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# Expanding the Scope of the Good-Faith Exception to the Exclusionary Rule to Include a Law Enforcement Officer's Reasonable Reliance on Well-Settled Case Law that is Subsequently Overruled

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## COMMENTS

# EXPANDING THE SCOPE OF THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE TO INCLUDE A LAW ENFORCEMENT OFFICER'S REASONABLE RELIANCE ON WELL-SETTLED CASE LAW THAT IS SUBSEQUENTLY OVERRULED

ROSS M. OKLEWICZ\*

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## INTRODUCTION

In 2009, the Supreme Court handed down several important decisions on criminal procedure.<sup>1</sup> Perhaps unanticipated at the time, two of those decisions have been read together by lower courts to reach dramatically

1. See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (holding that under the Sixth Amendment, laboratory test results are testimonial in nature, and in order for the results to be admissible into evidence, the analysts who generated them must testify in court); *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091–92 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986), to hold that a waiver of the Sixth Amendment right to counsel is possible if the waiver is knowing and intelligent); *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009) (holding that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest”); *Herring v. United States*, 129 S. Ct. 695, 704 (2009) (expanding the scope of the good-faith exception to the exclusionary rule to encompass situations where an unlawful search is the result of isolated police negligence).

different results.<sup>2</sup> The emerging split has been sharp, bringing with it urgent calls for the Court to intervene.<sup>3</sup>

Laying the foundation for the conflicting decisions was *New York v. Belton*,<sup>4</sup> in which the Supreme Court held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile” along with any containers found therein.<sup>5</sup> Following that decision, lower courts regularly upheld warrantless searches of vehicles conducted incident to an arrest after the police had secured the arrestee away from the target vehicle.<sup>6</sup> In 2009, the United States Supreme Court, in *Arizona v. Gant*,<sup>7</sup> found that these procedures did not comply with the rationale underlying *Belton* and declined to adopt the lower courts’ broad interpretations of that decision.<sup>8</sup>

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2. Compare *United States v. Gonzalez*, 578 F.3d 1130, 1132–33 (9th Cir. 2009) (holding that the good-faith exception does not apply to reliance on settled case law that is subsequently ruled unconstitutional while a conviction is on direct appeal), with *United States v. McCane*, 573 F.3d 1037, 1044 (10th Cir. 2009) (applying *Herring* to find that the good-faith exception to the exclusionary rule extends to an officer’s reasonable reliance on settled case law), *cert. denied*, 130 S. Ct. 1686 (2010).

3. Brief of Petitioner-Appellant at i, *McCane v. United States*, 130 S. Ct. 1686 (2010) (No. 09-402) (requesting that the Supreme Court grant certiorari on the question of “[w]hether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional”).

4. 453 U.S. 454 (1981).

5. *Belton*, 453 U.S. at 460.

6. See, e.g., *United States v. Weaver*, 433 F.3d 1104, 1106 (9th Cir. 2006) (applying the *Belton* rule and upholding a warrantless search of an automobile incident to arrest); *United States v. Barnes*, 374 F.3d 601, 605 (8th Cir. 2004) (holding that a warrantless search incident to arrest of a vehicle is permissible when the arrestee is handcuffed and secured away from the vehicle); *United States v. Wesley*, 293 F.3d 541, 549 (D.C. Cir. 2002) (“[W]e read *Belton* as creating a bright-line rule that, incident to . . . arrest of the occupant of a vehicle, the police may search the passenger compartment of the vehicle without regard to whether the occupant was removed and secured at the time of the search.”); *United States v. Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000) (upholding a search incident to arrest where the arrestee was handcuffed in the arresting officer’s patrol car at the time of the search); *United States v. Doward*, 41 F.3d 789, 793 (1st Cir. 1994) (validating a warrantless search of an automobile incident to arrest after the arrestee had been handcuffed and secured in the police officer’s vehicle); *United States v. White*, 871 F.2d 41, 44 (6th Cir. 1993) (holding that a warrantless search of the defendant’s car was permissible incident to arrest even when the defendant was locked in the police vehicle).

7. 129 S. Ct. 1710 (2009).

8. *Id.* at 1719. The *Belton* decision was premised on the earlier case of *Chimel v. California*, 395 U.S. 752 (1969), which allowed police to conduct warrantless searches incident to arrest of “the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].” *Chimel*, 395 U.S. at 763. The *Gant* majority declared that the lower courts’ broad interpretation of *Belton* ignored this crucial link. *Gant*, 129 S. Ct. at 1719. The Court held that searches of a vehicle incident to arrest are limited to situations where either the arrestee is “within reaching distance of the passenger compartment at the time of the search” or the arresting officer has a reasonable belief that evidence related to the crime of arrest will be found within the vehicle. *Id.* at 1723–24 (Scalia, J., concurring). The *Gant* majority emphasized that it did not expressly overrule *Belton*, but that the decision had the practical effect of invalidating the lower courts’ interpretation of that case. See *Gant*, 129 S. Ct. at 1722 n.9 (asserting that contrary to the dissent’s accusations, the Court’s decision

At the time the Supreme Court decided *Gant*, a number of cases were pending on direct review before lower courts based on evidence obtained in compliance with each jurisdiction's understanding of the *Belton* rule.<sup>9</sup> Because *Gant* did not require lower courts to mechanically suppress evidence obtained in reliance on pre-*Gant* precedent,<sup>10</sup> prosecutors searched for alternative justifications to uphold the admissibility of evidence collected according to these methods.<sup>11</sup> They were able to find the support for their position in *Herring v. United States*,<sup>12</sup> a decision handed down by the Supreme Court three months before *Gant*, which significantly enlarged the scope of the good-faith exception to the exclusionary rule.<sup>13</sup>

In *Herring*, the Supreme Court held that exclusion is an inappropriate remedy for Fourth Amendment violations caused by the objectively reasonable actions of law enforcement employees.<sup>14</sup> Government lawyers quickly deployed this new weapon in their battles against suppression where police officers obtained incriminating evidence in accordance with pre-*Gant* precedent.<sup>15</sup> Faithfully following the *Herring* court's decree that

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merely demonstrated a "narrow reading," rather than an overruling, of *Belton*); *United States v. Grote*, 629 F. Supp. 2d 1201, 1206 n.8 (E.D. Wash. 2009) (observing that *Gant* effectively changes how *Belton* is interpreted).

9. See, e.g., *United States v. Gray*, No. 4:09CR3089, 2009 WL 4739740, at \*1 (D. Neb. Dec. 7, 2009) (determining whether to apply the good-faith exception to a search conducted pursuant to valid case law at the time of the search later rendered unconstitutional by the decision in *Gant*); *United States v. McGhee*, 672 F. Supp. 2d 804, 811 (S.D. Ohio 2009) (analyzing the claim by a defendant that the search of his automobile incident to arrest violated the Constitution even though, at the time of the search, the police officers were relying on valid precedent); *Grote*, 629 F. Supp. 2d at 1206 (discussing whether to suppress evidence obtained in reliance on precedent that was invalidated by *Gant* before trial).

10. See *United States v. Lee*, No. 07-04050-01-CR-C-NKL, 2009 WL 3762404, at \*2 (W.D. Mo. Nov. 10, 2009) ("*Gant* did not require suppression of evidence from a search . . . supported by pre-*Gant* precedent . . .").

11. See *United States v. Peoples*, 668 F. Supp. 2d 1042, 1044 (W.D. Mich. 2009) (noting that while the government conceded that the search failed the *Gant* standard, it argued that the search was nonetheless valid because the police relied on pre-*Gant* law in good faith).

12. 129 S. Ct. 695, 704 (2009).

13. See *United States v. McCane*, 573 F.3d 1037, 1043–45 (10th Cir. 2009) (explaining that *Herring*'s rationale supports the conclusion that a law enforcement officer's reasonable reliance on the settled case law of a jurisdiction constitutes an exception to the exclusionary rule), *cert. denied*, 130 S. Ct. 1686 (2010); see also Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 417 (2009) ("[In *Herring*] the Court issued a sweeping rule that the exclusionary rule never applies if the police violate the Fourth Amendment in good faith or through negligence.").

14. Chemerinsky, *supra* note 13, at 416.

15. See, e.g., *United States v. Gonzalez*, 578 F.3d 1130, 1132 (9th Cir. 2009) (arguing that although the search violated *Gant*, the evidence obtained should be admitted pursuant to the good-faith exception to the exclusionary rule); *Peoples*, 668 F. Supp. 2d at 1045–46 (contending that the good-faith exception to the exclusionary rule justifies admission of the evidence obtained in violation of the Fourth Amendment); *United States v. Allison*, 637 F. Supp. 2d 657, 669–70 (S.D. Iowa 2009) (arguing that the good-faith exception allows for unlawfully obtained evidence to be admitted at trial when a police officer obtains the

the exclusionary rule should be used only as a “last resort,”<sup>16</sup> government advocates successfully argued that the good-faith exception should be extended to include a law enforcement officer’s reasonable reliance on the settled case law of a jurisdiction that is subsequently invalidated.<sup>17</sup> Such rulings, however, have given rise to a growing conflict among authorities, resulting in the disparate treatment of similarly situated defendants.<sup>18</sup>

This Comment will argue that courts should continue to expand the good-faith exception to the exclusionary rule to include a law enforcement officer’s reasonable reliance on the settled case law of the jurisdiction that is subsequently ruled unconstitutional. Such a ruling would be consistent with the Supreme Court’s previous decisions addressing the good-faith exception, and logically follows from their rationale.<sup>19</sup> Furthermore, expanding the scope of the exception would comport with the balancing test courts are required to undertake when confronted with questions of exclusion.<sup>20</sup> Finally, courts should not be deterred by arguments that the Supreme Court’s Fourth Amendment retroactivity doctrine precludes application of the expanded good-faith exception.<sup>21</sup> The few courts that

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evidence in reasonable reliance on case law).

16. *Herring*, 129 S. Ct. at 700 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

17. *See, e.g., McCane*, 573 F.3d at 1044 (explaining that in accordance with the principles expressed in *Herring*, “it would be proper . . . to apply the good-faith exception to a search justified under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by a Supreme Court decision”); *accord* *United States v. Gray*, No. 4:09CR3089, 2009 WL 4739740, at \*6 (D. Neb. Dec. 7, 2009) (stating that a police officer’s reliance on overruled case law does not result in the application of the exclusionary rule); *United States v. McGhee*, 672 F. Supp. 2d 804, 812 (S.D. Ohio 2009) (admitting evidence obtained by a police officer acting in reliance on pre-*Gant* precedent because the officer reasonably relied on the case law and did not act in bad faith); *United States v. Lee*, No. 07-04050-01-CR-C-NKL, 2009 WL 3762404, at \*2 (W.D. Mo. Nov. 10, 2009) (stating that officers’ reliance in good-faith on precedent pre-*Gant* is defensible, even if the search is unconstitutional post-*Gant*); *United States v. Lopez*, No. 6:06-120-DCR, 2009 WL 3112127, at \*3–4 (E.D. Ky. Sept. 23, 2009) (explaining that no benefit would be realized by suppressing evidence obtained by an officer acting in reasonable reliance on settled case law that was subsequently overturned); *United States v. Owens*, No. 5:09-cr-14/RS, 2009 WL 2584570, at \*3 (N.D. Fla. Aug. 20, 2009) (holding that a police officer acting in reasonable reliance on the settled case law of the United States Court of Appeals does not commit misconduct when that law is later ruled unconstitutional); *United States v. Allison*, 637 F. Supp. 2d 657, 672 (S.D. Iowa 2009) (“[A] law enforcement officer’s objective, good-faith reliance on doctrine derived from case law does not warrant application of the exclusionary rule.”); *United States v. Grote*, 629 F. Supp. 2d 1201, 1206 (E.D. Wash. 2009) (recognizing that there is “no deterrent effect to be gained [by applying] the exclusionary rule” in a situation where a police officer relies on case law that is subsequently invalidated).

18. *See supra* note 2 (comparing the current uses of the good-faith exception post-*Gant* and *Herring*).

19. *See infra* Part III.A (discussing how *Leon* supports expanding the good-faith exception).

20. *See Herring*, 129 S. Ct. at 700 (explaining that the exclusionary rule was designed to deter future violations of the Fourth Amendment, and that for the rule to apply, its deterrent benefits must outweigh its associated costs).

21. *See infra* Part III.B (explaining that the Supreme Court’s retroactivity doctrine does not preclude use of the good-faith exception where police officers reasonably rely upon case

have adopted this approach have misinterpreted the Court's retroactivity precedent and many of the arguments they employ are overstated.

Part I of this Comment will examine the historical development of the good-faith exception through *Herring*. Part II will discuss the split in authority that has come about as a result of the Supreme Court's decisions in *Gant* and *Herring*. Finally, Part III will analyze arguments for and against broadening the scope of the good-faith exception to the exclusionary rule, ultimately concluding that the good-faith exception should include a police officer's objectively reasonable reliance on settled case law that is subsequently overruled.

### I. A BRIEF HISTORY OF THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE

The Fourth Amendment does not contain a textual remedy for the violations of its dictates.<sup>22</sup> Over time, however, the Supreme Court developed a cogent rule mandating the exclusion of some illegally obtained evidence from trial.<sup>23</sup> Although this rule was initially limited to federal prosecutions, the Court explained that the exclusionary rule was of constitutional character, and therefore, must apply in state prosecutions as well.<sup>24</sup>

Prominent jurists and commentators argued that the early formulation of the exclusionary rule swept too broadly.<sup>25</sup> Excluding evidence obtained in violation of the Fourth Amendment hindered the traditional truth-finding functions of the courts, and frustrated the judicial system's goal of punishing the guilty.<sup>26</sup> Many believed that more was required to restrict the

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law that has been overruled by the Supreme Court).

22. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

23. See *Herring*, 129 S. Ct. at 699 (noting that the Court has created a rule that, when applicable, disallows the admission of "improperly obtained evidence at trial" (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914))). For a detailed account of the history leading up to the incorporation of the exclusionary rule see generally Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

24. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that any evidence obtained by unconstitutional searches and seizures is inadmissible in state court).

25. See Paul Simon, Comment, *The Fourth Amendment's Exclusionary Rule—Judicial Remedy or Constitutional Mandate: Is There Room for the "Good Faith" Exception?*, 41 S. TEX. L. REV. 1101, 1122 (2000) (discussing Justice Rehnquist's dissent in *California v. Minijares*, 443 U.S. 916, 927 (1979), and supporting the proposition that Justice Rehnquist "would prefer to see the Exclusionary Rule abolished in both state and federal prosecutions").

26. See *United States v. Leon*, 468 U.S. 897, 907 (1984) ("The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern."); *United States v. Payner*, 447 U.S. 727, 734 (1980) ("Our cases

“substantial costs” the exclusionary rule placed on the judicial system specifically, and on society in general.<sup>27</sup> Proponents of limiting the rule’s applicability eventually found their vehicle in *United States v. Leon*,<sup>28</sup> which established the good-faith exception to the exclusionary rule.<sup>29</sup>

*A. United States v. Leon*<sup>30</sup>—*A Framework for Balancing Deterrence and Social Costs to Determine When the Exclusionary Rule Applies*

In 1981, a confidential informant’s tip led police down an investigative trail that culminated with a search of Alberto Leon’s residence, where police seized a large quantity of narcotics.<sup>31</sup> In conducting their search, the police acted pursuant to a facially valid search warrant issued by a state superior court judge.<sup>32</sup> The district court reviewing the case subsequently invalidated the search because it found that the affidavit supporting the warrant was insufficient to establish probable cause.<sup>33</sup> The government argued that the court should not suppress the evidence because the officers conducting the search reasonably relied in good-faith on a judicial determination of probable cause.<sup>34</sup> Although the trial and appellate courts disagreed with this contention, the Supreme Court granted certiorari and accepted the government’s argument, establishing the foundation of the modern good-faith exception to the exclusionary rule.<sup>35</sup>

To support its conclusion, the Supreme Court first had to weaken the apparent strength of the exclusionary rule as it had been established in *Weeks v. United States*<sup>36</sup> and *Mapp v. Ohio*.<sup>37</sup> Justice Byron White, writing

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have consistently recognized that unbending application of the exclusionary sanction . . . would impede unacceptably the truth-finding functions of judge and jury.”); *Stone v. Powell*, 428 U.S. 465, 490 (1976) (“The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the [exclusionary] rule is contrary to the idea of proportionality that is essential to the concept of justice.”).

27. See Simon, *supra* note 25, at 1126 (noting that the Court “had been trolling for a case . . . that would substantially eliminate the rights secured under” the cases establishing the exclusionary rule).

28. 468 U.S. 897 (1984).

29. See *id.* at 922–23 (holding that the exclusionary rule should not apply to a law enforcement officer’s reasonable reliance on a facially sufficient judicial determination of probable cause later deemed invalid).

30. 468 U.S. 897 (1984).

31. *Id.* at 901.

32. *Id.* at 902.

33. *Id.* at 903.

34. *Id.* at 904.

35. *Id.* at 905.

36. 232 U.S. 383 (1914); see *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (explaining that *Weeks* was the first case to hold that in a federal prosecution, evidence obtained in violation of the Fourth Amendment must be excluded).

37. See *Leon*, 468 U.S. at 906 (explaining that the Fourth Amendment “has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings”)



for the Court, articulated a new balancing test to determine when the remedy of exclusion applies.<sup>38</sup> The Court explained that exclusion is only appropriate in cases where, after “weighing the costs and benefits of preventing the use . . . of inherently trustworthy tangible evidence,” the benefits of exclusion outweigh “[t]he substantial social costs exacted by the exclusionary rule.”<sup>39</sup> Justice White concluded that the balancing test strongly implied that the exclusionary rule should be altered to allow for the admission of evidence acquired on a “reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.”<sup>40</sup>

Emphasizing that the exclusionary rule was not an individual constitutional right, the Court explained that the rule applied only when exclusion was capable of deterring future violations of the Fourth Amendment.<sup>41</sup> Based on this conclusion, the majority highlighted three reasons why evidence obtained in good-faith reliance on a facially valid search warrant should not be suppressed.<sup>42</sup> First, the purpose of the exclusionary rule was to respond only to the transgressions of police officers in an attempt to dissuade them from committing future breaches of the Fourth Amendment.<sup>43</sup> The exclusionary rule was never designed to punish the mistakes of judicial actors.<sup>44</sup> Second, the Court noted that even if the exclusionary rule was designed to deter judicial actors, it found no evidence to support the proposition that judicial actors were “inclined to ignore or subvert the Fourth Amendment.”<sup>45</sup> Finally, Justice White reasoned that there was no basis “for believing that exclusion of evidence seized pursuant to a warrant [would] have a significant deterrent effect” on judicial officers.<sup>46</sup> This logic provided the necessary foundation for the

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(quoting *Stone v. Powell*, 428 U.S. 465, 486 (1976))). The *Leon* opinion began by loosening the exclusionary rule from its perceived constitutional moorings. *Id.*; see *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to the states); see also *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (recognizing that federal courts do not have “supervisory authority over state judicial proceedings” and may only intervene to correct constitutional violations).

38. *Leon*, 468 U.S. at 906–07.

39. *Id.* at 907.

40. *Id.* at 909 (citing *Illinois v. Gates*, 462 U.S. 213, 255 (1983) (White, J., concurring)).

41. See *id.* at 906 (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

42. *Id.* at 916. For a strong critique of the Court’s reasoning in *Leon*, see generally Simon, *supra* note 25, at 1126–39.

43. *Leon*, 468 U.S. at 916. The Court explained that a neutral magistrate’s determination of probable cause is a “more reliable safeguard against improper searches” than a law enforcement officer’s judgment because judges are not motivated by the same biases as law enforcement. *Id.* at 913–14.

44. *Id.* at 916.

45. *Id.* This point has stirred controversy. The Court itself cited several studies in contrast to its position, but disregarded them. *Id.* at 916 n.14. Commentators have suggested that this argument “deserves little credence.” Donald Dripps, *Living with Leon*, 95 *YALE L.J.* 906, 916 (1986).

46. *Leon*, 468 U.S. at 916.

Court's ultimate holding that exclusion is an inappropriate remedy when evidence is obtained by a police officer who acts in an objectively good-faith reliance upon a facially valid search warrant that is subsequently deemed invalid.<sup>47</sup>

Although the Court cut back dramatically on the scope of the exclusionary rule,<sup>48</sup> the majority was wary of particular circumstances where exclusion remained an appropriate remedy.<sup>49</sup> The Court noted that if an affiant misleads the judicial officer issuing the warrant by providing information that the affiant knew or should have known was false, courts could suppress the evidence obtained from the officer's reliance on the defective warrant.<sup>50</sup> The majority also declined to extend the exception to instances where the judicial officer issuing the warrant "wholly abandoned his judicial role."<sup>51</sup> In addition, the Court found that exclusion would be a possibility when a warrant was based on an affidavit that was so sufficiently bereft of probable cause that no reasonable officer could be justified in relying upon it.<sup>52</sup> Finally, the Court held that the good-faith exception applies only to warrants that are valid on their face.<sup>53</sup> If, for example, the warrant fails to meet the standards of particularization required by the Fourth Amendment, an officer cannot be said to have reasonably relied upon it, thus necessitating exclusion of the evidence obtained through the warrant's issuance.<sup>54</sup>

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47. *Id.* at 919–22. The Court made several auxiliary arguments to support this conclusion. Justice White noted that when police act within the scope of a seemingly valid search warrant, they are not acting illegally. *Id.* at 921. If a warrant is facially valid, the police officer's inquiry into its reasonableness ends because it is not within the province of executive branch officers to question the judicial officer's determination of probable cause. *Id.* Once a judicial actor issues a valid warrant, "there is literally nothing more the policeman can do in seeking to comply with the law." *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976)). From this, the Court determined that holding a police officer responsible for a judge or magistrate's mistake could not rationally be expected to prevent future violations of the Constitution. *Id.*

48. See Simon, *supra* note 25, at 1128 (arguing that the Court in *Leon* effectively overruled *Weeks* and *Mapp*).

49. *Leon*, 468 U.S. at 922.

50. *Id.* at 923. When a defense attorney believes the affiant has intentionally or recklessly misled an issuing magistrate or judge, the attorney will file a *Franks* motion in an attempt to void the search warrant. See generally *Franks v. Delaware*, 438 U.S. 154 (1978) (holding that at a defendant's request, a hearing must be held if there is a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included . . . in [the] search warrant affidavit").

51. *Leon*, 468 U.S. at 923. This is a particularly interesting caveat given the fact that to support its holding, the majority argued that there was "no evidence" to suggest magistrates engage in this behavior in the first place. *Id.* at 916. Regardless of this perceived inconsistency, this conclusion follows logically from the Court's reasoning that deterrence is ineffective against judges and magistrates because they "are not adjuncts to the law enforcement team." *Id.* at 917.

52. *Id.* at 923. This exception to the Court's holding appears to be little more than an example of a judicial officer wholly abandoning his or her judicial role.

53. *Id.*

54. *Id.*

B. *Illinois v. Krull*<sup>55</sup>—*Applying the Leon Framework to a Law Enforcement Officer's Reasonable Reliance on a State Statute that is Subsequently Declared Unconstitutional*

Three years after the Supreme Court decided *Leon*, it faced the question of whether to expand the good-faith doctrine to include a police officer's reasonable reliance on a subsequently invalidated state statute.<sup>56</sup> In an attempt to curb the trade in stolen cars, the Illinois state legislature passed a law requiring people in the business of selling automobiles to obtain a license from the Illinois Secretary of State.<sup>57</sup> The law mandated that these licensees keep thorough records of any vehicle bought or sold by the business, including each vehicle's identification number.<sup>58</sup> The statute provided state officials with authority to review the licensee's records at any reasonable time, and allowed officials to inspect the licensee's place of business to verify the accuracy of the records.<sup>59</sup> Acting pursuant to this statutory authority, a police officer inspected several cars on Albert Krull's lot and determined that a number of them were stolen.<sup>60</sup> The officer then seized the vehicles and arrested Krull.<sup>61</sup> The day after the search of Krull's property, a federal district court declared the statute on which the officer relied unconstitutional.<sup>62</sup>

In analyzing the question, the Supreme Court closely followed its decision in *Leon*.<sup>63</sup> Justice Blackmun, writing for the majority, explained that like judicial officers, legislators are not "adjuncts to the law enforcement team."<sup>64</sup> Although legislatures pass laws permitting police officers to act with certain authority, the majority found that there was no

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55. 480 U.S. 340 (1987).

56. *Id.* at 346.

57. *Id.* at 342.

58. *Id.* at 343.

59. *Id.* (citing 625 ILL. COMP. STAT. ANN. 5/5-401(e) (1981)) (citing ILL. REV. STAT., ch. 95 1/2, ¶ 5-401(e) (1981) (repealed 1983)).

60. *Id.*

61. *Id.*

62. *Id.* at 344 (ruling that the statute granted authorities too much discretion in their ability to conduct warrantless searches).

63. See George M. Dery, III, *Good Enough for Government Work: The Court's Dangerous Decision, in Herring v. United States, to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior*, 20 GEO. MASON U. C.R. L.J. 1, 11–12 (2009) (observing that the *Krull* court "steered so closely to *Leon* that it simply echoed many of *Leon*'s propositions"). An example of this similarity can be found at the outset of the opinion where the Court reaffirmed the notion that the exclusionary rule is not a constitutional right, and should only operate when it can deter future violations of the Fourth Amendment. *Krull*, 480 U.S. at 347.

64. *Krull*, 480 U.S. at 350–51. This claim suggests that since legislators have no stake in the outcome of criminal prosecutions, deterring evidence in those very proceedings will have little, if any, deterrent effect to prevent future violations of the Constitution by these actors. *Id.* at 351.

evidence to suggest legislatures knowingly enact statutes to permit violations of the Constitution they take an oath to uphold.<sup>65</sup>

Justice Blackmun explained that courts have the ability to invalidate state legislation when it infringes upon the Constitution, and by doing so, the courts send a message to the legislature that evidence obtained pursuant to the invalidated law will no longer be admissible at trial.<sup>66</sup> The majority argued that the “extreme sanction of exclusion” would not operate to deter potential legislative malfeasance before a court declared the law unconstitutional.<sup>67</sup> Even if exclusion did provide a modicum of deterrence, when weighed against the substantial costs the remedy imposes on the judicial system and society, the Court concluded that application of the rule would be unjustified.<sup>68</sup>

Like *Leon*, however, the majority limited the scope of its holding to situations where the officer’s reliance on the state statute was objectively reasonable.<sup>69</sup> The Court found that if a legislature “wholly abandon[s] its responsibility to enact constitutional laws,” law enforcement’s reliance on the defective statute would be unreasonable.<sup>70</sup> Furthermore, if the statute was so egregious that a reasonable officer should have known that it was unconstitutional on its face, reliance on the statute would not operate to preclude exclusion.<sup>71</sup> Because the statute appeared legitimate when the officer searched Krull’s property, the Court held that officer’s good-faith reliance on the law prevented suppression of the evidence obtained against Krull.<sup>72</sup>

C. *Arizona v. Evans*<sup>73</sup>—*Including Reasonable Reliance on the Clerical Errors of Court Employees Within the Leon Framework*

The last of the early good-faith cases was *Arizona v. Evans*. In January 1991, Isaac Evans was pulled over for driving the wrong way down a one-

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65. *Id.*

66. *Id.* at 352. The usual result of invalidating a state statute is that the legislature either repeals or amends the defective enactment, thus resolving the constitutional discrepancy. *Id.*

67. *Id.* at 351–52. The majority adopted language from *Leon*, stating that “[p]enalizing the officer for the [legislature’s] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” *Id.* at 350 (quoting *United States v. Leon*, 468 U.S. 897, 921 (1984)).

68. *Id.* at 352–53.

69. *Id.* at 355.

70. *Id.* (citing *Leon*, 468 U.S. at 923 (1984)).

71. *Id.*

72. *Id.* at 360. The Court appeared to find support for this conclusion, at least in part, from a passage Justice Blackmun quoted from *Leon*: “[e]xcluding evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.” *Id.* at 349 (quoting *Leon*, 468 U.S. at 920 (1984)).

73. 514 U.S. 1 (1995).

way street.<sup>74</sup> After Evans informed the officer that his license had been suspended, the officer ran a check of Evans' record.<sup>75</sup> The inspection revealed that Evans had a warrant out for his arrest.<sup>76</sup> When the officer took Evans into custody on the basis of that warrant, a marijuana cigarette fell out of his possession, prompting the officer to search Evans' vehicle where he discovered more marijuana.<sup>77</sup>

As it turned out, a justice of the peace had quashed the warrant seventeen days before Evans' arrest.<sup>78</sup> There was no indication, however, that any court clerk called the sheriff's office to have the office remove the warrant from its computer records pursuant to established procedure.<sup>79</sup> The Court was faced with the question of whether exclusion was an appropriate remedy when evidence was obtained by an officer acting in good-faith reliance upon computer records, which indicated the existence of an outstanding arrest warrant for a suspect, when those records were later discovered to be erroneous.<sup>80</sup>

Disagreeing with the Arizona Supreme Court, the majority found that "[a]pplication of the *Leon* framework support[ed] a categorical exception to the exclusionary rule for clerical errors of court employees."<sup>81</sup> Assuming that court employees were responsible for the error, the majority noted that excluding evidence at trial would not deter similar mistakes by these actors in the future, in part, because court employees had no interest in the outcome of individual criminal prosecutions.<sup>82</sup> Furthermore, the Court indicated that the clerk's mistake in this case was too minor to justify applying the severe remedy of exclusion.<sup>83</sup> Therefore, after finding that the officer's reliance on the computer record was objectively reasonable,<sup>84</sup> the Court reversed the lower court's decision.<sup>85</sup>

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74. *Id.* at 4. Interestingly, the officer observed Evans' conduct from his police station, which was located on the street where Evans was driving. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 5.

80. *Id.* at 3–4.

81. *Id.* at 16. The Arizona Supreme Court held that while the exclusionary rule may be inappropriate in circumstances where the magistrate "issued a facially valid warrant . . . based on an erroneous evaluation of the facts, the law, or both," invocation of the rule was "useful and proper" when an unlawful arrest had resulted from "negligent record keeping." *Id.* at 9–10 (quoting *State v. Evans*, 866 P.2d 869, 872 (Ariz. 1994)).

82. *Id.* at 14–15 (explaining that there was nothing to suggest that court employees were likely to disregard the Fourth Amendment).

83. *Id.* at 15–16.

84. *Id.* Chief Justice Rehnquist agreed with the trial court that the officer "would have been derelict in his duty if he failed to arrest [Evans]." *Id.* at 15. Therefore, he determined that there was no indication that the officer's reliance on the computer record was unreasonable. *Id.* at 15–16.

85. *Id.* at 16.

D. *Herring v. United States*<sup>86</sup>—*Focusing on Individual Law Enforcement Culpability to Determine When the Exclusionary Rule Applies*

For fifteen years after *Evans*, the Supreme Court did not alter the *Leon* framework. In *Herring v. United States*, however, the Court took the opportunity to expand the scope of the good-faith exception to the exclusionary rule, moving beyond the core rationale of the *Leon* line of cases.<sup>87</sup>

In 2004, a police officer asked his department's warrant clerk to check if there were any warrants out for the arrest of Bennie Dean Herring.<sup>88</sup> When the record search failed to return any outstanding warrants, the officer asked the clerk to search a neighboring county's database.<sup>89</sup> That county's database contained a record indicating that a warrant for Herring's arrest was outstanding.<sup>90</sup> Acting pursuant to this information, the police officer stopped Herring and arrested him.<sup>91</sup> While conducting a search of Herring's vehicle incident to the arrest, the officer found narcotics and an illegal firearm.<sup>92</sup>

Shortly thereafter, the warrant clerk received information from the neighboring county that, in fact, there was no outstanding warrant for Herring's arrest.<sup>93</sup> The officers eventually discovered that through some mistake of the neighboring county's police department, the records erroneously contained information indicating the existence of the arrest warrant.<sup>94</sup> Although both the government and the defense agreed that the

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86. 129 S. Ct. 695, 704 (2009).

87. *See Id.* at 704 (holding that "when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence" will not be sufficient to warrant exclusion); *see also* Dery, *supra* note 63, at 13–16 (arguing that *Leon*, *Krull*, and *Evans* were all premised on the distinction between the effect of deterrence on judicial and executive actors). Since the case was decided in January of 2009, it has been widely criticized. For a particularly blistering attack on the *Herring* decision, *see generally* Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009), which categorized *Herring* as one of the most egregious decisions on search and seizure law in the Supreme Court's history.

88. *Herring*, 129 S. Ct. at 698. The petitioner asserted that the officer was only interested in arresting Herring because the officer possessed animosity over Herring's report that the officer had been involved in the murder of a local youth. Dery, *supra* note 63, at 16–17.

89. *Herring*, 129 S. Ct. at 698.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* Roughly ten to fifteen minutes elapsed from the time that the officer discovered there was an outstanding warrant to the time the warrant clerk was notified that the information regarding the warrant was incorrect. *Id.*

94. *Id.* The standard procedure was that the other county's warrant clerk would keep hard copies of all outstanding warrants. *Id.* When those warrants were quashed, the clerk would remove the hard copies and would enter the necessary information into the police department's database. *Id.* The clerk was unable to find the hardcopy of the warrant, leading her to contact the court clerk who informed her that the warrant had been

arrest was a violation of the Fourth Amendment, the parties disagreed as to whether the evidence obtained as a result of this violation should be excluded.<sup>95</sup> The Supreme Court was asked whether evidence should be suppressed when it is obtained as a result of an arrest made in reasonable reliance on a police department record, when that record is subsequently determined to be inaccurate due to the negligent actions of law enforcement personnel.<sup>96</sup>

*Herring* began, as did all the previous good-faith cases, by reaffirming the concept that the exclusionary rule is not a personal constitutional right, but a court created doctrine designed to deter future violations of the Fourth Amendment.<sup>97</sup> The Court emphasized that suppression is an “extreme sanction” appropriately applied only when the benefits outweigh its “substantial social costs.”<sup>98</sup> Nevertheless, that is where most of the similarities with the previous good-faith cases ended.<sup>99</sup>

Rather than analyzing the three factors laid out in *Leon* to determine whether exclusion was an appropriate remedy in light of its potential deterrent effect, the Court chose to focus on the culpability of the warrant clerk’s conduct to decide if the error required suppression.<sup>100</sup> Chief Justice Roberts, writing for the majority, noted that the exclusionary rule came

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recalled five months earlier. *Id.*

95. *Id.*

96. *Id.* The Eleventh Circuit held that the evidence was admissible under the good-faith exception because the error on which the arrest was based was “merely negligent and attenuated from the arrest,” and because the benefits gained from exclusion would be minimal when compared to the costs. *Id.*

97. *Id.* at 699 (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)); see *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (stating that the exclusionary rule is a judicial construct operating as a law enforcement officer deterrent (citing *Calandra*, 414 U.S. at 348)); *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (stating that the exclusionary rule’s purpose is to deter Fourth Amendment violations by law enforcement officers (citing *Calandra*, 414 U.S. at 348)); *United States v. Leon*, 468 U.S. 897, 906 (1984) (affirming that the exclusionary rule is meant to have a deterrent effect on law enforcement officers (citing *Calandra*, 414 U.S. at 348)).

98. *Herring*, 129 S. Ct. at 700 (quoting *Krull*, 480 U.S. at 352–53). The Court noted that the exclusionary rule’s “costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” *Id.* at 701 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998)).

99. See Dery, *supra* note 63, at 21 (noting that “the *Herring* Court took a dramatic departure from its past decisions”).

100. *Herring*, 129 S. Ct. at 700–01. The first factor mentioned in the previous good-faith exception cases was that the exclusionary rule was “designed ‘to deter police misconduct rather than to punish the errors of judges and magistrates.’” *Krull*, 480 U.S. at 348. Because police action, rather than executive or judicial action, was at issue in *Herring*, the Court would find an immediate conflict with this factor. The second factor these courts addressed was whether there existed any evidence suggesting the particular actors at issue were “inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors require[d] application of the extreme sanction of exclusion.” *Id.* The final factor analyzed by *Leon* and its progeny was whether there was a “basis ‘for believing that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect’” on the particular actor’s behavior. *Id.* This final factor was of the “greatest importance” to these courts. *Id.*

about as a response to “intentional conduct that was patently unconstitutional.”<sup>101</sup> Under the majority’s view, errors arising from isolated instances of negligence did not warrant exclusion because they were not the result of the type of conduct that the rule was designed to counteract.<sup>102</sup> Explaining that an analysis of the flagrancy of law enforcement malfeasance “constitute[d] an important step in the calculus of [whether to apply] the exclusionary rule,” the Court stated that “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”<sup>103</sup> According to the Court, the negligent conduct of the warrant clerk did not meet this level of culpability.<sup>104</sup> Therefore, the Court declined to suppress the evidence.<sup>105</sup>

The Court limited the scope of its holding by taking note of two situations that could require exclusion.<sup>106</sup> First, if the defendant was able to demonstrate that the police department either created fictitious records for the purpose of making otherwise unlawful arrests, or was reckless in maintaining their record-keeping system, exclusion would be justified.<sup>107</sup> Second, the majority noted that suppression may be an appropriate remedy if the defense could show that the arrest was a result of systemic errors rather than isolated instances of negligence.<sup>108</sup> The Court explained that reliance on a system that produces widespread errors could not be objectively reasonable; therefore, the good-faith exception would not apply.<sup>109</sup>

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101. *Herring*, 129 S. Ct. at 702.

102. *See id.* (asserting that an error resulting from “nonrecurring and attenuated negligence is . . . far removed from” the concerns that led the Court to adopt the exclusionary rule).

103. *Id.* at 701–02.

104. *Id.* at 703.

105. *Id.*

106. *See id.* (discussing exclusion in *Franks* and *Leon*). The Court, in both *Leon* and *Krull*, took similar approaches to limiting the scope of the good-faith exception. *See Illinois v. Krull*, 480 U.S. 340, 355 (1987) (preventing the good-faith exception from applying to situations where “the legislature wholly abandon[s] its responsibility to enact constitutional laws,” or where a law is patently unconstitutional); *United States v. Leon*, 468 U.S. 897, 923 (1984) (declining to expand the good-faith exception to situations where a judicial officer “wholly abandons his judicial role,” where an affiant provides information that he knows or should know is false, where a warrant is so lacking in probable cause to render reliance on it unreasonable, or where the warrant is facially deficient). The Court in *Evans* declined to cabin its holding to only reasonable clerical errors. *Arizona v. Evans*, 514 U.S. 1, 16 (1995).

107. *Herring*, 129 S. Ct. at 703. This follows from the Court’s reasoning that the exclusionary rule can only deter sufficiently culpable conduct. *Id.* at 702.

108. *Id.* at 704. The majority found support for this contention in Justice O’Connor’s concurring opinion in *Evans*, where she stated that “it would *not* be reasonable for the police to rely . . . on a recordkeeping system . . . that routinely leads to false arrests.” *Id.* (citing *Evans*, 514 U.S. at 17 (O’Connor, J., concurring)).

109. *Id.* at 703–04.



After *Herring*, the good-faith exception to the exclusionary rule must be analyzed in two different contexts.<sup>110</sup> The *Leon* line of cases focused on errors committed by legislative and judicial branch actors, which ultimately resulted in a violation of the Fourth Amendment.<sup>111</sup> In these situations, courts are required to analyze the three *Leon* factors to determine whether the deterrent benefit provided by exclusion outweighs its attendant costs.<sup>112</sup> When legislative or judicial actors are at fault, the Supreme Court has regularly found that they do not.<sup>113</sup>

*Herring*, on the other hand, focused on errors committed by law enforcement officers that ultimately resulted in a constitutional violation.<sup>114</sup> When police conduct is at issue, courts must determine the individual actor's level of culpability.<sup>115</sup> If the police action resulting in the violation was deliberate, reckless, or grossly negligent, the benefit of deterrence provided by suppression may outweigh the costs to society, thus justifying application of the exclusionary rule.<sup>116</sup> If, however, the level of culpability is merely negligent and attenuated from the constitutional violation, the marginal deterrent benefits provided by exclusion do not justify its associated costs.<sup>117</sup> Following the promulgation of *Herring*, prosecutors quickly sought to expand the good-faith exception to include an officer's reasonable reliance on well-settled case law that is later overruled.<sup>118</sup> The resulting decisions gave rise to a distinct split in the circuits.<sup>119</sup>

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110. See Dery, *supra* note 62, at 12 (“The cases regarding the good faith exception before *Herring* bound themselves to the distinction *Leon* established between the executive and judicial branches of government.”).

111. *Id.*

112. *United States v. Leon*, 468 U.S. 897, 916 (1984).

113. See *Arizona v. Evans*, 514 U.S. 1, 16 (1995) (expanding the good-faith exception to include a police officer's reasonable reliance on the clerical errors of court employees); *Illinois v. Krull*, 480 U.S. 340, 359–60 (1987) (applying the good-faith exception to instances where a police officer reasonably relies on an apparently valid state statute that is subsequently ruled unconstitutional); *Leon*, 468 U.S. at 922 (holding that a law enforcement officer's good-faith reliance on a facially valid warrant issued by a judge or magistrate that is subsequently found to be deficient does not justify exclusion of the evidence obtained in compliance with that warrant).

114. See Dery, *supra* note 63, at 21–22 (noting that the Court focused on the “level of police impropriety” to conclude that the effectiveness of the exclusionary rule varies depending on the degree to which police conduct violates the Fourth Amendment).

115. *Id.*

116. *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

117. *Id.* at 704.

118. See, e.g., *United States v. McCane*, 573 F.3d 1037, 1040 (10th Cir. 2009) (noting that while the defendant's case was on appeal, the Supreme Court handed down *Gant*, which prompted the government to raise the good-faith exception argument), *cert. denied*, 130 S. Ct. 1686 (2010). The decision in *Herring* was announced on January 14, 2009. 129 S. Ct. at 695. The Tenth Circuit decided *McCane* on July 28, 2009. 573 F.3d at 1037. In *McCane*, however, the United States first made its good-faith argument on May 4, 2009. Supplemental Brief of Plaintiff-Appellee at 11, *United States v. McCane*, 573 F.3d 1037, 1040 (10th Cir. 2009) (No. 08-6235).

119. Compare *United States v. Davis*, 598 F.3d 1259, 1264 (11th Cir. 2010) (holding that the good-faith exception to the exclusionary rule includes a police officer's reasonable

## II. THE CIRCUIT SPLIT: A TREND TOWARD EXPANDING THE SCOPE OF THE GOOD-FAITH EXCEPTION

After the Supreme Court's decision in *Gant*, lower courts grappled with the question of whether to suppress evidence obtained as a result of a police officer's reasonable reliance on the previously settled case law that *Gant* overruled.<sup>120</sup> The majority of courts decided to expand the good-faith exception to preclude the suppression of evidence obtained by a police officer acting in objectively reasonable reliance on the settled precedent invalidated by *Gant*.<sup>121</sup> Other courts, however, chose to read the Supreme Court's retroactivity doctrine as prohibiting the admission into evidence of contraband obtained in violation of the new rule announced in *Gant*.<sup>122</sup>

### A. *The Tenth Circuit Extends the Good-Faith Exception to Include a Police Officer's Reasonable Reliance on the Settled Case Law of a Jurisdiction that is Eventually Invalidated*

Before the Supreme Court's rulings in *Gant* and *Herring*, few courts were willing to expand the good-faith exception to include an officer's reasonable reliance on the settled case law of a jurisdiction. In 1987, the

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reliance on the well-settled and unequivocal decisions of the Eleventh Circuit), *with* United States v. Gonzalez, 578 F.3d 1130, 1133 (9th Cir. 2009) (finding that the Supreme Court's Fourth Amendment retroactivity doctrine prohibits an expansion of the good-faith exception).

120. See *Davis*, 598 F.3d at 1262 (noting that the *Gant* decision had replaced its former interpretation of *Belton*); *Gonzalez*, 578 F.3d at 1133 (asserting that it could not apply the good-faith exception without creating tension with existing case law); *McCane*, 573 F.3d at 1039 (holding that, in light of the *Gant* decision, the district court had erred in finding a search incident to arrest valid); United States v. Gray, No. 4:09CR3089, 2009 WL 4739740, at \*5–6 (D. Neb. Dec. 7, 2009) (expressing uncertainty as to whether *Leon* would apply to pre-*Gant* searches); United States v. McGhee, 672 F. Supp. 2d 804, 811–12 (S.D. Ohio 2009) (noting the divide among circuits as to whether *Gant* should be applied retroactively); United States v. Lee, No. 07-04050-01-CR-C-NKL, 2009 WL 3762404, at \*2 (W.D. Mo. Nov. 10, 2009) (asserting that the good-faith exception should apply); United States v. Peoples, 668 F. Supp. 2d 1042, 1044–45 (W.D. Mich. 2009) (holding that the retroactivity rule does not apply); United States v. Lopez, No. 6:06-120-DCR, 2009 WL 3112127, at \*4 (E.D. Ky. Sept. 23, 2009) (maintaining that the good-faith exception should apply because the officer was well-trained and acted reasonably); United States v. Owens, No. 5:09-cr-14/RS, 2009 WL 2584570, at \*3 (N.D. Fla. Aug. 20, 2009) (applying the good-faith exception because the search was not a result of officer misconduct); United States v. Allison, 637 F. Supp. 2d 657, 672 (S.D. Iowa 2009) (maintaining that evidence should not be suppressed because no wrongful conduct on the part of the police officers had occurred); United States v. Grote, 629 F. Supp. 2d 1201, 1206 (E.D. Wash. 2009) (deciding not to apply the exclusionary rule because it would not have the effect of deterring future officer misconduct); United States v. Buford, 623 F. Supp. 2d 923, 927 (M.D. Tenn. 2009) (declining to extend the good-faith exception to cases of good faith reliance on subsequently overturned Supreme Court decisions).

121. *Davis*, 598 F.3d at 1264; *McCane*, 573 F.3d at 1039; *Gray*, 2009 WL 4739740, at \*6; *McGhee*, 672 F. Supp. 2d at 812; *Lee*, 2009 WL 3762404, at \*2; *Lopez*, 2009 WL 3112127, at \*4; *Owens*, 2009 WL 2584570, at \*3; *Allison*, 637 F. Supp. 2d at 672; *Grote*, 629 F. Supp. at 1206.

122. *Gonzalez*, 578 F.3d at 1133; *Buford*, 623 F. Supp. 2d at 927.

United States Court of Appeals for the Fifth Circuit became the first federal appellate court to hold that the good-faith exception to the exclusionary rule applied to evidence obtained by an officer who reasonably relied on settled case law that was later overturned.<sup>123</sup> When presented with the question, the Fifth Circuit originally upheld the constitutionality of warrantless searches at a permanent checkpoint deemed to be the functional equivalent of the United States' border with Mexico.<sup>124</sup> Later, that same court reversed its earlier decision, and determined that these searches violated the Fourth Amendment.<sup>125</sup>

Rather than exclude the evidence obtained in reliance on the earlier circuit precedent, the court held that the evidence was admissible pursuant to the good-faith exception to the exclusionary rule.<sup>126</sup> Although this ruling was novel, the decision failed to gain momentum with other courts and ultimately did not reach the Supreme Court for review.<sup>127</sup> Over twenty years later, the Tenth Circuit addressed the question of whether to apply the good-faith exception to an officer's reasonable reliance on pre-*Gant* precedent that was invalidated by the Supreme Court.<sup>128</sup>

In 2007, Markice McCane was arrested after police determined that he was driving on a suspended license.<sup>129</sup> The arresting officer handcuffed McCane and placed him in the back of his patrol car.<sup>130</sup> Relying on the controlling precedent of the Tenth Circuit,<sup>131</sup> the officer conducted a search incident to arrest of the passenger compartment of McCane's automobile, ultimately finding a loaded handgun.<sup>132</sup> McCane, a convicted felon, was charged with possession of a firearm in violation of federal law.<sup>133</sup>

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123. See *United States v. Jackson*, 825 F.2d 853, 866 (5th Cir. 1987) (en banc) (holding that the exclusionary rule should not be applied to searches conducted which relied on the existing case law of the jurisdiction).

124. *Id.* at 857 (citing *United States v. Jackson*, 807 F.2d 1185, 1190 (5th Cir. 1986)).

125. *Id.* at 854.

126. *Id.* at 866. The Fifth Circuit closely followed the Supreme Court's rationale from *Leon* and concluded that suppressing the evidence would fail to advance the deterrent purpose of the exclusionary rule. *Id.* For example, the Fifth Circuit read the three factors from *Leon* as justifying its holding. *Id.* at 865–66.

127. *Id.*

128. *United States v. McCane*, 573 F.3d 1037, 1040 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010).

129. *Id.* at 1038–39.

130. *Id.* at 1039.

131. See *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that when a lawful arrest is made of an occupant or recent occupant of a vehicle, police may search the passenger area of that vehicle, and all containers located within, incident to the arrest); *United States v. Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000) (finding that the *Belton* rule applies even when an arrestee is handcuffed and secured away from the scene of the search).

132. *McCane*, 573 F.3d at 1039.

133. *Id.* at 1040. McCane was charged with violating 18 U.S.C. § 922(g)(1) (2006). This provision states: "It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting

After the trial court found McCane guilty, he duly appealed his conviction.<sup>134</sup> While the case was pending on direct appeal, the United States Supreme Court decided *Arizona v. Gant*, which explicitly prohibited the police officer's search in *McCane*.<sup>135</sup> "On facts almost identical" to those in *McCane*, the Supreme Court held that an officer may search the passenger compartment of a suspect's vehicle incident to arrest so long as the suspect remains unsecured within the control area of the compartment, or the officer reasonably believes that evidence associated with the crime of arrest will be found in the vehicle.<sup>136</sup> Although the Supreme Court affirmed the suppression of evidence obtained in violation of its decision in *Gant*,<sup>137</sup> the Tenth Circuit took a different approach.<sup>138</sup>

Rather than order the suppression of the evidence obtained from the now unlawful search of McCane's vehicle, the Tenth Circuit upheld the admissibility of the evidence pursuant to the good-faith exception to the exclusionary rule.<sup>139</sup> Relying on the Supreme Court's recent decision in *Herring*, the court held that the exclusionary rule should not apply in situations where an officer reasonably relies on the settled case law of a jurisdiction that is subsequently ruled unconstitutional.<sup>140</sup> The court's decision broadened the scope of the good-faith exception beyond any existing Supreme Court precedent.<sup>141</sup>

To support its conclusion, the court recounted the familiar refrain found in each of the Supreme Court's good-faith exception cases that the exclusionary rule is not an individual constitutional right, and should only be invoked where its deterrent effects outweigh its social costs.<sup>142</sup> After reviewing the Supreme Court's good-faith precedent, the court noted that two common themes have emerged from these decisions: the exclusionary rule is designed to deter only unreasonable law enforcement conduct, and it

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commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." *Id.*

134. *McCane*, 573 F.3d at 1040.

135. *Id.*

136. *Id.* (quoting *Arizona v. Gant*, 129 S. Ct. 1710, 1718–19 (2009)).

137. *See Gant*, 129 S. Ct. at 1723–24 (affirming the judgment of the Supreme Court of Arizona). The Supreme Court of Arizona held that because the officer's search was unlawful, the evidence obtained from it must be suppressed. *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007).

138. *McCane*, 573 F.3d at 1040.

139. *Id.* at 1045.

140. *See id.* at 1042–45 (applying the deterrence rationale used in *Herring*).

141. *See United States v. Gonzalez*, 578 F.3d 1130, 1132 (9th Cir. 2009) (noting that the Supreme Court has never decided the issue of whether the good-faith exception to the exclusionary rule applies in a situation where a search is "conducted under a then-prevailing interpretation of a Supreme Court ruling, but rendered unconstitutional by a subsequent Supreme Court ruling announced while the defendant's conviction was on direct review").

142. *McCane*, 573 F.3d at 1042. The court also highlighted both the *Leon* and *Evans* incantations of the three-part test for determining when the exclusionary rule is appropriately applied. *Id.* at 1042–43.

is not intended, nor is it able, to deter the conduct of actors in the judicial or legislative branches.<sup>143</sup> Upon this foundation, the *McCane* court determined that application of the good-faith exception to the exclusionary rule was appropriate under the circumstances presented.<sup>144</sup>

Judge Murphy, writing for the court, analogized the police officer's conduct at issue in *McCane* to the officers' conduct in *Leon*, *Krull*, and *Evans*.<sup>145</sup> The court found the police officer's reliance on the settled case law of the jurisdiction to be no more unreasonable than an officer's reliance on a facially valid warrant, an apparently valid state statute, or the clerical error of a court employee.<sup>146</sup> Judge Murphy noted that the exclusionary rule was not designed to punish the mistakes of judicial officers and that "no evidence" existed to support the assertion that judicial actors were likely to violate the Fourth Amendment.<sup>147</sup> Therefore, the court reasoned that there was no basis to believe that suppressing evidence would have a significant deterrent effect on judges delegated the responsibility of interpreting the Constitution.<sup>148</sup> Consequently, the court declined to exclude the evidence obtained from the officer's reasonable reliance on the established precedent of Tenth Circuit that the Supreme Court later rendered null.<sup>149</sup>

Shortly after the Tenth Circuit decided *McCane*, a clear trend developed in favor of applying the good-faith exception to law enforcement reliance on pre-*Gant* precedent.<sup>150</sup> Federal district courts within the Sixth, Eighth,

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143. *Id.* at 1044. The Supreme Court has consistently emphasized limitations on this point. In *Herring*, the Court conceded that the exclusionary rule may be appropriate where law enforcement actors are reckless in maintaining their databases or make false entries for the purpose of making future arrests. *Herring v. United States*, 129 S. Ct. 695, 703 (2009). Similar caveats were emphasized in both *Krull* and *Leon*. See *supra* note 106.

144. *McCane*, 573 F.3d at 1044.

145. *Id.*

146. *Id.* at 1044–45 ("Relying upon the settled case law of a United States Court of Appeals certainly qualifies as objectively reasonable law enforcement behavior.").

147. *Id.* at 1045.

148. *Id.* (citing *United States v. Leon*, 468 U.S. 897, 916–17 (1984)). The court similarly argued that because the judicial branch is a neutral body with "no stake in the outcome of particular criminal prosecutions," excluding evidence based on judges' errors in interpreting the law would serve no real deterrent purpose. *Id.*

149. *Id.*

150. See *United States v. Gray*, No. 4:09CR3089, 2009 WL 4739740, at \*6 (D. Neb. Dec. 7, 2009) (expanding the good-faith exception to include executive branch reliance on case law); *United States v. McGhee*, 672 F. Supp. 2d 804, 812 (S.D. Ohio 2009) (interpreting the good-faith exception to include reasonable reliance on settled precedent that is later invalidated); *United States v. Lee*, No. 07-04050-01-CR-C-NKL, 2009 WL 3762404, at \*2 (W.D. Mo. Nov. 10, 2009) (agreeing with the result in *McCane*); *United States v. Lopez*, No. 6:06-120-DCR, 2009 WL 3112127, at \*4 (E.D. Ky. Sept. 23, 2009) (holding the good-faith exception includes a law enforcement officer's objectively reasonable reliance on settled case law); *United States v. Owens*, No. 5:09-cr-14/RS, 2009 WL 2584570, at \*3 (N.D. Fla. Aug. 20, 2009) (finding that the good-faith exception applies to a search authorized by precedent that is subsequently overruled); *United States v. Allison*, 637 F. Supp. 2d 657, 672 (S.D. Iowa 2009) (ruling that the good-faith exception precludes

and Eleventh Circuits were confronted with the same issue involving the Supreme Court's decision in *Gant*, with a majority of these courts reaching an identical conclusion: the good-faith exception to the exclusionary rule encompasses an officer's reasonable reliance on the settled case law of those jurisdictions that is subsequently overturned.<sup>151</sup> Later, the Eleventh Circuit agreed with the Tenth and Fifth Circuits and refused "to apply the exclusionary rule when the police have reasonably relied on clear and well-settled precedent."<sup>152</sup> Although the weight of authority clearly favors extending the good-faith exception to such a situation, several courts have explicitly declined to do so.<sup>153</sup>

*B. The Ninth Circuit Holds that the Supreme Court's Fourth Amendment Retroactivity Doctrine Prohibits Expansion of the Good-Faith Exception*

Addressing the same issue as presented to the Tenth Circuit in *McCane*, the Ninth Circuit explicitly rejected the government's argument for a broad interpretation of the good-faith exception to the exclusionary rule.<sup>154</sup> In *United States v. Gonzalez*, the police conducted a search of Ricardo Gonzalez's vehicle incident to arrest based upon circuit precedent that the *Gant* decision invalidated.<sup>155</sup> Rather than going into a detailed discussion regarding the government's argument, the court acknowledged the good-faith precedent in passing, and ruled that the Supreme Court's retroactivity doctrine concerning new rules of criminal procedure controlled the outcome of the case.<sup>156</sup>

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the suppression of evidence obtained as a result of a police officer's reliance on the jurisdiction's precedent); *United States v. Grote*, 629 F. Supp. 2d 1201, 1206 (E.D. Wash. 2009) (holding that the good-faith exception applies to searches conducted pursuant to settled case law). *But see* *United States v. Peoples*, 668 F. Supp. 2d 1042, 1050–51 (W.D. Mich. 2009) (declining to extend application of the good-faith exception to law enforcement reliance on case law); *United States v. Buford*, 623 F. Supp. 2d 923, 927 (M.D. Tenn. 2009) (rejecting the extension of the good-faith exception as anomalous to the Supreme Court's Fourth Amendment retroactivity doctrine).

151. *See supra* note 150 (detailing the subsequent decisions of federal courts after the Tenth Circuit handed down its ruling in *McCane*).

152. *United States v. Davis*, 598 F.3d 1259, 1266 (11th Cir. 2010).

153. *See, e.g.*, *United States v. Gonzalez*, 578 F.3d 1130, 1133 (9th Cir. 2009) (holding that the good-faith exception does not apply to an officer's reliance on settled precedent); *Buford*, 623 F. Supp. at 927 (declining to expand the good-faith exception to include an officer's reliance on case law).

154. *Gonzalez*, 578 F.3d at 1133. The procedural posture in *Gonzalez* was quite different from that in *McCane*. There, the defendant appealed his conviction, and while the case was pending before the court, the Supreme Court handed down *Gant*. *McCane*, 573 F.3d at 1039. In *Gonzalez*, the court faced the question after the defendant's original conviction was vacated by the Supreme Court and remanded for consideration in light of its opinion in *Gant*. *Gonzalez*, 578 F.3d at 1131.

155. *Gonzalez*, 578 F.3d at 1131.

156. *Id.* at 1132.

In *United States v. Johnson*,<sup>157</sup> the Supreme Court held that when a new rule of criminal procedure that interprets the Fourth Amendment is promulgated, that rule is to be applied to all cases pending on direct review at the time of the decision.<sup>158</sup> The Court found that a failure to apply a new rule construing the Fourth Amendment to those cases violated three standards of constitutional law.<sup>159</sup> First, drawing arbitrary lines as to when new rules would apply retroactively conflicts with norms of principled adjudication.<sup>160</sup> Second, the Court found it incomprehensible that a new rule would be applied purely prospectively with the exception of the one party whose case was lucky enough to be chosen as the vehicle for the construction of the new rule.<sup>161</sup> Finally, the Court noted that a discriminating application of new constitutional rules violates the principle that all similarly situated defendants should be treated equally.<sup>162</sup>

After explaining the reasoning behind adopting this conception of retroactivity, the *Johnson* court left a piece of the pre-existing retroactivity precedent intact.<sup>163</sup> The Court upheld the rule that if a new decision interpreting the Fourth Amendment constitutes “a clear break with the past,” then the rule is not retroactive.<sup>164</sup> Five years after the ruling in *Johnson*, the Supreme Court revisited the question of retroactivity and held that “even decisions constituting a ‘clear break’ with past precedent have retroactive application.”<sup>165</sup>

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157. 457 U.S. 537 (1982).

158. *Id.* at 562.

159. *Id.* at 546–47. Here, the Court adopted Justice Harlan’s arguments from his dissenting opinion in *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting), and his concurring opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring).

160. *Johnson*, 457 U.S. at 546.

161. *Id.* at 546–47. The Court pointed to the different roles the legislative and judicial branches play in rulemaking. *Id.* Whereas the legislature makes rules prospective or retroactive as it sees fit, the judiciary has a duty to interpret the Constitution. *Id.* at 547. In fulfilling this duty, if the Court were to allow similar cases to pass without receiving the same benefit as the one case that operated to create the new rule, then the Court would be engaging in “an indefensible departure from [the] model of judicial review.” *Id.* (quoting *Mackey*, 401 U.S. at 678–79 (Harlan, J., concurring)).

162. *Johnson*, 457 U.S. at 547.

163. *See id.* at 549 (adhering to past doctrine which found that “where the Court has expressly declared a rule of criminal procedure to be a clear break with the past, it almost invariably has gone on to find such a newly minted principle nonretroactive”) (citation omitted) (internal quotation marks omitted).

164. *Id.* (quoting *Desist v. United States*, 394 U.S. 244, 248 (1969)). When *Johnson* was decided, it was premised on a multi-factor test outlined by cases such as *Johnson v. New Jersey*, 384 U.S. 719 (1966), and *Stovall v. Denno*, 388 U.S. 293 (1967). In *Stovall*, the Court held that a determination of a new rule’s retroactivity should be made after weighing: “(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.” 388 U.S. at 297. When a new rule constitutes a clear break with the past, it fails the last two *Stovall* factors, requiring it to be applied only prospectively. *Johnson*, 457 U.S. at 549–50.

165. *United States v. Gonzalez*, 578 F.3d 1130, 1132 (9th Cir. 2009) (quoting *Griffith v.*

The *Gonzalez* court argued that if it were to accept the government's contention that the good-faith exception applied to reasonable reliance on case law, the decision would undermine the Supreme Court's settled retroactivity precedent.<sup>166</sup> Judge Betty Fletcher, author of the *Gonzalez* opinion, feared that application of the good-faith exception would transform the courts from judicial bodies deciding cases and controversies into de facto legislatures with the authority to announce new rules without applying them.<sup>167</sup> Furthermore, the court contended that adopting the government's argument would have the improper effect of treating two similarly situated defendants in fundamentally different ways.<sup>168</sup> Because the Supreme Court affirmed the lower court's decision to suppress the evidence obtained against the defendant in *Gant*, allowing the conviction against Gonzalez to stand would conflict with the same principles outlined in *Johnson* and its progeny.<sup>169</sup> On these grounds, the court ruled that exclusion of the evidence was required, and Gonzalez's conviction was reversed.<sup>170</sup>

Although several courts have adopted the retroactivity doctrine as a barrier to extending the good-faith exception to the exclusionary rule, the majority of courts deciding the issue have rejected such an argument.<sup>171</sup> As

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Kentucky, 479 U.S. 314, 328 (1987)).

166. *Id.* It is important to note that the Court in *Johnson*, though decided two years before *Leon* created the good-faith exception, addressed an argument similar to that made by the government in *Gonzalez*. *Johnson*, 457 U.S. at 559–60. There, the government argued that since the primary purpose of the exclusionary rule is to deter future violations of the Fourth Amendment by law enforcement officers, the “evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had [or should have had] knowledge . . . that the search was unconstitutional under the Fourth Amendment.” *Id.* at 559. The Court responded by stating that this argument renders the retroactivity test the government proposes absurd, because the only “Fourth Amendment rulings worthy of retroactive application [would be] those in which the arresting officers violated pre-existing guidelines clearly established by prior cases.” *Id.* at 560. The Court noted that cases dealing with violations of pre-existing Fourth Amendment rules do not raise questions of retroactivity. *Id.* Therefore, the government's argument would “automatically eliminate all Fourth Amendment rulings from consideration for retroactive application.” *Id.*

167. *Gonzalez*, 578 F.3d at 1131, 1132. This very fear was one of the reasons the for the Court's decision in *Johnson*. See *supra* note 166 and accompanying text.

168. *Gonzalez*, 578 F.3d at 1132. In *Johnson*, the Supreme Court created the retroactivity rule in an effort to prevent this very outcome. 457 U.S. at 546.

169. *Gonzalez*, 578 F.3d at 1132–33.

170. *Gonzalez*, 578 F.3d at 1132–33. At least one federal district court has reached the same conclusion as the Ninth Circuit. *United States v. Buford*, 623 F. Supp. 2d 923, 927 (M.D. Tenn. 2009). In *Buford*, the court's decision turned on the inconsistent outcomes that would result for similarly situated defendants if the good-faith exception were expanded. *Id.* at 926–27 (citing *Griffith*, 479 U.S. at 323). The court cautiously noted that the “Supreme Court has not indicated that the good faith exception should be extended into the realm of Supreme Court jurisprudence . . . [which is generally] protected by the retroactivity doctrine,” and granted the defendant's motion to suppress. *Id.* at 926 (internal quotations omitted).

171. See *United States v. McCane*, 573 F.3d 1037, 1044 n.5 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010) (rejecting the retroactivity argument, and finding that the law created by *Gant* applies, but that it is a separate question from what remedy, if any, the



Part III will demonstrate, not only does the framework for the good-faith exception operate in favor of its expansion to include a law enforcement officer's reasonable reliance on settled precedent, the argument that retroactivity requires the suppression of evidence is lacking.<sup>172</sup> Therefore, courts should continue to follow the rationale of the good-faith doctrine and apply the exception to an officer's reasonable reliance on settled case law that is later overturned.

### III. THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE INTERPRETED TO INCLUDE A LAW ENFORCEMENT OFFICER'S OBJECTIVELY REASONABLE RELIANCE ON WELL-SETTLED PRECEDENT THAT IS LATER OVERRULED

In its current form, the good-faith exception to the exclusionary rule renders suppression inappropriate when an officer acts in reasonable reliance on a facially valid search warrant,<sup>173</sup> on a state statute that is subsequently invalidated,<sup>174</sup> or on the negligent clerical errors of judicial<sup>175</sup> or executive branch actors.<sup>176</sup> Although the rationale supporting these decisions is equally applicable to a police officer's reasonable reliance on judicial precedent that is later overruled, some argue that the good-faith exception should not be interpreted so expansively.<sup>177</sup> This section will respond to those arguments.

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courts are required to apply); *accord* United States v. Peoples, 668 F. Supp. 2d 1042, 1047 (W.D. Mich. 2009) (ruling that the retroactivity rules do not preclude consideration of the good-faith doctrine); *see also* United States v. Gray, No. 4:09CR3089, 2009 WL 4739740, at \*5–6 (D. Neb. Dec. 7, 2009) (agreeing with the Tenth Circuit's ruling that the retroactivity doctrine does not preclude arguments regarding application of the good-faith exception).

172. *See infra* Part III.

173. United States v. Leon, 468 U.S. 897, 913–14 (1984).

174. *See* Illinois v. Krull, 480 U.S. 340, 352 (1987) (noting that applying the exclusionary rule to evidence seized in reliance on an unconstitutional state statute would not serve as an additional deterrent).

175. *See* Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (creating an exception to the exclusionary rule for clerical errors of court employees).

176. *See* Herring v. United States, 129 S. Ct. 695, 704 (2009) (holding that police negligence does not trigger the exclusion of evidence).

177. *See, e.g.,* United States v. Davis, 598 F.3d 1259, 1266–67 (11th Cir. 2010) (reviewing the rationale of the good-faith exception and applying it to reasonable law enforcement reliance on settled precedent later deemed unconstitutional).

A. *The Leon Framework Supports an Expansion of the Good-Faith Exception*

1. *The exclusionary rule is an inappropriate remedy because it cannot deter future violations of the Constitution*

Including a police officer's reasonable reliance on settled case law in the good-faith exception fits within the framework created by *Leon*.<sup>178</sup> Under *Leon* and its progeny, trial courts are required to employ a balancing test that weighs the costs and benefits of exclusion before suppressing evidence.<sup>179</sup> When conducting this analysis, courts must determine whether excluding the evidence at trial will deter the actors responsible for the constitutional violation from committing future infractions.<sup>180</sup> The Supreme Court has consistently held that when this goal is not met, application of the exclusionary rule is unwarranted.<sup>181</sup>

Where police officers rely on the settled case law of an appellate court that is subsequently invalidated, the exclusionary rule does not achieve its desired ends of deterring future constitutional violations.<sup>182</sup> This conclusion weighs in favor of an inclusive interpretation of the good-faith exception.<sup>183</sup> One prominent commentator, however, argues that the good-faith exception should not abrogate the exclusionary rule in cases where police reasonably relied on settled case law, asserting that the exclusion of such evidence would deter appellate judges from authorizing constitutional violations in future rulings.<sup>184</sup> This argument turns on dicta from *Danforth v. Minnesota*,<sup>185</sup> which explained that when the Supreme Court announces a new constitutional rule of criminal procedure, that rule pre-exists the Court's decision in dormancy.<sup>186</sup> Therefore, whenever an appellate court

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178. See *supra* Part I.A (detailing the contours of the *Leon* framework).

179. *United States v. Leon*, 468 U.S. 897, 906–07 (1984).

180. See *id.* at 916 (employing a three step syllogism to reach the conclusion that the exclusionary rule would not deter magistrates from authorizing future violations of the Constitution).

181. See, e.g., *Herring*, 129 S. Ct. at 702 (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it . . .”).

182. See *United States v. McCane*, 573 F.3d 1037, 1045 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010) (declining to apply the exclusionary rule where officers act in objectively reasonable reliance on settled circuit case law).

183. See, e.g., *United States v. Davis*, 598 F.3d 1259, 1265–66 (11th Cir. 2010) (finding support for its holding that the good-faith exception applies to reliance on settled case law later invalidated because the exclusionary rule is an inappropriate remedy for deterring judicial actors); *McCane*, 573 F.3d at 1044 (highlighting the inability of the exclusionary rule to deter judicial actors).

184. Posting of Orin Kerr to *The Volokh Conspiracy*, <http://volokh.com/2010/03/08/the-good-faith-exception-and-changing-law-distinguishing-illinois-v-krull/> (Mar. 8, 2010, 21:03 EST).

185. 552 U.S. 264 (2008).

186. *Id.* at 271.

authorizes a holding contrary to that latent rule, the court actually contravenes the Constitution.<sup>187</sup> This argument, though nuanced, is at odds with the Court's prevailing conception of the exclusionary rule.<sup>188</sup>

The exclusionary rule is intended to deter future violations of the Constitution committed by law enforcement authorities.<sup>189</sup> As interested parties to individual criminal prosecutions, the exclusionary rule prevents police from committing these violations by sending a clear message that their course of action did not comply with the law.<sup>190</sup> One of the enduring principles of the good-faith exception cases, however, is that the exclusionary rule was never intended to deter judicial conduct.<sup>191</sup> Judicial actors are neutral parties with no individual stake in the outcome of particular criminal prosecutions.<sup>192</sup> Therefore, excluding evidence at trial obtained by a police officer acting in reasonable reliance on the decisions of these actors cannot legitimately be expected to deter them from authorizing future violations of the Constitution.<sup>193</sup>

Furthermore, *Herring* reads a scienter requirement into the conduct that triggers operation of the exclusionary rule.<sup>194</sup> Chief Justice Roberts noted that only when police misconduct is deliberate, reckless, or grossly negligent can the exclusionary rule act as an effective deterrent.<sup>195</sup> The argument that exclusion would deter judges from authorizing future constitutional violations necessarily assumes that judges deliberately or recklessly reach their unconstitutional conclusions.<sup>196</sup> Yet, there exists "no

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187. See Posting of Orin Kerr, *supra* note 184 ("When the Supreme Court announces that the circuit courts have been getting the law wrong for a few decades, that means . . . the lower courts were consistently and repeatedly authorizing constitutional violations."). This argument also supports the contention that the constitutional error lies with the court that passed down a judgment that is later overruled, rather than the police officer who relied on the defective ruling.

188. See *Herring v. United States*, 129 S. Ct. 695, 700–01 (2009) (reviewing the Court's jurisprudence regarding the exclusionary rule and emphasizing that the rule does not deter judicial actors).

189. *United States v. Leon*, 468 U.S. 897, 916 (1984).

190. Cf. Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 54 (1994) (explaining that the exclusionary rule can only influence police behavior if the police are aware that the evidence was suppressed and the reasons for doing so).

191. See *Leon*, 468 U.S. at 916 n.15 ("[The exclusionary rule is] not well tailored to deterring judicial misconduct." (quoting *Commonwealth v. Sheppard*, 441 N.E.2d 725, 735 (1982))).

192. *United States v. McCane*, 573 F.3d 1037, 1045 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010).

193. *Leon*, 468 U.S. at 917.

194. *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

195. *Id.* The Court looks at the officer's conduct objectively to determine whether it was sufficiently deliberate or reckless to warrant application of the exclusionary rule. *Id.* at 703.

196. See *supra* notes 100–103 and accompanying text (demonstrating that the exclusionary rule, in part, aims to deter police misconduct); cf. *United States v. Allison*, 637 F. Supp. 2d 657, 673 n.8 (S.D. Iowa 2009) (quoting *Illinois v. Krull*,

evidence” to suggest that judicial actors are inclined to subvert the Fourth Amendment or the rule of law.<sup>197</sup> Of course, courts can render erroneous judgments, but the appropriate way to inform these courts of their mistakes and to deter them from authorizing future violations of the law is by reversing their decisions on review, not by suppressing evidence obtained in reliance on their judgments at trial.<sup>198</sup> The Supreme Court has consistently emphasized that the rule’s applicability is limited to those areas where its “remedial objectives are thought most efficaciously served.”<sup>199</sup> But, without culpable conduct on the part of the judiciary, the exclusionary rule cannot serve its deterrent purpose.<sup>200</sup> Consequently, application of the exclusionary rule to judicial conduct is inappropriate.<sup>201</sup>

Additionally, the police do not commit a culpable act capable of being deterred by the exclusionary rule when they reasonably rely on the settled precedent of an appellate court that is later overturned.<sup>202</sup> The duty of the judiciary is to interpret the Constitution and various statutes to determine what the law is.<sup>203</sup> When an appellate court issues an apparently valid ruling on a question of law, that decision generally obligates police to comply with it.<sup>204</sup> By adhering to that court’s decision, the police commit no deliberate or reckless constitutional violation.<sup>205</sup> Instead, they engage in objectively

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480 U.S. 340, 355 (1987)) (reading the Supreme Court’s decisions in *Leon* and *Krull* to find that exclusion might be justified in a case where a judge “wholly abandoned” his or her judicial role because an officer’s reliance on that particular decision may not be reasonable). This caveat to the good-faith exception, however, appears to have more value in theory than in practice.

197. *Leon*, 468 U.S. at 916.

198. *Cf. id.* at 918 n.18 (explaining that closer judicial supervision of magistrates “provides a more effective remedy than the exclusionary rule”).

199. *Arizona v. Evans*, 514 U.S. 1, 11 (1995) (citing *Leon*, 468 U.S. at 908).

200. *See Herring*, 129 S. Ct. at 702 (claiming that conduct must be sufficiently blameworthy before suppression could significantly deter it).

201. *Leon*, 468 U.S. at 908.

202. *See United States v. Davis*, 598 F.3d 1259, 1266 (11th Cir. 2010) (asserting that the exclusionary rule cannot meaningfully deter police officers from relying on the well-settled and unambiguous precedent of the appellate court).

203. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to [s]ay what the law is.”).

204. *Cf. Illinois v. Krull*, 480 U.S. 340, 349–50 (1987) (noting that police officers have the responsibility to enforce statutes as they are written). If this were not the case, there would be no need for the exclusionary rule in the first place because the primary purpose of the exclusionary rule is to deter future violations of the Fourth Amendment by law enforcement officers. *Id.* at 347. Moreover, police are invested with a significant amount of discretion when making decisions on whether to arrest or detain an individual. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR*, 6 (2007). The obligation to act in accordance with the law arises when the police officers take such action, not when they employ their discretion and refrain from acting. *See infra* note 235 and accompanying text (explaining the court’s assertion in *Davis* that a police officer’s reliance on an ambiguous rule is dangerous).

205. *See Davis*, 598 F.3d at 1265–66 (declaring that police actions that comport with a reviewing court’s mistaken interpretation of law cannot be considered culpable conduct

reasonable activity that the good-faith exception was designed to protect.<sup>206</sup> The constitutional error that arises when the case is later invalidated rests solely with the court that promulgated the erroneous decision, not with the police officer who reasonably relied upon it.<sup>207</sup> To hold a blameless law enforcement officer accountable for the mistakes of the judiciary does not further the intent of the exclusionary rule, further indicating that its operation is unjustified.<sup>208</sup>

Moreover, the benefits of deterrence do not outweigh the costs associated with the suppression of evidence when a police officer reasonably relies on established precedent that is subsequently overruled.<sup>209</sup> As described above, the particular circumstances of this situation undermine the deterrence rationale of the exclusionary rule; however, the costs associated with suppression remain.<sup>210</sup> One of the early justifications of the exclusionary rule was that it would preserve judicial integrity by refusing to allow courts to sanction unlawful government behavior.<sup>211</sup> By contrast, a rule that would reject application of the good-faith exception in this context would serve to punish the government even though it did not commit a culpable act.<sup>212</sup> Instead of maintaining the public's faith in the

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because police officers are entitled to rely on appellate court precedent).

206. *Id.* at 1265; *United States v. McCane*, 573 F.3d 1037, 1045 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010) (stating that an officer's reliance on settled case law "certainly qualifies as objectively reasonable law enforcement behavior").

207. *See United States v. Leon*, 468 U.S. 897, 921 (1984) (declaring that suppressing evidence obtained by an officer acting in reliance on a judicial officer's determination of probable cause would penalize the police officer for mistakes attributable only to the judicial actor issuing the warrant); *see also Davis*, 598 F.3d at 1267 (explaining that when a court hands down a judgment that is later invalidated, it is the court promulgating that decision that makes the mistake of law, not the police who reasonably relied on it); *McCane*, 573 F.3d at 1044 (contending that police officers commit no misconduct when they rely on the settled case law of a jurisdiction that is subsequently invalidated to effectuate a search).

208. *See McCane*, 573 F.3d at 1044–45 n.5 ("The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context."). Suppressing evidence that is obtained through objectively reasonable law enforcement conduct cannot be expected to deter future violations. *Id.* at 1042.

209. *E.g.*, *United States v. Gray*, No. 4:09CR3089, 2009 WL 4739740, at \*6–7 (D. Neb. Dec. 7, 2009) (explaining the cost-benefit rationale of the exclusionary rule and holding that the good-faith exception applies to an officer's reasonable reliance on subsequently nullified case law).

210. *See supra* Part III.A.1 (arguing that the rationale of the exclusionary rule does not support its application in the context of police officer reliance on subsequently abrogated precedent). One example of a cost associated with suppression is the interference with the courts' truth-finding function. *Leon*, 468 U.S. at 907–08.

211. *See Wesley MacNeil Oliver, Toward a Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 *BUFF. CRIM. L. REV.* 201, 211 (2005) (explaining that the Warren Court's understanding of the exclusionary rule was informed, in part, by its fear that admitting illegally obtained evidence would undermine the integrity of the courts). This rationale was largely renounced by the Supreme Court's decision in *United States v. Calandra*, 414 U.S. 338, 347 (1974), which focused almost exclusively on the deterrent effect of exclusion. Oliver, *supra*, at 212.

212. *See supra* notes 202–208 and accompanying text. It is unreasonable to expect the

courts, suppression would jeopardize the integrity of the criminal justice system by allowing otherwise guilty defendants go free without securing any benefit in return.<sup>213</sup> Courts should avoid such a deleterious result by reading the good-faith exception to include a law enforcement officer's objectively reasonable reliance on settled case law that is later reversed.

Here, not only do the costs of suppression outweigh the benefits of deterrence, but the deterrent effects that support the application of the exclusionary rule are entirely absent.<sup>214</sup> If a court were to hold that the exclusionary rule applied in this situation, it would do so in opposition to clear and long-standing Supreme Court precedent regarding the function and operation of the exclusionary rule.<sup>215</sup> Therefore, lower courts should follow this precedent and permit an expanded interpretation of the good-faith exception.

## 2. *Defining the scope of the expanded good-faith exception*

As described above, the rationale supporting the exclusionary rule supports a broad interpretation of the good-faith exception; however, this should not be understood to include all reliance on case law promulgated within a particular jurisdiction.<sup>216</sup> In order for the good-faith doctrine to preclude the exclusion of evidence at trial, law enforcement reliance must be objectively reasonable.<sup>217</sup> Consistent with the Supreme Court's rulings in *Leon* and beyond, certain limits must be placed on the applicability of the good-faith exception, thus allowing operation of the exclusionary rule when its benefits outweigh its costs.<sup>218</sup>

There are at least three situations where exclusion would remain a viable remedy. First, the government may not invoke the good-faith doctrine to admit evidence obtained from a police officer's reliance on a judicial

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police to question or ignore the apparently valid constitutional decisions of a court for doing so may, in itself, violate the Constitution. See H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 532 (1999) (arguing that the executive branch is constitutionally obligated to act in accordance with the limits imposed upon it by Supreme Court decisions).

213. See *Herring v. United States*, 129 S. Ct. 695, 701 (2009) (denouncing the fact that the exclusionary rule "let[s] guilty and possibly dangerous defendants go free").

214. See *supra* Part III.A.1 (arguing that the exclusionary rule cannot deter future constitutional violations).

215. See generally *Leon*, 468 U.S. at 905–08, 916–18, 922–25 (recounting the history and purpose of the exclusionary rule and developing the foundation of the good-faith exception).

216. *Cf. id.* at 914–15 (prohibiting application of the good-faith exception in situations where an officer's reliance on a warrant could not be deemed to have been objectively reasonable).

217. *Id.* at 922 (emphasizing that an officer's reliance on a facially valid warrant "must be objectively reasonable").

218. See *supra* note 106 (discussing the manner in which *Leon* and *Krull* limited the scope of the good-faith exception).

decision that is patently unconstitutional.<sup>219</sup> In these situations, police officers cannot be said to have been reasonable in their reliance on the rulings because the officers knew or should have known that the ruling was invalid.<sup>220</sup> Second, and more importantly, the good-faith exception should only be extended to include an officer's reasonable reliance on an appellate court's well-settled decisions that constitute mandatory authority.<sup>221</sup> If a court's decision has not been finalized, or the state of law remains in flux, reliance on its conclusions may be unreasonable.<sup>222</sup> Finally, a police officer's reliance must be on a decision that is unequivocal.<sup>223</sup> When a court promulgates a clear and well-defined rule, a police officer's reliance upon it would be equivalent to relying on a statute that is subsequently declared unconstitutional.<sup>224</sup> If the rule is ambiguous or undefined, a police officer's reliance upon it may be unreasonable.<sup>225</sup> The good-faith exception was designed, in part, to allow law enforcement officers to act "*without*

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219. See *United States v. Allison*, 637 F. Supp. 2d 657, 672 n.8 (S.D. Iowa 2009) ("A law enforcement officer cannot be said to have relied in good faith upon case law which abandons adherence to precedent and/or the applicable text such that it reaches a result 'that a reasonable officer should have known was unconstitutional.'" (quoting *Illinois v. Krull*, 480 U.S. 340, 355 (1987))); cf. *Krull*, 480 U.S. at 355 (prohibiting the application of the good-faith exception where an officer relies on a state statute that a "reasonable officer should have known . . . was unconstitutional"). It is difficult to imagine a situation where a court would enter a judgment that obviously violates the Constitution. Cf. *Krull*, 480 U.S. at 369 (O'Connor, J., dissenting) (doubting the authenticity of the Court's exception to the good-faith exception for situations where a legislature "wholly abandon[s] its obligation to pass constitutional laws"). In reality, there is no evidence to suggest that federal appellate judges are likely to disregard the Constitution. *Leon*, 468 U.S. at 916. But, the importance of the exception lies in the fact that it provides reviewing courts the opportunity to suppress evidence in cases of extreme judicial abuse without simultaneously reducing the scope of the good-faith doctrine.

220. See *Krull*, 480 U.S. at 355 (explaining that a state statute that is *per se* unconstitutional cannot be reasonably relied upon because police officers should have known that it was invalid). When *Leon* established the good-faith doctrine, it required reliance to be objectively reasonable. 468 U.S. at 919 n.20. By creating this standard, the *Leon* court intimated that any time an analysis is conducted regarding an officer's reasonableness, the court "must charge the officer with a certain minimum level of knowledge of the law's requirements." *United States v. Savoca*, 761 F.2d 292, 295 (6th Cir. 1985).

221. See *United States v. Davis*, 598 F.3d 1259, 1267 (11th Cir. 2010) (indicating that the exclusionary rule remains a valid remedy when police rely on novel case law, because doing so requires an interested officer to engage in the type of legal analysis that is reserved for neutral judicial officers).

222. See *id.* at 1266 (asserting that the good-faith exception applies to reasonable reliance on "well-settled" case law). For example, the good-faith doctrine might not apply when a police officer relies on the dictates of a trial court addressing a novel question of law that has not been thoroughly vetted on appeal. In this situation, the law would not be well-settled, therefore an officer's reliance on it would be unreasonable for the purposes of the good-faith exception.

223. See *id.* ("[O]ur precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation.").

224. *Id.* at 1267–68 (citing *Krull*, 480 U.S. at 340).

225. See *id.* at 1266–67 (explaining that the clarity of the rule is necessary to the good-faith analysis because without it, police officers might have the incentive to rely on the unsettled nature of a Fourth Amendment question to the detriment of the Constitution).

having to engage in the interpretive activities generally reserved to the courts.”<sup>226</sup> For police to rely on an ambiguous rule, however, they might have to undertake a level of legal analysis that the good-faith exception explicitly attempts to eliminate.<sup>227</sup>

These exceptions to the operation of the good-faith doctrine not only comport with Supreme Court precedent, but they also provide strong incentives for police officers to follow the law.<sup>228</sup> In *United States v. Peoples*,<sup>229</sup> a federal district court refused to expand the good-faith exception to include reasonable reliance on settled case law.<sup>230</sup> The court’s holding was based upon the concern that expanding the good-faith exception would allow a police officer to make a unilateral determination as to whether his or her actions were in compliance with the Constitution when conducting a search or seizure.<sup>231</sup> The court feared that extending the exception would allow police to conduct illegal searches so long as they were able to cite a case from which they could reasonably conclude that their actions were justified.<sup>232</sup> The court found that this result would soon render the exclusionary rule defunct because the exception would apply “whenever an officer could establish good-faith on most any basis.”<sup>233</sup>

The opinion in *Peoples* voiced serious concerns about an expanded view of the good-faith exception.<sup>234</sup> Its criticism, however, is excessive. A good-faith doctrine that includes reasonable reliance on the well-settled and unequivocal decisions of an appellate court will create an incentive for police to follow that court’s dictates rather than engage in the troublesome

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226. *United States v. Peoples*, 668 F. Supp. 2d 1042, 1049 (W.D. Mich. 2009).

227. *Id.*; see *Davis*, 598 F.3d at 1267 (emphasizing that an analysis of the ambiguity of a rule promulgated by an appellate court is essential to the determination of whether the officer satisfied the reasonableness requirement of the good-faith exception).

228. See, e.g., *United States v. Leon*, 468 U.S. 897, 922–23 (1984) (preventing the extension of the good-faith exception to situations where reliance is unreasonable, including when a police officer claims to rely on a warrant that is facially deficient).

229. 668 F. Supp. 2d 1042 (W.D. Mich. 2009).

230. *Id.* at 1050–51. The court looked to the Seventh Circuit, which had previously been confronted with the question of whether the good-faith exception included an officer’s reliance on precedent later overturned by the Supreme Court. *United States v. 15324 Cnty Highway E.*, 332 F.3d 1070, 1074 (7th Cir. 2003). The court declined to extend the exception, reasoning that such an expansion would have “undesirable [and] unintended consequences.” *Id.* at 1076. Although the court did not extensively elaborate on this conclusion, the opinion noted that a contrary ruling would encourage law enforcement officers to engage in activities, such as legal analysis and research, that are better left to members of the judiciary. *Id.* Citing this vague language, the federal district court in *Peoples* attempted to clarify the purported consequences of expanding the good-faith exception to include reasonable reliance on judicial precedent. 668 F. Supp. 2d. at 1047–50.

231. *Peoples*, 668 F. Supp. 2d at 1049.

232. *Id.* at 1050.

233. *Id.*

234. *Id.* at 1047–48.



types of legal analysis as described in *Peoples*.<sup>235</sup> It will also encourage police officers to adhere to the rule of law.

Under an inclusive good-faith doctrine, when police officers follow the unambiguous and firmly-rooted decision of an appellate court, they gain the benefit of having any evidence obtained in reliance on that decision admitted at trial, even if that case is later reversed.<sup>236</sup> Because police officers are concerned with the outcome of individual criminal prosecutions, they have an interest in seeing incriminating evidence admitted at trial.<sup>237</sup> This negates any impulse that police may have to rely on their own conceptions of the law to inform their actions. If the government can demonstrate that the officer's reliance was objectively reasonable, then the evidence will be admitted.<sup>238</sup> On the other hand, if the police decide to stray from established precedent and undertake actions based on their own view of the law, a trial judge analyzing the good-faith exception is more likely to exclude any improperly obtained evidence.<sup>239</sup> The judge is likely to exclude the evidence because the good-faith exception does not include a police officer's unilateral mistake of law.<sup>240</sup>

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235. See *United States v. Davis*, 598 F.3d 1259 at 1266–67 (11th Cir. 2010) (asserting that a police officer's mistake of law is not objectively reasonable, and thus does not fit within the good-faith exception). When police officers rely on a case that is subsequently overturned, the mistake is attributable to the court, not to the police officers acting in reliance on a court's decision. *Id.* at 1267–68.

236. See, e.g., *United States v. McCane*, 573 F.3d 1037, 1045 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010) (affirming the district court's denial of a motion to suppress evidence obtained by a police officer who reasonably relied on pre-*Gant* precedent). Even where precedent has not been thoroughly vetted, an expanded good-faith exception provides law enforcement with an incentive to adhere to the law. In this situation, the potential benefit that accompanies reliance outweighs the risk associated with a police officer's decision to ignore or individually interpret its requirements. Trial courts bound by the newly announced appellate decision are likely to find that a police officer's adherence to its dictates is reasonable. Of course, the defense would be able to argue the contrary position, but this is ultimately a question for the courts to decide given the particular circumstances surrounding the police officer's actions. It is clear, however, that an officer who, because of the law's relative temporal disposition, departs from its commands or attaches an unreasonable interpretation to it runs a higher risk of mistake, thus nullifying the operation of the good-faith exception. See *supra* note 235 and accompanying text (explaining that an expanded good-faith exception would discourage police from relying on their own interpretation of law).

237. Cf. *Illinois v. Gates*, 462 U.S. 213, 240 (1983) (explaining that a judicial determination of probable cause is preferred to the judgment of a police officer "engaged in the often competitive enterprise of ferreting out crime" (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948))).

238. See *Davis*, 598 F.3d at 1267–68 (declining to suppress evidence obtained by a police officer's objectively reasonable reliance on established precedent).

239. See *supra* notes 222, 235 (finding that a court would be more likely to exclude evidence if an officer relies on law that is not well-settled or if the officer relies on his or her own biased conception of the law).

240. See *supra* note 235 (excluding an officer's mistake of law because it is not objectively reasonable).

Paradoxically, the court's holding in *Peoples* may foster the very behavior that it attempts to prohibit.<sup>241</sup> Rather than barring the police from interjecting their biased interpretations of the law in an attempt to justify their actions, the holding in *Peoples* encourages it.<sup>242</sup> The *Peoples* decision communicates the message that police cannot trust judicial precedent to instruct them on how to comply with the law. Without this assurance, police will naturally question the disposition of every decision announced by the courts within their jurisdiction.<sup>243</sup> In so doing, they may interpose their own self-interested understanding of what the Constitution permits them to do.<sup>244</sup> Instead of creating an incentive for police "to err on the side of constitutional behavior," this rule encourages police to develop their own interpretations of the law beyond what the courts dictate.<sup>245</sup> But, police are not in a position to determine independently what the law requires, nor are they able to foresee any potential change in the law that would justify their disregard of settled precedent.<sup>246</sup> A rule that provokes police to rely on their own perception of the law invites constitutional violations, and that is a danger courts must avoid.<sup>247</sup>

Throughout the development of the good-faith exception, the Supreme Court has restricted the scope of the exception to law enforcement conduct that is objectively reasonable.<sup>248</sup> Limiting a police officer's reasonable reliance on case law to the well-settled and unambiguous decisions of an appellate court of that jurisdiction complies with this general requirement.<sup>249</sup> This formulation of the good-faith exception refrains from swallowing the exclusionary rule by providing defendants the opportunity to litigate the question of whether an officer's reliance was objectively reasonable.<sup>250</sup> It also discourages police from engaging in potentially

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241. *Cf.* *United States v. Peoples*, 668 F. Supp. 2d 1042, 1050 (W.D. Mich. 2009) ("Extending *Leon* good-faith to include reliance on court precedent . . . involves an interpretive step on the part of the police that is totally absent from and unjustified by any previous Supreme Court application of a good faith exception to the exclusionary rule").

242. *Cf. id.* (arguing that "[e]xtending the good-faith exception to cover an officer's good-faith interpretation of case law would in short order become functionally indistinguishable from an exception that applied whenever an officer could establish good faith on most any basis").

243. *United States v. Johnson*, 457 U.S. 537, 561 (1982).

244. *Id.*

245. *Id.*

246. *Cf. United States v. Leon*, 468 U.S. 897, 921 (1984) (concluding that a police officer "cannot be expected to question the magistrate's probable-cause determination"); *United States v. Savoca*, 761 F.2d 292, 295 (6th Cir. 1985) (noting that the officer must be provided with knowledge of the law's requirements).

247. *Johnson*, 457 U.S. at 561.

248. *See supra* note 220 and accompanying text (noting that the objectively reasonable standard assumes the officer has some minimum level of knowledge of the law's requirements).

249. *See supra* notes 205–206 and accompanying text (listing examples of cases holding that an officer's reliance on well-settled case law is objectively reasonable).

250. *Contra United States v. Peoples*, 668 F. Supp. 2d 1042, 1050 (W.D. Mich. 2009)

abusive behavior because this formulation of the good-faith exception motivates them to comply with the law as announced by the courts of review within their jurisdiction.<sup>251</sup> When these benefits provided by the good-faith exception are combined with the substantial costs associated with exclusion of evidence at trial, it is clear that the rationale underlying the Supreme Court's good-faith exception supports an expanded interpretation of that doctrine.<sup>252</sup>

*B. The Supreme Court's Retroactivity Doctrine Does Not Preclude Application of the Good-Faith Exception to a Police Officer's Reasonable Reliance on the Established Precedent of an Appellate Court that is Subsequently Overturned*

The strongest opposition to the expanded good-faith exception comes from courts that have interpreted the Supreme Court's Fourth Amendment retroactivity doctrine to prohibit such an expansion.<sup>253</sup> The Supreme Court laid out this doctrine in *United States v. Johnson*<sup>254</sup> and *Griffith v. Kentucky*.<sup>255</sup> In these decisions, the Court concluded that it must apply all new rules of constitutional criminal procedure to each case pending direct

(arguing that police officers would inevitably be able to find a case on which they could claim they reasonably relied, rendering the exclusionary rule null).

251. See *supra* notes 236–237 and accompanying text (arguing that officers will follow settled case law because they have an interest in seeing incriminating evidence admitted at trial and relying on case law makes admission more likely).

252. See *supra* Part III.A.1 (arguing that suppressing evidence obtained by police officers acting in reasonable reliance on well-settled case law that is later reversed fails the cost-benefit analysis required by *Leon* because it does not advance the deterrent purpose of the exclusionary rule).

253. See *supra* note 153 and accompanying text. This section assumes that *Gant* created a new rule of constitutional criminal procedure capable of being given retroactive effect. One could argue that *Gant* merely clarified the rationale of *Belton* instead of promulgating a new rule that could be applied retroactively. See *Arizona v. Gant*, 129 S. Ct. 1710, 1726 (2009) (Alito, J., dissenting) (noting that the majority opinion refused to explicitly overrule *Belton*). But, there is no clear authority that suggests this is the appropriate analysis.

254. 457 U.S. 537, 547–49 (1982) (applying a balancing test to hold that new rules of criminal procedure apply to cases pending on direct review unless they are a clear break from past decisions).

255. 479 U.S. 314, 328 (1987) (employing a bright-line rule that all new rules of criminal procedure regarding the Fourth Amendment apply to cases pending on direct review, regardless of whether they represent a clear break from past precedent). It is important to note that there is a key distinction between *Johnson* and *Griffith*. *United States v. Gonzalez (Gonzalez II)*, 598 F.3d 1095, 1108–09 (9th Cir. 2010) (Bea, J., dissenting), *denying reh'g*, 578 F.3d 1130 (9th Cir. 2009). *Johnson* dealt with the retroactive effect of Supreme Court decisions interpreting the Fourth Amendment. *Id. Griffith*, on the other hand, dealt with the retroactive effect of the Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), which addressed a question of law under the Fourteenth Amendment. *Gonzales*, 598 F.3d at 1109 (Bea, J., dissenting). The rights given retroactive effect under these decisions are different as well. *Id.* The Fourteenth Amendment decision addressed in *Griffith* dealt with the personal rights of every criminal defendant. *Id.* The Fourth Amendment's exclusionary rule, however, is not an individual right, but a "societal right" focused on influencing the behavior of law enforcement authorities. *Id.* at 1108–09.

review concerning the same issue.<sup>256</sup> Although this precedent is long-settled and well-reasoned, the courts holding that this doctrine precludes the extension of the good-faith exception are mistaken.

Opponents of a permissive good-faith exception argue that it would effectively overturn the Supreme Court's retroactivity doctrine.<sup>257</sup> To reach this conclusion, however, requires a strained reading of that line of cases. In dealing with the particular dilemma of whether to apply the good-faith exception to law enforcement's reliance on pre-*Gant* searches, the retroactivity doctrine requires only that lower federal courts apply the rule of Fourth Amendment law elucidated in *Gant*.<sup>258</sup> Although the United States Supreme Court affirmed the Arizona Supreme Court's holding, which suppressed evidence obtained in violation of the newly promulgated rule in *Gant*, such an affirmation does not make the entire holding of the Arizona Supreme Court the law as dictated by the United States Supreme Court.<sup>259</sup> Rather, the United States Supreme Court's "holding is limited to the questions on which it granted certiorari."<sup>260</sup> The Court in *Gant* only considered whether the search of the defendant's vehicle was a violation of the Fourth Amendment.<sup>261</sup> Under that authority, cases pending on direct review enjoy the benefit of the *Gant* decision only to the extent that the searches conducted in reliance on pre-*Gant* precedent are now deemed unconstitutional.<sup>262</sup> However, the lower courts must still determine whether exclusion is the proper remedy to apply when they are faced with these violations.<sup>263</sup> In this situation, courts must look to the Supreme Court's jurisprudence regarding the exclusionary rule for guidance.<sup>264</sup>

The Court in *Herring* reaffirmed the rationale underlying the earlier good-faith exception cases.<sup>265</sup> As outlined above, this reasoning

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256. *Griffith*, 479 U.S. at 328.

257. Reply Brief of Petitioner-Appellant at 8, *McCane v. United States*, 130 S. Ct. 1686 (2010) (No. 09-402).

258. *Accord* *United States v. Peoples*, 668 F. Supp. 2d 1042, 1045 (W.D. Mich. 2009) (asserting that *Gant* "must undoubtedly apply to all cases pending on direct review" (citing *Griffith*, 479 U.S. at 328)); see *United States v. Leon* 468 U.S. 897, 906 (1984) (quoting *Illinois v. Gates*, 426 U.S. 213, 223 (1983)) (asserting that the question of whether the exclusionary rule is an appropriate sanction to apply in any given case is a wholly distinct question from whether the Fourth Amendment rights of an individual seeking to invoke the rule has been violated); see also *United States v. McCane*, 573 F.3d 1037, 1044–45 n.5 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010) (explaining that the Supreme Court's retroactivity doctrine applies the Court's rule from *Gant* to the case pending on direct review, but the question of remedy remains open for interpretation).

259. *Peoples*, 668 F. Supp. 2d at 1045–46.

260. *Id.* (citing SUP. CT. R. 14.1(a)).

261. See *Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009) (affirming the Arizona Supreme Court's suppression of evidence obtained in reliance on pre-*Gant* case law).

262. *McCane*, 573 F.3d at 1044–45 n.5.

263. *Id.*

264. See generally *Herring v. United States*, 129 S. Ct. 695, 699–701 (2009) (discussing the rationale for the application of the exclusionary rule).

265. *Id.*

weighs heavily in favor of extending the good-faith exception to include executive branch reliance on settled case law.<sup>266</sup> Because this is the appropriate method of adjudicating cases under the Court's retroactivity doctrine, those courts that have applied the good-faith exception are correct in doing so.<sup>267</sup> Rather than operating as a barrier to analyzing the applicability of the exclusionary rule, the retroactivity doctrine forces courts to address this very question.<sup>268</sup> This result leads to the conclusion that, under the Supreme Court's current formulation of the exclusionary rule, the good-faith exception should be expanded to include an officer's reasonable reliance on firmly-established appellate court precedent.<sup>269</sup>

The historical connection between the Supreme Court's retroactivity doctrine and its good-faith exception helps illustrate the fact that it is not necessary to read the two lines of authority to conflicting ends. The retroactivity doctrine was developed during the same period in which the Supreme Court first articulated the good-faith exception. The Court announced the new Fourth Amendment retroactivity doctrine in *Johnson* only two years before it handed down its good-faith exception decision in *Leon*.<sup>270</sup> In *Leon*, the Court specifically addressed the contention that the good-faith

exception was in conflict with the Court's new retroactivity doctrine.<sup>271</sup> The Court succinctly declared that "nothing in *Johnson* precludes adoption of a good-faith exception tailored to situations in which the police have reasonably relied on a warrant issued by a detached and neutral magistrate but later found to be defective."<sup>272</sup> Similarly, the Court decided *Griffith* a mere two months before it adjudicated *Krull*.<sup>273</sup> Justice O'Connor, in her dissent in *Krull*, even invoked *Griffith*, arguing that its holding was at odds

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266. See Part III.A (arguing that the *Leon* framework supports extension of the good-faith exception to include reliance on judicial precedent).

267. See, e.g., *McCane*, 573 F.3d at 1042–45 (explaining that the rationale supporting the good-faith exception as described by the Supreme Court applies to police officer reliance on settled case law that is invalidated after the search or seizure in question occurs).

268. See *United States v. Peoples*, 668 F. Supp. 2d 1042, 1046, 1048–51 (W.D. Mich. 2009) (holding that retroactivity does not prevent consideration of the good-faith exception to police officer reliance on invalidated judicial precedent, and then analyzing whether the exclusionary rule is the appropriate remedy to apply when a violation of *Gant* is found).

269. See *McCane*, 573 F.3d at 1045 (holding that the good-faith exception to the exclusionary rule applies to law enforcement reliance on subsequently invalidated judicial precedent).

270. See *United States v. Leon*, 468 U.S. 897, 926 (1984) (adopting the good-faith exception to the exclusionary rule on July 5, 1984); *United States v. Johnson*, 457 U.S. 537, 537 (1982) (creating the modern Fourth Amendment retroactivity doctrine on June 21, 1982).

271. *Leon*, 468 U.S. at 912 n.9.

272. *Id.*

273. See *Illinois v. Krull*, 480 U.S. 340, 340 (1987) (expanding the good-faith exception on March 9, 1987 to include an officer's reasonable reliance on a state statute that is later declared unconstitutional); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (abrogating the "clear break" exception to the Supreme Court's retroactivity doctrine on January 13, 1987).

with the Court's decision in *Krull*.<sup>274</sup> The majority ignored this argument and further expanded the scope of the good-faith exception.<sup>275</sup> When read together, this history makes it clear that the retroactivity doctrine should not be considered a necessary impediment to the expansion of the good-faith doctrine.

The Ninth Circuit put forth an alternative argument in favor of using retroactivity to prevent an enlargement of the good-faith exception.<sup>276</sup> In *Gonzalez*, the court stated that if it were to allow the defendant's conviction to stand based upon evidence admitted under the good-faith exception, it would treat the defendant differently than a similarly situated defendant was treated in *Gant*, thus violating a norm of constitutional decision-making.<sup>277</sup> Although it is true that Justice Harlan was concerned about such a result in his dissent in *Desist v. United States*,<sup>278</sup> which the court cited with approval in *United States v. Johnson*,<sup>279</sup> the Ninth Circuit's framing of the issue is misleading.

Opponents of the Ninth Circuit's decision have argued that, in fact, the defendants in *Gant* and *Gonzalez* were not similarly situated,<sup>280</sup> and their conclusion is correct. In *Gant*, the government never raised the argument that the good-faith exception applied to preclude the suppression of evidence at trial.<sup>281</sup> Therefore, no court addressed the question of whether the exclusionary rule was appropriately applied by conducting the cost-benefit analysis required by *Leon* and its progeny.<sup>282</sup> However, before the Ninth Circuit, the government did invoke the good-faith exception, yet the court disregarded the contention by failing to conduct the necessary balancing test.<sup>283</sup> The Ninth Circuit hastily glossed over this key distinction to support its conclusion that the Supreme Court's retroactivity doctrine compelled suppression.<sup>284</sup>

Moreover, similarly situated defendants are regularly treated differently when circuit splits arise.<sup>285</sup> Such a result does not necessarily indicate that

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274. *Krull*, 480 U.S. at 368 (O'Connor, J., dissenting).

275. *Id.* at 352–53 (majority opinion).

276. *United States v. Gonzalez*, 578 F.3d 1130, 1133 (9th Cir. 2009).

277. *Id.* at 1132–33.

278. 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting).

279. 457 U.S. 537, 547–48 (1982) (quoting *Desist*, 394 U.S. at 258–59 (Harlan, J., dissenting)).

280. *Gonzalez II*, 598 F.3d 1095, 1107 (9th Cir. 2010) (Bea, J., dissenting), *denying reh'g*, 578 F.3d 1130 (9th Cir. 2009).

281. *Id.*

282. *See id.* 1107–08 (recounting the fact that *Gant* did not address questions of suppression and the deterrent effect it may have).

283. *See Gonzalez*, 578 F.3d at 1132 (noting that the good-faith argument was raised, but finding that the Supreme Court's retroactivity precedent controlled the decision of the case).

284. *Id.* at 1132–33.

285. *Compare United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (holding that the search incident to arrest doctrine did not apply to a recent occupant of a vehicle that was

the lower courts that have an expanded interpretation of the good-faith exception are violating the Supreme Court's retroactivity doctrine. Rather, it indicates that there is a misunderstanding as to whether the remedy affirmed by the Supreme Court in *Gant* must apply to cases pending on direct review.<sup>286</sup> As noted above, the Supreme Court's own rules prohibit such a reading of *Gant*.<sup>287</sup> Perhaps that is why the majority of courts facing the issue have disagreed with the *Gonzalez* court's analysis.<sup>288</sup>

Another argument in favor of finding that the retroactivity doctrine defeats an expansion of the good-faith exception was put forth by Justice O'Connor in her dissent in *Illinois v. Krull*.<sup>289</sup> Justice O'Connor contended that applying the good-faith exception to an officer's reasonable reliance on an apparently valid state statute that is subsequently overturned would remove "all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment rights" because they would not be afforded a remedy for the constitutional violation they suffered.<sup>290</sup> This argument essentially states that courts would be resigned to rendering advisory opinions if the good-faith exception were to apply, because although the courts find a constitutional violation, no remedy would be provided for the victims of such breaches.<sup>291</sup> Though powerful, this contention has not found substantial support in binding precedent.<sup>292</sup>

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thirty feet from the car at the time of the arrest), *with* *United States v. Thornton*, 325 F.3d 189, 194, 196 (4th Cir. 2003) (disagreeing with the Sixth Circuit's decision in *Strahan* and holding that officers may search a recent occupant's vehicle incident to arrest). The Supreme Court ultimately agreed with the Fourth Circuit's ruling. *See Thornton v. United States*, 541 U.S. 615, 623–24 (2004) (affirming the Fourth Circuit's judgment and holding that police officers may search a recent occupant's vehicle incident to arrest).

286. *See United States v. Peoples*, 668 F. Supp. 2d 1042, 1047 (W.D. Mich. 2009) (disagreeing with the Ninth Circuit Court of Appeals and finding that the Supreme Court's retroactivity doctrine does not apply to prevent analysis of whether the good-faith exception can be extended to include law enforcement reliance on settled judicial precedent that is subsequently invalidated (citing *Gonzalez*, 578 F.3d at 1133)).

287. *See Peoples*, 668 F. Supp. 2d at 1046 (explaining that Supreme Court Rule 14.1(a) limited the Court's ruling in *Gant* only to the question that was presented before the court regarding the contours of the Fourth Amendment, not the remedy the Court affirmed).

288. *Accord United States v. McCane*, 573 F.3d 1037, 1044–45 n.5 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010); *Peoples*, 668 F. Supp. 2d at 1047; *see, e.g., United States v. Davis*, 598 F.3d 1259, 1263–64 (11th Cir. 2010) (finding the Ninth Circuit's interpretation of the Supreme Court's retroactivity doctrine unavailing).

289. *Illinois v. Krull*, 480 U.S. 340, 368–69 (1987) (O'Connor, J., dissenting).

290. *Id.* at 369 (O'Connor, J., dissenting).

291. Reply Brief of Petitioner-Appellant at 12, *McCane v. United States*, 130 S. Ct. 1686 (2010) (No. 09-402).

292. *See United States v. Leon*, 468 U.S. 897, 924 n.25 (1984) (finding the argument that the good-faith exception would take away the incentive for defendants to litigate valid Fourth Amendment claims "unpersuasive"). When faced with a similar contention, the Eleventh Circuit responded rather bluntly, insisting that "the exclusionary rule is designed to deter misconduct, not to foster the development of Fourth Amendment law." *United States v. Davis*, 598 F.3d 1259, 1266 n.8 (11th Cir. 2010).

To begin, the Supreme Court appears to have little regard for this concern.<sup>293</sup> In the very case in which Justice O'Connor articulated her apprehension, the Court chose to apply the good-faith exception over her dissent.<sup>294</sup> Furthermore, the Court essentially ignored this argument when it revisited the good-faith exception in the later cases of *Evans* and, more recently, *Herring*.<sup>295</sup> In the context of *Gant* violations, the Supreme Court had the opportunity to explain that suppression would be an appropriate remedy for convictions pending on direct appeal based on evidence obtained in violation of the new *Gant* precedent, but it left the question unaddressed.<sup>296</sup> By applying the appropriate standard for exclusion and reaching the conclusion that the good-faith exception applies to a police officer's reasonable reliance on well-settled case law that is subsequently reversed, the Tenth and Eleventh Circuits acted in accordance with the rationale underlying the good-faith doctrine.<sup>297</sup>

Additionally, this argument incorrectly assumes that once an appellate court decides a case and a police officer relies upon it to obtain evidence, the good-faith exception will always preclude operation of the exclusionary rule at trial.<sup>298</sup> The Supreme Court has always required a police officer's reliance, whether it is on a search warrant or state statute, to be objectively reasonable.<sup>299</sup> In situations where the precedent has not been thoroughly vetted on appeal or the rule on which the police relied was ambiguous, the defense retains its ability to effectively argue that a police officer's reliance upon the decision was unreasonable.<sup>300</sup>

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293. *Leon*, 468 U.S. at 924 n. 25.

294. *Krull*, 480 U.S. at 349–50.

295. See *Herring v. United States*, 129 S. Ct. 695, 699, 704 (2009) (accepting the assumption that the search of the petitioner was a violation of the Fourth Amendment, but affording him no remedy because the good-faith exception precluded exclusion); *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995) (holding that although the search of the defendant violated the Fourth Amendment, the good-faith exception to the exclusionary rule prevented suppression of the evidence obtained from that search); *Leon*, 468 U.S. at 926 (holding that objectively reasonable reliance on a facially valid search warrant that is later deemed deficient operates to prevent application of the exclusionary rule).

296. See *United States v. McCane*, 573 F.3d 1037, 1045 n.5 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1686 (2010) (finding that the Supreme Court's retroactivity requirements only demand application of the rule specifically declared in *Gant*, not the remedy of the lower court that the Supreme Court affirmed).

297. See *id.* at 1042–45 (analyzing the rationale of the good-faith exception and applying it to hold that the good-faith exception to the exclusionary rule includes reasonable law enforcement reliance on case law that is later overturned).

298. Cf. *Gonzalez II*, 598 F.3d 1095, 1106–07 (9th Cir. 2010) (Bea, J., dissenting) (“[T]he existence of a relevant court case supporting an officer's search does not automatically prove he was acting in good faith where that case is later overruled. A police officer must still prove that his reliance was objectively reasonable.”) *denying reh'g*, 578 F.3d 1130 (9th Cir. 2009).

299. *Id.* at 1107.

300. See *id.* at 1106–07 (noting that the good-faith exception is not applied automatically).



Furthermore, this argument goes so far as to assume that even in novel cases, criminal defendants and their attorneys will have the foresight to predict with certainty the outcome of their particular case before the trial and appellate courts, therefore dissuading them from pursuing their constitutional claims. But, this cannot be the rational approach. Due process requires that for each novel issue a court hears, it must do so with the possibility of finding in favor of the defendant.<sup>301</sup> A criminal defendant brought to trial would be far more rational in pursuing a vindication of her Fourth Amendment rights before that body than failing to raise the issue, thus precluding any possibility of a beneficial outcome before that tribunal.<sup>302</sup> Should such a claim fail, the rational defendant would opt to pursue review of the losing claim before an appellate court rather than squander such an opportunity by resigning herself to defeat at the trial level. Because there is always a chance that the higher courts may side with the defendant on a novel claim, the incentive to litigate Fourth Amendment violations remains intact.<sup>303</sup> Therefore, the concerns about the good-faith exception destroying any possibility that a defendant will retain the benefit of the exclusionary rule in the context of an officer's reasonable reliance on case law are unwarranted.

Although critics of the expanded good-faith exception rely, primarily, on the Supreme Court's retroactivity doctrine, this approach ignores the importance of the Court's equally long-standing good-faith doctrine.<sup>304</sup> So long as the exclusionary rule is understood to operate only as a last resort to deter future violations of the Fourth Amendment,<sup>305</sup> admitting evidence obtained in good-faith reliance on settled case law that is subsequently invalidated is justified. If courts were to suppress such evidence, they would do so to the detriment of both society and the criminal justice system.<sup>306</sup> Those who argue that admitting the evidence would violate

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301. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

302. Cf. *Illinois v. Krull*, 480 U.S. 340, 354 (1987) (explaining that "'the magnitude of the benefit conferred on defendants by a successful [suppression] motion makes it unlikely that litigation of colorable claims will be substantially diminished'" (quoting *United States v. Leon*, 468 U.S. 897, 924 n.25 (1984))).

303. See *supra* note 295 (noting that due process requires a fair tribunal).

304. See *People v. Branner*, 103 Cal. Rptr. 3d 256, 267 (Ct. App. 2009) (noting that the Supreme Court's precedent regarding the good-faith exception is as important as the Supreme Court's retroactivity doctrine), *review granted*, 227 P.3d 342 (2010).

305. *Herring*, 129 S. Ct. at 700.

306. Cf. *United States v. Leon*, 468 U.S. 897, 907 (1984) (explaining that the costs associated with a dogmatic application of the exclusionary rule, such as impeding the truth-finding functions of the courts and letting some guilty defendants go free, "have long been a source of concern" for the Court). The Court also noted that when a police officer acts in good faith but commits a minor infraction, an inflexible approach to the exclusionary rule would confer a higher magnitude of benefits to an otherwise guilty defendant. *Id.* at 908.

basic norms of constitutional adjudication overlook the fact that suppressing the evidence would offend basic concepts of justice underlying the entire judicial system's operation.<sup>307</sup>

#### CONCLUSION

The costs society is forced to bear when inherently trustworthy physical evidence is excluded from trial are substantial.<sup>308</sup> That is why application of the exclusionary rule is only appropriate when the benefits it provides in terms of deterring future constitutional violations outweigh its accompanying costs.<sup>309</sup> When a court lets an otherwise guilty defendant go free, it jeopardizes the integrity of the entire judicial system.<sup>310</sup> Because these institutions possess only as much power as society is willing to attribute them, anything that casts doubt on the courts' decision-making processes cannot be healthy for the rule of law.<sup>311</sup> That is why courts should work to reduce public perceptions of judicial impropriety at every turn. The good-faith exception to the exclusionary rule is a rational response to this dilemma.

The framework set forth in *Leon* clearly supports the expansion of the good-faith exception to include a police officer's objectively reasonable reliance on a well-settled and unambiguous decision of an appellate court that is later reversed.<sup>312</sup> As the Supreme Court declared, the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."<sup>313</sup> Yet, if courts were to adopt the exclusionary rule in this context, they would be attempting to do just that. When police officers conform their conduct to the law as announced by the courts within their jurisdiction, they are doing precisely what society expects of them, thus making their actions reasonable.<sup>314</sup> An expanded

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307. *Id.*

308. *See* Herring v. United States, 129 S. Ct. 695, 700–01 (2009) (providing examples of the costs associated with the exclusion of incriminating evidence at trial (citing Illinois v. Krull, 480 U.S. 340, 352–53 (1987))).

309. *Id.* at 700.

310. *Id.* at 701 (citing *Leon*, 480 U.S. at 908).

311. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

312. *Cf.* Arizona v. Evans, 514 U.S. 1, 10–16 (1995) (reviewing the rationale supporting the good-faith exception in *Leon* and applying it to find that the exception encompasses a law enforcement officer's reasonable reliance on the negligent mistake of judicial employees); Illinois v. Krull, 480 U.S. 340, 347–53 (1987) (appropriating the reasoning of *Leon* to hold that a law enforcement officer's reasonable reliance on a subsequently invalidated state statute precluded the application of the exclusionary rule).

313. United States v. Leon, 468 U.S. 897, 919 (1984).

314. *See* United States v. Owens, No. 5:09-cr-14/RS, 2009 WL 2584570, at \*3 ("Relying upon settled case law is objectively reasonable law enforcement behavior.").

good-faith exception recognizes this incongruity, and prevents the operation of the exclusionary rule when it would only work to harm society.

Some courts, however, have rejected an expansion of the good-faith exception out of fear that it would conflict with the Supreme Court's Fourth Amendment retroactivity doctrine.<sup>315</sup> These courts read an importance into the retroactivity doctrine that ignores the fundamental interests served by the current formulation of the good-faith exception.<sup>316</sup> Furthermore, they misunderstand how the retroactivity doctrine operates.<sup>317</sup> Ever since the Supreme Court adopted the good-faith exception, it has carefully explained that questions of law must be separated from questions of remedy.<sup>318</sup> The courts that mechanically apply remedies not specifically addressed in the Supreme Court's rulings do so in error.<sup>319</sup> Therefore, courts should continue to adopt the good-faith exception to the exclusionary rule in situations where a police officer reasonably relies on the settled case law of the jurisdiction in which the officer acts.

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315. *See supra* Part II.B.

316. *See supra* note 304 and accompanying text.

317. *See supra* note 171 and accompanying text.

318. *See supra* note 258 and accompanying text.

319. *See United States v. Peoples*, 668 F. Supp. 2d 1042, 1046 (W.D. Mich. 2009) (explaining that the Supreme Court's rules require only the retroactive application of the constitutional rule announced in *Gant* not the remedy that the Court affirmed).