

No. 09-11328

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIE GENE DAVIS,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit**

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**BRIEF OF THE NATIONAL ASSOCIATION OF  
FEDERAL DEFENDERS AS *AMICUS CURIAE*  
IN SUPPORT OF 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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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The National Association of Federal Defenders (“NAFD”) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD’s members represent many defendants who have sought suppression of evidence, based upon circumstances similar to those at issue in this case. Thus, the issue presented in this case is of significant importance to our clients, as it will likely control the outcome of pending cases.

**SUMMARY OF ARGUMENT**

In the decision below, the Eleventh Circuit held that the search of Willie Davis’s car violated the rule set forth by this Court in *Arizona v. Gant*, 129 S. Ct. 1710 (2009) and that *Gant* must apply retroactively

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<sup>1</sup>The parties to this case have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation or submission of this brief.

to Mr. Davis's case. *United States v. Davis*, 598 F.3d 1259, 1263-64 (11th Cir. 2010). Nevertheless, the lower court held that evidence obtained during the search was immune from suppression under the "good faith" exception to the exclusionary rule because the search predated *Gant* and the Eleventh Circuit's pre-*Gant* case law had approved of the types of searches proscribed by *Gant*. 598 F.3d at 1265-68. The Eleventh Circuit's analysis is unpersuasive because it fails to accurately account for the costs and benefits of applying the exclusionary rule to cases impacted by a "new" Fourth Amendment rule.<sup>2</sup>

As explained in the Brief for Petitioner, there are numerous benefits to applying the exclusionary rule in this context. Pet'r Br. 27-43. One additional benefit is deterring unconstitutional police practices. The Executive had been warned, prior to *Arizona v. Gant*, that a vehicle search incident to the arrest of the vehicle's occupant must be grounded in concerns for officer safety or preservation of evidence. Application of the exclusionary rule in the current context would encourage the Executive, which is responsible for training police officers, to scrupulously honor the Fourth Amendment, even when the law in a particular area is in flux.

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<sup>2</sup>Retroactivity jurisprudence refers to "new" and "old" rules, though new rules are perhaps better understood as newly recognized rules. See *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008).

The exclusionary rule likewise “pays its way” in this context because it is essential to the even-handed development of Fourth Amendment law. The reality of the modern justice system is that the vast majority of cases are resolved by guilty pleas. Defendants wishing to pursue Fourth Amendment claims, novel or otherwise, must pay a substantial cost for seeking vindication of their rights – most obviously by risking an increased sentence due to the withholding of credit under the U.S. Sentencing Guidelines for acceptance of responsibility. Without the potential remedy of suppression, the benefit to the defendant of pursuing a novel Fourth Amendment claim will be nonexistent, yet the cost will remain high. Thus, defense arguments seeking to move Fourth Amendment are unlikely to be made, but the government’s arguments toward the same end will continue unabated. The inevitable result would be a skewing of Fourth Amendment law in favor of government authority over personal privacy and security.

Due to the limitations that have been set on civil liability for unconstitutional police searches, the exclusionary rule plays a critical role in ensuring that the citizens of this country remain free from unlawful searches and seizures. Because an incentive to advocate for change is critical for a balanced approach to the Fourth Amendment, the exclusionary rule must be applied even when a police search might appear justified by prior precedent.

## ARGUMENT

### **A. Application of the exclusionary rule in the current context would have a deterrent effect on law enforcement.**

As explained in the Brief for Petitioner, retroactive application of the exclusionary rule, through the remedy of suppression, is worth its cost because it plays a critical role in the development of Fourth Amendment law. Pet'r Br. 27-43. But this is not the only benefit. Retroactive application of the exclusionary rule also provides substantial deterrence against unconstitutional police conduct.

New constitutional rules rarely, if ever, come as a complete surprise. They are developed over time and are usually preceded by judicial warnings, short of a full-fledged opinion. See Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 70 (1965) (new rules are typically “foreshadowed by prior judicial developments”). A warning from this Court that previous understandings of the Fourth Amendment may be in error puts the legal community, including Executive branch officials responsible for training police officers, on notice that an existing law-enforcement practice is risky, and therefore best avoided.

This Court's decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which invalidated the type of search at issue in the case at bar, presents a classic

example of judicial foreshadowing. The Court presaged the rule announced in *Gant* through footnote four and the concurring opinions in *Thornton v. United States*, 541 U.S. 615 (2004). The warning sounded in *Thornton* did not go unheard. After *Thornton*, the legal community was aware that the lower courts' broad interpretations of *New York v. Belton*, 453 U.S. 454 (1981) stood on shaky ground. Defense attorneys began filing claims of error. See, e.g., Petition for Certiorari, *Hrasky v. United States*, 550 U.S. 903 (2007) (No. 06-827); *United States v. Osife*, 398 F.3d 1143 (9th Cir. 2005). Criminal defense organizations conducted seminars, encouraging practitioners to challenge over-expansive *Belton* searches. Law journals and treatises noted that change was afoot. See Wayne R. LaFave, 3 Search & Seizure, § 7.1(b) (4th ed. 2004); Carol A. Chase, *Cars, Cops, and Crooks: A Reexamination of Belton and Carrol with an Eye Toward Restoring Fourth Amendment Privacy Protection to Automobiles*, 85 Or. L. Rev. 913, 915 (2006); Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny*, 79 Tul. L. Rev. 365, 395 (2004); G. Paul McCormick, *Supreme Court 2003-2004 Review - Part I*, The Champion 12, 15 (Dec. 2004). Even prosecutors have acknowledged that they knew, as of *Thornton*, that change was at least possible – if not inevitable. See Stephen Trinen, *Gant and Crawford Update*, Wash. State Bar Ass'n 17th Annual Criminal Justice Institute § 6b at 7 (2010).

While *Thornton* sounded a particularly loud warning bell, *amicus* is not suggesting that police officers are responsible for reading footnotes or concurring opinions in order to predict whether a change in law will render a type of search invalid. This misconceives the notion of deterrence. The exclusionary rule's deterrence rationale has never been premised on the idea that police officers should read case law. The point of the exclusionary rule is to deter constitutional violations committed by the police. That is achieved by influencing prosecutors and other Executive intermediaries who, quite properly, *do* pay attention to evolutions in the law and are expected to train police officers accordingly.

After *Thornton*, and the attention it caused in the legal community, the Executive was on notice that, to the extent that it continued to train officers that vehicle searches were automatically permitted incident to an occupant's arrest, instead of only in light of concerns for safety and preservation of evidence, their conduct could (and likely would) at some point be ruled unlawful. The fact that *Thornton's* widely recognized warning may not have trickled down to some individual officers should not garner significant sympathy. Law enforcement officers who engaged in expansive *Belton* searches had been operating on thin ice for years. *Gant*, 129 S. Ct. at 1722 (rejecting the idea that police could rely on a rule that permitted them to conduct searches that "were not justified by the reasons underlying the [search incident to arrest] exception"). This is not a circumstance in which

police officers were investigating suspected crimes, only to find themselves stymied by intervening authority that could not have been anticipated. Instead, officers, such as those in *Gant*, were taking the discretion given them by the lower courts and exploiting it to justify the type of generalized, exploratory searches that the Bill of Rights was intended to prohibit. *Gant*, 129 S. Ct. at 1718 & n.3; *Thornton*, 541 U.S. at 625-25 (O'Connor, J., concurring) & 628 (Scalia, J., concurring).

This Court has recognized that the exclusionary rule is a proper means of deterring “systemic error or reckless disregard of constitutional requirements.” *Herring v. United States*, 129 S. Ct. 695, 704 (2009). *Compare Illinois v. Krull*, 480 U.S. 340, 351 (1987) (cost-benefit analysis does not warrant application of the exclusionary rule when there is no evidence of a pattern of constitutional violations). The state of affairs prior to *Gant* (and particularly after *Thornton*) is a prime example of such a situation. Thus, application of the exclusionary rule is appropriate under this Court’s case law, based upon the traditional concept of deterring unconstitutional police conduct.

Enforcement of the exclusionary rule in the current context would also have the added deterrent effect of emphasizing to the law enforcement community that the last word on whether a constitutional question is settled lies with this Court, not with the lower courts. In the decision below, the Eleventh Circuit claimed that it held the

power to sufficiently settle a Fourth Amendment question so as to warrant good-faith reliance by law enforcement. *United States v. Davis*, 598 F.3d 1259, 1267 n.10 (11th Cir. 2010). But the federal appellate courts are not the only ones involved in deciding constitutional questions – State courts are also charged with this task. A State high court and federal appellate court with overlapping geographical jurisdictions may well disagree on a matter of Fourth Amendment law. Should this occur, the increasingly broad federalization of crimes means police would have an incentive to forum shop their cases to avoid suppression. The incentive to avoid compliance with the Fourth Amendment by seeking refuge in a jurisdiction that does not enforce the exclusionary rule is precisely what this Court had intended to eliminate when it decided *Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961) (applying the exclusionary rule to the states). The law should not move backwards.

**B. Retroactive application of the Fourth Amendment, through the remedy of the exclusionary rule, is necessary for even-handed development of the law.**

As Petitioner explains, development of Fourth Amendment law requires an adversarial process under which both sides have an equal incentive to advocate for change. Pet'r Br. 9, 31-36. Prior to the adoption of a good-faith exception for new Fourth Amendment rules by some lower courts, including the Eleventh Circuit, the incentives of the

government and the defense were balanced and the law could develop in a reasonably fair way. The government held a clear incentive to advocate for newly permissive interpretations of the Constitution, in that success on the merits would mean orders suppressing evidence would be reversed and convictions reinstated. *See, e.g., California v. Hodari D.*, 499 U.S. 621 (1991); *United States v. Ross*, 456 U.S. 798 (1982); *United States v. Robinson*, 414 U.S. 218 (1973). Likewise, the defense had an incentive to argue for newly protective Fourth Amendment rules since, subsequent to *Griffith v. Kentucky*, 479 U.S. 314 (1987), the exclusionary rule would apply to newly recognized rules. *See, e.g., Georgia v. Randolph*, 547 U.S. 103 (2006) (adopting consent-search standard that differed from the standard recognized in the federal courts of appeal); *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008) (order of suppression based upon a *Randolph* violation, even though the search predated *Randolph*).

The good-faith exception adopted by the Eleventh Circuit upsets this balance. Should the circuit court's approach be adopted by this Court, Fourth Amendment jurisprudence will become a one-way ratchet, favoring the government. Without the possibility of a remedy, defendants who would otherwise advocate for newly protective Fourth Amendment rules will have no basis for filing motions, developing factual records, or preserving issues for appeal. Yet the government would still retain an incentive to challenge Fourth Amendment

standards, so as to obtain increasingly permissive rules expanding police power.

Contrary to what some might argue,<sup>3</sup> neither the institutional interests of public defenders, nor those of the defense bar in general, are sufficient by themselves to prompt advancement of new Fourth Amendment claims. Public defenders and appointed counsel owe the same ethical duties to their clients as privately compensated practitioners. *Polk v. Dodson*, 454 U.S. 312, 318 (1981). Whatever interest defense counsel might have in advancing Fourth Amendment law, a client's individual interests must take precedence. The standards of conduct set by the American Bar Association make this point clear:

The natural desire for personal achievement, or for personal success, or simply to be in the forefront in developing new legal concepts or theories ... never justifies a lawyer compromising his or her professional judgment about a client's best interests. A lawyer's risking his or her client's conviction and a severe sentence in order to make 'new law' or headlines, for example, is never justifiable where a lesser plea can be negotiated.

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<sup>3</sup>See Richard H. Fallon, Jr., *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1812 n.448 (1991); Yale Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 Iowa L. Rev. 551, 601-08 (1984).

ABA Standards for Criminal Prosecution Function and Defense Function Third Ed., cmt. to 4-1.2 at 163 (1993).

Without a suppression remedy, a client's interests will almost always run counter to any institutional interest in pursuing a novel Fourth Amendment challenge because Fourth Amendment litigation comes at a cost. As intimated by the above ABA Standard, the primary cost to raising a Fourth Amendment challenge is the loss of favorable plea terms. The modern-day criminal justice system is driven by guilty pleas. *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, fig. C (2009) (over 95% of federal cases result in guilty pleas). In federal court, there is a push to plead, not only to obtain more favorable charges, but also to qualify a defendant for a three-level "acceptance of responsibility" sentencing reduction under the United States Sentencing Guidelines. *See* U.S.S.G. § 3E1.1.<sup>4</sup> Despite the advisory nature of the

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**§ 3E1.1. Acceptance of Responsibility**

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of

Sentencing Guidelines, most federal sentences still fall within the applicable Guidelines range. U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl. N (2009). Thus, defendants retain a significant motivation to qualify for acceptance of responsibility.

Under current federal practice, a defendant who pursues a Fourth Amendment claim – novel or otherwise – puts the acceptance of responsibility reduction at risk. It is increasingly common for the government to refuse to file a motion for full acceptance of responsibility, if a defendant files a motion to suppress. *See, e.g., United States v. Drennon*, 516 F.3d 160 (3d Cir. 2008). Because a government motion is required for the last of the three levels of reduction under U.S.S.G. § 3E1.1(b), a defendant who chooses to file a motion in district court automatically risks a higher Guidelines range, should he be convicted.

Taking a Fourth Amendment challenge from district court to the court of appeals comes at an

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his own misconduct by timely notifying the authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

even greater cost. Under the federal rules, a defendant wishing to preserve a pretrial motion for appeal cannot simply plead guilty and thereby salvage at least two of the three acceptance of responsibility points under U.S.S.G. § 3E1.1.<sup>5</sup> A conditional guilty plea, preserving the right to appeal a pretrial motion, requires consent from the government. Fed. R. Crim. P. 11(a)(2). However, consent is unlikely to be forthcoming if the issue a defendant wants to preserve is not potentially case-dispositive. Fed. R. Crim. P. 11(a)(2) Advisory Committee Note (1983 Amendment) (consent should not be granted if an appeal in the defendant's favor will not dispose of the case "by such action as compelling dismissal of the indictment or suppressing essential evidence"); U.S. Dep't of Justice, *Antitrust Grand Jury Practice Manual*, ch. 9(E)(4) (Nov. 1991) (conditional pleas "should be

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<sup>5</sup>The commentary to the Sentencing Guidelines states that a guilty plea is not always necessary to obtain a reduction for acceptance of responsibility. In the "rare situation" where a defendant proceeds to trial for reasons unrelated to factual guilt (e.g., to challenge the constitutionality of a statute), acceptance of responsibility may still be awarded. U.S.S.G. § 3E1.1 comt. n.2. However, it is unlikely that a defendant seeking to litigate a Fourth Amendment claim will fall under this exception since such claims often relate to factual guilt and are not addressed in the Guidelines commentary. Furthermore, unlike a defendant preserving a challenge to a criminal statute, a defendant wishing to preserve a Fourth Amendment challenge cannot submit to a stipulated-facts trial without risking waiver of the Fourth Amendment claim. *United States v. Garcia-Ruiz*, 546 F.3d 716 (5th Cir. 2008) (stipulated-facts trial moots a Fourth Amendment challenge).

entered into only when the issues that are to be appealed will be dispositive of the case”). Furthermore, several federal appellate courts refuse to honor conditional pleas unless the issue preserved for appeal is potentially dispositive. *See United States v. Bundy*, 392 F.3d 641 (4th Cir. 2004); *United States v. Yasak*, 884 F.2d 996, 999 (7th Cir. 1989); *United States v. Wong Ching Hing*, 867 F.2d 754, 758 (2d Cir. 1989).

Given the cost of raising and preserving a Fourth Amendment claim, the absence of the prospect of suppression would simply result in a lack of litigation either at the district or appellate court levels. Without the possibility of suppression, a defense attorney, counseling a client on his best interests, would need to advise against pursuing a Fourth Amendment challenge in the vast majority of cases. The only exception might be a circumstance in which the client has other potentially meritorious claims, apart from a Fourth Amendment challenge. However, in such circumstances, litigation would likely focus on the claims that have the potential to impact the outcome, rather than on the novel Fourth Amendment claims. Without the urgency that accompanies a case-dispositive issue, neither litigants nor courts would be apt to adequately develop such Fourth Amendment claims. Pet’r Br. 34-36.

The disinclination to resolve nondispositive legal issues recently led this Court to eliminate the requirement, in the civil context, that a court first

decide the merits of a contested constitutional issue before ruling on the defense of qualified immunity. *Pearson v. Callahan*, 129 S. Ct. 808, 817 (2009). It is precisely because the defense of qualified immunity impairs adequate litigation that this Court has recognized that the incentive offered by the exclusionary rule plays a critical role in the development of new Fourth Amendment claims. *Callahan*, 129 S. Ct. at 822. The reasoning of *Callahan* and the system of qualified immunity that has been developed by this Court would be undermined should there be a good-faith exception to retroactive application of the exclusionary rule.

## CONCLUSION

This Court has explained that application of the exclusionary rule in any specific context turns on a cost-benefit analysis. Decades ago, the Court decided that the benefit of retroactive application of new constitutional rules and remedies to all pending cases outweighs the cost. *See, e.g., People v. McCarty*, 229 P.3d 1041, 1044-46 (Colo. 2010) (setting forth history). The outcome should be no different today. Retroactive application of the exclusionary rule to pending cases involving a “new” rule of constitutional procedure is necessary for the reasoned development of Fourth Amendment law

and to deter unconstitutional police practices. The decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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