No. 09-11328

IN THE

Supreme Court of the United States

WILLIE GENE DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

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QUESTION PRESENTED

Does the Fourth Amendment require suppression of evidence resulting from a search when (1) the search was considered legal under controlling precedent in the jurisdiction at the time of the search, but (2) by the time of the trial or appeal that precedent has been overruled, such that the search is not considered legal under the later view of the law?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a motion to suppress evidence on Fourth Amendment grounds. Suppression

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

on this basis is contrary to the basic function of a criminal trial to find the truth and reach a just verdict. The exclusionary rule should therefore be limited to the narrowest possible scope. Suppression in this case, where it would contribute nothing to the deterrence that is the sole modern basis of the exclusionary rule, is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant Willie Gene Davis was a passenger in a car stopped for excessive noise by an officer of the Greenville, Alabama Police Department. See Report and Recommendation of the Magistrate Judge, J. A. 99. The driver was arrested for driving under the influence. Davis identified himself to the officer as Ernest Harris, but a bystander identified him as Willie Gene Davis. J. A. 100. He was arrested for giving false information to a law enforcement officer, handcuffed, and placed in the patrol car. A search of the car revealed a revolver in the pocket of Davis's jacket. J. A. 100-101.

Davis was indicted for possession of a firearm by a felon, 18 U. S. C. § 922(g)(1). See *United States* v. *Davis*, 598 F. 3d 1259, 1261 (CA11 2010). The trial court denied his motion to suppress the gun. Davis was convicted and sentenced to 220 months in prison. See *id*., at 1262.

On appeal after this Court's decision in *Arizona* v. *Gant*, 556 U. S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the Eleventh Circuit held there was a Fourth Amendment violation under *Gant*. *Davis*, 598 F. 3d, at 1263. However, the search was consistent with the Eleventh Circuit's prior interpretation of the controlling Supreme Court precedent. See *id*., at 1262.

The Court of Appeals then held that the good-faith exception allows the use of the evidence. *Id*., at 1268. The circuits are divided on this point. See *id*., at 1263.

SUMMARY OF ARGUMENT

The exclusionary rule causes a miscarriage of justice in the cases where it is applied, frustrating rather than assisting the search for truth. It is not inherent in the Fourth Amendment and was unknown at the time of the adoption of the Bill of Rights. The rule continues to exist solely by the utilitarian rationale of deterring police misconduct. It should be confined to the minimum possible scope.

Recognition of the good-faith exception applied by the Eleventh Circuit in this case would not prevent this Court from reviewing practices established by circuit precedent. Given the very large number of courts whose decisions are reviewable by this Court and no other, it is likely that some courts will differ and provide a vehicle for review from a jurisdiction where the rule is not clearly established. *Arizona* v. *Gant* itself demonstrates this, coming from a state whose courts chose to buck the trend.

Experience with the *Teague* rule and qualified immunity show us that broader limits on remedies than the one considered here do not stop litigants from bringing cases to this Court. The contours of what is "clearly established" are rarely clearly established, and parties regularly couple their arguments on the underlying rule with an argument that relief is not precluded by the state of prior law.

The judicial power limitations of Article III do not prevent a federal court from establishing a precedent on a question of law in a case where the party prevailing

on that point is ultimately found not to be entitled to the remedy he seeks. This is regularly done in qualified immunity cases, and for eight years addressing the issues in that order was mandatory.

A party does not lack standing to make a claim and seek a remedy merely because he is ultimately found not to be entitled to the remedy. The element of standing analysis known as "redressability" goes to whether the remedy sought would redress the grievance if granted. Whether the litigant is legally entitled to that remedy goes to merits of the claim. It is not a standing issue and does not implicate the existence of an Article III "case" or "controversy."

Recognizing a limit on remedies for claims that are valid under current interpretation of the law but would have been rejected under the prior interpretation is not a return of the discredited *Linkletter* approach to retroactivity. Just the opposite, this view of the problem is fully consistent with the approach proposed by Justice Harlan and ultimately adopted in *Griffith* v. *Kentucky* and *Teague* v. *Lane*.

Application of the exclusionary rule is not necessary in this case, and therefore it should not be applied.

ARGUMENT

I. The exclusionary rule produces a miscarriage of justice in the case before the court and should be confined to its minimum possible scope.

Ask the proverbial people on the street what is a just result in a criminal case, and most will think it is a simple question. The defendant should be convicted if he is guilty and acquitted if he is innocent. Most of the rules governing criminal trials, including those in the

Constitution, are designed to reach a just result, a verdict that reflects the truth. Defendants have a right to confront witnesses, for example, because cross-examination is the " 'greatest legal engine ever invented for the discovery of truth.' " *California* v. *Green*, 399 U. S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)).

The Fourth Amendment exclusionary rule is the exact opposite. When it is invoked, it is almost always used to suppress reliable evidence. If it affects the result of trial, the effect is virtually always to produce a wrong verdict, not a right one. The exclusionary rule is the greatest legal engine ever invented for the suppression of truth.

No other doctrine in modern American law has so seriously diminished the law and the judiciary in the public mind. In 1961, this Court cited a judicial decision in California for the growing acceptance of the exclusionary rule, see *Mapp* v. *Ohio*, 367 U. S. 643, 651-652 (1961), but in 1982 the people of California repudiated that decision by direct vote. See *California* v. *Greenwood*, 486 U. S. 35, 44 (1988); Cal. Const., Art. I, § 28(f)(2) (renumbered in 2008). In 1996, a federal trial judge's decision suppressing evidence was denounced by the highest elected officials of both major political parties, with the Speaker of the House calling for the judge's resignation, and the President indicating that he would do the same if the judge did not reverse himself. See Perrin, Caldwell & Chase, If It's Broken Fix It, 83 Iowa L. Rev. 669, 671-672, and n. 3 (1998). The unfortunate trial judge was not to blame, of course. He was bound to follow this Court's precedents, however misguided. "The buck stops here." Harry Truman, quoted in J. Bartlett, Familiar Quotations 788 (15th ed. 1980).

The exclusionary rule was first adopted for federal courts in a case where the activity in question was simply the importation of glass, and the only crime was not giving the government its share of the proceeds. See *Boyd* v. *United States*, 116 U. S. 616, 617-618 (1886). In such a case, the application of the rule to deny the government the benefit of an illegal search does not appear to be such a grave injustice. Similarly, the public's sense of justice is not offended if the government's misconduct prevents it from prosecuting the victimless crime of use of the mail for gambling. See *Weeks* v. *United States*, 232 U. S. 383, 386 (1914). In contrast, the case where Judge Cardozo famously rejected the rule for New York courts involved a crime against an individual. See *People* v. *Defore*, 242 N. Y. 13, 17, 150 N. E. 585, 586 (1926). In the first half of the twentieth century, the widespread rejection of this rule in state courts, see *Wolf* v. *Colorado*, 338 U. S. 25, 29 (1949) (overruled in *Mapp*), while it was accepted without great controversy in federal courts may be due in part to the differences in the character of state and federal law enforcement. Crimes by one individual against another were usually state-law matters, while federal offenses were more often crimes against the government itself with no identifiable individual victim. See *California* v. *Minjares*, 443 U. S. 916, 920-921 (1979) (Rehnquist, J., dissenting from denial of stay). Cardozo's nightmare scenario of suppressing the body of the murder victim and letting a murderer go free, *Defore*, *supra*, at 24, 150 N. E., at 588, was a greater danger in state court, and it is this scenario that presents the injustice of the exclusionary rule in its starkest form.

An exclusionary rule limited to so-called victimless crimes would be less problematic than the rule we have at present. Proposals along this line have been made, see 1 W. LaFave, Search and Seizure § 1.2(e), pp. 50-53

(4th ed. 2004) (describing and criticizing proposals), but none has been adopted. In addition, the present case illustrates that some crimes cannot be neatly categorized as victimless or not. The crime is possession of a gun by a convicted felon. There is no identifiable victim of this offense, but the recent tragedy in Tucson reminds us of the potentially horrific consequences to innocent people of guns being in the wrong hands. The parameters of the exclusionary rule and its exceptions must therefore be set with the understanding that they will apply to murder cases, gun cases, drug cases, and revenue cases alike.

The existence of this great legal engine for the suppression of truth can be supported, if at all, only by the weightiest of considerations. Rationales advanced in the past, such as interrelation with the Fifth Amendment, being a necessary corollary of the Fourth Amendment, or protecting the integrity of courts, have been abandoned, leaving deterrence of police misconduct as the sole basis for the rule. See *United States* v. *Leon*, 468 U. S. 897, 905-906, 921, n. 22 (1984); *Herring* v. *United States*, 555 U. S. 135, 129 S. Ct. 695, 700, n. 2, 172 L. Ed. 2d 496, 504-505, n. 2 (2009). Because this is a purely utilitarian rationale, with no basis in the text or history of the Constitution, it necessarily involves a weighing of costs and benefits. See *Leon*, *supra*, at 906-907; *Hudson* v. *Michigan*, 547 U. S. 586, 594-595 (2006). While this Court has implicitly decided, by not overruling *Mapp*, to keep the exclusionary rule in the core of cases to which it applies, in cases outside the core the result of the weighing has regularly come out against exclusion. See *Leon*, *supra*, at 922 (good-faith reliance on warrant); *Hudson*, *supra*, at 599 (knock-and-announce); *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 369 (1998) (parole revocation hearings); *Illinois* v. *Krull*, 480 U. S. 340, 353 (1987) (reliance on statute); *Arizona* v. *Evans*, 514

U. S. 1 (1995) (error by court employee); *Herring*, 129 S. Ct., at 702, 172 L. Ed. 2d, at 507 (mistake of police employee attenuated from search).

That is the correct result, because the cost of deliberately blinding a criminal trial court to the truth is enormous, not "modest" as petitioner contends. Cf. Brief for Petitioner 49-60. How many violent criminals need to go free to prey again before the cost of the exclusionary rule is greater than "modest"? One.

For a state to employ the rules of evidence to deny a defendant the core of his defense without a compelling justification is a denial of due process of law. See *Chambers* v. *Mississippi*, 410 U. S. 284, 302-303 (1973). The people and the victims are also entitled to due process of law. See *Stein* v. *New York*, 346 U. S. 156, 197 (1953), overruled on other grounds in *Jackson* v. *Denno*, 378 U. S. 368, 391 (1964). In a sense, a court commits a *Chambers* violation against the people every time it invokes the exclusionary rule.

In the present case, the petitioner concedes that the deterrence rationale is absent.[2] He makes the remarkable claim that this Court should require a miscarriage of justice in the case before it for the purpose of insuring a steady stream of vehicular traffic aimed at changing settled law in favor of criminal defendants. The argument depends on an exaggerated estimate of the effect that the rule adopted by the Eleventh Circuit would have.

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2. An *amicus* argues that deterring searches presently authorized but which might be disapproved in the future is a desirable result. See Brief for National Association of Federal Defenders as *Amicus Curiae* 4-8. It is not. See Brief for the United States 39-40.

II. Petitioner's fear of insufficient grist for the Fourth Amendment mill is unfounded.

Petitioner claims, "This is a case about the role of the Supreme Court in the development of Fourth Amendment law." Brief for Petitioner 7. He fears that by adopting the rule followed by the Eleventh Circuit in this case, this Court will disable itself from changing the law in favor of broader interpretation of the Fourth Amendment, and "the direction of Fourth Amendment law would become a one-way street in favor of expanded government power." Brief for Petitioner 9. These fears are unfounded. The argument gives insufficient weight to the multiplicity of America's courts and the creativity of its lawyers.[3] It gives too much weight to Article III limitations, which are not as broad as petitioner makes them out to be.

A. Three Score and Four Courts.

Petitioner contends that if searches clearly authorized by controlling case law at the time of the search are exempt from the exclusionary rule, "Article III would leave the Court unable to review challenges to circuit court or Supreme Court Fourth Amendment precedents in criminal cases." Brief for Petitioner 22-23. *Arizona* v. *Gant*, 556 U. S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), itself disproves this assertion for circuit precedents. For Supreme Court precedents, there is more of an issue, but not so great as to require the drastic remedy of an intentional miscarriage of justice in the criminal case.

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3. Petitioner also underestimates the utility of civil "policy or custom" suits for challenging established law. See Brief for United States 34-37.

This Court is unique in a number of ways, one of which is the breadth of American courts it has jurisdiction to review, none of which is required to follow the precedents of any of the others. The federal circuit courts of appeals are not required to follow each others' precedents. See *Hart* v. *Massanari*, 266 F. 3d 1155, 1172-1173 (CA9 2001). The highest court of each state is not required to follow the precedents of other states or of the federal court of appeals for its circuit. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997) (citing *Lockhart* v. *Fretwell*, 506 U. S. 364, 375-376 (1993) (Thomas, J. concurring)); *id*., at 66, n. 21.

There are eleven numbered federal circuits and the D.C. Circuit deciding Fourth Amendment questions in federal criminal cases. The Court of Appeals for the Armed Forces also decides criminal cases, sometimes involving considerations unique to the military but sometimes not. See, *e.g.*, *United States* v. *Scheffer*, 523 U. S. 303 (1998) (polygraph evidence, straight application of civilian precedents). There are 50 state high courts doing the same in state cases, plus the District of Columbia Court of Appeals, which is the "highest court of a State" for this purpose. See 28 U. S. C. § 1257(b); *M. A. P.* v. *Ryan*, 285 A. 2d 310, 312 (D. C. 1971) (D. C. Circuit precedents after effective date of D. C. Court Reform Act in 1971 not binding precedent in D. C. Court of Appeals). Supreme Court Rule 10 indicates that a split of authority among circuits and state high courts is the primary reason for grant of certiorari.

That comes to 64 independent courts, all rendering independent interpretations of what this Court's Fourth Amendment precedents mean, none bound to follow any of the others. Even if we assume for the sake of argument that the rule at issue in this case would have precluded rendering the *Gant* decision in a

case from the Eleventh Circuit, but see Part III, *infra*, it would not have precluded rendering it in *Gant* itself.

The Arizona Attorney General asserted in the certiorari petition in *Gant* that the Arizona Supreme Court decision was contrary to the interpretation of *New York* v. *Belton*, 453 U. S. 454 (1981), followed in numerous federal circuits, although not specifically mentioning the Eleventh. See Pet. for Cert. in *Arizona* v. *Gant*, No. 07-542, pp. 15-16. Indeed it was, and by affirming the Arizona decision in *Gant*, this Court did effectively review and reject the contrary Eleventh Circuit precedent, along with the others. How would this process have differed if the exclusionary rule exception now under consideration had been in force then? Not at all. Gant's Fourth Amendment claim would have been considered on the merits because there was no clearly established authority to the contrary in Arizona, and the Arizona Supreme Court had no obligation to follow the contrary Ninth Circuit precedent. See *State* v. *Gant*, 216 Ariz. 1, 6, 162 P. 3d 640, 645 (2007) (declining to follow, inter alia, *United States* v. *Osife*, 398 F. 3d 1143, 1144, 1146 (CA9 2005)); see also *State* v. *Gant*, 202 Ariz. 240, 243, ¶ 7, 43 P. 3d 188, 191 (App. 2002) (initial appeal: "whether *Belton* applies to Gant's situation 'appears to be a matter of first impression in Arizona' ").[4]

The state court in *Gant* further noted that two other state high courts had come to similar conclusions. See 216 Ariz., at 6, n. 4, 162 P. 3d, at 645, n. 4. The Arizona Attorney General criticized these decisions as failing to discuss *Belton*, see Pet. for Cert. in *Arizona* v.

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4. In the present case, there was no split between the state and federal courts. See *State* v. *Jemison*, No. CR-09-0399, 2010 Ala. Crim. App. Lexis 142, *41-42 (Dec. 17, 2010) (citing *Sheffield* v. *State*, 606 So. 2d 183, 187 (Ala. Crim. App. 1992)).

Gant, No. 07-542, p. 17, but that is beside the point for the present purpose. The rule relied on by the police officers in this case was not clearly established in at least three jurisdictions prior to this Court's decision in *Gant*, so review of this rule, uninhibited by any good-faith exception, would not have been precluded or even significantly impaired.

This Court rarely creates a rule of law out of blue sky that has never been accepted by any other court. Recent decisions of this Court expanding the substantive reach of the Fourth Amendment have been presaged by decisions of lower courts, see, *e.g.*, *Wilson* v. *Arkansas*, 514 U. S. 927, 930, n. 1 (1995) (knock-and-announce), even when the bulk of authority was to the contrary. See *Kyllo* v. *United States*, 533 U. S. 27, 46, n. 4 (2001) (Stevens, J., dissenting) (thermal imaging, five circuits upheld but one Tenth Circuit opinion *contra*, although later vacated and decided on other grounds); see also Pet. for Cert. in *Kyllo* v. *United States*, No. 99-8508, pp. 6-7 (citing three contrary state decisions); Brief in Opposition in *Kyllo* v. *United States*, No. 99-8508, pp. 9-10 (conceding one of these decisions rests solely on federal law and one other "went on to find" a federal Fourth Amendment violation after deciding primarily on the state constitution). Indeed, this Court sometimes intentionally refrains from deciding an issue while the opinions of other courts accumulate, in order to better illuminate the subject. See *Brown* v. *Texas*, 522 U. S. 940, 943 (1997) (opinion of Stevens, J., respecting denial of certiorari); *Johnson* v. *Texas*, 509 U. S. 350, 379 (1993) (O'Connor, J., dissenting) (" 'percolate' "). Where the determination of the substantive rule of law turns on interpretation of one of this Court's precedents, the exception would not apply in a jurisdiction that has taken the narrower interpretation and, importantly, it would not apply in

a jurisdiction that has not yet squarely addressed the question.

The claim that good-faith reliance on clear circuit precedent (or state precedent) will cripple this Court's trail-blazing function in Fourth Amendment law is an unfounded fear. The proposed exclusionary rule exception only applies when and where the prior law is "well-settled" in favor of the legality of the search. See *Davis*, 598 F. 3d, at 1264. Given 64 jurisdictions, it is extremely unlikely that an incorrect interpretation of a precedent of this Court would be clearly established law in all of them. Even the predominant of two arguably correct interpretations is highly unlikely to be universal, as *Gant* illustrates.

B. Lawyer Creativity.

Petitioner's argument paints a picture of a compliant criminal defense bar, meekly throwing in the towel and not even arguing a point if contrary precedent would deny an exclusionary remedy under a good-faith exception. "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." Brief for Petitioner 32. Many of us who regularly cross swords with the defense bar do not recognize the lawyer in this portrait.

Experience with the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), refutes the "no incentive to argue" argument. The line separating new rules from new applications of existing rules is rarely a bright one. Lawyers for habeas petitioners continued to argue that the rules they proffered were not really new, even after *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990), raised the bar to a daunting height. Looking back through the cases, we see that disagreement within this Court as to whether the rule was truly new was the norm, and

agreement was very much the exception. See, *e.g.*, *Sawyer* v. *Smith*, 497 U. S. 227 (1990) (5-4); *Stringer* v. *Black*, 503 U. S. 222 (1992) (6-3); *Graham* v. *Collins*, 506 U. S. 461 (1993) (5-4); *Gray* v. *Netherland*, 518 U. S. 152 (1996) (5-4); *Lambrix* v. *Singletary*, 520 U. S. 518 (1997) (5-4); *O'Dell* v. *Netherland*, 521 U. S. 151 (1997) (5-4); *Beard* v. *Banks*, 542 U. S. 406 (2004) (5-4).

Experience with the qualified immunity rule is similar. The boundaries of what is "clearly established" are not clearly established. In *Wilson* v. *Layne*, 526 U. S. 603 (1999), the Wilsons brought their suit and claimed that the right they asserted was clearly established despite a lack of on-point precedent. They prevailed in the District Court, and their position received the support of five judges of the Court of Appeals, see *id*., at 608, as well as one Justice of this Court. See *id*., at 618-619 (Stevens, J., concurring in part and dissenting in part). Meanwhile, back in the West, another circuit had decided that the rule was indeed clearly established. See *id*., at 608; see also *Hanlon* v. *Berger*, 526 U. S. 808, 810 (1999) (reversing the latter judgment).

Sometimes a litigant argues a position based on a clearly established rule of law. Occasionally, a litigant argues for changing a rule of law that is clearly established contrary to his position. Then there is the great gray mass in the middle where the state of current law is debatable. The exception at issue in this case is, in a sense, the opposite of the rules concerning clearly established law that operate under the retroactivity rule of *Teague* v. *Lane*, the law of qualified immunity, or the relitigation bar of 28 U. S. C. § 2254(d). For all of those rules, when reasonable minds may differ the doubt is resolved in favor of the state court judgment or the police officer. See *Butler,* 494 U. S., at 415; *Wilson,* 526 U. S., at 614-615; *Berghuis* v. *Smith*, 559 U. S. __, 130

S. Ct. 1382, 1395, 176 L. Ed. 2d 249, 262-263 (2010) (lack of clearly established precedent supporting Smith's claim was enough to reject it). "[A]n undeveloped state of the law," see *Wilson*, *supra*, at 617, results in a judgment for the state or its officers under these rules. For the rule at issue in this case, an undeveloped state of the law results in a decision in favor of exclusion. The great gray mass in the middle is effectively on the other side.

Given that these much more severe limitations on remedies have not shut off the flow of creative legal arguments, it defies belief that the modest limitation at issue in this case would. As with these other doctrines, lawyers will continue to argue that the rule they seek is not really new. That argument will succeed far more often, because the burden of establishing that the rule is "clearly established" is on the other side. Even when the argument does not succeed, a decision making new law may be rendered in the process. See *Wilson*, 526 U. S., at 614.[5]

Even when a party does not argue to make new law, that argument may be made by *amici*. See *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (Fourth Amendment exclusionary rule proposed by *amicus*); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion) (nonretroactivity of proposed Sixth Amendment rule argued by *amicus*). An *amicus* who argues for the overruling of a case that the party argues is distinguishable has departed much less from the question presented than the arguments this Court accepted in *Mapp* or *Teague*. For example, a defendant could come to this Court with a claim that a "stop and frisk" was not supported by the reasonable suspicion required by

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5. The argument that Article III precludes rulemaking without remedy is addressed in Part III, *infra*.

existing precedent, see *Illinois* v. *Wardlow*, 528 U. S. 119, 123 (2000), and an *amicus* could call for raising the standard to a higher level.

Does this Court need to be concerned with the scenario of overruling a precedent of its own with such crisp boundaries that no case can come to this Court with both a credible claim it is distinguishable and an alternative challenge to the precedent itself? Looking back over 21 years of *Teague* cases in this Court, we only see one where the newness of the rule was clear beyond dispute. In *Walton* v. *Arizona*, 497 U. S. 639, 649 (1990), this Court affirmed the constitutionality of the Arizona statute requiring the trial judge to find the eligibility circumstances in capital cases, rejecting the Sixth Amendment holding of *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1023-1029 (CA9 1988). See *Walton*, *supra*, at 647 (certiorari granted to resolve conflict with *Adamson*). Twelve years later, the Court overruled *Walton* and struck down the same statute on the same theory as *Adamson* in *Ring* v. *Arizona*, 536 U. S. 584, 588-589 (2002). When the *Teague* question arrived in this Court, there was no dispute that *Ring* was new, and the only question was whether an exception applied. See *Schriro* v. *Summerlin*, 542 U. S. 348, 352-353 (2004).

Ring involved a binary choice of factfinder, judge or jury, rather than the shades-of-gray type of choice typically encountered in Fourth Amendment cases. See *Illinois* v. *Gates*, 462 U. S. 213, 238-239 (1983) (rejecting rigid test and adopting a totality of circumstances analysis). This scenario, rare enough in other aspects of criminal procedure, is even less likely to arise in the Fourth Amendment area. Even if it is a theoretical possibility, is it sufficient to impose the unjust exclusionary rule on a whole class of cases where it serves neither a truth-finding nor a deterrent function?

Such a remote possibility is too slender a reed to support the drastic remedy of exclusion of valid, probative evidence. When the scarcity of precedents fitting this description is combined with diversity of courts discussed in Part II-A, above, the possibility becomes vanishingly small. Even when this Court's precedents do establish clear, discrete rules in favor of the government, it is not unheard of for at least one state or circuit to go the other way, particularly if later cases had dropped hints that an overruling was in the cards. In *Simmons* v. *Roper*, 112 S. W. 3d 397, 399-400 (Mo. 2003), for example, the Supreme Court of Missouri ruled contrary to an unmistakably clear precedent of this Court, jumping the gun on the actual overruling. This Court granted certiorari and affirmed without a trace of disapproval. See *Roper* v. *Simmons*, 543 U. S. 551 (2005); cf. *Agostini* v. *Felton*, 521 U. S. 203, 237-238 (1997) (lower courts should follow Supreme Court precedent on point until expressly overruled by this Court).

Even if the proposed good-faith exception on the exclusionary remedy prevented making new law in a case where exclusion would not result, there would still be more than enough vehicles for future shaping of Fourth Amendment law. However, this prerequisite to petitioner's argument is not true, weakening it even further.

III. The limits of the judicial power do not prevent deciding whether a right has been violated first and whether the remedy is available afterward.

Petitioner maintains that Article III forbids deciding "questions of law when [the court's] decision would not have any actual impact on the case before it or on any

other case," equating "actual impact" with granting relief. See Brief for Petitioner 22.[6] If that were correct, courts would always have to decide the "remedy" question before the "right" question, because questions regarding the limits of the judicial power are jurisdictional and must "be established as a threshold matter . . . ." *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94-95 (1998).

We will begin, therefore, with an examination of cases deciding whether there is what Justice Breyer called a "rigid 'order of battle,' " see *Morse* v. *Frederick*, 551 U. S. 393, 430 (2007) (opinion concurring in the judgment in part and dissenting in part), and show that this Court has largely rejected the notion of any such requirement in situations equivalent to the present case.

A. Rights, Remedies, and Order of Battle.

The two-prong test of *Strickland* v. *Washington*, 466 U. S. 668 (1984), may be seen as a right-remedy rule. Every criminal defendant, except for petty offenses, has a right to an effective attorney. See *id.*, at 685-686. However, the unique and drastic remedy of reversing one party's judgment for the shortcomings of the other party's attorney is only granted where there is a showing of prejudice significantly greater than the harmless error test applicable to most trial errors. See *id.*, at 693-694. These issues may be decided in either order.

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6. On its face, this statement seems to imply that a case not otherwise within the judicial power to decide could be brought within it by virtue of its impact on other cases. However, nothing in petitioner's argument supports such a remarkable proposition, and one of the cases he quotes directly contradicts it, see Brief for Petitioner 25 (quoting *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943)), so we will not address it further.

Id., at 697. Therefore, a court may make a precedent on what constitutes deficient performance even though the decision ultimately does not "have any actual impact on the case before it" because the defendant has not made a showing of prejudice sufficient to set aside his conviction.

In habeas corpus, the question of whether the petitioner has forfeited his claim to the remedy through procedural default is normally answered before addressing whether his rights were violated. However, this order is not strictly required. See *Lambrix* v. *Singletary*, 520 U. S. 518, 524-525 (1997) (default normally decided before *Teague*, which precedes merits, but order not mandatory); cf. *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992) (default issue is jurisdictional on direct review of state judgment in this Court). If the claim is defaulted, and no exception applies, a decision on whether a right was violated will have no impact. Yet habeas courts are not rigidly precluded from deciding the substantive question first.

The qualified immunity cases are closely analogous to the present case in this regard. In *Wilson* v. *Layne*, 526 U. S. 603 (1999), this Court did what petitioner claims Article III forbids. It resolved the substantive Fourth Amendment question in the Wilsons' favor, establishing a precedent, see *id*., at 614, and then it denied them any remedy. See *id*., at 617-618. Indeed, for a period of eight years, this Court *required* this order of decision in qualified immunity cases. See *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001), overruled on this point in *Pearson* v. *Callahan*, 555 U. S. 223, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565, 576 (2009). Promoting development of the law was the reason. See *id*., at 201. Before it was required, this order of decision was considered the better practice. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 841, n. 5 (1998). Present

doctrine recognizes that development of the law is an important consideration in deciding whether to decide on the right before the remedy, but whether development will actually be fostered varies from case to case, and other considerations are also significant. See *Pearson*, *supra*, 129 S. Ct., at 818-821, 172 L. Ed. 2d, at 576-580.

Conspicuously absent from *Pearson*'s extended discussion is any suggestion that deciding whether a right has been violated before deciding whether the complaining party is entitled to the remedy creates any problems under Article III. The problem is approached entirely as one of policy, not constitutional mandate. If there had been an Article III problem, the *Pearson* Court would have prescribed the opposite order of decision, rather than leaving the matter to the discretion of the court hearing the case. Cf. *id*., 129 S. Ct., at 818, 172 L. Ed. 2d, at 576 (discretionary). Similarly, in *Morse* v. *Frederick*, even while Justice Breyer protested that the Court should decide only the qualified immunity question in that case, 551 U. S., at 425, 428-432, he did not suggest that the Constitution required this procedure or that it should be followed in every case. Quite the opposite, "In some instances, it is appropriate to decide a constitutional issue in order to provide 'guidance' for the future." *Id*., at 428; see also *id*., at 431-432.

Even closer to the present case is the warrant good-faith case, *United States* v. *Leon*, 468 U. S. 897 (1984). Justice White's opinion for the Court addressed and rejected an argument very similar to the one petitioner makes in the present case. See *id*., at 924. On the "order of battle" point, the *Leon* Court said, "If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing

courts from deciding that question before turning to the good faith issue." *Id*., at 925.

That leaves only *Teague* v. *Lane*, 489 U. S. 288, 316 (1989) (plurality opinion), as saying that a court cannot decide the question of substantive law in a party's favor while also deciding he is not entitled to the remedy he seeks or perhaps any remedy at all. The rationale given by the *Teague* plurality for its threshold question requirement was avoidance of advisory opinions, see 489 U. S., at 316, but that rationale cannot be reconciled with the contrary practice in the qualified immunity cases or *Leon*. The correct rationale for the rule must lie in the policy considerations that apply to *Teague* and not to these other areas.

From the time it was proposed to the present day, the rule we now call *Teague* has been a policy-based limitation, grounded on "the purposes for which the writ of habeas corpus is made available." See *Mackey* v. *United States*, 401 U. S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part); *Danforth* v. *Minnesota*, 552 U. S. 264, 278 (2008). In the context of federal habeas review of state judgments, *Teague*'s threshold question rule served the important policy of at least partially restraining the lower federal courts from doing indirectly what they had no authority to do directly—establishing precedents that were binding *de facto* on state courts, even though the state courts had no *stare decisis* obligation to follow them. See *supra*, at 10. Congress endorsed this policy decision when it enacted the largely overlapping rule of 28 U. S. C. § 2254(d)(1) and expressly provided that only Supreme Court precedent made a rule of federal law "clearly established" for the purpose of collateral attack on a state criminal judgment in federal court.

The threshold question rule of *Teague* can be examined in more depth if and when a case ever arises

that requires it.[7] For now, it is sufficient to note that the rule is unique to the habeas context and not an expression of a broader principle that applies in other contexts.

In general, when both a violation of a right and an entitlement to a remedy are at issue, courts may address the questions in either order, and they may address both or stop at one if one is sufficient to conclude the case. That rule, combined with *Steel Co.*'s rule that jurisdictional Article III requirements must be addressed at the threshold, necessarily implies that entitlement to the remedy is not essential for the case to come within the judicial power under Article III.

B. Standing.

Petitioner contends, "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." Brief for Petitioner 26. It appears that petitioner has confused the two different senses of the word "redressability."

Standing is explained in *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U. S. 269, 273-274 (2008):

> "[I]n order to have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (*i.e.*, a 'concrete and particularized' invasion of a 'legally protected interest'); (2) causation (*i.e.*, a ' "fairly . . . trace[able]" ' connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i.e.*, it is ' "likely" ' and not 'merely "speculative" ' that the plaintiff's injury will

7. So few claims are *Teague*-barred today that are not also barred by either 28 U. S. C. § 2254(d) or the procedural default rule that it may never be necessary to examine the question.

> be remedied by the relief plaintiff seeks in bringing suit). *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (calling these the 'irreducible constitutional minimum' requirements)."

Importantly, *Sprint* referred to the remedy plaintiff seeks, not the remedy plaintiff is entitled to. That is the critical distinction in the "redressability" element illuminated by *Steel Co.*, particularly in its discussion of *Bell* v. *Hood*, 327 U. S. 678 (1946). In *Bell*, the *Steel Co.* Court tells us,

> "This Court held that the nonexistence of a cause of action was no proper basis for a jurisdictional dismissal. Thus, the uncertainty about 'whether the plaintiff's injuries can be redressed' to which [the *Steel Co.* dissent] refers is simply the uncertainty about whether a cause of action existed—which is precisely what *Bell* holds *not* to be an Article III 'redressability' question. It would have been a different matter if the relief *requested* by the plaintiffs in *Bell* (money damages) would not have remedied their injury in fact; but it of course would." 523 U. S., at 96 (emphasis in original).

The environmental group's complaint in *Steel Co.* failed the redressability element not because it was not legally entitled to any of the remedies it sought but because none "would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent." 523 U. S., at 105-106.

In a criminal case, the defendant always has standing in the broadest sense of a personal stake in the outcome of the case. See *Leon*, 468 U. S., at 924 ("undoubtedly raise live controversies"). In the more particular terms of the "triad of injury in fact, causation, and redressability," *Steel Co.*, 523 U. S., at 103,

the first two are satisfied in a Fourth Amendment case by a breach of the defendant's Fourth Amendment rights, not someone else's, by the police. See *Alderman* v. *United States*, 394 U. S. 165, 174 (1969). That leaves redressability.

In terms of remedy, the Fourth Amendment is fundamentally different from constitutional provisions protecting trial rights, such as the Self-Incrimination Clause of the Fifth Amendment or the Confrontation Clause of the Sixth Amendment. For those clauses, exclusion of the evidence at trial prevents the constitutional violation, regardless of what transpired before. An unlawful search violation, on the other hand, is complete when the search is made and cannot be undone. See *Withrow* v. *Williams*, 507 U. S. 680, 691 (1993).

The traditional remedy for harms that cannot be prevented or undone is money damages, and that was the understood remedy for illegal search or seizure when the Fourth Amendment was ratified. See Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 774 (1994). Exclusion of evidence in a criminal case is an odd remedy, and if it were subjected *de novo* to the kind of scrutiny that the requested remedies were given in *Steel Co.*, it might fail the test. Exclusion of evidence does not prevent the violation, it does not undo the violation, and it is not compensation in any kind of proportion to the harm caused by the violation. However, that would be an argument against the exclusionary rule in general, not the exception at issue in this case. For the purpose of this case, we must accept the premise of long-established precedent that exclusion of evidence is an acceptable form of redress, *i.e.*, "that the requested relief will [if granted] redress the alleged injury." *Steel Co.*, 523 U. S., at 103.

Petitioner's standing argument, then, comes down to an assertion that a litigant lacks standing when the remedy he seeks would be redress for a wrong he personally suffered but the law precludes him from receiving that remedy, *i.e.*, he has "no prospect for success." Brief for Petitioner 26. That is precisely the view of redressability that *Steel Co*. rejected. See 523 U. S., at 96. Whether the remedy a party requests constitutes redress goes to standing, but whether the party is legally entitled to that remedy goes to the merits of case.

There is no standing problem in the present case.

C. Remedies and Retroactivity.

In Part I-C of his brief, petitioner contends that the exclusionary rule exception in this case harkens back to the discredited retroactivity regime of *Linkletter* v. *Walker*, 381 U. S. 618 (1965), and in Part II-A, he contends that the exception violates the prohibition on purely prospective decision-making in *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86 (1993). See Brief for Petitioner 16-25. Actually, it is just the opposite. The right-remedy distinction of this exception is fully consistent with the jurisprudence that replaced *Linkletter* in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), *Teague*, and *Harper*. We address the first argument in this part and the second argument in the next part.

The problems with the *Linkletter* approach are described in the oft-cited separate opinion of Justice Harlan in *Mackey* v. *United States*, 401 U. S. 667 (1971).[8] One problem was the inconsistency arising from deciding retroactivity rule-by-rule based on policy judgments about the purpose of the individual rule. As

8. All *Mackey* cites in this brief are to Justice Harlan's opinion.

a result, "the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *Id*., at 676.

A second problem was the arbitrariness and incompatibility with the judicial function of granting relief in the case that made the rule but denying it other cases similarly situated. *Id*., at 678-679. Ernesto Miranda received a second trial, and the woman he raped was forced to endure that ordeal a second time, see *State* v. *Miranda*, 104 Ariz. 174, 450 P. 2d 364 (1969), but no retrial was required for similarly situated murderers and rapists. See *Johnson* v. *New Jersey*, 384 U. S. 719, 721 (1966). "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review." *Mackey*, 401 U. S., at 679.

A third problem is the anomaly of reversing a lower court that comes to the same conclusion that the Supreme Court ultimately reaches, but in one of the cases that is not fished from the stream. See *id*., at 680. A fourth was the reduced incentive to bring novel arguments to this Court, see *ibid*., and a fifth was a perceived detrimental effect on *stare decisis*. See *id*., at 680-681.

Justice Harlan's proposal was to replace retroactivity with a focus on remedies. This Court's "duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was." *Id*., at 681. It does not follow, however, that the drastic remedy of collateral attack on a final judgment must be extended to every

case where the interpretation at the time of the attack is different than it was at the time of the direct appeal. The interest in finality warrants strict limits on that remedy, see *id*., at 683, and one appropriate limit is to only redress procedural errors that were seen as errors at the time the conviction became final. See *id*., at 692. This is, with some modifications, current law under *Griffith* and *Teague*.

This doctrine corrects the main problems Justice Harlan saw with *Linkletter*. No longer is "retroactivity" the result of a policy-based decision made rule-by-rule. All new constitutional rules of criminal procedure apply on direct review. Habeas corpus may be used to remedy errors of substantive law that were not seen as errors at the time of the appeal, *Schriro* v. *Summerlin*, 542 U. S. 348, 351-352 (2004), but that remedy does not lie for subsequently recognized rules of procedure.[9]

No cases are fished from the stream for disparate treatment. All cases on direct review are treated alike. All cases on habeas corpus are treated alike. Habeas petitioners are treated differently from direct appellants, but they are seeking different remedies and not similarly situated. A lower court that decides a case in either of those contexts will be affirmed if it reaches the same conclusion that this Court ultimately reaches.

All of these salutary results would also be obtained with the rule under consideration in this case. The availability of the exclusion remedy would be based not

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9. Justice Harlan, *Mackey*, 401 U. S., at 693-694, and *Teague*, 489 U. S., at 311-314, recognized an exception for procedural changes of the magnitude of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), but this Court has never found such a rule in the 22 years since *Teague* and has recognized the unlikelihood that it ever will. See *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001). It would be better to officially pronounce this never-used exception obsolete and retired.

on a nebulous policy decision but on the clarity of the prior law in the jurisdiction in question. A search in a jurisdiction where it was clearly authorized at the time is not the same as a search in a jurisdiction where the case law said it was forbidden at the time, so it is not arbitrary to treat them differently. That treatment will be the same all the way up the appellate chain in a given case, so this Court and lower courts will be deciding on the same basis.

Only when we get down to Justice Harlan's final make-weight arguments (arguments not mentioned when the Court accepted his view in *Griffith*, 479 U. S., at 322-323), do we see even a hint of the problems that existed under the *Linkletter* regime. Even there, it is only a hint. As we showed in Part I, *supra*, the flow of Fourth Amendment cases to this Court's door may be reduced a bit by the rule under consideration, but it will not be cut off by any means. The impact on *stare decisis* is similarly minimal.

In *Danforth* v. *Minnesota*, 522 U. S. 264, 271, and n. 5 (2008), this Court recognized anew what Justice Harlan said from the beginning, that the *Teague* rule is about remedies and not "retroactivity" as such.[10] So it is in this case. What the Court of Appeals decided was not to disregard current law and apply since-discarded precedent. That would be "nonretroactivity." Instead, the Court of Appeals applied current substantive Fourth Amendment law to recognize a violation but then applied a rule of remedies law to decide that the remedy requested in this case is not available to redress that violation, given the state of the law at the time of the search. See *Davis*, 598 F. 3d, at 1263, 1268. That

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10. *Danforth*'s use of the word "redressability," though, creates potential for confusion with the use of that word in a different sense in the law of standing. See *supra*, at 23.

is what this Court has done for many years in qualified immunity cases, see *supra*, at 19, and it is consistent with the law of retroactivity under *Griffith* and *Teague*.

D. Prospective Decisionmaking.

Petitioner contends that the rule applied by the Court of Appeals in this case would require courts to engage in constitutionally forbidden prospective decisionmaking, citing Justice Scalia's concurrence in *Harper*. See Brief for Petitioner 23. With the above discussion of the distinction between retroactivity and remedy limitations in mind, we can see that *Harper* holds exactly the opposite.

Harper involved a state income tax law that exempted retirement benefits paid to state but not federal employees, a practice held unconstitutional in *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 817 (1989). See *Harper*, 509 U. S., at 89-90. Applying *Griffith* to civil cases, *Harper* decided that the rule of *Davis* must be applied in *Harper* and any other case pending on direct review. See *id*., at 95-97.

However, the Court expressly refrained from deciding that Harper was entitled to the remedy he sought or any remedy still available to him. See 509 U. S., at 100. On remedy, *Harper*, *supra*, at 100-102, relied on *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18 (1990). *McKesson* held, "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure." *Id*., at 38, n. 21. Thus while the Virginia courts were required to apply the substantive rule of *Davis* retroactively, that application would not necessarily result in the remedy plaintiffs sought, and the case was

remanded to make that determination. *Harper*, *supra*, at 99, 102.

Limits on remedies were distinguished from retroactivity in the next major case to apply *Harper*, *Reynoldsville Casket Co.* v. *Hyde*, 514 U. S. 749, 757-758 (1995). The plaintiff pointed to the qualified immunity cases as an example of permitted nonretroactivity based on reliance. The Court acknowledged that the qualified immunity doctrine can result in a denial of a remedy in the event of a change in the law, just as nonretroactivity would. However, qualified immunity remains a "separate legal ground," not a doctrine of retroactivity, based on "special federal policy considerations." *Id*., at 757-758.

> "The upshot is that Hyde shows, through her examples, the unsurprising fact that, as courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, *does not determine the outcome of the case*. Thus, a court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of 'finality' present in the *Teague* context, that limits the principle of retroactivity itself." *Id*., at 758-759 (first emphasis added).

Hyde thus rejects the notion that a new rule must "determine the outcome of the case" to avoid the prohibition on prospectivity. Nonretroactivity and a limit on remedies may lead to the same result in the case before the court or even in all cases within a

certain time frame, but that does not make them equivalent. As long as the court applies the new rule to the question of substantive law before it, it has not engaged in forbidden prospectivity, even if some other limit on remedies ultimately denies the remedy to the party who prevails on the substantive point.

The application of the exclusionary rule is not needed in this case for deterrence, the sole reason given for the rule by this Court in many cases over the years. It is not needed as a practical matter to maintain the development of Fourth Amendment law, as explained in Part II. It is not needed as a theoretical matter to avoid problems of standing and prospectivity, as explained in this Part.

At best, the exclusionary rule is a necessary evil. Where it is not necessary, it is just plain evil.

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation