No. 13-188

In the Supreme Court of the United States

ABASI S. BAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(C) and (e), a defendant's failure to file a timely motion to suppress constitutes a waiver that precludes appellate review absent a showing of good cause.

2. Whether the issuance of a new Supreme Court decision after a defendant's conviction constitutes good cause to excuse his prior failure to have filed a suppression motion.

3. Whether this Court's decision in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which held that new constitutional rules apply to defendants still pursuing their direct appeals, compels lower courts to hear unpreserved suppression claims that are based on the new rule.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 713 F.3d 558.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2013. A petition for rehearing was denied on May 14, 2013 (Pet. App. 25). The petition for a writ of certiorari was filed on August 6, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on seven counts of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951; seven counts of use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and

seven counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2, 13. The district court sentenced petitioner to a term of 164 years of imprisonment, to be followed by three years of supervised release. *Id.* at 14-15. The court of appeals affirmed. *Id.* at 1-10.

1. Between January and March 2011, a series of seven armed robberies took place in Kansas City, Kansas. Pet. App. 2. Surveillance footage showed that the robbers were using a car owned by petitioner's girlfriend. *Ibid.* On March 2, 2011, without first securing a warrant or consent, federal agents, working in cooperation with local police, placed a Global Positioning System (GPS) tracking device on the car while it was parked in a public location in Kansas City, Missouri. *Id.* at 2-3; 9/9/11 Tr. 826-827. On March 3, 2011, the device allowed the police to connect "the car to a just-completed robbery in Overland Park, Kansas." Pet. App. 2-3. Officers stopped the car and arrested petitioner and an accomplice. *Id.* at 3. Inside the car, the officers found cash from the robbery as well as a loaded semi-automatic handgun. *Ibid.*

2. In the district court, petitioner did not move to suppress the evidence discovered through use of the GPS tracking device. Pet. App. 4. Following the entry of final judgment and while petitioner's direct appeal was pending, this Court held in *United States* v. *Jones*, 132 S. Ct. 945 (2012), "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the meaning of the Fourth Amendment. *Id.* at 949 (footnote omitted). On the basis of *Jones*, petitioner argued for the first time in the court of appeals "that the GPS evidence of

his location at the time of the crimes should have been excluded because the GPS device was installed without a warrant in violation of the Fourth Amendment." Pet. App. 4. Petitioner argued that the court of appeals should review his argument for plain error. *Ibid.*

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1-10. The court held "that [petitioner] ha[d] waived his right to raise the [Fourth Amendment] issue." *Id.* at 4. The court explained that motions to suppress must be raised before trial and that the failure to file a suppression motion before trial results in a waiver of the issue, absent good cause. *Id.* at 4-5 (citing Fed. R. Crim. P. 12(b)(3)(C) and (e)). The court then cited circuit precedent holding that "Rule 12 dictates that 'a suppression argument raised for the first time on appeal is waived (i.e., completely barred) absent a showing of good cause for why it was not raised before the trial court.'" *Id.* at 5 (quoting *United States* v. *Burke*, 633 F.3d 984, 988 (10th Cir.), cert. denied, 131 S. Ct. 2130 (2011)).

The court of appeals identified several policy reasons for "why it is appropriate to bar defendants from raising suppression arguments on appeal that were never presented to the district court." Pet. App. 5. First, "the exclusionary rule should be used sparingly in instances where its deterrent effect on police violations is minimal (as with appellate review for plain error)." *Ibid.* (citation omitted). Second, "fairness concerns militate in favor of a waiver rule because although the government can appeal an adverse ruling on a suppression motion prior to trial, it cannot do so once jeopardy has attached." *Ibid.* (citation omitted). Third, when a defendant forgoes a suppression mo-

tion, the government "may plausibly conclude during trial that it does not need to accumulate and introduce additional evidence to prevail." *Ibid.* (citation omitted). And fourth, "allowing a defendant to challenge the inclusion of evidence on appeal places the government in the difficult position of defending itself based on a potentially meager record." *Id.* at 5-6 (citation omitted).

The court of appeals further concluded that petitioner had failed to establish good cause to excuse his failure to raise the suppression argument. Pet. App. 6. Petitioner's sole assertion as to good cause was "that he did not know that there had been a violation of the Fourth Amendment because *Jones* was not decided until he had been sentenced." *Ibid.* The court rejected that argument on the grounds that (i) petitioner "knew about the GPS monitoring soon enough to raise a timely suppression motion"; (ii) "[d]efendants need not, and often do not, await a Supreme Court precedent directly [o]n point before raising a constitutional challenge to a search or seizure"; and (iii) petitioner's argument was the same argument that other defendants raised in other cases before his trial, including a case in the D.C. Circuit, which had ruled in favor of the defendant. *Ibid.* (citing *United States* v. *Maynard*, 615 F.3d 544 (D.C. Cir. 2010), aff'd, *sub nom. Jones*, 132 S. Ct. at 945).

The court of appeals also rejected the argument that this Court's decision in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), entitled petitioner to relief. Pet. App. 7-8. *Griffith* held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the

new rule constitutes a 'clear break' with the past." *Id.* at 7 (quoting *Griffith*, 479 U.S. at 328). The court explained that *Griffith* establishes that the law applicable to a case on direct review is the new rule, but says nothing about whether principles of waiver or forfeiture may preclude a particular defendant from benefitting from that rule. *Ibid.* And *Powell* v. *Nevada*, 511 U.S. 79, 84-85 (1994), the court added, clarified that *Griffith* left open the "consequences of [a defendant's] failure to raise" the legal issue in a timely fashion. Pet. App. 7-8 (emphasis omitted). The court concluded that "*Powell* thus clearly forecloses [petitioner's] argument that *Griffith*'s rule 'trumps Rule 12(e)'s ordinary waiver principles.'" *Id.* at 8 (citation omitted).

ARGUMENT

Petitioner contends (Pet. 9-27) that the court of appeals should have reviewed his Fourth Amendment argument for plain error under Federal Rule of Criminal Procedure 52(b) and under this Court's holding in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), even though he did not file a motion to suppress in the district court. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or present a circuit conflict worthy of this Court's review.

1. a. Federal Rule of Criminal Procedure 12(b)(3)(C) provides that a motion to suppress evidence "must be raised before trial," and Rule 12(e) states that a party who fails to raise "any Rule 12(b)(3) defense, objection, or request" within the time specified by the district court "waives" that "defense, objection, or request," subject to relief for "good cause." Under Rule 12(e), therefore, unpreserved

suppression claims are waived, *i.e.*, are not subject to appellate review even under Rule 52(b)'s plain-error standard. See, *e.g.*, *United States* v. *Burke*, 633 F.3d 984, 988 (10th Cir.) ("Rule 12, and not Rule 52, applies to pretrial suppression motions and a suppression argument raised for the first time on appeal is waived (i.e., completely barred) absent a showing of good cause for why it was not raised before the trial court."), cert. denied, 131 S. Ct. 2130 (2011); *United States* v. *Rose*, 538 F.3d 175, 180-184 (3d Cir. 2008); see also *Davis* v. *United States*, 411 U.S. 233, 242 (1973) (interpreting a prior version of Rule 12 as providing that "a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires"); *Wainwright* v. *Sykes*, 433 U.S. 72, 84 (1977) ("[W]e concluded [in *Davis*] that review of [a claim waived under Rule 12] should be barred on habeas, as on direct appeal, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.").

In *United States* v. *Olano*, 507 U.S. 725, 733 (1993), this Court distinguished between "waiver" and "forfeiture" and explained that "[m]ere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." Rule 12(e) provides for "waiver," not "forfeiture." "Great weight must be given to the plain language of [Rule 12(e)], particularly since Congress amended it in 2002 (after [this Court's decision in *Olano*] had made the distinction between waiver and forfeiture pellucid) and left the 'waiver' terminology intact." *United States* v. *Walker*, 665 F.3d 212, 228 (1st Cir. 2011), cert. denied, 132 S. Ct. 2713 (2012); see

also *United States* v. *Acox*, 595 F.3d 729, 731 (7th Cir. 2010); *Rose*, 538 F.3d at 183 ("In 2002, well after *Olano*, the waiver provision of section (f) was moved to section (e) and its text was revised, but the Advisory Committee kept the term 'waiver' in place. Had the drafters thought that term outdated in light of *Olano* or other precedent, they could have changed the term to 'forfeiture,' but they did not.") (internal citation omitted). The court of appeals therefore correctly held that petitioner's unpreserved suppression claim was waived and not subject to appellate review.

In addition to adhering to the text of Rule 12(e), the court of appeals' decision advances substantial policy interests. See generally, *e.g.*, 1A Charles Alan Wright & Andrew D. Leipold, *Federal Practice and Procedure* § 193 (4th ed. 2008). First, "the exclusionary rule is not an individual right and applies only where it result[s] in appreciable deterrence." *Herring* v. *United States*, 555 U.S. 135, 141 (2009) (internal quotation marks and citation omitted; brackets in original). And because the suppression of evidence imposes a "costly toll upon truth-seeking and law enforcement objectives" by "letting guilty and possibly dangerous defendants go free," the rule should apply only where "the benefits of deterrence * * * outweigh the costs." *Ibid.* (citation omitted). Here, to the extent that preserved claims of a violation would result in suppression, the deterrent effect of the exclusionary rule would not be appreciably advanced by reviewing suppression claims raised for the first time in the court of appeals. See Pet. App. 5-6 (citing *Burke*, 633 F.3d at 989-990); *Rose*, 538 F.3d at 183; *United States* v. *Chavez-Valencia*, 116 F.3d 127, 132 (5th Cir.) ("[T]o allow a[] suppression motion to be

considered for the first time on appeal, we would have to imagine a policeman tempted to make an unconstitutional search or seizure pausing to think and then being dissuaded by the consideration that the prospective defendant, if he is so unlucky as to have a lawyer who commits plain error in failing to file a timely pretrial suppression motion, will have another bite at the apple.") (original brackets omitted) (quoting *United States* v. *Brown*, 663 F.2d 229, 238 (D.C. Cir. 1981) (en banc) (Wilkey, J. concurring)), cert. denied, 522 U.S. 926 (1997).

Second, enforcing a waiver rule is necessary because while the government can appeal an adverse suppression ruling before jeopardy attaches, it may not do so afterwards. See Pet. App. 5; *Acox*, 595 F.3d at 730-731; *Chavez-Valencia*, 116 F.3d at 132; *United States* v. *Ford*, 34 F.3d 992, 994 n.2 (11th Cir. 1994); *United States* v. *Nunez*, 19 F.3d 719, 723 (1st Cir. 1994).

Third, when a defendant proceeds to trial without arguing that particular evidence must be suppressed, the government may reasonably conclude that the later-challenged evidence was sufficient and may have accordingly forgone an opportunity to adduce other evidence. See Pet. App. 5; see also *Burke*, 633 F.3d at 989-990; *Chavez-Valencia*, 116 F.3d at 132. And fourth, if a defendant is permitted to seek suppression for the first time on appeal, the government may be in the position of opposing the motion on a "potentially meager record." Pet. App. 6 (citation omitted); see also *Burke*, 633 F.3d at 989-990; *Chavez-Valencia*, 116 F.3d at 132.

b. The court of appeals' holding in this case—that petitioner waived his suppression argument, thereby

rendering appellate review unavailable absent a showing of good cause—is consistent with the approach of a majority of the courts of appeals. See *Walker*, 665 F.3d at 228 ("The majority view [among the courts of appeals] is that a party's failure to raise Rule 12(b)(3) defenses prior to trial * * * constitutes a waiver in the classic sense and, thus, precludes appellate review of the defaulted challenge."); see also, *e.g.*, *United States* v. *Curbelo*, 726 F.3d 1260, 1266 (11th Cir. 2013); *United States* v. *Dunn*, 723 F.3d 919, 927 (8th Cir. 2013) (holding that "Dunn did not raise this [suppression] issue in his pretrial motion to suppress" and had therefore "waived" the issue "absent a showing of good cause Dunn has not made," but noting that "[i]n any event, there was no plain error"); *United States* v. *Crooker*, 688 F.3d 1, 9-10 (1st Cir.), cert. denied, 133 S. Ct. 772 (2012); *United States* v. *Dupree*, 617 F.3d 724, 727-728 (3d Cir. 2010) (citing *Rose*, 538 F.3d at 184); *United States* v. *Walden*, 625 F.3d 961, 967 (6th Cir. 2010); *United States* v. *Whorley*, 550 F.3d 326, 337 (4th Cir. 2008), cert. denied, 558 U.S. 1117 (2010);[1] *United States* v. *Yousef*, 327 F.3d 56, 124-125 (2d Cir.), cert. denied, 540 U.S. 933 (2003); *United States* v. *Redman*, 331 F.3d 982, 986-987 (D.C. Cir. 2003); *United States* v. *Murillo*, 288 F.3d 1126, 1135 (9th Cir.), cert. denied, 537 U.S. 931 (2002).

The Fifth Circuit has alternatively held that unpreserved suppression arguments are waived or are subject to review for plain error. Compare *United States* v. *Seale*, 600 F.3d 473, 505 (plain error), cert. denied, 131 S. Ct. 163 (2010), with *United States* v. *Scroggins*,

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[1] The Fourth Circuit applied plain error review in the unpublished decision in *United States* v. *Hill*, 471 Fed. Appx. 143, 151, cert. denied, 133 S. Ct. 455 (2012).

599 F.3d 433, 448 (waiver), cert. denied, 131 S. Ct. 158 (2010). But a closer examination of Fifth Circuit case law demonstrates that the court has effectively adopted the majority view of Rule 12(e).[2] Furthermore, while the Seventh Circuit has also issued conflicting holdings, the clear trend is toward adoption of the majority view. Compare *United States* v. *Cephus*, 684 F.3d 703, 706 (waiver), cert. denied, 133 S. Ct. 588, and 133 S. Ct. 807 (2012), and *Acox*, 595 F.3d at 730-731 (waiver), with *United States* v. *Johnson*, 415 F.3d 728, 730 (2005) (plain error).

Petitioner overstates (Pet. 12-14) the extent of disagreement among the courts of appeals. He cites (Pet. 13) *United States* v. *Mahdi*, 598 F.3d 883, 887-888 (D.C. Cir.), cert. denied, 131 S. Ct. 484 (2010), and *Yousef*, 327 F.3d at 144, for the proposition that the D.C. and Second Circuits "ha[ve] rejected the view that, under Rule 12(e), a defendant's failure to raise an argument in a pretrial motion under Rule 12(b) waives plain error review." Pet. 13. But in *Mahdi*,

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[2] In *Seale*, the Fifth Circuit relied on, but misinterpreted, its prior decision in *United States* v. *Baker*, 538 F.3d 324 (2008), cert. denied, 555 U.S. 1123 (2009). See 600 F.3d at 505 & n.6. In *Baker*, the court stated that "there is a division of authority among the circuit courts as to whether arguments not raised in a motion to suppress are waived or are merely forfeited and subject to plain-error review." 538 F.3d at 328. *Baker* then recognized that the Fifth Circuit's prior decision in *United States* v. *Pope*, 467 F.3d 912 (2006), held "that an issue not raised in a motion to suppress in the trial court is waived" and "may not be considered on appeal." 538 F.3d at 329. Nevertheless, *Baker* and *Pope* proceeded to review for plain error. *Ibid.* Regardless, the waiver holdings in *Baker* and *Pope* are in fact *holdings*. See, *e.g.*, *ibid.*; *Scroggins*, 599 F.3d at 448 (stating that prior cases applied the waiver rule but reviewed for plain error "for good measure").

the court stated that it "need not resolve the parties' waiver dispute. Because Mahdi did not object in the district court to the alleged multiplicity, we review his arguments for plain error." 598 F.3d at 888. Moreover, *Mahdi* involved an unpreserved challenge to a multiplicitous indictment, not an unpreserved challenge to a motion to suppress. As noted above (p. 9, *supra*), in the context of an unpreserved motion to suppress, the D.C. Circuit has employed a waiver rule. See *Redman*, 331 F.3d at 986-987.

The Second Circuit has also employed the waiver rule adopted by the majority of the courts of appeals. See p. 9, *supra*. And the Second Circuit has cited *Yousef* for the proposition that unpreserved suppression claims are waived and are not reviewable for plain error (absent good cause). See *United States* v. *McCullough*, 523 Fed. Appx. 82, 83 (2013) (unpublished) (citing *Yousef* and holding that "McCullough's failure to move to suppress the evidence forecloses even plain error review"); *United States* v. *Oquendo*, 192 Fed. Appx. 77, 80 (2006) (unpublished) (citing *Yousef* and holding that "this [suppression] issue was not raised at the suppression hearing, and Oquendo has not demonstrated good cause for his failure to do so. Thus, this issue was waived").[3]

Petitioner quotes (Pet. 14) language in *United States* v. *Lawing*, 703 F.3d 229, 235 n.7 (2012), cert. denied, 133 S. Ct. 1851 (2013), that "[i]t is an open question in the Fourth Circuit whether [that court]

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[3] Both *McCullough* and *Oquendo* cite to page 125 of *Yousef*, which, as set forth on page 9, *supra*, reflects the Second Circuit's view that Rule 12(e) means waiver, not forfeiture subject to plain error review. Petitioner's reliance (Pet. 13) on a different passage in *Yousef* therefore offers him no assistance.

review[s] an unpreserved challenge to a multiplicitous indictment for plain error or whether it is altogether waived." The court declined to resolve the issue, and as a result, *Lawing* cannot be said to conflict with the court of appeals' decision in this case. Moreover, *Lawing*, like *Mahdi*, was about "an unpreserved challenge to a multiplicitous indictment," not an unpreserved challenge to a motion to suppress. In the context of unpreserved suppression motions, the Fourth Circuit has applied Rule 12(e) just as the court of appeals did in this case. See *Whorley*, 550 F.3d at 337.

Similarly, petitioner states (Pet. 14) that in *Scroggins*, the Fifth Circuit left open the question whether an unpreserved suppression argument is waived or subject to review for plain error. But *Scroggins* recognized that Fifth Circuit precedent "hold[s] that a defendant who fails to make a timely suppression motion cannot raise that claim for the first time on appeal." 599 F.3d at 448 (citation and internal quotation marks omitted). That *Scroggins* proceeded to apply plain error review "for good measure" reflects only the Fifth Circuit's unremarkable decision to deny relief on more than one theory.

Finally, citing *United States* v. *Caldwell*, 518 F.3d 426, 430 (6th Cir.), cert. denied, 554 U.S. 929 (2008), and other cases, petitioner contends (Pet. 13-14) that the Sixth Circuit is engaged in an "ongoing, intra-circuit split over this issue." But more than two-and-a-half years after *Caldwell*, the Sixth Circuit concluded in *Walden*, 625 F.3d at 967, that "Rule 12 provides that a party waives the ability to bring a motion to suppress by failing to file a motion before the pretrial motion deadline. Therefore, Walden waived his ability to bring this motion [to suppress], and the Court can-

not review it for plain error under Rule 52." (internal citation omitted).

2. Petitioner cannot establish the requisite "good cause" to excuse his waiver by arguing simply that this Court's decision in *United States* v. *Jones*, 132 S. Ct. 945 (2012), was issued after the district court entered final judgment. "[G]ood cause" is "lacking when '[t]he record show[ed] that sufficient information was available to defense counsel before trial that would have enabled him to frame his [argument for] suppression.'" Pet. App. 6 (second and third set of brackets in original) (quoting *United States* v. *Wilson*, 115 F.3d 1185, 1191 (4th Cir. 1997)); see, *e.g.*, *Curbelo*, 726 F.3d at 1267 ("Defendant was aware before trial that the Government used GPS tracking, but he did not challenge the tracking. So we will not set aside Defendant's waiver of his suppression claim."). Here, "[t]here is no doubt that [petitioner] knew about the GPS monitoring soon enough to raise a timely suppression motion." Pet. App. 6. The Tenth Circuit had not previously ruled on whether officers need a warrant or other Fourth Amendment justification before placing a GPS tracking device on a vehicle. And "the very argument unpressed by [petitioner] had been raised in other circuits before his trial and, most notably, had prevailed in the D.C. Circuit in" *United States* v. *Maynard*, 615 F.3d 544 (2010). Pet. App. 6. The simple fact that *Jones* postdated petitioner's conviction does not provide the requisite "good cause" to excuse waiver.

3. Petitioner's argument (Pet. 17-27) that this Court's decision in *Griffith*, *supra*, entitles him to relief is unavailing. In *Griffith*, this Court held "that a new rule for the conduct of criminal prosecutions is to

be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U.S. at 328. The retroactive application of new rules on direct appeal is necessary because of "the nature of judicial review" and because to do otherwise would "violate[] the principle of treating similarly situated defendants the same." *Id.* at 322-323. *Griffith* makes clear what *law* is applicable to a defendant's case. But it does not require affording defendants the opportunity to raise new claims based on that law where they failed to present their claims in a timely fashion. And applying procedural-default rules to bar consideration of claims that have not been properly preserved does not treat similarly situated defendants differently. Defendants who have not preserved a claim of error are not "similarly situated" with those who have.

Contrary to petitioner's assertion (Pet. 18) that "*Griffith*'s constitutional concerns must override the ordinary rules governing how and whether an issue may be raised on direct appeal," this Court has made clear that the retroactive application of new constitutional rules to cases still pending on direct appeal does not displace the traditional application of procedural default rules. See, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 268 (2005) (explaining that the holdings announced therein "must apply * * * to all cases on direct review" (citing *Griffith*) but that "reviewing courts [should] * * * apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test"); *Shea* v. *Louisiana*, 470 U.S. 51, 58 n.4 (1985) ("As we hold, if a case was pending on direct review at

the time *Edwards* [v. *Arizona*, 451 U.S. 477 (1981)] was decided, the appellate court must give retroactive effect to *Edwards*, subject, of course, to established principles of waiver, harmless error, and the like."). Accordingly, as courts of appeals have held, *Griffith* does not resurrect unpreserved claims and does not disturb Rule 12(e)'s requirement that unpreserved suppression claims are waived. See, *e.g.*, Pet. App. 7-8; *Curbelo*, 726 F.3d at 1266-1267 ("*Griffith* does not allow Defendant to get around our usual rule that failing to file a suppression motion waives Fourth Amendment claims, even claims based on a new ruling from the Supreme Court.") (citation and ellipsis omitted); *United States* v. *Johnson*, No. 12-10308, 2013 WL 4046716, at *1 (9th Cir. Aug. 12, 2013); *United States* v. *Mays*, 593 F.3d 603, 607 n.3 (7th Cir.) ("[T]he *Griffith* rule is subject to established principles of waiver."), cert. denied, 130 S. Ct. 3340 (2010).

Petitioner is mistaken when he argues (Pet. 22-23) that *Powell* v. *Nevada*, 511 U.S. 79 (1994), revives waived claims. *Powell* held that under *Griffith*, the holding of *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991)—that defendants who are arrested without a warrant and subsequently detained are entitled to a probable cause hearing generally within 48 hours—applies retroactively to cases still on direct appeal. 511 U.S. at 81-85. But in so holding, the Court also explained that "[i]t does not necessarily follow, however, that Powell must 'be set free,' * * * or gain other relief, for several questions remain open for decision on remand. In particular, the Nevada Supreme Court has not yet closely considered * * * the consequence of Powell's failure to raise the federal question." *Id.* at 84. As the court of ap-

peals correctly held, *Powell* shows that ordinary default principles are not inconsistent with *Griffith*.

In addition to *Powell*, petitioner points (Pet. 18, 21) to this Court's order in *Levy* v. *United States*, 545 U.S. 1101 (2005), to support his *Griffith* argument. But *Levy* offers petitioner no aid. After a panel of the Eleventh Circuit affirmed the judgment against the defendant, this Court issued its decision in *Blakely* v. *Washington*, 542 U.S. 296 (2004). See *United States* v. *Levy*, 391 F.3d 1327, 1328 (11th Cir. 2004) (Hull, J., concurring in the denial of rehearing en banc). For the first time in his petition for rehearing en banc, the defendant raised a claim under *Blakely*. *Ibid.* Judge Hull, joined by three other judges, concurred in the denial of rehearing "because Defendant Levy did not raise a claim regarding a right to a jury trial on his sentencing enhancements until after this Court had affirmed his conviction and sentence." *Ibid.* The concurrence explained, *inter alia*, that this Court's decision in *Griffith* did not require a reviewing court to hear claims that were not properly preserved, even if they were based on a decision of this Court that was issued following the defendant's conviction. *Id.* at 1329-1330.

This Court vacated and remanded for further consideration in light of *Booker*, *supra*. See *Levy*, 545 U.S. at 1101. On remand, the Eleventh Circuit affirmed, and this Court denied further review. *United States* v. *Levy*, 416 F.3d 1273, 1276-1277, cert. denied, 546 U.S. 1011 (2005). In particular, the Eleventh Circuit relied on *Booker*'s language (see p. 14, *supra*) that *Griffith* applied to *Booker*'s holding, but courts should nonetheless continue to "apply ordinary prudential doctrines including, for example, whether the

issue was raised below." *Levy*, 416 F.3d at 1277 (quoting *Booker*, 543 U.S. at 268) (brackets omitted). In addition, the Eleventh Circuit cited this Court's decision in *Pasquantino* v. *United States*, 544 U.S. 349 (2005), which "declined to address" petitioners' *Blakely* claim raised for the first time in their merits brief, notwithstanding that this Court granted the petitions for certiorari before *Blakely* was decided. See *Levy*, 416 F.3d at 1277; see also *Pasquantino*, 544 U.S. at 372 n.14; *id.* at 377 n.5 (Ginsburg, J., dissenting). The Eleventh Circuit continued: "It seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why this Court should be powerless to apply its prudential rule to foreclose defendant Levy's untimely *Blakely*, now *Booker*, claim." *Levy*, 416 F.3d at 1277. Petitioner's reliance on *Levy*, therefore, is misplaced.[4]

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[4] In the court of appeals, the government argued that, even if petitioner could raise a *Jones* claim, the good-faith exception to the exclusionary rule would bar suppression. See Gov't C.A. Br. 32-35. The officers placed the GPS device on the car in Kansas City, Missouri, 9/9/11 Tr. 826-827, and at the time binding Eighth Circuit precedent concluded that a warrant is not required to attach a GPS device if the officers have reasonable suspicion that the car is being used for criminal activity. See *United States* v. *Marquez*, 605 F.3d 604, 609-610 (2010); see also *Davis* v. *United States*, 131 S. Ct. 2419, 2429 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."). The car later entered Kansas, and the Tenth Circuit had not addressed the installation of a GPS device, but the officers' reliance on the validity of the lawful original installment was reasonable. Cf. *United States* v. *Katzin*, No. 12-2548, 2013 WL 5716367 (3d Cir. Oct. 22, 2013) (rejecting good-faith exception where no binding precedent existed in the jurisdiction where the GPS device was installed); but see *id.* at

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*22-*39 (Van Antwerpen, J., concurring in part and dissenting in part) (endorsing good-faith exception for pre-*Jones* GPS surveillance). The court of appeals did not address that issue, but that additional and unresolved basis for upholding the admission of the GPS evidence makes this an inappropriate vehicle for review of petitioner's waiver, good cause, and *Griffith* claims.