No. 09-402

In The

Supreme Court of the United States

MARKICE LAVERT McCANE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government's arguments cannot withstand scrutiny. The decision below creates an acknowledged split that conflicts with the holdings of several circuits and many decisions of this Court. The decision below is a dramatic departure from accepted practice that would alter the basic structure of Fourth Amendment litigation. Finally, delay to let the issue percolate would cause extraordinary unfairness.

I. The Government Concedes That A Circuit Split Exists.

The Government concedes the circuit split between the decision below and *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009). *See* BIO at 10-11. Although the government suggests that *Gonzalez* is unpersuasive, the arguments for the good-faith exception were squarely raised and squarely rejected by the Ninth Circuit. Later panels have properly recognized that *Gonzalez* is binding. *See, e.g., United States v. Contreras*, 2009 WL 3241915 (9th Cir. 2009). Indeed, in the short time since the Petition in this case was filed, two additional lower courts have examined the circuit

split and adopted the Ninth Circuit's view that no good-faith exception can apply to these facts.[1]

The government denies the circuit split with the Seventh Circuit by construing the Seventh Circuit's decision as dicta. *See* BIO at 11 (citing *United States v. Real Property Located at 15324 County Highway E.*, 332 F.3d 1070 (7th Cir. 2003)). This is incorrect. The Seventh Circuit announced and applied a rule that the good-faith exception does not apply unless the government has obtained a warrant. *See 15324 County Highway*, 332 F.3d at 1076. Although the Seventh Circuit applied that rule in a case where a warrant was obtained, the rule is equally binding in a warrantless case such as this one. *See United States v. Johnson*, 256 F.3d 895, 915-16 (9th Cir. 2001) (Opinion of Kozinski, J.) ("Where . . . it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law of the circuit and can only be overturned by an en banc court or by the Supreme Court.").

Two recent district court decisions have agreed. Both decisions surveyed the circuit split raised by this petition, and both concluded that the Seventh Circuit's rejection of the good-faith exception was a

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[1] *See State v. Harris*, ___ P.3d ___, 2010 WL 45755 at *7 (Wash. App. 2010) ("We too decline to apply the good-faith exception here."); *United States v. Peoples*, ___ F.Supp.2d ___, 2009 WL 3586564 (W.D.Mich. 2009) (rejecting the good-faith exception for *Gant* violations).

holding rather than dicta. *See United States v. Peoples*, ___ F.Supp.2d ___, 2009 WL 3586564 at *4 (W.D.Mich. 2009) (stating that the Seventh Circuit's decision in *15324 County Highway* "reached the opposite conclusion" as the decision in the case below, and describing its rejection of the good-faith exception as a "holding"); *United States v. Gray*, 2009 WL 4739740, at *3 (D. Neb. 2009) (including the Seventh Circuit's decision as a case that "refused to apply the Leon's good-faith exception to warrantless searches, holding instead that *Leon* applies only to searches conducted pursuant to a warrant").

Petitioner concedes it is difficult to count with precision how many circuits have rejected the good-faith exception. The Ninth Circuit is clearly one, and the Seventh Circuit is a second. However, some circuits have rejected the good-faith exception for warrantless searches generally without addressing whether it would apply to claims based on changing law specifically. *See, e.g., United States v. Curzi*, 867 F.2d 36, 44 (1st Cir. 1989). Such circuits may or may not count in the overall assessment of the split. For example, one recent District Court decision concluded that three circuits have rejected the good-faith exception under these circumstances. *See Gray*, 2009 WL 4739740, at *3 (finding that the Ninth Circuit, Seventh Circuit, and Sixth Circuit have rejected the good-faith exception). In contrast, another district court concluded that only two circuits have rejected the good-faith exception. *See, e.g., Peoples*, 2009 WL 3586564 at *4 (counting the Ninth Circuit and the

Seventh Circuit). Whether the proper number is two, three, or more, the fact remains that this is a clear and widely recognized circuit split.

II. The Government Cannot Reconcile The Decision Below With *Katz v. United States*, *Stone v. Powell*, And *Arizona v. Gant,* A Conclusion Confirmed By The Government's Refusal To Even Argue Good Faith In Some Circuits After *Gant*.

The Government's claim that the decision below is consistent with this Court's decisions is manifestly unpersuasive. As explained in the Petition, the famous case of *Katz v. United States,* 389 U.S. 347 (1967), rejected an exception to the exclusionary rule for reasonable reliance on subsequently overruled caselaw. *See* Pet. for Cert. at 18-19; *Katz*, 389 U.S. at 356. Unfortunately, the Government's Brief in Opposition offers no response. The BIO does not even cite *Katz*, much less try to reconcile *Katz*'s apparent rejection of a reasonable reliance exception with the decision below.

Similarly, *Stone v. Powell*, 428 U.S. 465 (1976), expressly weighed the costs and benefits of the exclusionary rule and concluded that the exclusionary rule must apply "at trial and its enforcement on direct appeal" in Fourth Amendment cases. *Id.* at 493. The BIO does not cite *Stone v. Powell* or try to reconcile its conclusion with the contrary decision below.

The Government does attempt to reconcile the decision below with *Arizona v. Gant*, 129 S. Ct. 1710 (2009), but its argument reflects a basic misunderstanding of Fourth Amendment law. The Government focuses on the *Gant* footnote stating that qualified immunity would block civil lawsuits for *Gant* violations. BIO at 8-9 (citing *Gant*, 129 S. Ct. at 1722 n.11). The Government assumes that if qualified immunity is available, then so is the good-faith exception. It therefore reasons that the *Gant* footnote mentioning qualified immunity "compel[s] the conclusion that the good-faith exception to the exclusionary rule also applies." BIO at 8-9.

This is simply wrong. Qualified immunity is a general privilege from suit that can be raised in any Fourth Amendment civil case against the police. *See Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987). In contrast, the good-faith exception to the exclusionary rule has been recognized in only a few specific and discrete contexts. *See* 1 W. LaFave, Search and Seizure § 1.3(g) (4th ed. 2004). This difference explains why the Court often agrees to hear new cases to determine whether the good-faith exception should be recognized. Each new case carves out a specific domain in which good-faith arguments can or cannot be raised. *See United States v. Leon*, 468 U.S. 897, 927-28 (1984) (Blackmun, J., concurring) (noting that the scope of the good-faith exception is rooted in a provisional "empirical judgment about the effect of the exclusionary rule in a particular class of cases").

The *Gant* majority responded to the dissent's concerns about the scope of suppression *in criminal cases* by mentioning that qualified immunity would apply *in civil cases* because it understood that no good-faith exception applied in such circumstances. That explains the Court's unusual step of affirming the Arizona Supreme Court's decision vacating Gant's conviction rather than remanding for further proceedings. The Arizona Supreme Court had specifically looked for exceptions that might have preserved Gant's conviction, but after a review of several possible exceptions it had found none. *See State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007). Both the state court and this Court understood that no good-faith exception applied and Gant's conviction had to be vacated.

This understanding of *Gant* is confirmed by the Justice Department's refusal to even argue the good-faith exception in some circuits in cases with facts essentially identical to those of this petition. For example, in *United States v. Hrasky*, 567 F.3d 367 (8th Cir. 2009), the defendant was arrested for driving on a suspended license and put in the back of the officer's squad car before his car was searched and two handguns were found. On interlocutory appeal, the Eighth Circuit ruled that guns were admissible as searches incident to arrest under the bright-line rule of *New York v. Belton*, 453 U.S. 454 (1981). *See United States v. Hrasky*, 453 F.3d 1099, 1011 (8th Cir. 2006). The Eighth Circuit affirmed the conviction by an unpublished order. *See United States*

v. Hrasky, 309 Fed.Appx. 83 (8th Cir. 2009). Hrasky then petitioned for rehearing in light of *Gant*.

Instead of arguing the good-faith exception, the Government confessed error and acknowledged that the conviction had to be vacated. *Hrasky*, 567 F.3d at 368. Judge Colloton explained the Justice Department's position in his decision vacating the conviction:

> [T]he government makes no argument in this case for application of a good-faith exception to the exclusionary rule, and expressly concedes that "due to the Supreme Court's decision in *Arizona v. Gant*, the two handguns seized from Appellant's vehicle should be suppressed." As a result, the government concludes, "the conviction on appeal must be vacated."

Id. (internal citation omitted). *See also United States v. Stotler*, ___ F.3d ___, 2010 WL 114938 at *8 n.4 (7th Cir. 2010) (Sykes, J., dissenting) (noting that "[n]either has the government raised the good-faith exception to the exclusionary rule as a basis to affirm" for a search in violation of *Arizona v. Gant* that predated *Gant*).

It is striking that the Government now defends as plainly correct a position that *it declined to even argue* in another circuit with facts essentially identical to those in this petition. The Government's refusal to argue good faith in some circuits following

Gant shows the weakness of its present effort to reconcile *Gant* with the good-faith exception.

III. The Government Cannot Reconcile The Decision Below With This Court's Retroactivity Caselaw.

The Government argues that the decision below is consistent with the Court's retroactivity decisions because the good-faith inquiry is distinct from retroactivity. *See* BIO at 9. Again, the Government is mistaken. The two doctrines share the same history and were designed to be complimentary. The Government's new approach to the good-faith exception therefore effectively overturns decades of retroactivity caselaw.

A short history lesson is helpful here. During the Warren Court era, this Court adopted a balancing approach to whether new criminal procedure decisions expanding constitutional rights should apply on direct review. *See Stovall v. Denno*, 388 U.S. 293 (1967). Under that framework, new decisions were applicable on direct review only if it would serve "the deterrent purpose of the exclusionary rule" in light of the fact that retroactive application, and its resulting application of the exclusionary rule, would "overturn convictions based on fair reliance upon [overruled] decisions." *Desist v. United States*, 394 U.S. 244, 253 (1969).

That balancing approach to retroactivity inspired the adoption of the good-faith exception for defective

warrants in *United States v. Leon*, 468 U.S. 897 (1984). As the Court noted in *Leon*, "the balancing approach that has evolved during the years of experience" in the retroactivity setting "provides strong support for the modification currently urged upon us" in the good-faith exception. *Id*. at 913. In short, the good-faith exception was modeled from and designed to replicate the basic approach the Court applied to the retroactivity of new decisions on direct review. *Id*. at 912-13, n.10.

Three years after *Leon*, however, the Court abandoned the case-by-case balancing approach of retroactivity in favor of a bright-line rule in *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Griffith* relied heavily on Justice Harlan's dissent in *Desist,* in which Harlan had called for a clear rule that the exclusionary rule applied to all new decisions on direct review: "If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced." *Desist*, 394 U.S. at 259 (Harlan, J., dissenting). Under *Griffith*, all new criminal procedure cases apply in full force on direct review. *See Powell v. Nevada*, 511 U.S. 79, 94 (1994).

This history shows why the Government's approach to the good-faith exception is starkly inconsistent with existing retroactivity law. By unhinging the good-faith exception from its origins in retroactivity law, the government imagines a good-faith exception that effectively overturns *Griffith* and returns the law to the discredited version from the

Warren Court years. Indeed, the Government's approach to the good-faith exception in this case tracks the long-abandoned retroactivity standard from *Desist* almost to the letter. That is not consistent with the Court's present retroactivity law. Rather, it is a repudiation of it.

IV. Delay Would Cause Extraordinary Unfairness Because Fourth Amendment Claims Do Not Provide A Basis For Relief On Collateral Review.

The Government's brief argues that granting review would be "premature." BIO at 6. The Government has petitioned for rehearing in *Gonzalez* with the goal of overturning that decision. *Id.* at 10. The Government therefore asks the Court to wait rather than grant review.

Such an approach would cause extraordinary unfairness because Fourth Amendment claims are not recognizable in habeas corpus or other collateral review proceedings. *See Stone v. Powell*, 428 U.S. 465, 493 (1976). If a defendant litigates a Fourth Amendment issue on direct review and loses, he cannot obtain relief on that argument in a habeas proceeding even if the law has changed to recognize the claim. *See id.* As a result, letting this issue percolate will have the effect of permanently denying relief to McCane and the many other defendants presently in the pipeline whose rights were violated under

Arizona v. Gant before their cases became final. Justice delayed will be justice denied.

Further, there is no telling when the Ninth Circuit might rule on the government's petition for rehearing. Petitions for rehearing can remain pending for a long time. When a panel of the Ninth Circuit handed down its decision in *Dukes v. Wal-Mart, Inc.,* 509 F.3d 1168 (9th Cir. 2007), it took *more than 14 months* for the en banc court to finally rule on whether it would grant the petition for rehearing. *See Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009) (ruling on the petition). While such a delay may be acceptable in some cases, it is not acceptable given that the precise issue in this petition is currently pending in several additional circuits with others expecting briefing very soon.[2]

If the Court denies certiorari in this petition, the Justice Department can continue to attempt to delay this issue by petitioning for rehearing in response to

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[2] Although the Westlaw CTA-BRIEFS database is incomplete, it shows the United States has filed briefs arguing good faith for *Gant* violations in the Fourth Circuit, Sixth Circuit, and Eighth Circuit. *See* Brief of United States in *United States v. Stitt*, available at 2009 WL 2430351; Brief of United States in *United States v. Johnson*, available at 2009 WL 5069080; Brief of United States in *United States v. Salamasina*, available at 2009 WL 2955464. District court decisions accepting the good faith exception in the Eleventh Circuit and Seventh Circuit suggest that cases may be pending in those circuits soon. *See United States v. Owens*, 2009 WL 2584570 (N.D.Fla. 2009); *United States v. Mays*, 2009 WL 536912 (E.D.Wis. 2009). The issue is also pending in several state supreme courts.

any adverse decisions and citing its pending petition for rehearing as a reason to deny any future petitions for certiorari. Meanwhile, more denials will mean more final convictions. This Court should not permit such tactics in light of its unfairness to the Petitioner and others similarly situated.

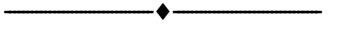
V. The Decision Below Is A Dramatic Departure From Accepted Practice That Would Alter The Basic Structure Of Fourth Amendment Litigation.

The BIO is largely devoted to arguing that the decision below is correct. *See* BIO at 6-8. However, the approach adopted by the decision below would severely damage the traditional process of Fourth Amendment development.

Under the decision below, no rational criminal defendant would ever argue that a court should depart from prior law in his favor. By expressly seeking a departure from prior law, the defendant would effectively concede that he is not entitled to relief under the good-faith exception. In the rare case when a defendant would volunteer such a claim, the good-faith exception would force the courts to render advisory opinions: No defendant could benefit from his own argument. For criminal defendants, Fourth Amendment litigation would resemble a game of "heads I win, tails you lose."

The result would make Fourth Amendment litigation strikingly asymmetrical. The government would be free to argue for changes in the law in the government's favor, and any decision in its favor would immediately apply to all cases on direct review. Defendants could make no such arguments. To avoid the good-faith exception, defendants would have to argue, however bizarrely, that they were entitled to relief under preexisting law. This Court would be denied access to the honest and direct arguments in favor of and against prospective legal rules upon which the development of Fourth Amendment law traditionally has been based. *See v. City of Seattle*, 387 U.S. 541, 546 (1967).

During the Warren Court era, this Court avoided such a result by applying new rules to the one defendant whose case recognized the new right but sometimes denying relief to others in the pipeline. *Compare Katz v. United States*, 389 U.S. 347 (1967) (applying the exclusionary rule to a case announcing new law) *with Desist v. United States*, 394 U.S. 244 (1969) (rejecting the exclusionary rule for *Katz* violations for all others on direct review). In contrast, the Government expressly argues that the exclusionary rule should not apply even in the first case recognizing the right. *See* BIO at 10.



CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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