

# American University Criminal Law Brief

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Volume 6 | Issue 1

Article 4

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2010

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### Recommended Citation

Kauf, Karly A. "Gant and the Good-Faith Exception." American University Criminal Law Brief 6, no. 1 (2010): 23-36.

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# *Gant* and the Good-Faith Exception

BY KARLY A. KAUF

## I. INTRODUCTION

The Fourth Amendment of the United States Constitution states:

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.<sup>1</sup>

To enforce this guarantee the Supreme Court enacted a rule, known as the exclusionary rule, that evidence obtained from searches in violation of the Fourth Amendment would be suppressed at trial.<sup>2</sup> Nearly one-hundred years later, the rule has become riddled with exceptions and qualifications, allowing for the admission of evidence despite constitutional violations in the manner in which it was obtained.<sup>3</sup> Specifically, the good-faith exception permits admission when a police officer reasonably relied on some qualified basis in taking action, such as the approval of a neutral magistrate.<sup>4</sup>

The Supreme Court's decision in *Arizona v. Gant* changed the scope of the interpretation of its prior ruling in *New York v. Belton*.<sup>5</sup> In *Belton*, the Court explained that after a police officer has lawfully arrested the occupant of an automobile, a search of the passenger compartment contemporaneous to arrest is valid for the purpose of ensuring the officers' safety and the preservation of evidence.<sup>6</sup> Subsequent to this holding, police departments enacted procedures instructing officers to search the passenger compartment every time an occupant was arrested.<sup>7</sup> The Court in *Gant* reasoned that the *Belton* rule's

dual aims of ensuring officer safety and preserving evidence were ill served by such an interpretation.<sup>8</sup> In modifying this rule, the *Gant* Court held that a search violates the Fourth Amendment if a defendant is already in police custody when the warrantless search of an automobile occurs.

Following this decision, federal circuit courts disagreed over *Belton*'s application to defendants searched in the manner proscribed by *Gant*.<sup>9</sup> Some courts suppressed evidence of the search pursuant to exclusionary and retroactivity principles.<sup>10</sup> Others admitted the evidence by applying the good-faith exception to searches conducted based on a police officer's reliance on judicial precedent.<sup>11</sup> This Article argues that should the Supreme Court have the occasion to reconcile these interpretations, it should follow the direction of the former circuits by holding the good-faith exception to the exclusionary rule is inapplicable where police officers rely solely on judicial precedent, thus excluding evidence obtained during that search.

Part II of this Article outlines the foundation of the exclusionary rule and the good-faith exception.<sup>12</sup> A detailed discussion of Supreme Court and Circuit Court precedent is included to demonstrate the contradiction in the Circuits' applications of these principles.<sup>13</sup> Part III conducts an analysis of Circuit Court cases to identify the interpretation that best adheres to

constitutional safeguards. Adoption of the Ninth Circuit and D.C. Court of Appeals' interpretations is preferable because it provides support for exclusion of evidence while adhering to constitutional and other considerations in certain circumstances.<sup>14</sup> In conclusion, this Article advocates for the Supreme Court to ensure the equal treatment of similarly situated defendants throughout the country by declaring the good-faith exception to the exclusionary rule inapplicable.



### A. EXCLUSIONARY RULE

The exclusionary rule is a “judicially created remedy designed to safeguard Fourth Amendment rights generally,” and not meant to serve as a remedy for an individual defendant.<sup>15</sup> This rule requires evidence obtained in violation of the Constitution to be suppressed from admission in subsequent judicial proceedings.<sup>16</sup> Initially, the rule sent the strong message that failure to comply with search and seizure requirements would have consequences.<sup>17</sup> However, over the past century the Supreme Court has carved out numerous exceptions and qualifications to the exclusionary rule, which have slowly whittled away its scope to the point that elimination of the rule altogether is a genuine possibility.<sup>18</sup>

In determining whether to suppress evidence, the Court developed a balancing test, which weighs the costs and benefits of exclusion.<sup>19</sup> The Court explained that such costs include exclusion of “inherently trustworthy” evidence, in addition to their concern that “[i]ndiscriminate application of the exclusionary rule . . . [will] ‘generat[e] disrespect for the law and administration of justice’.”<sup>20</sup> Originally, the two benefits of exclusion were articulated as protecting the integrity of the court system and deterring future unconstitutional conduct. In current progeny, the deterrence rationale has more or less enveloped the integrity reasoning.<sup>21</sup> In finding the deterrent effect, “the Court will consider both specific deterrence of individual law enforcement officers involved in Fourth Amendment violations and systemic deterrence of the law enforcement profession generally.”<sup>22</sup> The suppression of evidence is a drastic action, and is only applicable to provide substantial deterrence for future constitutional violations, thus justifying this significant cost to society.<sup>23</sup>

Though the list of articulated exceptions and qualifications is lengthy, a defendant’s case must always meet three criteria: 1) there must be a sufficient nexus between the violation and the evidence sought to be admitted; 2) the defendant must be a person permitted to challenge the illegality of the search; and 3) the constitutional violation must be serious enough to warrant suppression.

First, exclusion requires a significant connection between the constitutional violation and the evidence sought to be presented. Pursuant to the fruit of the poisonous tree doctrine, suppression is required unless “granting establishment of the primary illegality, the evidence to which instant objection is made has been come . . . by means sufficiently distinguishable to be purged of the primary taint.”<sup>24</sup> Additionally, evidence otherwise discoverable is not subject to the exclusionary rule unless the violation is asserted by an independent source.<sup>25</sup>

Next, the standing requirement provides that in order to challenge evidence admission due to an improper search, a de-

fendant must demonstrate a violation of his or her legitimate expectation of privacy.<sup>26</sup> Additionally, one must demonstrate that his or her case was properly decided pursuant to a particular precedent; specifically, binding decisions of a higher court rendered while a defendant’s matter is under direct review are entitled to the benefit of the exclusionary rule.<sup>27</sup>

Finally, the Court must determine if the violation is of the type that warrants suppression. The Court has determined that certain “minor” defects or mistakes do not invoke the exclusionary rule. In reaching that determination, the reviewing court must consider whether the good-faith exception would apply and allow the evidence to be admitted despite the existence of a constitutional violation.<sup>28</sup> Thus, as long as no “serious” violation of the Fourth Amendment is present, the exclusionary rule will not apply and the evidence will be admitted.<sup>29</sup>

### B. THE GOOD-FAITH EXCEPTION

Pursuant to the good-faith exception elicited in *United States v. Leon*, all evidence seized during the execution of a search warrant is admissible even if the warrant is subsequently determined to be invalid, as long as the officer’s reliance on that warrant was in good faith.<sup>30</sup> “Good faith” is determined using an objective standard, *i.e.*, whether the police officer should have known the search was unreasonable.<sup>31</sup> The Court’s analysis in each case has relied upon this “illusion of technical precision and ineluctability” in order to rationalize further expansion of the good-faith exception.<sup>32</sup>

It is important to note that the seminal holding underlying the good-faith exception in *Leon* included a scathing dissent from Justice Brennan, in which he argued that the Court exaggerated the costs of exclusion while underestimating its benefits.<sup>33</sup> Justice Brennan explained:

[I]t is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the “costs” of excluding illegally obtained evidence loom to exaggerated heights and where the “benefits” of such exclusion are made to disappear with a mere wave of the hand.<sup>34</sup>

Notwithstanding the dissent, the Court has expanded the exception’s scope to include reliance on other administrative errors. For example, no suppression is allowed when the warrant executed was based on erroneous information from the court clerk.<sup>35</sup> Similarly, evidence is admissible when executing a warrant from another jurisdiction where the information is later found to be incorrect because of that jurisdiction’s error.<sup>36</sup> Evidence is also admissible when the search was based in an existing statute later found to be unconstitutional.<sup>37</sup> These applications of the exception are based on the notion that the officer’s reliance on such information was objectively reasonable, and no deterrent effect would be advanced by excluding the evidence.<sup>38</sup>

## C. PRECEDENT

### 1. Supreme Court of the United States

#### a. *Arizona v. Gant*

In 1999, Tucson police officers arrested Rodney Gant outside of his home after they discovered that he had an outstanding arrest warrant for driving with a suspended license, and then witnessed him driving.<sup>39</sup> After arresting Gant, the officer handcuffed him and placed him in the locked backseat of a patrol car.<sup>40</sup> Two officers then searched Gant's car, finding both a gun and a bag of cocaine.<sup>41</sup> Gant was charged with possession of a narcotic drug for sale and possession of drug paraphernalia.<sup>42</sup> During his court proceedings, Gant moved to suppress the evidence discovered in his vehicle because the warrantless search violated his Fourth Amendment rights.<sup>43</sup> Gant argued that because he was secured in the backseat of the patrol car, he posed no threat to the officers' safety.<sup>44</sup>

Further, he argued that no evidence of the traffic violation could be discovered in the vehicle.<sup>45</sup> When asked at the suppression hearing why the search was conducted, the arresting officer simply stated, "Because the law says we can do it."<sup>46</sup>

Although the trial court rejected the State's argument of probable cause to search Gant's vehicle, which would have triggered the automobile exception, it nevertheless denied Gant's motion to suppress the evidence because the search was incident to his arrest.<sup>47</sup> The State's highest court reversed this decision by holding that, although precedent allowed the contemporaneous search of an automobile following the lawful arrest of its occupant, it did not answer "the threshold question whether the police may conduct this search once the scene is secure."<sup>48</sup>

In granting *certiorari*, the Supreme Court adopted the State's reasoning based on *Chimel v. California*, which justifies a search and grants exception to the warrant requirement when protection of officer safety and preservation of evidence is at stake.<sup>49</sup> The Court explained that once the scene is secure, *Chimel*'s dual aims are no longer present, and thus a warrantless search is not allowable.<sup>50</sup> As such, the Supreme Court affirmed the holding of the Arizona Supreme Court and excluded the evidence obtained.<sup>51</sup> Specifically, the Court held:

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*Evidence is admissible  
when executing a warrant  
from another jurisdiction  
where the information  
is later found to be  
incorrect because of that  
jurisdiction's error.*

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Police 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. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.<sup>52</sup>

In so holding, the Court reasserted the rationale underlying *Belton*, explaining that police departments' interpretations of that holding have been incorrect since its inception.<sup>53</sup> Thus, the Court explained, procedures allowing the unfettered search of a vehicle's passenger compartment incident to a lawful arrest, with no regard to the *Chimel* justifications, are unconstitutional.<sup>54</sup>

The Court invoked Justice Brennan's dissent in *Belton*, where he "characterized the Court's holding as resting on the 'fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car.'"<sup>55</sup> The Court explained that erroneous obedience to unconstitutional police procedures over an extended period of time does not invoke *stare decisis* nor entitle perpetuation of the unconstitutional action in order to ease the duties of police.<sup>56</sup> The result of the Court's holding was to disallow the use of a common and widely accepted police procedure, and police officers around the country had to follow new procedural rule that comported with the holding.<sup>57</sup> Specifically, an officer could

only conduct a search incident to arrest when the search protects the officer's safety or preserves evidence.<sup>58</sup>

Before *Gant* was decided, the Court encountered cases applying the good-faith exception to the exclusionary rule in a variety of situations. Discussion of those decisions is helpful in understanding the underpinnings of the instant question and allows for a more complete analysis of the constitutional issue.

#### b. *Herring v. United States*

In 2004, Bennie Herring drove to the Coffee County Sheriff's Department to get something out of his impounded truck.<sup>59</sup> A sheriff's investigator, who had had numerous encounters with Herring in the past, asked the warrant clerk to check the computer database to determine if Herring had any outstanding



warrants for arrest in Coffee County.<sup>60</sup> When none were found, the investigator asked the clerk to contact her counterpart in another county to inquire about outstanding warrants for arrest in that jurisdiction.<sup>61</sup> The clerk discovered an active arrest warrant for failing to appear on a felony charge, and the investigator followed Herring out of the impound lot, pulled him over, and arrested him.<sup>62</sup> The investigator performed a search of Herring's vehicle and discovered both drugs and an illegal firearm.<sup>63</sup> However, unbeknownst to the investigator, the warrant had been recalled five months earlier and the computer database had not been updated.<sup>64</sup> While the warrant clerk tried to alert the investigator of the error within ten to fifteen minutes of the discovery, Herring had already been arrested and found to be in possession of the drugs and gun.<sup>65</sup>

Herring was indicted for the illegal possession of drugs and a firearm in violation of federal law.<sup>66</sup> Herring moved to suppress the evidence found in his car because the initial arrest warrant had been rescinded.<sup>67</sup> The district court adopted the recommendation of the magistrate, who reasoned that the arresting officer's good-faith reliance that the warrant was valid allowed the evidence to be admitted.<sup>68</sup> The Magistrate explained, "[E]ven if there were a Fourth Amendment violation, there was 'no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes.'"<sup>69</sup> The Court of Appeals for the Eleventh Circuit affirmed the district court's holding.

In reviewing the Eleventh Circuit's decision, the Supreme Court granted *certiorari* to decide whether the good-faith exception allows the admission of evidence obtained through police error.<sup>70</sup> The Court analogized the facts to those of *Leon*, *Krull*, and *Evans* and determined that the good-faith exception applied, reasoning that application of the exclusionary rule is not an individual right and should be utilized only when it provides a substantial deterrent effect.<sup>71</sup> Previous precedent seemed to apply the good-faith exception only in situations where the police themselves did not cause the unconstitutional search.<sup>72</sup> However, without reference to the fault of the police department in causing the violation, the Court explained that the deterrent effect must be weighed against the cost of exclusion.<sup>73</sup> In order for the exclusionary rule to apply, "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>74</sup> Because the police officer relied on a warrant he presumed to be valid, there was no need to deter future conduct, even though the arrest was based on the police department's own erroneous information.<sup>75</sup> Pursuant to this reasoning, the Court held that the evidence was admissible under the good-faith exception to the exclusionary rule.<sup>76</sup>

### c. *Danforth v. Minnesota*

In 1996, Stephen Danforth was found guilty of first-degree criminal sexual conduct with a minor.<sup>77</sup> During his trial, the judge ruled that the six-year-old victim was incompetent to be a witness at trial.<sup>78</sup> Notwithstanding that finding, the jury was allowed to view a videotaped interview of the victim, as the testimony bore "sufficient indicia of reliability" to allow for its admittance without violating the Confrontation Clause.<sup>79</sup> Among other factors, the victim's testimony "appeared spontaneous and largely unsolicited by leading questions" and the victim seemingly "lacked any apparent motivation to fabricate the accusation."<sup>80</sup>

Danforth appealed his conviction based largely on his assertion that admission of the videotape violated his Sixth Amendment rights.<sup>81</sup> However, pursuant to applicable precedent, the Minnesota Court of Appeals affirmed the conviction because the videotape was "sufficiently reliable to be admitted into evidence."<sup>82</sup> Danforth's conviction became final after the Minnesota Supreme Court denied review, and Danforth's time for filing a writ of *certiorari* lapsed in 1998.<sup>83</sup>

Nearly six years later, in *Crawford v. Washington*, the Supreme Court of the United States held, "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."<sup>84</sup> *Crawford* established a rule contrary to that of *Danforth*, and thus overturned the applied precedent.<sup>85</sup> As a result, Danforth moved for post-conviction relief, arguing that he was entitled to a new trial because the admission of the videotape violated the new rule.<sup>86</sup> The Minnesota Supreme Court denied relief, explaining that federal retroactivity precedent did not permit review of Danforth's case.<sup>87</sup>

The Supreme Court of the United States granted Danforth's petition for *certiorari* to determine the constitutional question.<sup>88</sup> In reversing the Minnesota Supreme Court's decision, the Court held that although federal precedent did not allow for retroactive application of *Crawford*, such a decision does not forbid Minnesota from applying it retroactively to state cases.<sup>89</sup> The Court explained:

Retroactivity suggests that when we declare that a new constitutional rule of criminal procedure is "nonretroactive," we are implying that the right at issue was not in existence prior to the date the "new rule" was announced. But this is incorrect. As we have already explained, the source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule.<sup>90</sup>

Thus, the Court elucidated the principle that the retroactivity doctrine does not apply to the constitutional decision itself. In-

stead, the question is whether a violation of that already-existing right prior to the change in the law entitles a person to relief.<sup>91</sup>

#### **d. Illinois v. Krull**

Albert Krull and his business partners [hereinafter Krull] operated an automobile wrecking yard in Chicago in 1981.<sup>92</sup> At that time, an Illinois statute required licensed sellers of motor vehicles and their parts to allow state officials to inspect certain records.<sup>93</sup> Pursuant to this statute, a Chicago Police Department detective entered Krull's wrecking yard and asked to inspect the record books.<sup>94</sup> The detective also received permission to inspect the cars in the yard; upon doing so, he discovered that at least three of the cars had been stolen.<sup>95</sup> Krull was charged with various criminal violations relating to the incident.<sup>96</sup>

One day after the search of Krull's wrecking yard, the Federal District Court for the Northern District of Illinois held that a warrantless administrative search of licensees was unconstitutional.<sup>97</sup> Relying on that ruling, the state trial court granted Krull's motion to suppress the evidence discovered at the wrecking yard.<sup>98</sup> The Appellate Court of Illinois vacated the trial court's finding and remanded for consideration in light of applicable law indicating that a "good-faith reliance on the state statute might be relevant in assessing the admissibility of evidence."<sup>99</sup> Nevertheless, the trial court maintained its decision on remand, explaining that the statute in effect at the time was unconstitutional and thus the evidence could not be admitted.<sup>100</sup> The Supreme Court of Illinois affirmed the decision of the trial court, rejecting the State's argument that the evidence should be admitted based on the officer's good-faith reliance on the statute.<sup>101</sup>

The Supreme Court of the United States reversed the decision, holding that the good-faith exception to the exclusionary rule was applicable.<sup>102</sup> They explained that *Leon's* holding meant the good-faith exception applied and the evidence was admissible if it was objectively reasonable for the officer to believe that the statute comported with the Fourth Amendment.<sup>103</sup> Conversely, as in *Leon*, if the statute was objectively unreasonable, then any evidence obtained through such a search must be excluded.<sup>104</sup>

In reaching their decision, the Court expounded three reasons why the exclusionary rule should not apply.<sup>105</sup> First, application of the exclusionary rule would not deter police from violating the Constitution where a statute explicitly authorizes their behavior.<sup>106</sup> The Supreme Court stated, "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law."<sup>107</sup> Next, application of the exclusionary rule was not necessary to deter legislatures from violating the Constitution, as there was no evidence to support the belief that legislatures are prone to such behavior. In addition, utilization of the exclusionary rule would have little, if any, effect on the legislature, as the punishment

for enacting such a statute would be the courts striking it down, not applying it to a particular case.<sup>108</sup> Last, the Court explained that application of the good-faith exception would not insulate statutes from judicial review because not only could defendants still challenge searches by arguing that the statute was clearly unconstitutional, they could also bring declaratory-judgment actions to enjoin the enforcement of the law.<sup>109</sup> Based on this reasoning, the Court applied the good-faith exception to situations in which "officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment."<sup>110</sup>

## **2. Courts of Appeals**

### **a. Denying Application of the Good-Faith Exception to Changing Judicial Precedent**

#### *i. Seventh Circuit Court of Appeals*

In 1998, Charles Acker's home was the subject of an investigation into suspected marijuana cultivation and sales.<sup>111</sup> During the course of the investigation, the Wisconsin Division of Narcotics Enforcement performed a thermal imaging scan of Acker's house without first obtaining a search warrant.<sup>112</sup> Utilizing the scans, along with other evidence, law enforcement obtained a warrant to search the property, during which they discovered and seized a large amount of plants, cultivated marijuana, and growing supplies.<sup>113</sup>

In late 1998, the government filed a civil forfeiture action pursuant to a federal statute.<sup>114</sup> In that action, Acker filed a motion to suppress the evidence obtained from his home, arguing that the thermal image scans were a violation of his Fourth Amendment rights.<sup>115</sup> The district court denied Acker's motion, and the Court of Appeals for the Seventh Circuit affirmed the denial.<sup>116</sup> However, in 2001, the Supreme Court of the United States granted Acker's petition for *certiorari* and vacated the decision of the Seventh Circuit. The Court remanded the decision for further consideration in light of *Kyllo v. United States*, in which the Supreme Court held that warrantless "thermal-imaging observations of the intimate details of a home are impermissible."<sup>117</sup> The Seventh Circuit nevertheless upheld the search, reasoning that the good-faith exception to the exclusionary rule was applicable in a situation where an agent reasonably relied upon a validly issued search warrant, even if the reasons for that validity were later found to be unconstitutional.<sup>118</sup> In doing so, the Seventh Circuit Court explained that the officer's reliance on the warrant was distinguishable from an officer's reliance on court precedent itself.<sup>119</sup> The Seventh Circuit stated:

We decline to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon

subsequently overruled case law—as distinguished from the subsequently invalidated statute at issue in *Krull*—absent magistrate approval by way of a search warrant. Such expansion of the good-faith exception would have undesirable, unintended consequences, principal among them being an implicit invitation to officers in the field to engage in the tasks—better left to the judiciary and members of the bar more generally—of legal research and analysis.<sup>120</sup>

Thus, in making its decision, the Seventh Circuit Court was careful to explain that searches conducted in reliance on judicial precedent, with nothing more, are not bound by *Krull* and instead should be excluded from application of the good-faith exception.<sup>121</sup>

#### ii. Ninth Circuit Court of Appeals

Ricardo Gonzalez was convicted of possession of a firearm in violation of a federal statute after the car he was riding in was pulled over for a routine traffic stop.<sup>122</sup> The driver of the vehicle had outstanding warrants, leading the police to search the passenger compartment of the vehicle incident to his arrest, during which they discovered a loaded Beretta in the glove box.<sup>123</sup> Gonzalez moved for suppression of the evidence, asserting that the search violated his Fourth Amendment rights; however, the motion was denied based on the Ninth Circuit's interpretation of the established precedent of *Belton*.<sup>124</sup>

Following the Supreme Court's decision in *Gant*, Gonzalez sought to have the search invalidated using the newly elucidated rule.<sup>125</sup> The government conceded that under the current interpretation, “[t]he search of Gonzalez’s vehicle was improper because Gonzalez was handcuffed and secured in a patrol vehicle at the time of the search of the vehicle.”<sup>126</sup> Still, the government argued that the search was conducted in good-faith reliance on *Belton*, and thus the exclusionary rule should not apply.<sup>127</sup>

The Ninth Circuit Court of Appeals disagreed with the government’s contention and suppressed the search.<sup>128</sup> It explained that the government’s reliance on *Herring* was erroneous because it did not apply to the instant case, but instead to cases in which the officers relied on a warrant later deemed invalid or where a statute or regulation was found to be unconstitutional during direct review of the defendant’s conviction.<sup>129</sup>

The Ninth Circuit Court explained that the “retroactivity” line of precedent should control Gonzalez’s motion.<sup>130</sup> It reasoned that *United States v. Johnson* required application of the exclusionary rule in this case, as failure to do so would “violate the integrity of judicial review” by turning the judiciary into a legislative body that announces new rules rather than interprets the Constitution.<sup>131</sup> Additionally, such a decision would “‘violate the principle of treating similarly situated defendants the same’ by allowing only one defendant to be the beneficiary of a newly announced rule.”<sup>132</sup>

#### iii. District of Columbia Court of Appeals

Police initiated a traffic stop of Lorenzo Ali Debruhl in early 2009 after he was observed driving without his headlights on at night.<sup>133</sup> After running a check of his license plate and discovering that his car was unregistered, police asked Debruhl to exit the car, handcuffed him, placed him under arrest, and had him stand behind his vehicle with an officer.<sup>134</sup> Upon doing so, another officer searched the passenger compartment of the car and discovered a brown paper bag containing controlled substances and contraband.<sup>135</sup>

Debruhl was indicted for possession with intent to distribute and possession of drug paraphernalia.<sup>136</sup> Debruhl filed a motion to suppress the drugs and paraphernalia pursuant to the recent *Gant* decision.<sup>137</sup> The trial court noted that the search was incident to Debruhl’s lawful arrest, making the only issue for consideration whether the recent *Gant* decision required suppression of this evidence in light of the fact that the search took place prior to that decision.<sup>138</sup> After discussion of *Gant* and relevant case law, the trial court ruled that the good-faith exception did not apply and suppressed the evidence found in Debruhl’s car.<sup>139</sup>

The District of Columbia Court of Appeals upheld the suppression of the evidence.<sup>140</sup> First, the Court explained that no dispute existed as to whether *Gant* applies retroactively;

the search of Debruhl’s car and subsequent seizure of evidence were unconstitutional.<sup>141</sup> Instead, the legal question regarded the retroactive applicability of the exclusionary rule pursuant to a Fourth Amendment violation.<sup>142</sup> At trial, Debruhl argued that the exclusionary rule is inherent in the Fourth Amendment and therefore must accompany retroactive application here. In opposition to this motion, the government argued that the exclusionary rule is no longer considered to be an “essential part”

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*such a decision would  
“violate the principle  
of treating similarly  
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same’ by allowing only  
one defendant to be the  
beneficiary of a newly  
announced rule.”*

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of the Fourth Amendment, and “thus retroactive applicability of the Fourth Amendment does not necessarily imply retroactive application of the exclusionary rule, without exception; these issues are separate.”<sup>143</sup> The Court agreed with the government that the exclusionary rule is not necessarily tied to the retroactivity of a Fourth Amendment ruling, but explained:

*Gant* presents a closer question, as language from both the Court’s opinion and the principal dissent suggest that both sides assumed suppression would follow from retroactive application of the Court’s decision. That said, none of the opinions in *Gant* expressly acknowledged, let alone addressed, that assumption. We are therefore left to deal with the issue anew in connection with the good-faith exception.<sup>144</sup>

Second, the Court of Appeals discussed the good-faith exception with reference to a “mistake-of-law” situation.<sup>145</sup> The Court reasoned that although the Supreme Court’s holding in *Herring* rejected the notion that the exclusionary rule is an inherent Fourth Amendment right, that explanation was premised in the context of an officer’s “reliance on a warrant, a statute, or other official record germane to an anticipated search.”<sup>146</sup> The narrow issue presented, the Court explained, was whether “a police officer’s reliance on appellate opinions supply the check on police behavior—and thus serve as the basis for objective good faith—that statutes, warrants, and other official records provide in advance of a search.”<sup>147</sup> In its analysis, the Court of Appeals clarified that the only situation being considered was when the Supreme Court modified a “settled rule of law on which the officer relied” prior to its ruling.<sup>148</sup> The Court explained that the good-faith exception is unavailable in a “mistake-of-law” situation in which an officer’s illegal actions can be excused by a good-faith, yet erroneous, understanding of the law, and the situation in this case should not be conflated with that scenario.<sup>149</sup>

Third, the Court of Appeals discussed the applicability of the good-faith exception to “settled law.”<sup>150</sup> The Court explained that if *Belton* and its progeny reflected “settled law,” then the good-faith exception likely applied.<sup>151</sup> However, if the officers relied on a precedent that did not reflect “settled law,” the good-faith exception could not be applied.<sup>152</sup> As the Court reasoned:

[T]here is a crucial predicate that must be satisfied before the warrantless search of an automobile under *Belton* law can be a candidate for the good-faith exception. The tribunal’s interpretation of the Supreme Court’s rule on which the officer relies must be “settled” *as applied to all the material facts the officer faces*. Short of satisfying that strict requirement—i.e., a requirement of explicit protection or “cover” from the court on which the officer relies—we cannot say that the officer’s search would be objectively reasonable enough

for the good-faith exception to apply. Otherwise, that officer, conducting a search later held unlawful by the Supreme Court, would be in no better position than that of the officer in a typical mistake-of-law situation that arguably makes a reasonable, but ultimately incorrect, guess at the lawfulness of the search.<sup>153</sup>

The Court explained that although there are settled principles within the good-faith progeny, such as reliance on a defective warrant, a state statute, or an erroneous police record, judicial precedent does not categorically qualify for the good-faith exception.<sup>154</sup> Specifically, the Court held that *Belton* and its progeny does not reflect settled law with reference to the facts of the instant case, and thus application of the good-faith exception was unavailable.<sup>155</sup>

## **b. Applying the Good-Faith Exception to Changing Judicial Precedent**

### *i. Fifth Circuit Court of Appeals*

Charles Jackson and Anthony Browning [hereinafter Jackson] were convicted of possession of controlled substances with intent to distribute after their car was searched at a checkpoint near the Mexican border.<sup>156</sup> Jackson sought to suppress the evidence discovered in the vehicle based on, among other reasons, his assertion that the exclusionary rule should be applied to searches now deemed illegal by a change in circuit precedent.<sup>157</sup>

In rejecting Jackson’s argument and upholding the search, the Fifth Circuit Court explained that excluding such evidence would not meet the goal of deterring unconstitutional conduct and thus was untenable.<sup>158</sup> Analogizing to *Leon*, the Court explained that just as “there was no sound reason for extending the exclusionary rule to deter misconduct on the part of judicial officers responsible for issuing warrants,” no such reason existed here, as there was no implication that the Court was “inclined to ignore or subvert the Fourth Amendment.”<sup>159</sup> It noted that the reasoning in *Leon* was applicable to this case because officers’ reliance on precedent was reasonable, as the Court had upheld searches at the same checkpoint numerous times before they were deemed unconstitutional.<sup>160</sup> Using that reasoning, the Fifth Circuit Court held the evidence obtained from the search to be admissible.<sup>161</sup>

### *ii. Tenth Circuit Court of Appeals*

Markice McCane was stopped for a suspected traffic offense in 2007.<sup>162</sup> Upon realizing that McCane’s license was suspended, the officer arrested McCane, handcuffed him, and placed him in the backseat of his patrol car.<sup>163</sup> The officer then searched the passenger compartment of McCane’s car and found a firearm in the pocket of the driver’s side door.<sup>164</sup> McCane was charged with possessing a firearm in violation of federal statute.<sup>165</sup> McCane filed a motion with the District Court to exclude the firearm from submission as evidence, which the



Court denied based on its conclusion that the search was performed incident to a lawful arrest.<sup>166</sup> McCane appealed his conviction after the jury returned a guilty verdict.<sup>167</sup>

While McCane's case was pending before the Tenth Circuit Court of Appeals, the Supreme Court issued its ruling in *Gant*. In light of that decision, McCane argued that his case should be governed by the newly applicable standard, and thus the evidence should be excluded.<sup>168</sup> In opposition, the government asserted that the good-faith exception to the exclusionary rule should be applied to the officer's reliance on past precedent and thus the evidence should be allowed.<sup>169</sup>

The Court of Appeals agreed with the government's argument, determining that the Supreme Court's reasoning in *Krull* and *Herring* was relevant here because in each situation, a police officer reasonably relied on information he believed to be correct.<sup>170</sup> The Court explained, "The Supreme Court's line of good-faith cases clearly indicates that the reach of the exclusionary rule does not extend beyond police conduct to punish the mistakes of others, be they judicial officers or employees, or even legislators."<sup>171</sup> Thus, the Tenth Circuit Court determined that no genuine deterrent effect would be served by excluding evidence in this situation.<sup>172</sup> In doing so, the Court found that the foremost consideration in determining whether to invoke the exclusionary rule is deterrence of misconduct *by law enforcement officers*.<sup>173</sup>

The Court concluded that, similar to the situations in *Evans* and *Krull*, no officer misconduct exists where an officer relies on settled precedent, even when the search is later found to be invalid.<sup>174</sup> As such, the Court denied McCane's motion and upheld his conviction.<sup>175</sup> Subsequently, McCane petitioned the Supreme Court for *certiorari* and was denied.<sup>176</sup>

### iii. Eleventh Circuit Court of Appeals

Also in 2007, Willie Davis was arrested after a routine traffic stop; when asked his name he answered "Ernest Harris."<sup>177</sup> Prior to exiting the vehicle, Davis removed his jacket and placed it on the driver's seat, even though the officer requested otherwise.<sup>178</sup> The officer took Davis to the rear of his vehicle, where a group of bystanders had gathered.<sup>179</sup> The officer obtained Davis's real name from one of the bystanders, arrested Davis for giving a false name, handcuffed him, and placed him in the back of the patrol car.<sup>180</sup> During a search of the passenger compartment of the vehicle, the officer found a revolver in the pocket of the jacket that Davis had removed.<sup>181</sup>

Davis was indicted for possession of a firearm in violation of federal statute.<sup>182</sup> At that hearing, Davis filed a motion to suppress the evidence found in his jacket pocket, which was denied because the court found that the search was incident to a lawful arrest.<sup>183</sup> Davis appealed his conviction following the *Gant* decision.<sup>184</sup>

In reviewing Davis's case, the Eleventh Circuit Court of Appeals held that the good-faith exception to the exclusionary rule applied to this case and upheld the conviction. The Court determined that the holding in *Gant* must be applied to this case pursuant to applicable retroactivity precedent because the case was pending on direct appeal when *Gant* was decided.<sup>185</sup> Still, the Court of Appeals explained that although the search violated Davis's Fourth Amendment rights, whether to exclude the evidence obtained through that violation was a separate question.<sup>186</sup> As such, the Court held that the good-faith exception allowed for inclusion of the evidence, as the rationale served by the exclusionary rule did not apply.<sup>187</sup>

In so holding, the Circuit Court explicitly disagreed with the Ninth Circuit's holding in *Gonzalez*.<sup>188</sup> The Ninth Circuit Court had reasoned that the Supreme Court's application of the exclusionary rule to the defendant in *Gant*, rather than announcing the rule and then applying the good-faith exception to the police's conduct, required the same treatment in *Gonzalez* pursuant to established precedent.<sup>189</sup> The Eleventh Circuit Court of Appeals, however, refuted this assertion, explaining that the holding in *Gant* was confined to the question of the constitutionality of the search, and did not endorse the manner in which Arizona applied the exclusionary rule.<sup>190</sup>

Additionally, the Eleventh Circuit Court disagreed with the Ninth Circuit's assertion that failure to suppress evidence in this type of case would result in a violation of the integrity of judicial review.<sup>191</sup> The Eleventh Circuit Court explained that it "considers constitutional violations and remedies separately in the Fourth Amendment context and the Supreme Court has refused to tie the retroactivity of the new Fourth Amendment rules to the suppression of evidence."<sup>192</sup> Reiterating the language of the Tenth Circuit in *McCane*, the Court explained, "The issue . . . is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy upon application of *Gant* to this case."<sup>193</sup>

Pursuant to that reasoning, the Eleventh Circuit Court of Appeals held the good-faith exception to the exclusionary rule was applicable in this case.<sup>194</sup> The Court explained that it could not decipher any consequential difference between this situation and those of *Leon* and *Krull*.<sup>195</sup> As such, the Court denied Davis's motion for suppression and upheld his conviction.<sup>196</sup>

## III. ANALYSIS

Since *Gant*, the Circuit Courts have demonstrated profound disagreement over the application of the good-faith exception to the exclusionary rule when a police search, lawful at the time of its occurrence, is made unlawful due to changing judicial precedent.<sup>197</sup> As such, it is necessary for the Supreme Court of the United States to resolve the circuit split and allow for uni-

form adjudication of cases pending in the judicial pipeline so “similarly situated defendants” are treated equally throughout the country.<sup>198</sup>

In doing so, the Supreme Court should conclude that the reasoning of the D.C. Court of Appeals, with support from the Ninth Circuit, faithfully applies the appropriate precedent.<sup>199</sup> Indeed, the Supreme Court should declare the good-faith exception inapplicable to searches made in reliance on subsequently changed law, and exclude evidence seized in violation of the Constitution.

### A. POST-*GANT* DECISIONS COMPARED

Even prior to *Gant*, the Circuit Courts discussed the broader issue of the good-faith exception’s applicability to changing law.<sup>200</sup> However, because the effect of *Gant* has been to require revision of commonly accepted police practices in virtually every jurisdiction, the issue has been pushed to the forefront.<sup>201</sup> In a short time, *Gant*’s holding has created confusion and discord throughout the country; four circuits have reached differing conclusions about the applicability of the good-faith exception and all have based their decision on different rationales.<sup>202</sup>

As previously discussed, the D.C. Court of Appeals held that evidence obtained in reliance on precedent later deemed unconstitutional does not qualify for the good-faith exception and therefore must be excluded.<sup>203</sup> The Court reasoned that no dispute existed as to whether *Gant* applies retroactively, not only because the Government conceded this point, but also because the retroactivity precedent clearly supported this notion.<sup>204</sup> However, while no contest existed as to whether the defendant’s rights were violated, the issue turned on whether the violation necessarily required exclusion of the evidence obtained through the illegality.<sup>205</sup> The Court explained that the question of *Gant*’s retroactive application with reference to the Fourth Amendment violation was separate from the question of retroactive application of the exclusionary rule pursuant to that violation.<sup>206</sup> Thus, retroactivity could not be the sole reason for invoking the exclusionary rule, and the question of admissibility required further inquiry into the “rule of law” upon which the officer relied.<sup>207</sup>

In the District of Columbia Courts, the determining factor was whether the “rule of law” was “settled” enough to allow the officer’s good-faith reliance to override the presumption of the necessity of a warrant to protect the defendant’s constitutional rights.<sup>208</sup> The Court discussed other areas within the good-faith context they deemed to be “settled,” and concluded that the law with regard to good-faith reliance on judicial precedent did not meet the required threshold.<sup>209</sup> Therefore, it is necessary to suppress evidence obtained in violation of the *Gant* requirements because the good-faith exception to the exclusionary rule is inapplicable.<sup>210</sup>

Although the Ninth Circuit reached the same conclusion, its decision does not provide the next level of retroactivity analysis discussed by the D.C. Court of Appeals.<sup>211</sup> The entirety of the Ninth Circuit’s reasoning was based upon its understanding that retroactivity of precedent requires that evidence obtained in contravention of *Gant*’s requirements be excluded for all “similarly situated defendants.”<sup>212</sup> However, there is a gap in this Circuit’s reasoning because it fails to explain whether retroactivity requires both the constitutional violation and the remedy of exclusion be applied to defendants on direct review.<sup>213</sup>

Still, the reasoning of the Ninth Circuit provides further support to the more comprehensive decision of the D.C. Court of Appeals. The Ninth Circuit explained that failure to apply *Gant* retroactively (presumably both the constitutional violation and the exclusion of evidence) effectively turns the judiciary into a rule-making legislative body, rather than a separate branch of government charged with interpreting the Constitution.<sup>214</sup> Invoking the Supreme Court’s reasoning in *Danforth*, the Ninth Circuit explained that the Supreme Court’s announcement should not be understood to create a new right that did not exist prior to its holding, but was instead simply a declaration of rights that one already had.<sup>215</sup>

In contrast to the differing analyses in the Ninth Circuit and the D.C. Court of Appeals, the Tenth and Eleventh Circuits based their decisions on similar grounds. The Tenth and Eleventh Circuits interpreted the fundamental purpose of the exclusionary rule as the desire to deter future unlawful police conduct.<sup>216</sup> The Tenth Circuit ruled the good-faith exception applies because the exclusionary rule may only be invoked in

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situations where future *police* misconduct would be deterred by suppression.<sup>217</sup> Such an extension of this principle was unwarranted because deterrence of unconstitutional behavior by the judiciary, the legislators, or other government entities has never been deemed a valid reason for excluding evidence.<sup>218</sup>

The Eleventh Circuit ruled that reliance on settled precedent does not invoke the need to deter future police conduct, so the good-faith exception was applicable.<sup>219</sup> Similar to the D.C. Court of Appeals, it explained that while retroactivity precedent requires that *Gant* be applied to cases pending on direct appeal, a Fourth Amendment violation and exclusion of evidence pursuant to that violation are distinct issues that should be addressed separately.<sup>220</sup> Contrary to the D.C. Court's holding, however, it held that the good-faith exception allows the evidence to be included because the rationale behind the exclusionary rule did not apply.<sup>221</sup> In so holding, the Eleventh Circuit explicitly referenced the Ninth Circuit's holding, refuting its assertion that inclusion of evidence in this type of situation would violate the integrity of judicial review because the Ninth Circuit's holding was restricted to remedies available to the defendant and not the retroactive applicability of the constitutional interpretation.<sup>222</sup>

The Tenth and Eleventh Circuits' holdings are unsound when compared to the holdings of the Ninth Circuit and the D.C. Court of Appeals.<sup>223</sup> The Eleventh Circuit based its entire holding on the assertion that reliance on settled precedent does not invoke the exclusionary rule, yet its decision is completely devoid of any analysis of what qualifies as "settled law."<sup>224</sup> Instead, both the Tenth and Eleventh Circuits perpetuate the circular argument that the good-faith exception applies because there is no need to deter future unconstitutional conduct by the police, and that there is no need to deter future unconstitutional conduct by the police because the good-faith exception applies to judicial precedent.<sup>225</sup>

The Supreme Court of the United States should adopt the reasoning set forth in the holdings of the Ninth Circuit and the D.C. Court of Appeals.<sup>226</sup> That reasoning, particularly when combined, logically applies the applicable precedent while remaining faithful to the requirements of the Fourth Amendment. In addition to the overarching protection of constitutional rights, further considerations support such a decision.

## **B. RATIONALE IN SUPPORT OF EXCLUSION**

### *1. Constitutional Considerations*

Every Court to decide the issue so far has agreed that the constitutional requirements elicited in *Gant* must be retroactively applied; meaning that in each case, the Court conceded that there was a constitutional violation of the defendant's Fourth Amendment rights.<sup>227</sup> Yet, the Tenth and Eleventh Circuits contend that such an application does not require exclu-

sion, so that evidence is only excluded when the deterrence of future police misconduct is necessary.<sup>228</sup>

The Tenth and Eleventh Circuits' rationale dodges the genuine constitutional issues in lieu of applying quasi-related situations to the case on review in order to squeeze it into an established good-faith exception.<sup>229</sup> Although a cursory glance at *Krull* or *Herring* may seem analogous to the cases on review, a deeper consideration is required to determine if they are in fact similar.<sup>230</sup>

The Supreme Court routinely holds that the good-faith exception is proper when police erred in relying on a defective warrant or unconstitutional statute.<sup>231</sup> Police do not have complete discretion over when to conduct a particular search. Instead, they must follow the explicit directions of a neutral party, namely a magistrate, clerk, legislator, or other. In contrast, applying the good-faith exception here, where there was no explicit rule allowing for the warrantless search, would permit police to rely on their own (or the department's) interpretation of judicial holding. The *Gant* situation provides a perfect example of the dangers of allowing the good-faith exception to apply in such a situation.<sup>232</sup> In that case, police departments had been erroneously interpreting the *Belton* holding for decades through their internal procedures. Law enforcement should not be rewarded for their own error through the inclusion of illegally obtained evidence at trial. The *Herring* decision bolsters this assertion, as even though evidence obtained after execution of a defective warrant due to a database error was found to be admissible, there was still a check on the unfettered discretion of the officer because he had to obtain a warrant (although erroneous) before searching.<sup>233</sup>

As explained in *Danforth*, the Supreme Court does not create new constitutional rules; it simply applies the established protections of the Constitution. In doing so, there are times when the Court must explain that the Constitution has been erroneously followed due to a certain decision or interpretation of that decision. However, an individual's rights were there all along, and the Court is merely clarifying the manner in which they must be protected.<sup>234</sup>

### *2. Other Considerations*

There are other important reasons for clarifying the scope of the good-faith exception. First, Fourth Amendment jurisprudence is most often advanced by parties to a particular action appealing the decision of the trial court and moving through the appellate procedure.<sup>235</sup> If the Supreme Court were to follow the Tenth and Eleventh Circuits, thus announcing that good-faith exceptions permit the admission of evidence found via unconstitutional police conduct, little incentive to appeal one's conviction would remain.<sup>236</sup> In order to maintain consistency, the Court would be forced to determine that the officer in the instant

case *also* reasonably relied on judicial precedent, and thus no relief would be available.<sup>237</sup>

That notion brings up the issue of judicial intent in *Gant*. If courts could legitimately apply the good-faith exception when an officer relies solely on judicial precedent, Mr. Gant would not have been able to get his evidence suppressed. Instead, consistent with the established process, Gant's evidence was suppressed because his Fourth Amendment rights had been violated.<sup>238</sup> A contrary conclusion cannot be reconciled with the Supreme Court's decision in *Gant*, as he was allowed to benefit from the clarification of the *Belton* rule.<sup>239</sup> The internal inconsistency in such an argument is overwhelming, and cannot possibly provide the necessary foundation for a rule that would have such a drastic effect on constitutional rights.

#### IV. CONCLUSION

The exclusionary rule began as a strong pronouncement that an individual's constitutional rights are of utmost importance, and as such, genuine enforcement mechanisms must be enacted to ensure that these rights are protected. While exceptions and qualifications have caused the rule to lose its strength over its near century-long existence, the exclusionary rule is necessary to maintain the genuine protections guaranteed by the Fourth Amendment. Conversely, the good-faith exception was created as a very narrow exception and has expanded dramatically to include various forms of police officers' good-faith reliance. However, it is important for the Court to remember that the good-faith exception is just that: an *exception*. It should not be molded and distorted to encompass every situation in which a particular officer was not at fault. Instead, it should be applied sparingly in order to ensure that police officers conduct themselves in a manner consistent with the Constitution.

The efficacy of the Fourth Amendment depends on adherence to its requirements and declaration of rules to enforce those requirements. The Supreme Court of the United States, in reviewing lower courts' decisions, adheres to both precedent and logical construction to ensure the faithful application of the Constitution. In doing so, it should find the good-faith exception to the exclusionary rule inapplicable when a police officer relies solely on judicial precedent to support a warrantless search, so that evidence improperly obtained is suppressed. **CLB**

<sup>5</sup> *Id.*

<sup>6</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1710 (2009) (holding search of a vehicle incident to a recent occupant's arrest is permissible 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."); *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that due to the exigencies of a situation, the warrantless search of a vehicle incident to defendant's lawful custodial arrest is justifiable).

<sup>7</sup> *See infra* Part II.C.1.a, notes 39-58 and accompanying text.

<sup>8</sup> *Id.*

<sup>9</sup> *See infra* Part II.C.2, notes 111-196 and accompanying text.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See infra* Part II.A-B, notes 15-38 and accompanying text.

<sup>13</sup> *See infra* Part II.C, notes 39-196 and accompanying text.

<sup>14</sup> *See infra* Part III, notes 197-239 and accompanying text.

<sup>15</sup> *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)) (modifying the exclusionary rule to admit evidence seized in reasonable, good-faith reliance on a search warrant that was subsequently held to be defective); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (declining to extend the exclusionary rule to grand jury proceedings).

<sup>16</sup> *Weeks*, 232 U.S. 383; *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the Due Process Clause of the Fourteenth Amendment includes the exclusionary rule provided by the Fourth Amendment).

<sup>17</sup> Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 663-65 (1999) (providing a historical analysis of the development of the Fourth Amendment); *see Weeks*, 232 U.S. at 398.

<sup>18</sup> *See Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (determining that the exclusionary rule is inapplicable when the knock and announce rule is violated); *see also* Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 177-78 (2009) (arguing that the decision in *Herring* allows courts to apply the good-faith exception to all police conduct until the Supreme Court declares the opposite); David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 283-284 (2006) (arguing the end of the exclusionary rule); Mark A. Summers, *The Constable Blunders but isn't Punished: Does Hudson v. Michigan's Abolition of the Exclusionary Rule Extend Beyond Knock-And-Announce Violations?*, 10 BARRY L. REV. 25, 38-39 (2008) (discussing potential elimination of the exclusionary rule).

<sup>19</sup> *Leon*, 468 U.S. at 906-07.

<sup>20</sup> *Id.* at 908 (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

<sup>21</sup> *See Mapp*, 367 U.S. 643, 659 (1961); Silas J. Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 85-87 (1984) (discussing underlying rationale for the exclusionary rule and explaining that deterrence of unlawful police conduct is the sole purpose of the rule under the current approach); *see also* Janine L. Hochberg, *Dining in Good Faith on Poisonous Fruit?*, 15 WIDENER L. REV. 301, 306-07 (2009) (proposing that courts should not to extend the good-faith exception to warrants based on predicate illegal searches and seizures and that the poisonous fruit theory should be used to analyzed evidence gathered pursuant to such warrants).

<sup>22</sup> Hochberg, *supra* note 21, at 306; *Leon*, 468 U.S. at 916-18.

<sup>23</sup> *Leon*, 468 U.S. at 908-09; *see also* Hochberg, *supra* note 21, at 306-07.

<sup>24</sup> *Wong Sun v. United States*, 371 U.S. 471, 488 (1959) (quoting JOHN M. MAGUIRE, *EVIDENCE OF GUILT* 221 (1959)) (holding that admitting a co-conspirator's statement as corroboration of the other co-conspirator's guilt is a violation of the co-conspirator's hearsay rule).

<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> *See Weeks v. United States*, 232 U.S. 383 (1914) (holding that the use of private correspondence during trial was a prejudicial error because the correspondence was seized in violation of the Fourth Amendment).

<sup>3</sup> *See infra* Part II.B, notes 30-38 and accompanying text.

<sup>4</sup> *Id.*



<sup>25</sup> See *Nix v. Williams*, 467 U.S. 431 (1984) (ruling that admission of information regarding the location of the *corpus delicti* was viable because of the inevitable discovery doctrine); *Murray v. United States*, 487 U.S. 533 (1988) (holding that the independent source doctrine also applies to evidence initially discovered during or as a consequence of, an unlawful search, if later obtained independently from activities untainted by the initial illegality).

<sup>26</sup> *Rakas v. Illinois*, 439 U.S. 128 (1978) (discussing the standing requirement for a Fourth Amendment challenge).

<sup>27</sup> *United States v. Johnson*, 457 U.S. 537 (1982); see *Stone*, 428 U.S. 456 (holding that defendants cannot benefit from the exclusionary rule where final judgment has been entered).

<sup>28</sup> *Leon*, 468 U.S. 897.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (outlining the original good-faith exception doctrine).

<sup>31</sup> *Id.* at 920–21.

<sup>32</sup> *Id.*; see *Herring v. United States*, 129 S. Ct. 695, 704 (2009); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995); *Illinois v. Krull*, 480 U.S. 340, 348 (1987).

<sup>33</sup> See *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

<sup>34</sup> *Id.*

<sup>35</sup> *Evans*, 514 U.S. at 10.

<sup>36</sup> *Herring*, 129 S. Ct. at 695.

<sup>37</sup> *Krull*, 480 U.S. 340.

<sup>38</sup> See *Leon*, 468 U.S. at 909–10 (explaining a series of cases in which the Supreme Court relied upon the likelihood of deterrence); *Herring*, 129 S. Ct. at 704; *Evans*, 514 U.S. at 10–11; *Krull*, 480 U.S. at 348.

<sup>39</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1714–15 (2009).

<sup>40</sup> *Id.* at 1715.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; see U.S. CONST. amend. IV.

<sup>44</sup> *Gant*, 129 S. Ct. at 1715.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*; see also *Carroll v. United States*, 267 U.S. 132 (1925)

(establishing the automobile exception to the warrant requirement by holding that an officer may search a vehicle without a warrant if he has probable cause to do so).

<sup>48</sup> *Gant*, 129 S. Ct. at 1715; see *New York v. Belton*, 453 U.S. 454 (1981) (extending the *Chimel* rule, which allows search of the area within the lunging area of a suspect incident to a lawful arrest, to vehicles); *Chimel v. California*, 395 U.S. 752 (1969) (holding that the search of any room other than that in which the arrest occurred is unreasonable).

<sup>49</sup> *Gant*, 129 S. Ct. at 1716 (citing *Chimel*, 395 U.S. at 763–64 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964))).

<sup>50</sup> *Id.*; see *Chimel*, 395 U.S. at 763–64.

<sup>51</sup> *Gant*, 129 S. Ct. at 1716.

<sup>52</sup> *Id.* at 1723–24.

<sup>53</sup> *Id.* at 1724.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1718 (quoting *Belton*, 453 U.S. at 466 (Brennan, J., dissenting)).

<sup>56</sup> *Id.* at 1724; see *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.”).

<sup>57</sup> *Gant*, 129 S. Ct. at 1723; see also Orin Kerr, *The Good Faith Exception and Changing Law: The Context of the Good Faith Exception*, THE VOLOKH CONSPIRACY, Mar. 1, 2010, <http://volokh.com/2010/03/01/the-good-faith-exception-and-changing-law-the-context-of-the-good-faith-exception/> (discussing why the good faith exception to the exclusionary rule does not apply to searches conducted in reliance of previously lawful rules before a final conviction) [hereinafter Kerr, *Context*].

<sup>58</sup> See *Gant*, 129 S. Ct. 1710; *Chimel*, 395 U.S. 752; see also Kerr, *Context*, *supra* note 57.

<sup>59</sup> *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 698.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; see 18 U.S.C. §922(g)(1) (2005) (prohibiting any person convicted of a felony from transporting or possessing any firearm or ammunition); 21 U.S.C. §844(a) (2010) (prohibiting a person from possessing controlled substances).

<sup>67</sup> *Herring*, 129 S. Ct. at 699.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*; see *United States v. Herring*, 492 F.3d 1212 (2007) (arguing in favor of the good-faith exception to the exclusion exception which was later invalidated on appeal).

<sup>70</sup> *Herring*, 129 S. Ct. at 699 (discussing the reason for granting *certiorari*).

<sup>71</sup> *Id.* at 701–704 (citing *Leon*, 468 U.S. 897); see *United States v. Leon*, 468 U.S. 897 (1984). See also *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Krull*, 480 U.S. 340 (1987).

<sup>72</sup> See *Evans*, 514 U.S. 1 (applying good-faith exception where the officer relied on erroneous information from the court clerk); *Krull*, 480 U.S. 340 (applying good-faith exception where the officer relied on a statute later deemed to be unconstitutional); *Leon*, 468 U.S. 897 (applying good-faith exception where the officer relied on a facially-valid warrant later deemed to lack sufficient probable cause).

<sup>73</sup> *Herring*, 129 S. Ct. at 700 (citing *Leon*, 468 U.S. 897).

<sup>74</sup> *Id.* at 702.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 704.

<sup>77</sup> *Danforth v. Minnesota*, 552 U.S. 264, 267 (2008).

<sup>78</sup> *Id.*; *State v. Danforth*, 573 N.W.2d 369, 372 (Minn. App. 1997) (discussing the competency of a child for the purpose of testimony).

<sup>79</sup> *Danforth*, 573 N.W.2d at 372; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding that the Confrontation Clause is not contravened by introduction of testimony where the out-of-court statement bears “adequate indicia of reliability.”). See also U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

<sup>80</sup> *Danforth*, 573 N.W.2d at 372.

<sup>81</sup> *Danforth*, 552 U.S. at 267; U.S. CONST. amend. VI.

<sup>82</sup> *Danforth*, 573 N.W.2d at 375; see *Roberts*, 448 U.S. at 66.

<sup>83</sup> *Danforth*, 552 U.S. at 267.

<sup>84</sup> *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004) (holding that the right to confrontation is a procedural guarantee to insure the reliability of a victim witness by cross-examination).

<sup>85</sup> See *Danforth*, 552 U.S. at 267 (stating that the Minnesota Court of Appeals evaluated the admissibility of testimony using a test set forth by the Supreme Court, and not by the Constitution).

<sup>86</sup> See *id.*

<sup>87</sup> *Danforth v. State*, 718 N.W.2d 451, 461 (Minn. 2006).

<sup>88</sup> *Danforth v. Minnesota*, 550 U.S. 956 (2007) (granting *certiorari*).

<sup>89</sup> See *Danforth*, 552 U.S. at 290–91.

<sup>90</sup> See *id.* at 271.

<sup>91</sup> See *id.* at 290–91; see also Orin Kerr, *The Good Faith Exception and Changing Law: Distinguishing Illinois v. Krull*, THE VOLOKH CONSPIRACY, Mar. 8, 2010, <http://volokh.com/2010/03/08/the-good-faith-exception-and-changing-law-distinguishing-illinois-v-krull/> [hereinafter Kerr, *Distinguishing*].

- <sup>92</sup> *Illinois v. Krull*, 480 U.S. at 340, 343 (1987).
- <sup>93</sup> *Id.* at 342-43.
- <sup>94</sup> *Id.* at 343.
- <sup>95</sup> *Id.*
- <sup>96</sup> *Id.* at 344.
- <sup>97</sup> *Id.* at 344; *see* *Bionic Auto Parts & Sales, Inc. v. Fahner*, 518 F. Supp. 582 (ND Ill. 1981) (declaring that inspections by administrative agencies are searching within the meaning of the Fourth Amendment and that the establishment of inspection procedures are necessary to make a search constitutional).
- <sup>98</sup> *Krull*, 480 U.S. at 344 (discussing the trial court's basis for suppression which was a ruling invalidating the search at issue).
- <sup>99</sup> *Id.* (remanding the matter to the appellate court to consider the good-faith exception in its analysis of the search at issue).
- <sup>100</sup> *Id.* at 345.
- <sup>101</sup> *Id.* at 345-46.
- <sup>102</sup> *Id.* at 360-61; *see also* Kerr, *Distinguishing*, *supra* note 98 (discussing the inapplicability of the good-faith exception on certiorari).
- <sup>103</sup> *Krull*, 480 U.S. 340.
- <sup>104</sup> *Id.*
- <sup>105</sup> *Id.* (discussing the statute at issue as objectively unreasonable and therefore barring the application of good-faith exception).
- <sup>106</sup> *Id.*
- <sup>107</sup> *Id.*
- <sup>108</sup> *Id.*
- <sup>109</sup> *Id.*
- <sup>110</sup> *Id.* (discussing application of good-faith exception when the officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches).
- <sup>111</sup> *United States v. 15324 County Highway E.*, 332 F.3d 1070, 1071 (7th Cir. 2003) [hereinafter *Real Property*].
- <sup>112</sup> *Id.* at 1072.
- <sup>113</sup> *Id.*
- <sup>114</sup> *Id.*; *see* 21 U.S.C. § 881 (2002) (allowing forfeiture of any real property used to manufacture, distribute or dispense controlled substances).
- <sup>115</sup> *Real Property*, 332 F.3d at 1072; *see also* U.S. CONST. amend. IV.
- <sup>116</sup> *Real Property*, 332 F.3d at 1073.
- <sup>117</sup> *Id.* at 1072; *see* *Kyllo v. United States*, 533 U.S. 27, 36 (2001) (holding that the use of technology not available to the general public constitutes a search).
- <sup>118</sup> *Real Property*, 332 F.3d at 1072.
- <sup>119</sup> *Id.* at 1075-76.
- <sup>120</sup> *Id.* at 1076.
- <sup>121</sup> *Id.*
- <sup>122</sup> *United States v. Gonzalez*, 578 F.3d 1130, 1131 (9th Cir. 2009).
- <sup>123</sup> *Id.*
- <sup>124</sup> *Id.*
- <sup>125</sup> *Id.*
- <sup>126</sup> *Id.* at 1131-32.
- <sup>127</sup> *Id.* at 1132 (arguing for admission under reliance on *Belton* precedence).
- <sup>128</sup> *Id.*
- <sup>129</sup> *Id.*; *see* *Herring v. United States*, 129 S. Ct. 695 (2007); *Illinois v. Krull*, 480 U.S. 340 (1987). *See also* *United States v. Peltier*, 422 U.S. 531, 534-35 (1975) (agreeing with the government's argument that even though the search was deemed illegal after the fact, the underlying rationale for the exclusionary rule do not justify its application in *Peltier*); *United States v. Meek*, 366 F.3d 705, 713-14 (9th Cir. 2004) (stating that even if the statute was unconstitutional, the evidence would not be suppressed because the officer executed a warrant he believed to be valid).
- <sup>130</sup> *Gonzalez*, 578 F.3d at 1132.
- <sup>131</sup> *Id.* (quoting *United States v. Johnson*, 457 U.S. 537, 562 (1982)); *see also* *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that retroactive application is required even in decisions constituting a "clear break" from past precedent).
- <sup>132</sup> *Gonzalez*, 578 F.3d at 1132 (quoting *Griffith*, 479 U.S. at 322-23).
- <sup>133</sup> *United States v. Debruhl*, 993 A.2d 571, 572 (D.C. 2010).
- <sup>134</sup> *Id.*
- <sup>135</sup> *Id.* at 572-73.
- <sup>136</sup> *Id.* at 573.
- <sup>137</sup> *Id.*
- <sup>138</sup> *Id.*; *see also* *Arizona v. Gant*, 129 S. Ct. 1710 (2009); *supra* notes 39-58 and accompanying text (discussing the *Gant* holding).
- <sup>139</sup> *Debruhl*, 993 A.2d at 573.
- <sup>140</sup> *Id.* at 585.
- <sup>141</sup> *Id.* at 575 (demonstrating that no dispute existed because the government conceded the retroactive applicability of *Gant* with regards to Fourth Amendment violations generally).
- <sup>142</sup> *Id.*
- <sup>143</sup> *Id.* *Compare* *Mapp v. Ohio*, 367 U.S. 634, 649, 657 (1961) (explaining that the "exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments") with *Illinois v. Gates*, 462 U.S. 213, 223 (1983) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.").
- <sup>144</sup> *Debruhl*, 993 A.2d at 575.
- <sup>145</sup> *Id.* at 577.
- <sup>146</sup> *Id.*
- <sup>147</sup> *Id.*
- <sup>148</sup> *Id.*
- <sup>149</sup> *Id.*; *see* *United States v. Davis*, 598 F.3d 1259, 1267 (11th Cir. 2010) ("The justifications for the good-faith exception do not extend to situations in which police officers have interpreted ambiguous precedent or relied on their own extrapolations from existing case law.").
- <sup>150</sup> *Debruhl*, 993 A.2d at 579.
- <sup>151</sup> *Id.* at 578 ("If our cases interpreting *Belton*, as the government suggests, had 'settled' that the officers were allowed to conduct a warrantless search on the facts they encountered in *Debruhl*—that is, if our case law was not ambiguous as to that situation—then, theoretically, the test for the good-faith exception would have been met.").
- <sup>152</sup> *Id.*
- <sup>153</sup> *Id.* at 584-85 (clarifying that "settled law" does not refer to case law with identical facts to the instant case, but rather to material facts affecting the decision to search and its reasonableness).
- <sup>154</sup> *Id.* at 589. *See* *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Krull*, 480 U.S. 340 (1987); *United States v. Leon*, 468 U.S. 897 (1984).
- <sup>155</sup> *Debruhl*, 993 A.2d at 578.
- <sup>156</sup> *United States v. Jackson*, 825 F.2d 853, 854 (5th Cir. 1987).
- <sup>157</sup> *Id.* at 865 (explaining that prior Circuit precedent allowed for searches in areas constituting the "functional equivalent" of the Mexican border).
- <sup>158</sup> *Id.*
- <sup>159</sup> *Id.* at 865-66 (quoting *Leon*, 468 U.S. at 916).
- <sup>160</sup> *Id.* at 865.
- <sup>161</sup> *Id.*
- <sup>162</sup> *United States v. McCane*, 573 F.3d 1037, 1039 (10th Cir. 2009).
- <sup>163</sup> *Id.*
- <sup>164</sup> *Id.*
- <sup>165</sup> *Id.*; *see* 18 U.S.C. § 922(g)(1) (2005).
- <sup>166</sup> *McCane*, 573 F.3d at 1040.
- <sup>167</sup> *Id.*

<sup>168</sup> *Id.*  
<sup>169</sup> *Id.*  
<sup>170</sup> *Id.* at 1045.  
<sup>171</sup> *Id.* (discussing the limited application of the good-faith exception to police conduct only).  
<sup>172</sup> *Id.* at 1044 (“The purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities, and even if it was appropriate to consider the deterrent effect of the exclusionary rule on other institutions, there would be no significant deterrent effect in excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement.”).  
<sup>173</sup> *Id.*  
<sup>174</sup> *Id.*  
<sup>175</sup> *Id.* at 1047.  
<sup>176</sup> *United States v. Davis*, 598 F.3d 1259, 1261 (11th Cir. 2010).  
<sup>177</sup> *Id.*  
<sup>178</sup> *Id.*  
<sup>179</sup> *Id.*  
<sup>180</sup> *Id.*  
<sup>181</sup> *Id.*  
<sup>182</sup> *Id.*  
<sup>183</sup> *Id.* at 1262.  
<sup>184</sup> *Id.*  
<sup>185</sup> *Id.* at 1264.  
<sup>186</sup> *Id.* at 1263 (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)).  
<sup>187</sup> *Id.* at 1263–64.  
<sup>188</sup> *Id.*; see *United States v. Gonzalez*, 578 F.3d 1130, 1131 (9th Cir. 2009); *infra* notes 122–132 and accompanying text.  
<sup>189</sup> *Gonzalez*, 578 F.3d at 1132–33; see *Griffith v. Kentucky*, 479 U.S. 314 (1987) (“[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”); *United States v. Johnson*, 457 U.S. 537, 562 (1982) (“[A] decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.”).  
<sup>190</sup> *Davis*, 598 F.3d at 1263–64; see *Yee v. Escondido*, 503 U.S. 519, 535–36 (1992) (explaining that Supreme Court holdings are confined to the questions on which it grants *certiorari*).  
<sup>191</sup> *Davis*, 598 F.3d at 1263–64.  
<sup>192</sup> *Id.* at 1264–65 (citing *Leon*, 468 U.S. at 906, 912, n.9).  
<sup>193</sup> *Id.* (quoting *McCane*, 573 F.3d at 1045 n.5); see *supra* notes 162–176 and accompanying text.  
<sup>194</sup> *Davis*, 598 F.3d at 1265–66.  
<sup>195</sup> *Id.*; see *Leon*, 468 U.S. at 921; *Krull*, 480 U.S. at 347.  
<sup>196</sup> *Davis*, 598 F.3d at 1267–68.  
<sup>197</sup> See *supra* Part II.C.2 (discussing the pertinent decisions of the lower federal courts and demonstrating that there have been as many cases decided with regards to this issue in the last year as existed in the entire history prior to *Gant*).  
<sup>198</sup> *Id.*  
<sup>199</sup> See *supra* Part II.C.2, notes 111–193 and accompanying text (discussing the post-*Gant* circuit decisions that refused to apply the good-faith exception).  
<sup>200</sup> See *supra* notes 111–121, 133–155 and accompanying text (discussing two pre-*Gant* decisions regarding this issue).  
<sup>201</sup> See *supra* notes 48–58 and accompanying text (discussing the *Gant* holding and its effect on police procedure).  
<sup>202</sup> See *supra* notes 122–155, 162–198 and accompanying text (discussing the recent decisions of the Ninth, Tenth, Eleventh, and D.C. Court of Appeals).

<sup>203</sup> See *supra* notes 133–155 and accompanying text.  
<sup>204</sup> *Id.*  
<sup>205</sup> *Id.*  
<sup>206</sup> *Id.*  
<sup>207</sup> *Id.*  
<sup>208</sup> See *supra* notes 133–155 and accompanying text.  
<sup>209</sup> *Id.*  
<sup>210</sup> *Id.*  
<sup>211</sup> *Id.*  
<sup>212</sup> See *supra* notes 130–132 and accompanying text.  
<sup>213</sup> See *supra* notes 140–155 and accompanying text.  
<sup>214</sup> See *supra* notes 130–132 and accompanying text.  
<sup>215</sup> See *supra* notes 89–90, 130–132, 139–155 and accompanying text.  
<sup>216</sup> See *supra* notes 170–176, 186–196 and accompanying text.  
<sup>217</sup> See *supra* notes 170–176 and accompanying text.  
<sup>218</sup> *Id.*  
<sup>219</sup> See *supra* notes 182–196 and accompanying text.  
<sup>220</sup> *Id.*  
<sup>221</sup> *Id.*  
<sup>222</sup> See *supra* notes 182–196, 128–132 and accompanying text.  
<sup>223</sup> See *supra* notes 111–196 and accompanying text (detailing the lower courts’ holdings).  
<sup>224</sup> See *supra* notes 182–196 and accompanying text.  
<sup>225</sup> See *supra* notes 162–196 and accompanying text.  
<sup>226</sup> See *supra* notes 122–155 and accompanying text.  
<sup>227</sup> See *supra* notes 111–196 and accompanying text (detailing the lower courts’ holdings).  
<sup>228</sup> See *supra* notes 16–26 and accompanying text.  
<sup>229</sup> See *supra* notes 162–196 and accompanying text.  
<sup>230</sup> See *supra* notes 59–76, 92–110 and accompanying text.  
<sup>231</sup> See *supra* notes 39–110 and accompanying text.  
<sup>232</sup> See *supra* notes 39–58 and accompanying text.  
<sup>233</sup> See *supra* notes 59–76 and accompanying text.  
<sup>234</sup> See *supra* notes 89–91 and accompanying text; Kerr, *Context*, *supra* note 57.  
<sup>235</sup> See Kerr, *Context*, *supra* note 57.  
<sup>236</sup> *Id.*  
<sup>237</sup> *Id.*  
<sup>238</sup> See *supra* notes 39–58 and accompanying text.  
<sup>239</sup> *Id.*

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