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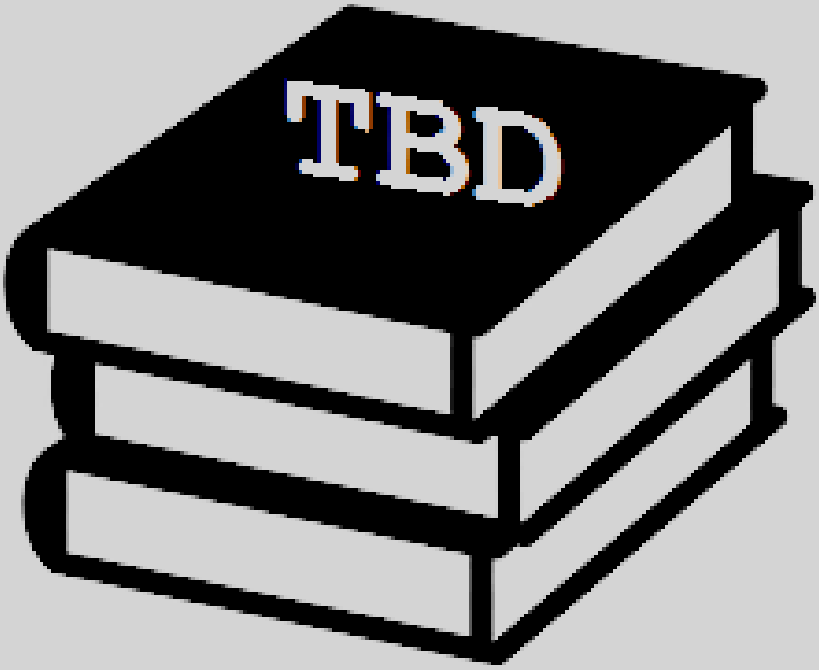




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IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER L. CARPENTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-2125

STATE'S AMENDED MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure 9.330 and 9.331. the Respondent, the State of Florida (hereinafter State), moves this Honorable Court for a rehearing. In support thereof, Respondent states:

1. The majority opinion indicated that "[t]he State and our dissenting colleagues in the case seek to expand Davis to significantly different facts here. We reject that expansion." (slip opinion-p. 6). This Court further interpreted Davis as applying to binding judicial precedent that had been in place and followed for almost 30 years. (slip opinion-p.6). Finally, the majority opinion indicated that Davis should not be applied to the case at bar because the issue was still developing and because of the reasoning utilized in the concurrence from the Davis case. (slip opinion-p.10,13).
2. The State respectfully disagrees and asserts that it is the majority opinion of this Court that has mistakenly expanded Davis v. United

States, 564 U.S. 229 (2011). The State further argues that this Court has mistakenly determined that there was case law in existence, which was contrary to Smallwood I, prior to this Court issuing its opinion in Smallwood II.

3. First, the majority opinion in Davis held that the exclusionary rule did not apply when police conduct a search in objectively reasonable reliance on binding appellate precedent. Davis did not indicate, in any fashion, that the binding precedent had to be well-established or well-settled. In fact, the Davis court noted that not every court agreed with the reading of New York v. Belton, 453 U.S. 454 (1981), and it noted that even the justices on the Supreme Court did not agree on what the holding in Belton meant. Id. at 234.

4. Furthermore, this Court's indication that police cannot rely on binding precedent until it is well-established or well-settled is inconsistent with what the United States Supreme Court has stated. The United States Supreme Court has stated that it is rational for police officers to utilize the investigative techniques that they are specifically authorized to use and that they were not to be punished for the mistakes of appellate judges. The United States Supreme Court specifically stated as follows in Davis:

> Indeed, in 27 years of practice under Leon's good-faith exception, we have "never applied" the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. Herring, supra, at 144, 129 S.Ct. 695. If the police in this case

had reasonably relied on a warrant in conducting their search, see Leon, supra, or on an erroneous warrant record in a government database, Herring, supra, the exclusionary rule would not apply. And if Congress or the Alabama Legislature had enacted a statute codifying the precise holding of the Eleventh Circuit's decision in Gonzalez, we would swiftly conclude that "'**[p]enalizing the officer for the legislature's error ... cannot logically contribute to the deterrence of Fourth Amendment violations**.' " See Krull, 480 U.S., at 350, 107 S.Ct. 1160. **The same should be true of Davis's attempt here to "'[p]enaliz[e] the officer for the [appellate judges'] error**.' " See ibid.

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn "what is required of them" under Fourth Amendment precedent and will conform their conduct to these rules. Hudson, 547 U.S., at 599, 126 S.Ct. 2159. **But by the same token, when binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "'ac[t] as a reasonable officer would and should act' " under the circumstances**. Leon, 468 U.S., at 920, 104 S.Ct. 3405 (quoting Stone, 428 U.S., at 539–540, 96 S.Ct. 3037 (White, J., dissenting)). **The deterrent effect of exclusion in such a case can only be to discourage the officer from "'do[ing] his duty**.' " 468 U.S., at 920, 104 S.Ct. 3405.

Davis v. United States, 564 U.S. 229, 240–41 (2011). (emphasis added).

5. Second, as noted by the dissent, this Court has mistakenly followed the reasoning of the concurring opinion, instead of the majority opinion in Davis. The concurring opinion does not represent the law and the State notes that Justice Sotomayor's vote was not needed, as the majority opinion would have still prevailed with six votes.

6. Third, even pursuant to the reasoning of the majority opinion from this Court, Petitioner's case should be approved. In Davis, the United

States Supreme Court affirmed the case because the lower court relied on the Eleventh Circuit's interpretation of Belton. Id. at 239. According to the Davis court, the Eleventh Circuit interpreted Belton to indicate that there was a bright line rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest. Id. The Davis Court stated, "[a]lthough the search *turned out* to be unconstitutional under Gant, all agree the officers' conduct was in strict compliance with the then-binding Circuit law and was not culpable in any way." Id. at 239-240. (emphasis added).

7. Likewise, in the case at bar, the police relied on the First District's interpretation of United States v. Robinson, 414 U.S 218 (1973), which was a case that had been in place since 1973. The First District interpreted Robinson to establish a bright line rule that police could search the defendant's cell phone. The First District specifically stated as follows in Smallwood I:

> Subsequently, the Supreme Court summarized its holding in Robinson, explaining "[i]n Robinson, we held that the authority to conduct a full field search as incident to an arrest was a 'bright-line rule,' which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern." Knowles, 525 U.S. at 118, 119 S.Ct. 484 (finding in order to fall under the incident-to-arrest warrant exception, it is not enough that an officer would have had probable cause to make an arrest if the officer so chose; the officer must actually make an arrest). **Therefore, clearly the Supreme Court has established a bright-line rule permitting a search incident to arrest, regardless of whether an officer had reason to believe evidence would be found. Thus, whether or not the officer had reason**

**to believe appellant's cell phone contained evidence of the crime is irrelevant.**

Smallwood v. State, 61 So. 3d 448, 460 (Fla. 1st DCA 2011), decision quashed, 113 So. 3d 724 (Fla. 2013). Therefore, the First District interpreted case law from the highest court as establishing a bright line rule that police officers could search a cell phone. The State fails to see how the First District's interpretation of Robinson, which indicated there was a bright line rule permitting officers to search incident to arrest, was any different than the Eleventh Circuit's interpretation of Belton, which determined that there was a bright line rule in a different context.

The First District subsequently expressed concern over what it interpreted to be the existing law and certified a question to this Court. The First District stated as follows:

> **However, we express great concern in permitting the officer to search appellant's cell phone here where there was no indication the officer had reason to believe the cell phone contained evidence. The bright-line rule established by Robinson may have been prudent at the time, given the finite amount of personal information an arrestee could carry on his or her person or within his or her reach. However, the Robinson court could not have contemplated** the nearly infinite wealth of personal information cell phones and other similar electronic devices can hold. Modern cell phones can contain as much memory as a personal computer and could conceivably contain the entirety of one's personal photograph collection, home videos, music library, and reading library, as well as calendars, medical information, banking records, instant messaging, text messages, voicemail, call logs, and GPS history. Cell phones are also capable of accessing the internet and are, therefore, capable of accessing information beyond what is stored on the phone's physical memory.

> For example, cell phones may also contain web browsing history, emails from work and personal accounts, and applications for accessing Facebook and other social networking sites. Essentially, cell phones can make the entirety of one's personal life available for perusing by an officer every time someone is arrested for any offense. **It seems this result could not have been contemplated or intended by the Robinson court.**

Smallwood v. State, 61 So. 3d 448, 461 (Fla. 1st DCA 2011), decision quashed, 113 So. 3d 724 (Fla. 2013). (emphasis and underlining added).

In a nutshell, the First District did not express any uncertainty as to what the law was, it simply indicated that the law should be reconsidered because the Robinson court could not have contemplated the technology that we have today and because there was no reason for the officer to believe the cell phone contained evidence. It is also noteworthy that *in the case at bar*, the police *did have* reason to suspect the cell phone had evidence on it, so any reasonable officer reading the case would not have considered the concern of the First District to apply in this case. As noted in the majority opinion, Petitioner had been sending sexually explicit emails or texts to an undercover officer posing as a fourteen-year-old girl. (slip opinion-p. 2).

8. In fact, there are courts, including the Ninth Circuit, that have held a police officer could reasonably rely on Robinson in good faith for the proposition that he/she could search a cell phone incident to arrest without obtaining a warrant first. The case law appears to

indicate that the United States Supreme Court deviated from the existing law when it issued Riley. See United States v. Gary, 790 F.3d 704, 710-711 (7th Cir. 2005)(Holding that police acted in objectively reasonable reliance on Robinson, Edwards, and a seventh circuit case when the defendant's cell phone was searched, so the good faith exception applied.); United States v. Lustig, 830 F.3d 1075, 1080 (9th Cir. 2016)(Holding that it was objectively reasonable to have interpreted Robinson to announce a bright-line rule authorizing any search incident to arrest, including a cell phone); Rivera v. Com., 778 S.E.2d 144, 149 (Va. Ct. App. 2015)(holding that an officer could reasonably rely on Robinson for his determination that he could search a cell phone incident to arrest and noting that even the United States Supreme Court in Riley, stated, "'a mechanical application of Robinson might well support the warrantless searches at issue [in Riley ].' Id. at ----, 134 S.Ct. at 2484."; Spence v. State, 444 Md. 1, 12-13, 118 A.3d 864, 870-71 (2015) ("Riley no doubt represents the Supreme Court's effort to adjust Fourth Amendment jurisprudence to the quickly evolving digital age. The Riley Court understood, though, that its holding represents a significant departure from what had long been the search incident to arrest rule, as described and applied in Robinson and its progeny. See Riley, 134 S.Ct. at 2484 (acknowledging that 'a mechanical application of Robinson might well support the warrantless searches at

issue here.'). The categorical rule established by Robinson has been followed in Maryland. It follows that Sergeant Nagel acted in objectively reasonable reliance on then-binding authority when she conducted the warrantless search of the cell phone, and the Davis good-faith exception to the exclusionary rule applies to the search.")

9. As noted above, the officer in the case at bar was reasonably relying on binding precedent from the First District, which interpreted binding precedent from the United States Supreme Court. The First District case specifically authorized a search of a cell phone incident to arrest without a warrant. There was also a case from this Court, which indicated that district court opinions represent the law of Florida unless and until they are overruled by this Court, without noting any exception as to the Fourth Amendment. See Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992).

10. Fourth, this Court stated, "[m]oreover, the Second District's decision in Willis, holding that the exclusionary rule applied to a warrantless cell phone search, further fuels the notion that the issue of warrantless cell phone searches was a significant and still-developing area of law and thus not one that the officers should have relied upon as being well-established precedent under Davis." (slip opinion- page 7) This Court further stated as follows in regard to Willis v. State, 148 So. 3d 480 (Fla. 2d DCA 2014), "[r]elying on an opinion still under

review in this Court on an unsettled area of law, when an opinion from another district court existed that came to the opposite conclusion, furthers the notion that officers should have erred on the side of caution and obtained a warrant before searching Carpenter's cell phone." (slip opinion-p.11-12).

11. However, the Willis decision was not in existence at the time of the search in the case at bar. The search of Carpenter's phone occurred in June of 2012 and Willis was not decided until September of 2014, which was over 2 years later. (slip opinion- p. 1, Record 1 pages 2,50-51, and See Willis v. State, 148 So. 3d 480 (Fla. 2d DCA 2014).

12. Therefore, Smallwood I (and its progeny Fawdry v. State, 70 So. 3d 626 (Fla. 1st DCA 2011) were the only cases in Florida that addressed the issue of searching a cell phone of a defendant incident to arrest at the time of the search and they existed without opposition for about two years prior to this Court overruling them in Smallwood II (from April 29, 2011 until May 2, 2013). The State notes that the Fifth District also interpreted Robinson to indicate that police could search a cell phone incident to arrest without obtaining a warrant first. See State v. Glasco, 90 So. 3d 905, 907-908 (Fla. 1st DCA 2012). Therefore, the State respectfully disagrees with this Court's contention that the law was rapidly developing and/or unsettled. (slip opinion-p. 7).

13. Finally, this Court's determination that the exclusionary rule would

be furthered in the case at bar is not supported by Davis. In Davis, the United States Supreme Court stated as follows:

> The basic insight of the Leon line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. Herring, 555 U.S., at 143, 129 S.Ct. 695. **When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. Id., at 144, 129 S.Ct. 695. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, Leon, supra, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" **2428 negligence, Herring, supra, at 137, 129 S.Ct. 695, the " 'deterrence rationale loses much of its force,' "** and exclusion cannot "pay its way." See Leon, supra, at 919, 908, n. 6, 104 S.Ct. 3405 (quoting United States v. Peltier, 422 U.S. 531, 539, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

Davis v. United States, 564 U.S. 229, 238 (2011).

14. It is worth noting that in Utah v. Strieff, 136 S.Ct. 2056 (2016), which is a case the State previously provided in supplemental authority, the United States Supreme Court determined that two mistakes by an officer regarding existing law was isolated negligence. In Strieff, the court applied the attenuation doctrine to the case and one of the factors included the purpose and flagrancy of the official misconduct. Id. 2062. The Strieff court stated that the exclusionary rule exists to deter police misconduct. Id. at 2063. The Strieff court stated as follows:

> **"Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he**

> **did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so.** Officer Fackrell's stated purpose was to "find out what was going on [in] the house." App. 17. Nothing prevented him from approaching Strieff simply to ask. See Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions"). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights."
>
> Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

15. The Strieff court further stated, "[m]oreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that **the stop was an isolated instance of negligence** that occurred in connection with a bona fide investigation of a suspected drug house." Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016). As noted above in bold, the Davis court stated that the deterrence rationale loses much of its force when there is simple, isolated negligence. (emphasis and underlining added). Davis v. United States, 564 U.S. at 238.

16. Finally, the State argues that there is no way, pursuant to the United States Supreme Court precedent, that a police officer acting on binding appellate precedent, which interpreted a United States Supreme Court case as establishing a bright line rule that one could search a cell

phone incident to arrest, was acting with deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights as contemplated by the United States Supreme Court.

17. WHEREFORE, the State of Florida respectfully requests that this Court grant rehearing and affirm as to the issue.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following to Ross A. Keene, Esquire, at rkeene@rosskeenelaw.com, on this 11th day of July, 2017.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/Trisha Meggs Pate
_____
TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

/s/Virginia Harris
_____
By: VIRGINIA HARRIS
Assistant Attorney General
Florida Bar No. 0706221
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)

Attorney for the State of Florida

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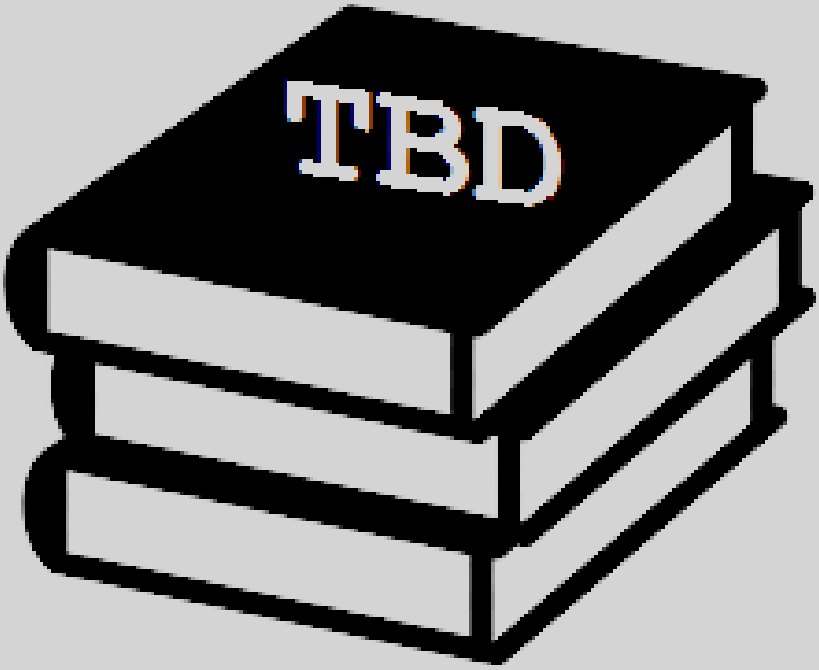




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