supreme Court plays a unique role in the system of Fourth Amendment law. Every judge takes an oath to uphold the Constitution. Every judge, when called on, must interpret the Fourth Amendment. But the Constitution bestows upon the Supreme Court the ultimate responsibility to interpret the Fourth Amendment. While lower courts must follow the law, this Court does more: The Supreme Court has the power to recognize when prior law has veered off-course and to restore the law to its proper path. *See, e.g., Katz v. United States,* 389 U.S. 347, 353 (1967) (overturning *Olmstead v. United States*, 277 U.S. 438 (1928)).

The exclusionary rule provides the critical means to enforce the Constitution because it enables the correction of constitutional errors. The promise of freedom provides the incentive needed for defendants to challenge erroneous precedents. *See Stovall v. Denno*, 388 U.S. 293, 301 (1965) (recognizing that the

exclusionary rule must apply to cases announcing new rules to provide an "incentive of counsel to advance contentions requiring a change in the law"). In his classic *Harvard Law Review* article, frequently cited by this Court, Professor Mishkin explained the problem:

> The effective operation of the regular judicial process depends upon parties raising issues for decision and presenting (ordinarily through adversary argument) the considerations relevant to the wise resolution of those issues. The performance of these functions by litigants depends, not unnaturally, upon the incentive supplied by the possibility of winning a rewarding judgment. When a new rule of law is given purely prospective effect, it of course does not determine the judgment awarded in the case in which it is announced. It follows that if parties anticipate such a prospective limitation, they will have no stimulus to argue for change in the law.

Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965) (cited in *Stovall*, 388 U.S. at 301 n.4).

If the good-faith exception applied when an officer relies on clear circuit precedent, defendants would have no incentive to argue for a change in the law. By arguing for a change in the law, defendants would concede that they could not benefit from the change in law urged. The Government would win

either way. If the Court retained the prior decision, the Government would win on the merits. If the Court overturned the prior decision, the Government would win under the good-faith exception. Fourth Amendment litigation would become a game of "heads" the Government wins, "tails" the defense loses. Assuming that this dynamic would not eliminate Article III standing for challenges to existing precedents, it would largely end such challenges in practice because defendants would have no reason to raise the arguments in the first place.

Such an environment would be untenable because the Court needs defense counsel to raise constitutional challenges. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court struck down a federal statute that barred legal services lawyers who accepted federal funds from bringing constitutional challenges to welfare laws. By "insulat[ing] the Government's laws from judicial inquiry," the Court noted, the law "threaten[ed] severe impairment of the judicial function." *Id.* at 546. "An informed, independent judiciary presumes an informed, independent bar," the Court explained. *Id*. at 545. Limiting claims by lawyers "distort[ed] the legal system" and amounted to a "serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Id.* at 544. "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon

which courts must depend for the proper exercise of the judicial power." *Id*. at 545.

A similar principle applies here. The proper exercise of the judicial power requires defense lawyers to make arguments for their clients. The exclusionary rule provides the incentive to make such arguments by raising the prospect that a defendant might benefit if the law changes. Counsel for criminal defendants are officers of the Court, *Powell v. Alabama*, 287 U.S. 45, 73 (1932), and the exclusionary rule provides the incentive by which those officers of the Court make arguments that enable the Court to set the proper direction of Fourth Amendment jurisprudence. Eliminating the exclusionary rule in this setting would impose a "serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Velazquez*, 531 U.S. at 544. Enforcing new legal decisions through the exclusionary rule therefore "ensures respect for the law and allegiance to our institutions, and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force." *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring).

It is theoretically possible – assuming Article III standing can be established – that some defense lawyers might continue to make arguments to change the law even if their own clients could not benefit from the change. It is hard to know how often this might happen, if it all. But even if lawyers tried to make such arguments, the quality of briefing likely

would be weak and the risk of poor decisionmaking high. That is true for two reasons. First, the lack of any genuine stake in the outcome would lessen the quality of arguments:

> [T]he party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (internal quotations omitted). This will not occur if lawyers make arguments without any theoretical possibility of victory. *Stovall*, 388 U.S. at 301. *See also Pearson v. Callahan*, 129 S.Ct. 808, 820 (2009) (noting that requiring courts to decide the merits of Fourth Amendment questions when not outcome-determinative "may create a risk of bad decisionmaking" because it can lead to "cases in which the briefing of constitutional questions is woefully inadequate.").

Second, the fact that any new rule would be purely prospective would make it difficult to weigh accurately the costs of new restrictions on police conduct. Purely prospective rulemaking creates a

false impression that restrictions on the police have no cost. *See Harper*, 509 U.S. at 105 (Scalia, J., concurring) ("Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis" that was "formulated in the heyday of legal realism and promoted . . . as a means of making it easier to overrule prior precedent."). The fact that fewer wrongdoers will be convicted going forward is much less easily observed: It's hard to identify criminals who were never caught because searches that otherwise would have occurred never did. The exclusionary rule ensures that those costs are recognized and accounted for fully in the weighing of interests that Fourth Amendment law requires. *See Gant*, 129 S.Ct. at 1728 (Alito, J., dissenting) (noting the costs of the shift from *Belton* to *Gant*).

(B) The Development Of Fourth Amendment Law Is A Proper Concern Of The Exclusionary Rule Because Police Deterrence Requires Correct Precedents To Follow.

The Court of Appeals ignored the role of the exclusionary rule in the development of Fourth Amendment law because it concluded that such concerns were outside the proper concern of the exclusionary rule's scope. J.A. 119 n.8 ("We recognize that applying the good-faith exception under these circumstances may weaken criminal defendants' incentive to urge 'new' rules on the courts, but the exclusionary rule is designed to deter misconduct, not

to foster the development of Fourth Amendment law."). This conclusion is wrong both as a matter of precedent and common sense.

First, precedent recognizes that the exclusionary rule must enable constitutional development. In *Stovall*, the Court held that new rules must apply to the cases in which they are announced in part to provide an "incentive of counsel to advance contentions requiring a change in the law." 388 U.S. at 301 (citing Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965)). Although *Stovall*'s balancing test for other cases on direct review was overturned by *Griffith*, this aspect of *Stovall* remains good law. Other cases on the scope of the exclusionary rule have also discussed the role of incentives to challenge police action. *See, e.g., Illinois v. Krull*, 480 U.S. 340, 353-54 (1987); *United States v. Leon*, 468 U.S. 897, 924, n.25 (1984). Although *Krull* and *Leon* involved contexts in which the exclusionary rule was not needed to create that incentive, both cases gave serious consideration to the role of incentives to bring Fourth Amendment challenges.

Second, the exclusionary rule must account for the development of the law because the ultimate goal of the exclusionary rule is "to enforce the Constitution's limits on government." Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule,* 83 Colum. L. Rev. 1365, 1384 (1983). The Constitution is not enforced when the police follow erroneous legal

decisions that authorize constitutional violations. Enforcement of the Constitution requires both the judiciary and the executive to serve their respective roles properly. The courts must interpret the Constitution correctly and the police must follow the announced rules accurately. If either branch errs, the police action will violate the Constitution. As a result, the deterrence calculus must account for the development of the law.

It may seem counterintuitive to speak of incentives in criminal litigation as matters of "deterrence." Judges are persuaded by force of reason rather than threat of penalty. But failure to correct mistaken precedents has the same impact as failure to follow correct ones. Incentives for counsel that enable courts to exercise the judicial power properly have the same effect on the enforcement of the Constitution as do direct threats of suppression that deter the police from ignoring existing law. As a result, litigation incentives that enable correction of constitutional errors are just as important to deterring constitutional violations as are police incentives to follow existing caselaw.

Arizona v. Gant is instructive. Before *Gant*, circuit courts "approve[d] routine constitutional violations." *Gant*, 129 S.Ct. at 1723. Police academies had widely trained officers to follow an incorrect rule. "Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result." *Id.* at 1722-23. Availability of the

exclusionary rule encouraged challenges to those circuit precedents, which allowed the Court to review and stop the unconstitutional searches in *Gant*. In the future, if rogue police officers decide to ignore *Gant*, courts will readily apply the exclusionary rule to enforce the Fourth Amendment rule it recognized. But the possible impact of using the exclusionary rule to deter violations by rogue officers following *Gant* is dwarfed by the proven impact of the exclusionary rule in prompting the Court to announce the *Gant* rule in the first place.

(C) No Other Remedy Provides A Mechanism To Correct Fourth Amendment Errors.

The exclusionary rule for new law is particularly important because no other remedy creates an incentive to argue for corrections in Fourth Amendment doctrine. Five alternative remedies must be considered: civil suits seeking damages against officers; civil suits seeking injunctive and declaratory relief; civil suits against municipalities; criminal prosecutions; and internal police discipline.

(1) Civil Suits Seeking Damages Against Officers. It would be pointless to argue for changes in Fourth Amendment doctrine in civil suits against officers seeking damages because the doctrine of qualified immunity applies. *See Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009). The doctrine of qualified immunity requires that the constitutional violation must be "clearly established at the time of the search" for the

suit to proceed. *Wilson v. Layne*, 526 U.S. 603, 606-07 (1999). This doctrine readily blocks civil litigation seeking to overturn precedent in favor of expanding constitutional protection. The reason is obvious. If binding caselaw at the time of the search says a search is actually *lawful*, it must be true that its illegality was not clearly established at the time of the search. *See Gant*, 129 S.Ct. at 1722, n.11 (confirming that qualified immunity will block civil suits for pre-*Gant* searches made in reliance on *Belton* "[b]ecause a broad reading of *Belton* has been widely accepted").

Thanks to qualified immunity doctrine, efforts to overturn precedent through civil damages actions against officers would not succeed. The district court would reject such a suit both on the merits and on qualified immunity grounds, and the court of appeals would do the same. The Supreme Court would then deny certiorari because any decision on the merits would be an advisory opinion without Article III standing. With this future outcome clear, no sensible attorney would file suit in the first place. Indeed, counsel is unaware of any Fourth Amendment civil suits seeking only damages from officers that have attempted to overturn circuit or Supreme Court precedent.

(2) Civil Suits Seeking Injunctive or Declaratory Relief. Civil suits seeking injunctive or declaratory relief cannot be used widely to challenge Fourth Amendment precedents due to the limitations of Article III jurisdiction. Under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), a Fourth Amendment suit

seeking injunctive relief must show a real and immediate threat that a specific search or seizure will occur in the future. *Id.* at 105-07. Similarly, a plaintiff seeking declaratory relief in a Fourth Amendment civil case must show ongoing injury that would be redressed by the declaratory relief. *See Mayfield v. United States*, 599 F.3d 964, 969-73 (9th Cir. 2010). In either instance, the suit must also establish concretely what will happen to the plaintiff or each member of the plaintiff class in order to satisfy ripeness doctrine. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

These requirements effectively limit the role of civil actions for injunctive and declaratory relief in Fourth Amendment cases to challenges against specific ongoing programs that widely impact members of the public. The leading examples are roadblocks and drug-testing programs. The fact that members of the public are repeatedly searched under such programs enables class-action lawsuits seeking injunctive or declaratory relief that can satisfy Article III and prudential ripeness concerns. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (class action seeking injunctive relief for drug interdiction checkpoints). But this occurs only rarely. Most Fourth Amendment issues arise in the context of individual searches in criminal investigations. Because Fourth Amendment law is intensely fact-specific, every search or seizure will be different. As a result, civil lawsuits seeking injunctive or declaratory relief in the routine criminal setting will be readily dismissed

for failure to satisfy Article III and ripeness doctrine. *See Lyons*, 461 U.S. at 105-07; *Warshak v. United States,* 532 F.3d 521, 526-30 (6th Cir. 2008) (en banc) (Sutton, J.).

(3) Civil Suits Against Municipalities. Civil actions could be brought against municipalities on a failure-to-train theory. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978). Such suits do not trigger qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 650 (1980). Suits against municipalities cannot be brought to challenge existing precedent, however, because they require plaintiffs to establish "deliberate indifference to the rights of persons with whom the police come into contact." *Canton v. Harris*, 489 U.S. 378, 388 (1989). The police cannot be deliberately indifferent to rights that courts have not yet recognized.

(4) Criminal Prosecutions. Federal prosecutors can bring criminal charges under 18 U.S.C. § 242 for willful constitutional violations, including violations of the Fourth Amendment. This criminal statute cannot be used to develop Fourth Amendment law, even assuming the Justice Department would try. Prosecutions under § 242 require that any constitutional violation must first be clearly established using the standard of qualified immunity law. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997). More fundamentally, using criminal prosecutions to charge conduct that is actually deemed lawful at the time of the search would violate the Ex Post Facto clause. *See* U.S. Const. Art. I, § 9, cl. 3.

(5) Internal Discipline. Internal police disciplinary proceedings cannot develop the law for two reasons. Although disciplinary procedures can encourage police compliance with existing law, *see Hudson*, 547 U.S. at 598-99, they have no role in developing the law in the appellate courts. Second, an officer who conducts a search considered lawful at the time does not deserve discipline. He is not personally at fault for the constitutional violation that occurred.

(D) The Good-Faith Cases Of *United States v. Leon*, *Illinois v. Krull*, And *Herring v. United States* Are Distinguishable Because They Concern Enforcement Of Existing Law Rather Than The Development Of The Law.

The Court of Appeals relied on three cases about the good-faith exception to the exclusionary rule: *United States v. Leon*, 468 U.S. 897 (1984), *Illinois v. Krull*, 480 U.S. 340 (1987), and *Herring v. United States*, 129 S.Ct. 695 (2009). These cases are distinguishable because the good-faith exception deals with ensuring compliance with existing precedents instead of correcting erroneous precedents. The issue in this case is how to ensure that the Supreme Court can correct constitutional errors, not how to ensure compliance with existing law. Because that problem was not implicated in *Leon*, *Krull*, or *Herring*, those cases are distinguishable and their statements about the exclusionary rule must be viewed in the context in

which they arose. The good-faith exception developed in those cases does not apply here.

Leon, *Krull*, and *Herring* all consider whether the exclusionary rule is justified when the police rely on sources other than caselaw to gauge the lawfulness of a search or seizure. For example, an officer might rely on a report from a local police database that there is a warrant for a suspect's arrest to justify arresting that suspect. *See Herring*, 129 S.Ct. at 698. Alternatively, he might rely on a magistrate's decision to sign a search warrant to conclude that the described search will be lawful. *See Leon*, 468 U.S. at 902. Similarly, he might rely on a state law permitting a search as evidence that the search satisfies the Fourth Amendment. *See Krull*, 480 U.S. at 342-43. Unfortunately, these sources of guidance sometimes prove unreliable. A police database may contain a bookkeeping error; a magistrate may misread a warrant application; and a legislature may inadvertently authorize an unlawful search. *Leon*, *Krull*, and *Herring* consider when police reliance on one of these erroneous sources justifies the exclusionary rule.

Leon, *Krull*, and *Herring* focus on whether an exclusionary rule will encourage the following of existing Fourth Amendment law. The cases recognize that suppression of evidence normally will not encourage clerks, magistrates, and legislators to be more careful. Magistrates already have "professional incentives to comply with the Fourth Amendment." *Leon*, 468 U.S. at 917. Legislators care about "enact[ing] statutes for broad, programmatic purposes"

and thus would be deterred by invalidation of their statutes rather than suppression of evidence. *Krull*, 480 U.S. at 352. And absent some sign that a police error in a database was caused by more than garden-variety negligence, a suppression remedy would not substantially improve the accuracy of police databases. *Herring*, 129 S.Ct. at 703.

Because an exclusionary rule is not needed for clerks, magistrates, or legislators to follow existing law, the cases focus exclusively on deterrence of police misbehavior as a justification for the exclusionary rule. They reason that the police are culpable only if the error by the clerk, magistrate, or legislature is an obvious one that the police should realize based on then-existing law. In that case, the exclusionary rule applies because a reasonable police officer should spot the error. *See Leon*, at 468 U.S. at 919-20; *Krull*, 480 U.S. at 355; *Herring*, 129 S.Ct. at 703. On the other hand, if the error by the clerk, magistrate, or legislature is a minor one, it is reasonable for the officer to rely on it and the exclusionary rule does not apply. *See Leon*, 468 U.S. at 914-15; *Krull*, 480 U.S. at 358-59; *Herring*, 129 S.Ct. at 703-04.

Leon, *Krull*, and *Herring* are distinguishable from the present case because they concern compliance with existing precedents rather than compliance with the Constitution. The cases assume that the current state of Fourth Amendment caselaw is correct and fixed. They then consider how the exclusionary rule can ensure compliance with that fixed law

among clerks, magistrates, legislators, and the police. This case is different. In this case, the state of Fourth Amendment caselaw is dynamic. The goal is to ensure the correct interpretation of the law by appellate courts. The scope of the exclusionary rule must be determined by the incentives needed to facilitate the adversary process and enable the correction of constitutional errors.

This is a different question from that raised by *Leon*, *Krull*, and *Herring* because database clerks, magistrates, and legislators play no role in the development of Fourth Amendment law. Database clerks simply report on warrants in the database. Magistrates just review warrant applications in brief ex parte proceedings. Legislatures only enact statutes. As a result, *Leon*, *Krull*, and *Herring* do not consider the future course of Fourth Amendment jurisprudence. None implicate "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While their holdings are correct for the question that they answered, those cases did not concern the impact of the exclusionary rule on the adversary process. Because *Leon*, *Krull*, and *Herring* do not implicate this question, their statements must be limited to the context of the issues that they actually decided.

A few specific statements from those cases are worth addressing in detail. First, *Leon* states that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916. This statement

must be understood in context. The relevant passage of *Leon* was concerned with whether the exclusionary rule should apply when judges and magistrates issue warrants improperly. Review of a warrant application is not an exercise in developing the law. In the state system, many magistrates are not even lawyers. *See Shadwick v. City of Tampa*, 407 U.S. 345, 349-50 (1972). As a result, *Leon*'s statement that the exclusionary rule is not designed to punish the errors of judges refers only to the errors of judges and magistrates *in issuing warrants*. That statement should not be yanked out of context and treated as signaling a broad theory of the exclusionary rule and legal error. Such a broad reading would be particularly untenable because *Leon* approvingly cites *Stovall,* which concluded that the exclusionary rule must apply in the decision announcing a new rule to provide the "incentive of counsel to advance contentions requiring a change in the law." *Stovall,* 388 U.S. at 301.

Herring v. United States also contains several statements that must be understood in the context of enforcing existing law. "To trigger the exclusionary rule," *Herring* explained, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 129 S.Ct. at 702. The Court continued: "[W]hen police mistakes are the result of negligence . . . , rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way." *Id*. at 704 (internal

quotations omitted). These statements make sense when the goal is to enforce existing law. In such cases, "police mistakes" lead to a constitutional violation. The constitutional violation is measured by reference to existing law. The more deliberate and culpable the police error, the more the threat of suppression can lead the police to recognize the error and change course to better follow existing law.

The same principles do not justify an exception to the exclusionary rule when the police rely on erroneous appellate precedents. When the police rely on existing caselaw, they are not making "mistakes [that] are the result of negligence . . . rather than systemic error." *Id.* at 704. The police are not negligent at all, as the court blundered rather than the constable. In this case, the police have made a "systemic error" – an error incorporated into the legal training they first received at "police academies and that law enforcement officers have relied on" over time. *Gant*, 129 S.Ct. at 1722. The absence of police culpability does not mean that police conduct follows the Constitution, however. Erroneous precedents may authorize constitutional violations unbeknownst to the police. Supreme Court correction of those errors requires the exclusionary rule even though the police are not at fault. The exclusionary rule applies in such settings not to "punish" the police but rather to foster the adversary process upon which courts rely to interpret the Constitution accurately.

Leon and *Herring* cannot be faulted for failing to recognize these limitations on the language they

employed. The scope of the exclusionary rule for new decisions has in the past been considered a question of retroactivity law, which recent precedents of this Court rightly have considered settled. *See, e.g., Danforth*, 552 U.S. at 271-75. But the broader perspective of the exclusionary rule implicated by this case reveals that the statements in *Leon* and *Herring* must be read as limited to the enforcement of existing law. When the exclusionary rule is needed to punish the police for flouting existing law, some culpability is necessary before the exclusionary rule is justified. When the exclusionary rule is needed to develop the law, however, the police are not at fault. The Supreme Court does not "punish" police officers when the Court recognizes that circuit precedent has gone astray and must be corrected. In these instances, suppression implies no assignment of blame.

IV. THE COSTS OF THE EXCLUSIONARY RULE ARE MODEST WHEN A COURT OVERTURNS PRECEDENT BECAUSE MANY SEARCHES WILL REMAIN CONSTITUTIONAL AND EIGHT DOCTRINES ALREADY SHARPLY LIMIT THE OPERATION OF THE EXCLUSIONARY RULE.

The good-faith exception requires the benefits of deterrence to be weighed against the social cost of the exclusionary rule – principally, that some people who are guilty may not be punished. *See Herring*, 129 S.Ct. at 700-01. The costs of the exclusionary rule when courts overturn Fourth Amendment precedents

are modest for two reasons. First, the fact that the Court recognizes a change in the interpretation of the Fourth Amendment does not mean that searches made in reliance on the prior law violate the Constitution. In many cases, the searches will be constitutional under the new test or under some other theory of Fourth Amendment reasonableness. The pre-*Gant* searches that violated the rule announced in *Gant* provide helpful illustrations: Many (perhaps most) of those searches have been deemed lawful under either the automobile exception or the inventory search exception.

Second, even if a search did violate the Constitution, the actual set of cases in which relief will be granted usually will be quite small. Even where the exclusionary rule is available in theory, it is still full of holes: The fact that it is available does not mean it will be applied often. To obtain the benefit of the exclusionary rule, a defendant whose rights were violated must satisfy eight different doctrinal tests: 1) Inevitable discovery; 2) Independent source; 3) Attenuated basis; 4) Standing; 5) The good-faith exception for the type of violation; 6) The availability of the exclusionary rule for that type of legal proceeding; 7) Plain error; and 8) Harmless error. Because most defendants will fail at least one of the doctrines, relatively few defendants who have the benefit of the exclusionary rule in theory will obtain relief in fact.

(A) Searches Made In Reliance On Overturned Precedent Will Often Be Constitutional Even Applying The New Decision.

The fact that the Supreme Court recognizes expanded Fourth Amendment protection in one area does not mean that searches made in reliance on prior law necessarily violate the Fourth Amendment. In many cases, the search will happen to satisfy the new rule. Even if the search violates the new rule, Fourth Amendment law gives the Government several bites at the apple: A search that cannot be justified on one ground can be justified on another. In many cases, alternative Fourth Amendment exceptions will apply and render the search constitutional. No criminals will be set free in any of these cases.

The recent lower court decisions applying *Arizona v. Gant* to pre-*Gant* searches confirm the dynamic. In many instances, lower courts have applied the new rule of *Gant* and concluded that pre-*Gant* searches were constitutional because they satisfied the "search incident to arrest" test announced in *Gant*. *See, e.g., Brown v. State*, 24 So.3d 671, 677 (Fla.App. 2009) (approving pre-*Gant* search under *Gant* because defendant was arrested for theft and there was "reason to believe" stolen property was in car); *State v. Cantrell*, 233 P.3d 178, 185-86 (Idaho App. 2010) (same result for a pre-*Gant* DUI arrest); *United States v. Cole*, 2010 WL 3210963 (N.D.Ga. 2010) (same for pre-*Gant* drug arrest).

Additional lower court decisions have applied other Fourth Amendment exceptions to validate pre-*Gant* searches made in reliance on *Belton*. Under the so-called "automobile exception," probable cause to believe evidence of crime is inside the car justifies a warrantless search of the car. *See Wyoming v. Houghton*, 526 U.S. 295 (1999). Many lower court decisions have held that pre-*Gant* searches made in reliance on *Belton* did not violate the Fourth Amendment because the facts triggered the automobile exception. *See, e.g., United States v. Evans*, 2009 WL 2230924 (C.D.Cal. 2009); *United States v. Deal*, 2009 WL 5386061 (M.D.Fla. 2009); *Meister v. State*, 912 N.E.2d 412 (Ind. App. 2009) (on remand after GVR following *Gant*); *United States v. Grooms*, 602 F.3d 939 (8th Cir. 2010) (same); *United States v. Webster*, ___ F.3d ___, 2010 WL 4366379 (8th Cir. 2010); *State v. Hobbs*, 933 N.E.2d 1281, 1286-87 (Ind. 2010).

Other lower court decisions have held that pre-*Gant* searches were constitutional under the so-called "inventory search" exception. The inventory search exception permits officers to search cars that are impounded following an arrest so long as they follow standardized procedures. *See Colorado v. Bertine*, 479 U.S. 367, 371-72 (1987). Many lower courts have held that pre-*Gant* automobile searches made in reliance on the *Belton* rule were constitutional because the inventory search exception applied. *See, e.g., United States v. McGhee*, 672 F.Supp.2d 804, 814 (S.D.Ohio 2009); *United States v. Rollins*, 2010 WL 3843776 (E.D.Tenn. 2010); *People v. Mason*, 935 N.E.2d 130,

137 (Ill.App. 2010); *Moskey v. State*, ___ S.W.3d ___, 2010 WL 4484190 (Tex.App. 2010); *State v. Townsend*, 40 So.3d 103, 106 (Fla.App. 2010).

(B) Eight Different Doctrines Sharply Limit The Number Of Cases In Which Defendants Obtain Relief For Unconstitutional Searches Made In Reliance On Overturned Law.

Even where a search is recognized as unconstitutional, courts will actually provide a remedy to a criminal defendant in only a small number of cases. Eight distinct doctrines limit the scope of the exclusionary rule. Collectively, these doctrines sharply limit the number of cases in which courts will grant relief to a defendant who has been the subject of an unconstitutional search.

(1) Inevitable Discovery. Under the inevitable discovery exception, the exclusionary rule does not apply to unconstitutionally obtained evidence if the government can show by a preponderance that it would have obtained the information through alternative constitutional means if the constitutional violation had not occurred. *See Nix v. Williams*, 467 U.S. 431 (1984). Recent cases involving pre-*Gant* searches illustrate the power of this doctrine. In the months since *Arizona v. Gant*, many lower courts have held that the fruits of pre-*Gant* searches were admissible because the evidence would have been inevitably discovered through some other constitutional means.

See, e.g., United States v. Bradford, 2009 WL 3754174 (E.D.Wis. 2009); *United States v. Page*, 679 F.Supp.2d 648, 654 (E.D.Va. 2009); *United States v. Engle*, 677 F.Supp.2d 879, 888 (E.D.Va. 2009); *United States v. Owen*, 2009 WL 2857959 (S.D.Miss. 2009).[1]

(2) Independent Source. Under the independent source exception, the exclusionary rule does not apply to unconstitutionally obtained evidence if the evidence was actually obtained through some alternative constitutional means. *See Murray v. United States*, 487 U.S. 533, 541 (1988). The independent source exception does not often apply to an automobile search such as this case and other post-*Gant* cases, but it often applies to other kinds of search and seizure cases to admit evidence following a Fourth Amendment violation.

(3) Attenuated Basis. Under the attenuated basis exception, the exclusionary rule does not apply if the evidence obtained was not a "fruit of the poisonous tree" because there were intervening events that attenuated the taint. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Together with the inevitable discovery exception and the independent source exception, the attenuated basis exception poses a causation inquiry: An unconstitutional search

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[1] The District Court in this case concluded that the inevitable discovery doctrine applied even if Davis should receive the benefit of the forthcoming decision in *Gant*. J.A. 98. The Court of Appeals did not reach this issue. J.A. 109 n.1.

does not trigger the exclusionary rule unless the unconstitutional search was both the "but for" and the proximate cause of the discovery of evidence by the police. *See Hudson v. Michigan*, 547 U.S. 586, 592-93 (2006).

(4) Standing. The scope of the exclusionary rule will be further limited by the requirement that a defendant show that his own rights, and not those of a third party, were violated. If an unconstitutional search leads to evidence against a defendant, but the defendant did not have privacy rights in the place or thing searched, the exclusionary rule is unavailable. *See Rakas v. Illinois*, 439 U.S. 128, 148-50 (1978). Several lower courts have used this doctrine to reject the exclusionary rule for pre-*Gant* searches made in reliance on lower court interpretations of *Belton*. *See, e.g., United States v. Ferguson*, 667 F.Supp.2d 567, 572 (M.D.N.C. 2009) (unauthorized driver could not challenge *Belton* search of car); *People v. Frias*, 912 N.E.2d 1236, 1241-42 (Ill.App. 2009) (driver could not challenge search of passenger's property found in car during *Belton* search); *United States v. Bronner*, 2009 WL 1748533 (D.Minn. 2009) (passenger could not challenge *Belton* search of car).

(5) Good-faith Exception for the Type of Violation. The good-faith exception developed in cases like *United States v. Leon* limits the scope of the exclusionary rule to those types of Fourth Amendment violations that require suppression as a remedy. When the Supreme Court overturns precedent and recognizes expanded constitutional protection, the

newly-recognized protection may or may not be sufficiently integral to the enforcement of the Fourth Amendment as to warrant suppression for violations. If the newly-recognized rights need not be enforced by the exclusionary rule, the exclusionary rule will not apply.

The remedy for knock-and-announce violations provides an illustration. The Supreme Court first held that the Fourth Amendment ordinarily requires the police to knock and announce their presence when executing a warrant in *Wilson v. Arkansas*, 514 U.S. 927 (1995). Two years later, in *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Court invalidated widely-adopted practices among state police forces by holding that the knock-and-announce rule applies in felony drug investigations. *See id.* at 388. *Richards* raised the prospect that fruits of many state searches would be suppressed because they were executed in reliance on state court decisions that *Richards* rejected. That prospect was thwarted a few years later when the Court held that the exclusionary rule does not apply to knock-and-announce violations. *See Hudson v. Michigan*, 547 U.S. 586, 592-93 (2006). Because the exclusionary rule was not needed to deter violations of the knock-and-announce rule, the Court's expansion of Fourth Amendment protection to encompass the knock-and-announce rule did not trigger the exclusionary rule.

(6) Availability of the Exclusionary Rule for the Type of Proceeding. The traditional cost/benefit approach to the exclusionary rule has been used to limit

the type of proceedings in which the exclusionary rule is available. Under this framework, the exclusionary rule is not available in habeas corpus proceedings, *see Stone v. Powell*, 428 U.S. 465 (1976); in grand jury proceedings, *United States v. Calandra*, 414 U.S. 338 (1974); in parole board hearings, *see Pennsylvania Board of Probation and Parole v. Scott,* 524 U.S. 357 (1998); or at sentencing hearings in criminal cases, *see United States v. Brimah*, 214 F.3d 854, 858-859 (7th Cir. 2000) (joining nine other circuits in holding that "in most circumstances, the exclusionary rule does not bar the introduction of the fruits of illegal searches and seizures during sentencing proceedings"). The only proceedings at which the exclusionary rule is clearly available are criminal trials and direct appeals. *See Stone*, 428 U.S. at 493.

(7) Plain Error. The plain-error standard also limits the scope of the exclusionary rule for new Fourth Amendment decisions. If existing precedent clearly permits a search, defendants understandably may not file a motion to suppress challenging it. Failure to object to a search ordinarily triggers plain error review. *See* Fed. R. Crim. P. 52(b); *United States v. Young*, 470 U.S. 1, 15-16 (1985). The fact that an error was not recognized at the time of the trial may keep it from being "plain," however. The result is a Catch-22: Defendants won't know to challenge the search because it was considered lawful at the time of trial, but the fact that it was considered lawful at the time of trial means no relief can be granted. Two federal circuits have adopted this rationale to reject

Fourth Amendment challenges to *Belton* searches that were not challenged before *Arizona v. Gant* was handed down. *See United States v. Deitz*, 577 F.3d 672, 687-688 (6th Cir. 2009); *United States v. Rumley*, 588 F.3d 202, 205 n.1 (4th Cir. 2009). *See also State v. Millan*, 212 P.3d 603, 606-7 (Wash.App. 2009) (same result under state review standards). *But see State v. McCormick*, 216 P.3d 475, 477 (Wash.App. 2009) (disagreeing with *Millan*).

(8) Harmless Error. On top of all of these other doctrines, a conviction obtained in part through the admission of evidence obtained in violation of the Fourth Amendment will be subject to harmless error analysis. *See Chapman v. California*, 386 U.S. 18, 22 (1967). If evidence wrongly admitted was not central to a conviction, the conviction can be upheld despite the improper admission of evidence obtained in violation of the Fourth Amendment. Like many of the other doctrines, this doctrine has been used to limit the impact of the exclusionary rule for pre-*Gant* searches made in reliance on the *Belton* rule. *See, e.g., State v. Roberts*, 2010 WL 3945101 (Wash.App. 2010) (upholding conviction for trafficking in stolen puppies despite improper admission of stolen puppy found in car during *Belton* search because there was considerable evidence of trafficking in stolen puppies beyond fruits of unlawful search).

(C) The Benefits Of The Exclusionary Rule For Overturned Precedents Outweigh Its Costs.

Comparing the benefits of the exclusionary rule to its costs, the exclusionary rule for searches consistent with overturned precedents "pay[s] its way." *Herring,* 129 S.Ct at 704 (quoting *Leon,* 468 U.S. at 907-08 n.6). The benefits of the exclusionary rule in this setting are great: The exclusionary rule provides the linchpin that enables the proper development of Fourth Amendment law and the correction of constitutional errors. The exclusionary rule is the tool that the Supreme Court needs to ensure that the law remains on its proper path.

On the other hand, the costs are relatively modest. An exclusionary rule for searches made pursuant to overturned precedents will only infrequently lead to defendants going free. For a criminal defendant, the availability of the exclusionary rule is only the beginning. A long trail of doctrines must be navigated before any actual relief will be granted. These limiting doctrines expressly recognize the cost/benefit framework governing the exclusionary rule, and they narrow the exclusionary rule to its core in a way that greatly minimizes its costs. The only defendants who receive the benefit of the exclusionary rule will be a subset of the defendants who never would have been searched in the first place had the Fourth Amendment been followed. The new Fourth Amendment rule will have recognized that the costs of lost cases is a cost worth bearing *ex ante*. The same costs are also

worth bearing *ex post* for the cases not yet final at the time of the new decision.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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