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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 09-11328, Davis v.
5 United States.

6 Mr. Kerr.

7 ORAL ARGUMENT OF ORIN S. KERR

8 ON BEHALF OF THE PETITIONER

9 MR. KERR: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case raises the intersection of two
12 similar doctrines of the same vintage that point in
13 exactly opposite directions: The first, retroactivity;
14 and the second, the good faith exception. This Court
15 should reverse and hold that the good faith exception
16 does not apply to reliance on precedent, and instead,
17 that should be governed by the retroactivity principles
18 of *Griffith v. Kentucky*.

19 I think it's helpful to start with
20 *Linkletter v. Walker*, the 1965 decision that introduced
21 the concept of retroactivity. *Linkletter* held that
22 *Mapp v. Ohio*, which had held that the exclusionary rule
23 applied to State violations of the Fourth Amendment, is
24 not retroactive. The *Linkletter* decision was premised
25 on a simple syllogism: The exclusionary rule is about

1 deterrence; a decision that postdates a search cannot
2 deter the police; and therefore, the exclusionary rule
3 should not be available in cases before Mapp.

4 Linkletter's syllogism is the same syllogism
5 that the Court is attempting -- that, sorry, the
6 government is attempting to rely on in this case.
7 History has shown that that syllogism is powerful in the
8 context of collateral review and habeas corpus
9 proceedings, but it should not apply on direct review.

10 It should not apply on direct review for two
11 basic reasons. First, because on direct review the
12 first case must be treated like other cases on direct
13 review, the exclusionary rule must be available in order
14 to protect the adversary process and avoid advisory
15 opinions, which --

16 JUSTICE SCALIA: Excuse me. You lose me in
17 the argument because it doesn't seem to me that we -- if
18 we did apply the good faith rule, we would be denying
19 retroactive effect to the altered judgment. It
20 continues to apply to matters beforehand, but it's a
21 totally different question whether, assuming it is
22 retroactive, the good faith exception to the
23 exclusionary rule applies. It's a -- it's a separate
24 question from retroactivity, it seems to me.

25 MR. KERR: I disagree, Justice Scalia.

1 During the Linkletter period, the scope of the
2 exclusionary rule for the Fourth Amendment was an
3 essential concern in a series of retroactivity cases,
4 Linkletter being the first, Desist v. United States
5 being the second. There were -- many of the Linkletter
6 era retroactivity cases were concerned with the Fourth
7 Amendment exclusionary rule.

8 JUSTICE KENNEDY: Yes, but just to pursue
9 Justice Scalia's point: The good faith rule is itself a
10 rule that's intact, that's a precedent, that was on the
11 books, and the good faith rule qualifies the
12 exclusionary rule. So why aren't we just following the
13 good faith rule here?

14 MR. KERR: The --

15 JUSTICE KENNEDY: I mean, there's nothing
16 retroactive or prospective about it. It's just -- it's
17 just applying the existing law.

18 MR. KERR: I disagree, Justice Kennedy.
19 It's not applying existing law, because the effect of
20 what is labeled the good faith exception in this setting
21 is actually to apply the prior decision; that is, to
22 have all of the substance and effect of a retroactivity
23 decision.

24 JUSTICE KENNEDY: Well, that's an
25 application of -- that's a subset, it's one application,

1 of the good faith rule, which is an overall principle.
2 But we're being faithful, under the government's view,
3 it seems to me, to the overall principle.

4 MR. KERR: I think the Court needs to take
5 away the labels here. The government is using a label
6 of good faith for what is essentially a retroactivity
7 argument.

8 JUSTICE SCALIA: It's not a label at all.
9 You're -- we're not denying the application of the
10 altered rule to your client's conduct. It applies. But
11 the question of whether, when it does apply, the good
12 faith disregard of it by a police officer nonetheless
13 allows the evidence to be admitted, it's a totally
14 different -- we're giving full retroactive effect to
15 the -- to the change in the law.

16 MR. KERR: At the same time, Justice Scalia,
17 whatever rule is applied in this case would have to be
18 the same rule that applies in Gant itself, and without
19 the incentive of counsel to argue in favor of the change
20 in the law, that would block claims by defense attorneys
21 to overturn the precedents of this Court.

22 CHIEF JUSTICE ROBERTS: Well, Mr. Kerr, our
23 cases have talked about the deterrence impact on police
24 conduct. It seems to me you're trying to expand that
25 notion to cover incentives for defendants, and as I

1 read -- I guess it's Leon, in footnote 25, it says the
2 argument that defendants will lose their incentive to
3 litigate meritorious Fourth Amendment claims as a result
4 of a good faith exception is -- is unpersuasive.

5 MR. KERR: Leon, I think, raised a different
6 setting. It raised the question of reliance on errors
7 by a magistrate judge, which simply does not implicate
8 the concerns of retroactivity, which is this Court
9 changing its interpretation of the Fourth Amendment. I
10 think that raises a distinct set of principles, as
11 Justice Harlan recognized in his dissent in Desist and
12 his separate opinion --

13 CHIEF JUSTICE ROBERTS: Well, I think our --
14 our theory on the exclusionary rule across the board,
15 without regard to the underlying substantive violation,
16 is that you look to deterrence of police conduct. And
17 here, I mean -- I mean, you agree the police did nothing
18 wrong in this case, don't you?

19 MR. KERR: Yes.

20 CHIEF JUSTICE ROBERTS: So what impact --
21 why do we want to deter them from doing what's right?

22 MR. KERR: Because it takes two branches of
23 government for the exclusionary rule to deter
24 constitutional violations. The Court has to properly
25 construe the Fourth Amendment and the police need to

1 then properly follow the Court's precedents. The Court
2 can't turn away from the role of this Court's precedents
3 in the enforcement of the Fourth Amendment.

4 JUSTICE ALITO: Well, I understand your
5 argument with respect to decisions of this Court, and I
6 think that's your strongest argument, but would you
7 concede that that argument does not apply when the
8 precedent on which the police are relying is a decision
9 of one of the courts of appeals or a State supreme court
10 Fourth Amendment decision?

11 In that situation, there will be plenty of
12 avenues for obtaining review of the correctness of those
13 decisions; isn't that right?

14 MR. KERR: Justice Alito, I think it depends
15 on what the good faith exception is. The government's
16 brief I think does not exactly articulate what the
17 standard is that -- to which it would like to apply.

18 Even so, most Circuit Court decisions
19 interpreting the Fourth Amendment are derivative of this
20 Court's decisions interpreting the Fourth Amendment.
21 And this case is a good example. The facts of this case
22 are quite similar to the facts of Belton. The Eleventh
23 Circuit had not actually expanded upon Belton; it had
24 merely had relatively routine applications of Belton.

25 JUSTICE ALITO: Well, it applied its

1 understanding of Belton, which turned out to be
2 different from the understanding of the Arizona Supreme
3 Court in Gant and the understanding of at least four
4 members of this Court when Gant got here.

5 MR. KERR: At the same time, the Eleventh
6 Circuit's development of the law was -- went no further
7 than Belton itself, and this Court needs adversaries to
8 make forthright arguments to this Court which may
9 involve distinguishing precedent and may involve
10 overturning precedent.

11 JUSTICE ALITO: If I could just come back to
12 my question: Suppose you have a decision in one of the
13 courts of appeals that says certain conduct is permitted
14 under the Fourth Amendment, and the police in that
15 circuit, Federal law enforcement officers in that
16 circuit, follow that precedent.

17 Now, is -- will there not be plenty of
18 opportunities to review the correctness of that decision
19 because the issue may arise in other circuits where the
20 matter isn't settled?

21 MR. KERR: If this Court adopts a good faith
22 exception that is quite narrow and would not allow an
23 officer in one circuit to reasonably rely on the clear
24 circuit court decisions of another circuit, that's
25 certainly a possibility. However, it's not clear as to

1 why the Court would adopt such a narrow version of the
2 exception. The language that the government proposes,
3 at least, seems to be the language of qualified
4 immunity; the notion of reasonable reliance on a
5 decision being believed to be lawful.

6 JUSTICE GINSBURG: Mr. Kerr, the line that
7 has been suggested by Justice Scalia and Justice
8 Kennedy, that is exactly the line that the Eleventh
9 Circuit took; is it not the case?

10 I mean, Judge Kravitch said: Yes, the
11 Fourth Amendment was violated, so to that extent we're
12 following retroactivity precedent. But the remedy is
13 something different. That was exactly the line that she
14 took, wasn't it?

15 MR. KERR: That's correct.

16 JUSTICE GINSBURG: And on your theory, I
17 mean, there's another question in this case; that is,
18 perhaps this evidence would come in under the inventory,
19 as a -- as a legitimate inventory search, and if the
20 Court decided that question, then -- then the question
21 you're arguing, the exclusionary rule question, would
22 have no practical consequences.

23 On your theory, the way you reasoned,
24 shouldn't the Court first decide was this a legitimate
25 inventory search, and if so, then we never get to any

1 exclusionary rule question?

2 MR. KERR: That issue, of course, has not
3 been briefed in this case. It would remain for the
4 Eleventh Circuit to apply that in the event the Court
5 reverses.

6 At the same time, I wish to be clear that
7 I'm not arguing that the exclusionary rule is available
8 in every case when the Court overturns its precedent,
9 merely that it is a remedy in some cases, and I think
10 it's actually a necessary cost.

11 CHIEF JUSTICE ROBERTS: If I could just
12 follow up on Justice Ginsburg's question. Why did this
13 defendant have any incentive to bring his constitutional
14 claim if, as may or may not appear too likely, the
15 inventory search is going to result in the admission of
16 the evidence anyway?

17 It seems that your theory goes too far in
18 saying that defendants will never have an incentive to
19 bring a constitutional challenge if there's some other
20 ground on which the evidence might be admitted, and
21 that's never been our law.

22 MR. KERR: I agree that's never been the
23 Court's law, and I think there's an important
24 distinction to be made here. The distinction is between
25 an argument that has a remote chance of success, and

1 defendants will make those claims, and arguments that
2 have no chance of success, which is no --

3 CHIEF JUSTICE ROBERTS: Well, it's often --
4 we do that. We take cases where you can bring a
5 constitutional challenge or a different challenge all
6 the time, qualified immunity cases, you know, what was
7 the law and was it clearly established? Defendants
8 bring the qualified immunity cases all the time even if
9 they have a tough case on whether it's clearly
10 established. Harmless error cases, the underlying
11 violation, whether it's a harmless error, and the Court
12 can decide the case on either ground, but that doesn't
13 keep defendants from bringing the claims.

14 MR. KERR: But there's a big difference
15 between a tough case and no case. The difficulty of the
16 government's claim is the defendant would know any
17 effort to challenge this Court's precedent cannot
18 logically lead to any relief. Either the defendant will
19 lose on the merits, if the Court upholds its precedent
20 or the defendant will lose under the good faith
21 exception.

22 CHIEF JUSTICE ROBERTS: So your incentive
23 argument really only holds up when the ground on the
24 alternative ground is hopeless? Otherwise we'll expect
25 the defendants to bring a Fourth Amendment claim because

1 it's pretty easy to bring.

2 MR. KERR: Hopeless meaning a zero percent
3 chance of likelihood. That's the difficulty of the
4 government's position, is that it --

5 JUSTICE KAGAN: Mr. Kerr, let's say I'm
6 concerned about the kinds of issues that you're raise,
7 the incentives on defense counsel and also the oddity of
8 the Court deciding a case in which it's absolutely not
9 possible to grant a remedy. Wouldn't the solution to
10 that be not the rule that you are advocating, but
11 instead a much more limited rule which said that in that
12 case the exclusionary rule applied, but not in any other
13 case, not in any case on direct appeal?

14 MR. KERR: I think Justice Harlan's answer
15 to that is persuasive, that it's inconsistent with basic
16 norms of constitutional adjudication to treat the first
17 case differently from other cases not on -- other cases
18 on direct review.

19 JUSTICE KAGAN: I guess, Mr. Kerr, I'm not
20 sure that that's right. Justice Harlan was talking
21 about constitutional rights at a period where, as the
22 Chief Justice said, the exclusionary rule was viewed as
23 part of the constitutional right. But if this Court
24 doesn't view the exclusionary rule that way any more, if
25 it views the exclusionary rule as simply a prophylactic

1 rule which gives a particular defendant a windfall in
2 order to gain systemic effects, systemic benefits, why
3 would we do it any more broadly than we would need to do
4 it? And we would just say: Look, we understand your
5 point that this would very much change the incentives
6 for defense counsel. We understand your point that it's
7 kind of, I don't know, maybe inconsistent with Article
8 III to take a case in which there was absolutely no
9 chance of relief being granted, but we can deal with
10 those issues simply by saying that in your case you get
11 relief, but not in any other.

12 MR. KERR: Justice Kagan, that was the
13 precise premise of the Linkletter regime. The idea of
14 the exclusionary rule as a judge-created remedy, the
15 idea of the exclusionary rule as not being a personal
16 right, that actually was the premise of Linkletter. So
17 to go back to something that resembles that regime in
18 substance, even if with a new label. I think is ill-
19 advised in light of the history of the Linkletter era,
20 and the Court's struggles to try to articulate a
21 consistent standard that can treat the first case and
22 other cases similarly.

23 I think Desist was a Fourth Amendment case,
24 Peltier also a Fourth Amendment case, Peltier also a
25 Fourth Amendment case. The government's proposal is

1 essentially a return to Peltier with a difference. If
2 the Court wants to treat the first case differently than
3 later cases, it is essentially recreating Peltier.

4 JUSTICE ALITO: With respect to the
5 incentives that you're talking about, is there really
6 much difference between what would apply in a case like
7 this and what already applies in cases that fall under
8 Krull? Suppose Congress enacts a statute that
9 authorizes a search under particular circumstances, as
10 it did, as was the case in Almeida-Sanchez. Now, under
11 Krull nobody is going to be able to, and no one who is
12 subjected to a search under that statute is going to be
13 able, to challenge, to obtain suppression, unless you
14 can say that a reasonable law enforcement officer
15 couldn't have thought that this statute which was
16 enacted by Congress and signed by the President was a
17 correct interpretation of the Fourth Amendment.

18 Now, maybe there'll be a few cases like
19 that, but in the great majority, the vast majority of
20 cases, the person will not be able to mount such a
21 challenge. So what is the difference between the
22 situation here and the situation that the Court already
23 approved in Krull?

24 MR. KERR: I think there are two
25 differences. One is that there is a substantial

1 difference from the standpoint of a defendant or defense
2 attorney between a remote chance of success in a legal
3 claim and no chance of success on a legal claim. Krull
4 leaves open the possibility -- and it may be remote, but
5 nonetheless a possibility -- of relief if the defendant
6 can persuade a court that a reasonable officer would
7 have known in light of this Court's precedent that the
8 statute allowed unconstitutional searches.

9 JUSTICE ALITO: Well, we could leave that
10 open here. We could say that there's no good faith
11 immunity if a reasonable officer couldn't have believed
12 that a prior decision of this Court was a correct
13 interpretation of the Fourth Amendment. Maybe that
14 sounds strange only because we have a higher opinion of
15 ourselves than we do of the Congress and the President.

16 MR. KERR: And yet I think your -- your
17 hypothetical, your suggestion that perhaps the Court
18 could adopt that standard, shows the difficulty of
19 trying to craft a good faith exception that ends up
20 running up against the Linkletter problem. This is
21 exactly the issue the Court struggled with during the
22 Linkletter era that Justice Harlan --

23 JUSTICE GINSBURG: Essentially, is your
24 argument essentially that we should distinguish never,
25 which would be this case if your position is not right,

1 and hardly ever. Is that --

2 MR. KERR: That's correct. Where the rule
3 is never, defendants are unlikely to make any sort of
4 claim, and this Court would be denied the opportunity to
5 review its own precedents, and that's an essential role
6 of this Court's decisions in the Fourth Amendment
7 setting.

8 JUSTICE KENNEDY: Well, you might respond
9 that the government's going to say, well, there's Monell
10 that's in their brief, and you'll probably say that
11 that's a weak substitute for a criminal defense
12 attorney's doing it in the trial itself.

13 MR. KERR: It is a weak substitute. There's
14 been no case that I'm aware of at least involving
15 liability against a municipality seeking law reform.
16 It's because the Court has rejected the notion of
17 municipal liability as being based on respondeat
18 superior.

19 JUSTICE KENNEDY: Suppose we were concerned
20 with the costs of your rule in the sense that Gant does
21 have some exception for the safety of the officers, and
22 I think you can read the case if there's some general
23 safety considerations for not securing the car in a
24 neighborhood rather than leave it by itself. If we
25 adopted your rule, the prosecution in all those cases

1 would not have had the opportunity to make those
2 additional defenses or those -- to advance those
3 additional justifications for the search. Maybe you'll
4 say, well, I'm just trying to resurrect Linkletter.

5 MR. KERR: I disagree. Just to explain,
6 Justice Kennedy, my rule would be to retain the existing
7 practice of this Court. I'm suggesting no changes in
8 the practice of this Court, and that is when the Court
9 recognized the need to overturn Belton or at least to
10 substantially change Belton in the Gant case, the Court,
11 Justice Alito in his dissent, recognized that there were
12 costs along with that and that led to review of cases in
13 the lower courts. In many of those lower court
14 decisions, the lower courts held that the searches were
15 nonetheless constitutional under Gant, and that was
16 absolutely proper. In those situations there is no
17 constitutional violation, no one goes --

18 JUSTICE KENNEDY: Well, those cases were
19 pending. I was concerned with cases that were closed, I
20 suppose.

21 MR. KERR: In the closed cases, I'm not in
22 any way challenging the traditional rule of Teague v.
23 Layne and Stone v. Powell that the new rule is not
24 available. As soon as the conviction is final, the door
25 is closed and no defendant can seek review. This is

1 only about direct review and the initial case in which
2 the rule is announced, and that's why I think it raises
3 a special set of jurisprudential problems because it
4 implicates this Court's need to avoid advisory opinions
5 and to avoid what would amount to a one-way street.
6 Under the government's proposed rules, proposed rule,
7 defendants would have a limited ability to challenge
8 precedents that construe the Fourth Amendment too
9 narrowly, but of course of government would be free in
10 any case to challenge precedents that the government
11 believes construes the Fourth Amendment too broadly.
12 The concern is that over time that would lead to an
13 asymmetry in the Court's outcomes, not as a result of
14 the measured judgments of this Court, but rather as a
15 result of the incentives on counsel, and the Court
16 should strive to avoid that sort of result.

17 CHIEF JUSTICE ROBERTS: You're asking us for
18 an exception to our general approach, assuming the
19 general approach is not the one you succeed, for, as you
20 put it, cases where there's zero possibility of success,
21 while allowing application of the good faith precedent,
22 even if the chances of success are remote.

23 Is it really worth the candle to have
24 litigation over whether it was a difference between zero
25 chance and remote chance, as opposed to continuing to

1 apply the good faith rule across the board?

2 MR. KERR: Just to be clear, the Court has
3 not applied the good faith exception in this setting.
4 The government is arguing for an expansion of the good
5 faith exception into territory which has traditionally
6 been thought to be the regime of retroactivity.

7 CHIEF JUSTICE ROBERTS: I understand your
8 position on that. Now, getting to my question, is it
9 really worth it for us to have litigation over the
10 difference between zero and remote in determining what
11 rule we should apply in this case?

12 MR. KERR: I don't foresee litigation on
13 that point because, at least as I understand the
14 government's rule, as soon as a defendant utters the
15 phrase "This court should overturn its precedent," then
16 the good faith exception would automatically apply.
17 That's at least how I understand the government's
18 proposed rule. So it would be up to this Court to craft
19 exactly what the standard would be, but if the standard
20 is broad enough such that upon asking for --

21 CHIEF JUSTICE ROBERTS: Most lawyers don't
22 take that position. Most lawyers would argue the
23 Court's precedents should be overturned and, if not,
24 here's why our case is different. And we would still be
25 required under your theory to look if that second

1 argument has zero chance or only a remote chance.

2 MR. KERR: In that circumstance I think the
3 Court would be forced with issuing what -- forced to
4 issue what may amount to an advisory opinion.

5 CHIEF JUSTICE ROBERTS: And it seems to
6 me -- I mean, in terms of the incentives on the defense
7 counsel, it would be an odd defense lawyer who is going
8 to say you should consider argument A because my second
9 argument has got zero chance of succeeding.

10 MR. KERR: I think the incentive on defense
11 counsel, if the government's rule is adopted, is to
12 never argue that cases should be overturned, and instead
13 make not terribly candid arguments to this Court that
14 every case is distinguishable.

15 JUSTICE SCALIA: Mr. Kerr, I've been on the
16 bench 30 years or so now. I have never, never heard
17 counsel come before the court and say that we should
18 overrule a case without making the argument: The facts
19 of this case are not within the prior decision anyway.
20 It just doesn't happen.

21 MR. KERR: Katz v. United States is perhaps
22 a case worth focusing on, where the Court overturned the
23 rule of Goldman and Olmstead that wiretapping does not
24 implicate the Fourth Amendment. Katz's brief to this
25 Court argued that the Goldman-Olmstead regime had -- was

1 no longer applicable, had been implicitly overturned by
2 prior cases, and then said if it has not been implicitly
3 overturned, it must be overruled. There was no attempt
4 to try to distinguish the facts of the Katz case from
5 the Goldman-Olmstead regime.

6 JUSTICE SCALIA: There was still not the
7 argument you should overrule the prior case, period,
8 with no effort to show why you could come out that way
9 without overruling the prior cases. I just don't
10 know --

11 MR. KERR: Those arguments, I agree, Justice
12 Scalia, are rare. At the same time they are important
13 arguments. It is an -- it is an alternative argument --

14 JUSTICE SCALIA: I'm saying they're
15 nonexistent. I'm not saying they're rare.

16 CHIEF JUSTICE ROBERTS: The difference
17 between zero and remote.

18 (Laughter.)

19 MR. KERR: Nonetheless, the incentive on
20 counsel under the government's rule would be not to ever
21 make the claim that a precedent should be overturned.
22 And the Court needs that argument to be made in
23 appropriate cases so the Court can enter decisions and
24 consider the balance of the considerations
25 appropriately. It has done so under the current

1 practice, and that is really as a result of *Griffith v.*
2 Kentucky, which applies not only -- allows the
3 exclusionary rule to be available in the first case, but
4 in other cases on direct review.

5 If there are no further questions, I would
6 like to reserve the balance of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Dreeben.

9 ORAL ARGUMENT OF MICHAEL R. DREEBEN
10 ON BEHALF OF THE RESPONDENT

11 MR. DREEBEN: Mr. Chief Justice, and may it
12 please the Court:

13 Because the exclusionary rule has severe
14 consequences for the truth-seeking function of a
15 criminal trial, this Court has restricted its
16 application to those situations in which it's necessary
17 to further the deterrent purpose of the exclusionary
18 rule, namely to shape police conduct.

19 The Court has repeatedly rejected efforts to
20 expand the exclusionary rule to serve other purposes,
21 such as schooling judges who issue warrants on the need
22 to respect the Fourth Amendment, reminding legislatures
23 about their obligations under the Fourth Amendment, and
24 for other purposes such as to preserve judicial
25 integrity.

1 JUSTICE GINSBURG: Mr. Dreeben, what about
2 Gant itself? Gant severely qualified Belton. Should
3 there have been a suppression remedy for Gant, as
4 Justice Kagan suggested, the very case that changes the
5 law?

6 MR. DREEBEN: Justice Ginsburg, let me give
7 two responses to that. First of all, the rule that the
8 Eleventh Circuit adopted in this case, and that is the
9 only rule before the Court, involves a situation in
10 which there is binding appellant precedent that
11 instructs the officer, tells the officer, what you're
12 about to do complies with the Fourth Amendment.

13 The state of the law in Arizona would not
14 necessarily have risen to that level, in light of the
15 dissonance in that court's opinions, in the Arizona
16 Supreme Court opinions, about the reach and scope of
17 Belton.

18 So the question about whether the rule that
19 we're urging here would have applied in Arizona is a
20 separate question from the one that the Eleventh Circuit
21 resolved.

22 JUSTICE GINSBURG: And how would you answer
23 it? Was Gant purely prospective or did Gant itself get
24 the exclusionary rule?

25 MR. DREEBEN: Gant obtained relief. This

1 Court granted certiorari in Gant limited to the Fourth
2 Amendment question, and Arizona never raised any good
3 faith exception to the exclusionary rule in that case,
4 so the Court did not address the good faith issue.

5 JUSTICE GINSBURG: Suppose -- suppose it had
6 been raised?

7 MR. DREEBEN: The logic of our position
8 would be that, to the extent that Gant was seeking
9 Belton to be overruled, he would not be able to impugn
10 the actions of the officers who relied on it. To the
11 extent that he was doing what he actually did do and
12 which this Court's opinion in Gant accepted, which is to
13 say that the Gant opinion, that the Belton opinion did
14 not resolve the fact pattern in Gant, he would not be
15 automatically governed by the good faith exception. And
16 as a result, Gant is really the best illustration of how
17 unusual it is for a lawyer to come to this Court and
18 say, please outright overrule a Fourth Amendment
19 decision.

20 JUSTICE KAGAN: Mr. Dreeben, do you think
21 that if a lawyer did that, if a lawyer filed a cert
22 petition and said you should overturn the following
23 Fourth Amendment precedent, and that was all that was in
24 the cert petition, would we be able to grant that cert
25 petition knowing that there was no possibility of relief

1 for that petitioner?

2 MR. DREEBEN: Yes, Justice Kagan, I believe
3 the Court could grant that petition, although it's
4 highly likely that any criminal defendant who filed it
5 would couple it with a claim that this Court should
6 either reverse, modify, or limit any holding that came
7 out.

8 JUSTICE KAGAN: But you think that we would
9 have appropriate Article III authority to decide that
10 question without any hope of relief?

11 MR. DREEBEN: Certainly the Court would have
12 Article III authority, because it's always free to
13 limit, modify or abrogate one of its precedents,
14 including a holding, if one issued from this decision,
15 that the good faith rule applies when the Court
16 overrules its decision.

17 Litigants can all the time be faced with
18 impossible arguments under existing precedent, but that
19 doesn't preclude this Court's Article III jurisdiction
20 to adjudicate challenges to that precedent. That's
21 indeed the very premise of Petitioner's argument.

22 JUSTICE SCALIA: I assume if Petitioner says
23 we should be able to overrule our prior substantive
24 precedent, he should also logically say that we should
25 be able to overrule our prior precedent regarding the

1 exclusionary rule. So that whenever somebody wants to
2 come up here to challenge prior precedent, he can just
3 say: You know, Your Honors, we're asking you to
4 overrule two cases: The first one, the substantive rule
5 of Fourth Amendment law; and secondly, whether that --
6 that change in law can govern the action of the
7 policeman who didn't realize that the law was going to
8 be changed.

9 MR. DREEBEN: That's correct, Justice
10 Scalia, and I think it illustrates why there is no
11 Article III impediment. Now, this Court may
12 prudentially be reluctant to take a case in which it
13 knows that its resolution of the Fourth Amendment issue
14 would not dictate a reversal of the judgment, even if
15 the Fourth Amendment issue went in favor of the
16 defendant, but it is not that dissimilar from the
17 situation in qualified immunity, when there is no law on
18 the books that governs an issue and a petitioner asks
19 the Court to resolve the Fourth Amendment issue.

20 JUSTICE SCALIA: And if he asks for the
21 double overruling that I just suggested, I guess there's
22 some chance that the Court would do it?

23 MR. DREEBEN: It would be remote, but not
24 zero.

25 (Laughter.)

1 JUSTICE SOTOMAYOR: You've just raised the
2 question of qualified immunity and the similarities.
3 There is one problem that I have with the regime that
4 you are suggesting, which is that because laws differ
5 among circuits, now we've created a regime where we say
6 if the law was clear or if there was law on this issue
7 in your circuit, and the police officer relied on it,
8 the exclusionary rule won't apply; but if the law was
9 uncertain or not clear in another circuit, then the
10 exclusionary rule does apply.

11 There's something illogical about permitting
12 that kind of difference to control the outcome of
13 suppression. Are you through the back door trying to
14 get in a qualified immunity thing? If any police
15 officer has a reasonable cause to believe their conduct
16 didn't violate the Constitution, then no suppression?
17 That is what it sounds like your brief is ultimately
18 suggesting.

19 MR. DREEBEN: Well, Justice Sotomayor, we're
20 not kind -- trying to come in through the back door with
21 qualified immunity as a standard in this case. If we
22 ever were to urge that, it would be through the front
23 door. We would make the argument overtly.

24 This case doesn't involve that issue. Judge
25 Kravitch's opinion for the Eleventh Circuit very

1 carefully distinguished between cases in which governing
2 precedent instructed the officers, your conduct is
3 lawful if you do this, from cases in which the law is
4 unclear and there is no governing precedent.

5 JUSTICE SOTOMAYOR: So there's no value in
6 your mind to the fact, as your adversary is saying -- I
7 don't -- I haven't found one case previously by this
8 Court where it has applied the good faith exception to
9 the finding by the Court of a Fourth Amendment
10 violation. Have you? It's never been done in any case,
11 correct?

12 MR. DREEBEN: Not directly under the
13 exclusionary rule. United States v. Peltier considered
14 the factors that now go into the good faith exception
15 under the rubric of then-prevailing retroactivity law.

16 JUSTICE SOTOMAYOR: Well, what we're doing
17 is sort of -- your adversary is right, we're returning
18 to Linkletter, aren't we? We're sort of saying it's
19 going to apply, the exclusionary rule is going to apply
20 in some cases, but not all.

21 MR. DREEBEN: Not returning to Linkletter,
22 Justice Sotomayor, because Linkletter was an
23 across-the-board rule that said that this Court had the
24 authority to render --

25 JUSTICE SOTOMAYOR: I'm talking about what

1 happened before then.

2 MR. DREEBEN: Before --

3 JUSTICE SOTOMAYOR: We're going to have the
4 exclusionary rule apply sometimes but not other times.

5 MR. DREEBEN: That's true, but that's a
6 direct consequence of the logic of the good faith
7 exception itself; and the considerations that had
8 informed this Court's retroactivity jurisprudence in the
9 Peltier decision were taken out of the law of
10 retroactivity when the Court decided *Griffith v.*
11 *Kentucky*; but those same considerations became relevant
12 to the good faith exception, which is tied to the
13 question of whether there is a need to deter police
14 misconduct because the police have disregarded the
15 governing law.

16 JUSTICE BREYER: Is there -- is there
17 anything to be said for simplicity? The normal rule is
18 when the police violate the Fourth Amendment you exclude
19 the evidence. That's the rule. Then there are some
20 exceptions, good faith, et cetera. But that's the
21 normal rule.

22 You have a new law in this Court. The new
23 law says, now this is a violation; we didn't previously
24 think it is, but it is; and that applies to the case in
25 front us and to other cases on direct appeal. The

1 reason that's simple is that's what we've always done.
2 And somebody says let's make an exception here, bring in
3 the exception, good faith, and we say no. Why? Not
4 because any of the policy arguments are wrong, but just
5 because, as this last 40 minutes demonstrates, once we
6 do that it's so complicated, only 14 people are going to
7 understand it and they're not going to understand it,
8 either.

9 MR. DREEBEN: Well, Justice Breyer, I think
10 nine of the people who will understand it are on this
11 Court.

12 JUSTICE BREYER: That's very optimistic.
13 (Laughter.)

14 MR. DREEBEN: I'm an optimist.

15 JUSTICE GINSBURG: I don't think that --

16 JUSTICE SCALIA: I don't think it's so
17 complicated, counsel. Don't worry about it.

18 (Laughter.)

19 MR. DREEBEN: The principle is very
20 straightforward. The principle is that the exclusionary
21 rule applies only when it can deter police misconduct.
22 When police rely on a warrant issued by a magistrate, a
23 statute or a judicial decision issued by a court of
24 appeals that governs their conduct, they are not making
25 a decision about what the Fourth Amendment requires.

1 They are following a different actor in the system, and
2 this Court has held that there is no deterrent value to
3 suppress evidence with an important cost to the
4 truth-seeking function of the criminal trial, which is
5 why, even if it makes for a simpler rule, the Court does
6 not automatically suppress evidence just to achieve
7 simplicity. It does --

8 JUSTICE SCALIA: Actually, why don't we just
9 abolish the exclusionary rule? That would be really
10 simple. Whatever evidence tends to prove the truth
11 comes in. That would be a very simple system if we're
12 looking for just simplicity, wouldn't it?

13 MR. DREEBEN: It would be an extremely
14 simple system.

15 JUSTICE SCALIA: You're not proposing that,
16 though?

17 MR. DREEBEN: Not in this case, because this
18 case represents only an application of existing doctrine
19 in the Court with respect to the purposes of the
20 exclusionary rule.

21 JUSTICE KENNEDY: There is something ironic
22 in your position that the defendant who lives in the
23 circuit that is most clearly wrong is treated worst.

24 MR. DREEBEN: The defendant in these cases
25 is not the object of the Court's protection. I think,

1 as Justice Kagan's question made clear, the exclusionary
2 rule is not a personal individual right. It's not a
3 constitutional right at all. It is a remedy that this
4 Court has devised, not to protect the defendant's
5 interests as such. The Fourth Amendment violation has
6 happened out of court. It cannot be repaired. The
7 purpose of the exclusionary rule is to deter future
8 conduct by other counterparts of that police officer or
9 the police officer himself, so that when he confronts
10 the situation in the future he will be more solicitous
11 of Fourth Amendment rights.

12 JUSTICE SOTOMAYOR: Well, if there's a
13 circuit split, how do we encourage police officers to be
14 careful about the Fourth Amendment? There's a
15 presumption somehow that because a circuit precedent
16 exists that says it's okay to do this, that police
17 officers have to do this. I don't necessarily believe
18 that. If there's a circuit split and a police officer
19 knows that other circuits are saying this is
20 unconstitutional, why are we taking away the deterrent
21 effect of having thoughts occur to the officer about
22 thinking through whether there's a better way and a
23 legal way to do things?

24 With respect to the Fourth Amendment, we've
25 built -- your adversary is right, we've built in so many

1 exceptions, and including in this case the inventory
2 search, that the officers have many different ways of
3 doing things than merely doing what this particular
4 court thought was legal or this circuit. So I guess my
5 question is, when there's a circuit split, why are we,
6 as Justice Kennedy is saying, giving protection to the
7 circuit that's plain wrong and to the officer who chose
8 to follow that advice?

9 MR. DREEBEN: Justice Sotomayor, we don't
10 expect police officers to attempt to define the content
11 of the Fourth Amendment on their own. They are
12 recipients of the status of the law from the courts that
13 govern their activities; training programs will be
14 instituted based on that law. I'm sure that careful
15 training programs will advise officers that there may be
16 some legal risk if there's a circuit split, and that a
17 decision may ultimately be reversed; but we don't expect
18 police departments to try to make the Fourth Amendment
19 decision on their own. And there's some sound --

20 JUSTICE SOTOMAYOR: But they're going to be
21 protected -- they're going to be protected from that --

22 MR. DREEBEN: Well --

23 JUSTICE SOTOMAYOR: -- meaning they're going
24 to get qualified immunity from any personal liability.

25 MR. DREEBEN: Yes, but the reason that the

1 Fourth Amendment balance has been struck in any given
2 way in a particular court is because that is felt to be
3 the reasonable way for officers to operate. In other
4 words --

5 JUSTICE SCALIA: I assume that an officer
6 when he goes out to do his job does not have primarily
7 in mind not to get sued, but I think primarily in mind
8 he wants to arrest somebody in such a manner that the
9 person can be convicted of the crime that he's done,
10 right?

11 MR. DREEBEN: Justice Scalia, that's exactly
12 right. The officers are seeking to protect the public
13 interest, and by not taking advantage of decisions in
14 their circuits that explain that certain behavior is
15 reasonable, they can be putting the public interest at
16 risk by relinquishing procedures that have been held to
17 comply with the Fourth Amendment and yet allow the
18 police to solve crime or to arrest suspects.

19 Now, there's been a lot of discussion in
20 Petitioner's argument about the need to provide an
21 incentive to counsel to raise Fourth Amendment
22 challenges to existing precedent. I think it's useful
23 at the outset to look a little bit empirically at that
24 question, because some members of the Court have
25 expressed concern about that possibility.

1 From as best as I can tell, this Court has
2 not overruled one of its Fourth Amendment precedents in
3 a manner that favored defendants' interests since 1969.
4 Despite whatever incentives may have existed as a result
5 of the exclusionary rule, defendants will typically
6 understand that stare decisis is the normal course that
7 this Court follows, and as a result, they are highly
8 likely to structure their arguments in a manner that
9 will seek to distinguish, limit, or undermine a
10 precedent rather than calling for its outright
11 overruling.

12 JUSTICE ALITO: Well, particularly in light
13 of that, what is wrong with the suggestion that Justice
14 Kagan raised in one of her questions about retaining an
15 exception to the good faith exception for the situation,
16 for the defendant whose case comes up here and results
17 in the overruling of one of this Court's precedents?

18 The Court invented the exclusionary rule.
19 The Court invented the good faith exception to the
20 exclusionary rule. Is there anything to prevent the
21 Court from inventing a new exception to the exception to
22 the exclusionary rule?

23 MR. DREEBEN: No, Justice Alito, there is
24 nothing to prevent this Court from inventing that
25 exception. That exception would serve the purpose of

1 encouraging litigants to ask the Court to overrule its
2 decisions and thereby to receive a benefit when they do
3 so. If it's limited to the first individual who
4 actually succeeds in that endeavor, it would limit the
5 costs of the exclusionary rule, which, after all, result
6 in the exclusion of reliable probative evidence of guilt
7 in every case where it's applied.

8 And the Court could tailor the exclusionary
9 rule in that manner. If it did so, it would certainly
10 minimize the costs, and it would represent the least
11 amount of intrusion on the purposes of the exclusionary
12 rule. But I would caution the Court in this respect.
13 If the Court were to adopt another purpose for the
14 exclusionary rule, namely creating incentives for
15 counsel to challenge existing precedent, that will
16 represent a substantial departure from this Court's
17 consistent holdings that the only function of the
18 exclusionary rule is to deter police misconduct, and
19 once the Court has acknowledged that an additional
20 exception to the exclusionary rule is justified, even if
21 in these rare situations, it will create pressure for
22 litigants to urge that additional policy interests of
23 the administration of justice would be served if the
24 Court would create yet another exception.

25 JUSTICE SCALIA: I don't think we'd look

1 particularly good, either, do you? I mean, if.

2 We had one case raising a Fourth Amendment
3 question, and let's say six others who raise -- that
4 raise the same question, what would we do? We would
5 grant the first and hold the second? No use to hold the
6 second, because they're going to lose anyway, right?

7 MR. DREEBEN: Yes.

8 JUSTICE SCALIA: So I guess we would -- we
9 would just grant the first and deny all the rest, even
10 though they're raising the same issue?

11 MR. DREEBEN: I think the strongest argument
12 against --

13 JUSTICE SCALIA: It doesn't smell very good.

14 MR. DREEBEN: -- the proposal, Justice
15 Scalia, would be an appearance of arbitrariness in the
16 Court's actions.

17 JUSTICE BREYER: So that's why, isn't it --
18 that's why the normal rule has been that the person
19 litigating the case gets the advantage of the new rule,
20 as do other people whose initial appeals are not final,
21 and there we are. That's a rule existing, I guess, for
22 a long time. I guess these other people have to have
23 raised the question in their case. They have to have
24 asked for it. They can't -- they have to follow normal
25 rules. Has that caused havoc, or has that caused

1 things -- the legal system, even before --

2 MR. DREEBEN: Justice Breyer, it hasn't
3 caused havoc, for several reasons. One is it's
4 extraordinarily rare for this Court to overrule its own
5 Fourth Amendment precedent. It's apparently equally
6 rare, or almost equally rare, for the courts of appeals
7 to overrule their precedent and adopt a more
8 defendant-friendly Fourth Amendment rule.

9 I cannot claim to have done an exhaustive
10 survey of all of the courts of appeals decisions that
11 possibly overruled Fourth Amendment holdings, but the
12 results of my research disclose only one case in which a
13 court of appeals overruled its precedent to favor a
14 defendant, and that occurred in 1987 in the Fifth
15 Circuit, and the Fifth Circuit adopted a good faith
16 exception precisely like the one that the government is
17 urging the court to adopt today and declined to suppress
18 the evidence for that reason. No other circuit has
19 apparently confronted the question of whether overruling
20 a decision triggers the good faith exception.

21 JUSTICE BREYER: I would have thought it was
22 more for this Court, actually, anyway. I don't know if
23 it has to be the words "overruling." My recollection
24 was: Has the Court created a new rule of law? I think
25 it goes back to Cardozo, Sunburst or something, that if

1 the Court creates a new rule of law, then does it apply
2 prospective, retroactively? And the worked-out position
3 was it applies retroactively, but to the litigant and to
4 those whose appeals are not final if they raised it.

5 MR. DREEBEN: Yes, Justice Breyer.

6 JUSTICE BREYER: And you want to change
7 that, it seems to me.

8 MR. DREEBEN: No. That is the retroactivity
9 question, and the retroactivity question is --

10 JUSTICE BREYER: You're hiving off the --
11 the suppression. I understand.

12 MR. DREEBEN: This Court has acknowledged
13 that the exclusionary rule is not an individual right,
14 it's a remedy. It doesn't involve any violation of
15 constitutional rights of the defendant. It's a remedy
16 that this Court devised after finding a Fourth
17 Amendment.

18 And I think, as Justice Ginsburg pointed
19 out, in Judge Kravitch's opinion for the Eleventh
20 Circuit, Judge Kravitch acknowledged that Gant is the
21 law; the search in that case was unconstitutional. The
22 next question is an entirely separate issue of remedy,
23 and that remedy issue is governed by this Court's good
24 faith precedents. The rarity with which courts of
25 appeals have confronted this simply reflects the fact

1 that, even without the lack of incentive that Petitioner
2 says will result if the Court agrees with the government
3 today, holdings that overrule Fourth Amendment decisions
4 squarely and favor defendants do not occur all that
5 often.

6 JUSTICE GINSBURG: Were we right that --
7 there were several cases that were TBR'd in light of
8 Gant. Maybe some of them shouldn't have been TBR'd
9 under your theory.

10 MR. DREEBEN: Well, Justice Ginsburg, before
11 the litigation that occurred in the wake of Gant, there
12 was only one precedent on the books in any circuit that
13 I'm aware of that had applied the -- in the Federal
14 system -- that had applied a good faith rule to overrule
15 judicial decisions. That was United States v. Jackson
16 in the Fifth Circuit. It's cited in the Eleventh
17 Circuit's opinion in this case. It happened in 1987.

18 So I think it's fair to say that prosecutors
19 and government officials were not raising good faith
20 exclusionary rule arguments in the cases that were held
21 for Gant. I don't believe that the United States had
22 done so, and as a result, it was perfectly logical and
23 in accordance with this Court's normal practice to
24 grant, vacate, and remand those cases for further
25 consideration under Gant.

1 But in the wake of Gant, courts began to
2 think of the logic of Leon and Krull and this Court's
3 recent decision in Herring v. United States and attempt
4 to apply the logic of those decisions to a circumstance
5 in which a police officer relies on a binding and
6 governing appellate precedent, and they concluded that
7 courts that announce precedents have every reason to
8 expect that litigants will rely on them and that police
9 officers will rely on them. Therefore, there is no
10 deterrent purpose to be served by suppressing the
11 evidence. It's all cost.

12 And the cost would be that individuals whose
13 convictions have been obtained based on evidence that
14 was seized in reasonable good faith reliance on existing
15 appellate precedent will now be able to overturn their
16 convictions, and that's a heavy cost to the
17 administration of justice. It's why the exclusionary
18 rule has been confined to particularized circumstances
19 where it's thought that it will actually achieve a
20 benefit, and it has not been expanded beyond those
21 purposes.

22 So given that litigants, criminal
23 defendants, have a tremendous incentive to challenge
24 their convictions and to try to navigate around
25 precedents while simultaneously showing that those

1 precedents may have underlying material flaws, this
2 Court is highly unlikely to be deprived of cases in
3 which litigants attempt to undermine precedents without
4 actually calling for their overruling. That is what
5 happened, for example, in *Batson v. Kentucky*, where the
6 Petitioner in that case did not want to head-on confront
7 *Swain v. Alabama* and ask for its overruling, and as a
8 result asserted that racially discriminatory peremptory
9 challenges were invalid under the Sixth Amendment,
10 rather than the Equal Protection Clause. This Court got
11 the case and concluded that the proper analysis was the
12 Equal Protection Clause and it accordingly overruled
13 *Swain* in relevant part.

14 So it's highly unlikely that if, in fact, a
15 precedent of this Court is beginning to fray around the
16 edges and justices of this Court have written
17 concurrences or dissents that explain that they no
18 longer believe that the logic of that is sound,
19 litigants will exploit those statements in an effort to
20 narrow the precedent and ultimately expose its flaws, so
21 that if this Court determines it can overrule the
22 precedent, and it can do so even if the exclusionary
23 remedy will not follow.

24 JUSTICE ALITO: Would the rule that you're
25 arguing for apply only in the situation where there is a

1 binding precedent that affirmatively approves a
2 particular police practice, or would it also apply in
3 the situation in which there is simply absolutely
4 nothing on the books that prohibits the police practice,
5 so that a reasonable officer wouldn't have any reason to
6 think that the practice was unconstitutional?

7 MR. DREEBEN: This case, Justice Alito, only
8 involves the example of binding appellate precedent, and
9 Judge Kravitch's opinion for the Eleventh Circuit
10 distinguished between the two situations. In the
11 situation in which there is no precedent, such that an
12 officer would not be instructed that his conduct is
13 affirmatively unconstitutional, qualified immunity
14 applies, and there would be arguments that there is
15 nothing to deter if an officer acts within that empty
16 space.

17 But there is a countervailing argument, and
18 the countervailing argument, which Judge Kravitch talked
19 about in the Eleventh Circuit, opinion, would be that
20 when there's no law on the books courts should give
21 officers to -- an incentive to act in favor of the more
22 constitutionally protective manner, rather than taking a
23 flier on what might turn out to be unconstitutional.

24 JUSTICE GINSBURG: She did say that if there
25 is ambiguity, then the police must err on the side of

1 not searching. Do you think that that's -- do you
2 accept that?

3 MR. DREEBEN: No, Justice Ginsburg, I would
4 not submit to the Court that the United States
5 necessarily agrees with that. I think that this case
6 doesn't involve that problem and, as I said, there are
7 contrary arguments that could be advanced based on this
8 Court's description in Herring of the purpose of the
9 exclusionary rule to reach conduct that is either
10 reckless or intentional or at the least systematically
11 negligent.

12 And, so, some day this Court may have to
13 confront whether the narrow limitation that Judge
14 Kravitch adapted -- adopted in her opinion is the
15 correct rule of law versus a broader view that exclusion
16 is only appropriate when the officers have engaged in
17 truly culpable conduct. But that's not a bridge that
18 the Court needs to cross in this case. It's not an
19 argument that the United States is advancing for
20 affirmance of the judgment.

21 This judgment can be affirmed simply by
22 holding that the syllogism that the court of appeals
23 adopted that, absent a deterrent purpose there is no
24 basis for exclusion, there is no deterrent purpose here,
25 that's sufficient to resolve this case and the Court can

1 leave for another day, if it agrees with that
2 proposition, whether the exclusionary rule should have
3 any broader exception for good faith behavior.

4 If the Court has no further questions --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Dreeben.

7 Mr. Kerr, you have 6 minutes.

8 REBUTTAL ARGUMENT OF ORIN S. KERR

9 ON BEHALF OF THE PETITIONER

10 MR. KERR: Thank you.

11 I would like to start with the costs -- or
12 return to the costs here of the exclusionary rule.
13 First, the plain error doctrine is going to largely
14 address the concerns that the government has in this
15 case. If this Court is seeking to limit the scope of
16 the exclusionary rule when the Court overturns
17 precedents under the plain error doctrine, if defendants
18 don't raise a challenge to the search or seizure in
19 their case there will be no relief available to them.

20 So therefore, the only possible relief that
21 could be granted is for individuals that saw the issue,
22 raised the issue, and that will, of course, include the
23 individual who raises the claim in a case where the
24 Court overturns its precedent, therefore avoiding any of
25 the difficulties similar to that of retroactivity.

1 JUSTICE KENNEDY: In -- in -- in one -- in
2 one sense if we're talking about costs, the rule the
3 government proposes is -- is defendant friendly, in that
4 this Court may be more willing to impose stricter rules
5 under the Fourth Amendment, if it knows that the good
6 faith rule will protect against the -- the costs of --
7 of overturning the conviction.

8 MR. KERR: That's exactly right, Justice
9 Kennedy. And, in fact, that exact argument was one of
10 the reasons Justice Harlan concluded that the
11 exclusionary rule should be available in the first case
12 and on direct review. The Court needs to be aware of
13 the costs when it overturns precedent. It should not
14 depart from precedent lightly.

15 And I think Gant is a good example. Justice
16 Alito's dissent nicely points out the very real costs of
17 the shift from the Belton rule to the Gant rule, and if
18 there were no costs in a regime of pure prospectivity,
19 the Court would feel much more free to overturn its
20 precedents because no one would actually be affected by
21 the rule of any cases that are either on direct review
22 or in the initial case or of those individuals whose
23 convictions are already final.

24 JUSTICE KENNEDY: But that could work to the
25 benefit of defendants as a class, not the particular

1 defendant?

2 MR. KERR: That works to the benefit of
3 defendants as a class, absolutely. In fact, going back
4 to the Linkletter era, that was one of the -- perceived
5 as one of the benefits of Linkletter, that it freed the
6 Court to overturn precedent. But I think that is an
7 improper consideration. It is necessary for Fourth
8 Amendment decisionmaking for the Court to accurately
9 weigh the costs and benefits of any shift in the rules.
10 And so I think that the costs of the exclusionary rule
11 in that setting are actually necessary costs.

12 And I also think concerns of a windfall that
13 are available to defendants are overstated because of
14 the many doctrines that limit the scope of the
15 exclusionary rule such as inevitable discovery or
16 standing. Actually the only individuals who would
17 receive the benefit of the exclusionary rule would be
18 those individuals who were not searched in the first
19 place if the Constitution were followed.

20 So, those are individuals who actually did
21 not receive -- will not receive a windfall. They will
22 essentially, if they were lucky enough to raise the
23 issue, go back to the state that they were before the
24 Constitution was violated. And again, that's a limited
25 group of people, and those are, I think, the necessary

1 costs required by the basic norms of constitutional
2 adjudication that Justice Harlan raised in his dissent
3 in *Desist v. United States*, and I think in a lot of
4 ways this case does return to those concerns of Justice
5 Harlan, raised both in his *Desist* dissent and his
6 separate opinion for the Court in *Mackey v. United*
7 *States*.

8 I also wanted to focus on how similar the
9 issue is in this case to -- in the Linkletter era, if
10 you read the *Desist* dissent, in particular Justice
11 Harlan's dissent, it's clear that he's considering the
12 issue of retroactivity to be about the scope of the
13 exclusionary rule.

14 The Eleventh Circuit below had this idea
15 that retroactivity is about the availability of a rule,
16 but rules are not sort of ephemeral ideas that are
17 available or not without any impact. It must be that if
18 they are available, they are available independently of
19 when they were announced and should be enforced
20 accordingly.

21 If there are no further questions --

22 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kerr.
23 The case is submitted.

24 (Whereupon, at 11:02 a.m., the case in the
25 above-entitled matter was submitted.)

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