A NARROW EXTENSION OF GOOD FAITH TO POLICE RELIANCE ON SETTLED CASE LAW: THE CROSSROADS OF GANT AND HERRING

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ABSTRACT

This Article details the rapidly enfold ing debate on whether courts should recognize an extension of the good-faith exception to the exclusionary rule that would shield police searches made in reliance on an objectively reasonable understanding of the then-existing case law. Setting the argument in its historical context, the Article argues that such an extension should be acceded to and is likely to be accepted by the U.S. Supreme Court pursuant to the pillars of the good-faith exception as expounded by Herring and its forebears. Finally, noting that the most crucial step in recognizing such an extension is defining its scope, the Article proposes to limit the extension by remaining mindful of both the justifications for the good-faith exception and pragmatic concerns, taking into account the nature of the courts issuing the decision.

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TABLE OF CONTENTS

I. INTRODUCTION ........................................................................... 250

II. THE PROBLEM PRESENTED BY GANT: GOOD FAITH OF POLICE AND CHANGING RULES ............................................................... 253

III. THE INTERPLAY OF GOOD FAITH AND THE EXCLUSION OF EVIDENCE ................................................................................... 258
   A. The History of the Good-Faith Exception ........................................ 259
   B. A Robust Exception for Good Faith Under Herring ......................... 263

IV. THE ARGUMENTS FOR AND AGAINST A GOOD-FAITH EXCEPTION FOR CASE LAW ........................................................ 265
   A. The Deterrence Rationale and the Balancing of the Costs of Exclusion .................................................................................. 266
   B. Whose Mistake Is It Anyway?: The Judiciary as a Third-Party Safeguard .............................................................................. 267
   C. The Fear of a “J.D.-P.D.”: Police Improperly Engaging in Legal Analysis .................................................................................... 270
   D. The Retroactivity Doctrine .................................................................. 272

V. THE SCOPE OF A GOOD-FAITH EXCEPTION FOR RELIANCE ON CASE LAW ............................................................................ 275

VI. CONCLUSION .............................................................................. 278

I. INTRODUCTION

When the U.S. Supreme Court’s opinion in Arizona v. Gant\(^1\) was announced on April 21, 2009, the decision caused no little stir in criminal-procedure jurisprudence by declaring that the 28-year-old precedent of New York v. Belton\(^2\) had been mistakenly understood as a bright-line rule for searches incident to arrest—for the preceding twenty-eight years. The Gant requirement that such searches must be supported by the rationale originally underlying the search-incident-to-arrest exception from Chimel v. California\(^3\) or must otherwise be supported by independent probable cause effectively overruled Belton and twenty-eight years of settled precedent from the Court and nearly every federal circuit. As a consequence of Gant, innumerable searches that had been conducted on a reasonable, but later contradicted, understanding of Belton were instantly invalidated, and law-enforcement agencies across the nation were forced to overhaul

\(^1\) 129 S. Ct. 1710 (2009).
\(^3\) 395 U.S. 752 (1969).
longstanding procedures concerning searches following the arrests of recent occupants of motor vehicles.\(^4\)

The dissents in *Gant*, as well as Justice Samuel Alito’s opinions dissenting from the grant of certiorari in two subsequent cases of the Court’s 2008 term,\(^5\) highlight a plethora of predicted difficulties with the *Gant* decision for both the police and the courts in the future. Yet what the Court did not address in *Gant* or in subsequent decisions is the problem that both state courts and the lower federal courts have been facing in the months since *Gant*: the question of the appropriate interplay between the *Gant* decision and the Court’s decision from earlier in the term extending the good-faith exception to the exclusionary rule in *Herring v. United States*, a problem that is likely to reach the U.S. Supreme Court in the near future.\(^6\) Although the first post-*Gant* opinion from a U.S. District Court addressing this issue rejected the proposal that the good-faith exception should be extended to allow the introduction of evidence obtained when the police act with objectively reasonable reliance on subsequently reexamined case law,\(^7\) another decision following close on its heels indicated that such an exception was potentially viable.\(^8\) Within the months immediately following these decisions a circuit-court split developed. The U.S. Court of Appeals for the Tenth Circuit ruled in favor of extending good faith to searches made “‘in reasonable reliance upon the settled case law of a United States Court of Appeals, even though the search is later deemed invalid by Supreme Court decision . . . .’\(^9\) The U.S. Court of Appeals for the Ninth

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4. See Steven Walters & Stacy Foster, *High Court Ruling Alters Car Searches*, MILWAUKEE J. SENTINEL, Aug. 2, 2009, at B1 (noting that State Patrol administrators in Wisconsin changed procedures after the ruling and officers across the state were undergoing training concerning the change); see also Brian Lee, *Search Limits Scrutinized; Police React to Court Ruling on Arrests that Stem from Searching Vehicles*, WORCESTER TELEGRAM & GAZETTE, May 22, 2009 (commenting that the Massachusetts Chiefs of Police Association was developing a training-policy program to ensure that police across the state understood the new rule); Carl Manning, *Kansas High Court Narrows Scope of Vehicle Searches*, ASSOCIATED PRESS, June 27, 2009 (quoting a law-enforcement officer who stated, “We’ve been doing a lot of retraining. . . . We’re having to undo twenty-eight years of training . . . .”).


9. United States v. McCane, 573 F.3d 1037, 1044 (10th Cir. 2009).
Circuit ruled against the extension, taking a narrow view of good faith and relying—as the first district-court opinion had—completely upon the perceived inconsistency of the proposed extension with the application of the retroactivity doctrine. Results from lower courts elsewhere have continued to pour in on both sides of the issue.

The issue, of course, does not only affect the Belton–Gant line of decisions but also is central to the ongoing conversation over the continuing viability of the exclusionary rule and the breadth of the good-faith exception. Since Herring, the scholarly and judicial consensus has been that the exclusionary rule is not dead, nor on “life support,” but it is certainly more limited than it has been before. This is especially so relative to searches and seizures involving lower levels of police culpability rather than the “deliberate, reckless, or grossly negligent conduct,” which Herring acknowledged demands exclusion. Consequently, the question of whether the Constitution requires exclusion of the fruit of unconstitutional police searches conducted in the good-faith belief that the search is constitutionally permitted based on objectively reasonable reliance on settled case law has and will likely remain an open one until the U.S. Supreme Court’s eventual intervention.

10. United States v. Gonzalez, 578 F.3d 1130, 1132 (9th Cir. 2009).
12. Craig Bradley, Red Herring or the Death of the Exclusionary Rule?, TRIAL, Apr. 2009, at 52, 54 ( noting that Herring is not the death of the exclusionary rule but, in his opinion, “represents another chip out of the exclusionary rule, albeit a minor one.”).
14. One commentator has suggested that while the Court did not abolish the exclusionary rule outright, its decision “might lead one to believe that the end of the rule will come soon.” David A. Harris, How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule, 7 OHIO ST. J. CRIM. L. 149, 186 (2009).
16. In fact, during the pendency of the publication of this article, the U.S. Supreme Court granted certiorari on November 1, 2010, to determine this precise issue in the case of U.S. v. Davis, 131 S. Ct. 502 (2010) (certiorari granted on U.S. v. Davis, 598 F.3d 1259 (11th Cir. 2010)).
This Article explores that issue at the crossroads of *Gant* and *Herring*, the front lines of the present debate on good-faith reliance on case law and the exclusionary rule, and considers the arguments surrounding this potential extension of the good-faith exception. Taking into account the early decisions by lower courts on this issue as well as the history of the good-faith exception, the Article concludes that the principles and precedent of *Herring* and its ancestors weigh in favor of such an extension, and the Court is likely to find in favor of an extension of the good-faith exception under that perspective of the exclusionary rule. Finally, the Article turns to a discussion of what ought to be the scope of such an extension and argues for a limited extension available only when police reliance falls strictly within what is *objectively reasonable*, as determined by the justifications of the good-faith exception together with certain pragmatic considerations, and outlines several behaviors that are outside of this narrowly conceived extension.

II. THE PROBLEM PRESENTED BY *GANT*: GOOD FAITH OF POLICE AND CHANGING RULES

In February 2008, the Court granted a writ of certiorari in *Gant* to consider the question of whether “the Fourth Amendment require[d] law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured.” As indicated in the Court’s discussion of the merits, the purpose of granting certiorari was to revisit and clarify the scope of *Belton* and to decide whether *Belton* searches of vehicles that were unsupported by the underlying “twin rationales” in *Chimel v. California* —the case on which *Belton* was

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17. United States v. Grote, No. CR-08-6057-LRS, 2009 WL 2068023, at *3 (E.D. Wash. 2009) (commenting that the question “is an issue which remains ‘open for debate’”). The U.S. Court of Appeals for the Eighth Circuit indicated the same when, without ruling on the question, it pointed out the potential argument *sua sponte* and then declined to address it because it had not been raised. United States v. Hrasky, 567 F.3d 367, 368-69 (8th Cir. 2009).

18. These considerations are built into the definition of what is “reasonable” reliance.


based—were nonetheless reasonable under the Fourth Amendment.\footnote{See Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009) ("The chorus that has called for us to revisit \textit{Belton} includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. We therefore granted the State's petition for certiorari.")}{.23} Those twin rationales of \textit{Chimel}, that justify searches incident to arrest are, (1) ensuring officer safety, and (2) preventing the potential destruction of evidence.\footnote{\textit{Chimel}, 395 U.S. at 763.}{.24}

The petitioner, Rodney Gant, presented the Court with a model test case for this issue (although there were copious other cases with circumstances similarly distancing the searches from the \textit{Chimel} reasoning). Gant was arrested in the driveway of a suspected drug house for driving with a suspended license.\footnote{\textit{Gant}, 129 S. Ct. at 1714-15.}{.25} Previously that evening, Gant had answered the door at the residence during a police knock-and-talk and identified himself to the officers, denying ownership of the home.\footnote{\textit{Id.} at 1715.}{.26} When the police left the residence, they ran his information through a records check and discovered an outstanding warrant for a driving offense.\footnote{\textit{Id.}} \footnote{\textit{Id.}} Returning to the house later, the officers arrested two people for providing a false name and possession of drug paraphernalia, and the officers were still on the scene when Gant returned in his vehicle and parked in the driveway.\footnote{\textit{Id.}} On exiting his vehicle, the police immediately arrested and handcuffed Gant, later securing him in the back of a police car.\footnote{\textit{Id.}} Afterwards, the police searched his vehicle and discovered a gun and a bag of cocaine.\footnote{\textit{Id.}} He was charged with possession of a narcotic for sale and possession of drug paraphernalia, convicted by a jury, and sentenced to three years imprisonment.\footnote{\textit{Id.}} On appeal to the Arizona Supreme Court, Gant successfully argued for the suppression of the gun and cocaine on the basis that "when . . . the justifications underlying \textit{Chimel} no longer exist . . . the warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence."\footnote{State v. Gant, 162 P.3d 640, 644 (Ariz. 2007).}{.32} The U.S. Supreme Court affirmed on the same rationale.\footnote{\textit{Gant}, 129 S. Ct. at 1714.}{.33}
Prior to Gant, the Belton rule permitted the search of a passenger compartment of a vehicle and any containers in the car incident to the contemporaneous arrest of a recent occupant of the vehicle.\textsuperscript{34} This rule had been understood by many lower courts to be a bright-line rule allowing a search of a vehicle contemporaneous to any arrest of a recent occupant of the vehicle, with federal cases in nearly every circuit referring to the Belton holding as a bright-line rule.\textsuperscript{35} The understanding of the lower courts was not baseless; the U.S. Supreme Court had referred to the Belton holding as a bright-line rule in a number of its own opinions.\textsuperscript{36} For instance, in Florida v. Thomas, the Court began its opinion by explaining, “In New York v. Belton, we established a ‘bright-line’ rule permitting a law enforcement officer who has made a lawful custodial arrest of the occupant of a car to search the passenger compartment of that car as a contemporaneous incident of the arrest.”\textsuperscript{37} Similarly, in Michigan v. Long, decided just two years after Belton by a nearly identical Court that was split along the same votes,\textsuperscript{38} the majority opinion remarked in a footnote that “our decision [in this case] does not mean that the police may conduct automobile searches whenever they conduct an investigative stop, although the ‘bright line’ that we drew in Belton clearly authorizes such a search whenever officers effect a custodial arrest.”\textsuperscript{39} Even Robbins v. California—decided the same day as Belton—supported such a reading, as

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 1717.
\item \textsuperscript{35} \textit{Id.} at 1718; \textit{see also} United States v. Nichols, 512 F.3d 789, 796-97 (6th Cir. 2008); McLish v. Nugent, 483 F.3d 1231, 1258 (11th Cir. 2007); United States v. Mapp, 476 F.3d 1012, 1018 (D.C. Cir. 2007); United States v. Hrasky, 453 F.3d 1099, 1100 (8th Cir. 2006); United States v. Currence, 446 F.3d 554, 556 (4th Cir. 2006); United States v. Osife, 398 F.3d 1143, 1145 (9th Cir. 2005); United States v. Humphrey, 208 F.3d 1190, 1201-02 (10th Cir. 2000); United States v. Sholola, 124 F.3d 803, 816-17 (7th Cir. 1997); United States v. Hudgins, 52 F.3d 115, 119 (6th Cir. 1995); United States v. Doward, 41 F.3d 789, 792-93 (1st Cir. 1994); United States v. Arango, 879 F.2d 1501, 1504-06 (7th Cir. 1989); United States v. Vanhoesen, 552 F. Supp. 2d 335, 342 (N.D.N.Y. 2008).
\item \textsuperscript{36} Thornton v. United States, 541 U.S. 615, 617 (2004) (stating the Belton rule unequivocally: “[W]hen a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest.”); \textit{id.} at 623 n.3; \textit{id.} at 625 (Scalia, J., concurring); Florida v. Thomas, 532 U.S. 774, 776 (2001); Michigan v. Long, 463 U.S. 1032, 1049 n.14 (1983); Robbins v. California, 453 U.S. 420, 430-31 (1981) (Powell, J., concurring).
\item \textsuperscript{37} \textit{Thomas}, 532 U.S. at 776.
\item \textsuperscript{38} Justice Sandra Day O’Connor had by then replaced Justice Potter Stewart and voted with the majority in \textit{Long}, as Justice Stewart had done in Belton.
\item \textsuperscript{39} \textit{Long}, 463 U.S. at 1049 n.14.
\end{itemize}
Justice Lewis F. Powell, Jr.’s concurrence noted that he had joined Belton’s holding because of the necessity of a bright-line rule in those circumstances.40

In contrast to this commonly held interpretation of Belton’s holding, the Gant majority divided the understanding of Belton into the “broad reading,” according to which Belton has been described as a bright-line rule and that has been advanced by a number of circuit courts and approved by the Court itself, as described above;41 and the “narrow reading” proposed by the Arizona Supreme Court in its holding in Gant,42 a reading that restricted Belton to the reasoning of Chimel.43 The U.S. Supreme Court explained that reading Belton broadly “would thus untether the rule from the justifications underlying the Chimel exception—a result clearly incompatible with our statement in Belton that it ‘in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.’”44 The Court then adopted the narrower reading of the Arizona Supreme Court and held that searches of a vehicle after the arrest of a recent occupant are justified only when the arrestee is unsecured and within grabbing distance of the vehicle or when there is a reason to believe that evidence relevant to the crime of arrest might be found in the vehicle.45

As the Gant majority noted, the narrow reading of Belton had been endorsed by two prior U.S. Court of Appeals decisions, United States v. Green and United States v. Edwards.46 Both cases involved circumstances where the arrestee had been secured in handcuffs and was a good distance away from the vehicle when it was searched, and both found that the “grabbing distance” rationale of Chimel was not present. However, although the Edwards court asserted that the “justification for allowing searches incident to arrest also places a temporal restriction upon the police’s conduct,”47 and the Green panel similarly concluded that “[b]ecause none of the concerns articulated in Chimel and Belton regarding law enforcement safety and the destruction of evidence are present in this case, the Government cannot justify the search of Green’s vehicle under

42. Id. at 1722 n.9.
44. Gant, 129 S. Ct. at 1719.
45. Id.
46. See id. at 1718 n.2 (citing United States v. Green, 324 F.3d 375, 379 (5th Cir. 2003); United States v. Edwards, 242 F.3d 938, 938 (10th Cir. 2001)).
47. Edwards, 242 F.3d at 937.
Belton or Chimel, both cases placed a heavy emphasis on the extraordinary lapse of time between the arrest of the detainees and the search of the vehicles, and importantly, both were handed down before the U.S. Supreme Court’s decision in United States v. Thornton expanded the temporal scope of the Belton bright-line rule. The decisions were, therefore, of questionable authority by the time of the Gant opinion, and after Thornton’s extension of Belton to recent occupants of vehicles, as evidenced by subsequent decisions in those circuits.

As a result of the fairly uniform understanding that the Belton holding had been what the Gant majority called the “broad reading,” the Gant Court’s adoption of a “narrow reading” of Belton immediately invalidated an innumerable multitude of searches that had been conducted in reliance on that general lower-court consensus. Noting this undesirable consequence, Justice Alito’s dissenting opinion, joined by Chief Justice John G. Roberts, as well as Justices Anthony Kennedy and Stephen Breyer, noted that “[t]he Court’s decision will cause the suppression of evidence gathered in many searches carried out in reliance on well-settled case law,” thereby setting the stage for the many battles on the suppression of Belton-permissible but Gant-impermissible vehicle searches, in the months following Gant. Strikingly, the dissent did not itself invoke the good-faith exception as articulated in Herring. Nonetheless, following Gant, a growing number of lower courts have been asked to address the question of whether the fruits of Belton-permissible but Gant-impermissible searches ought to be suppressed or, to the contrary, are admissible in the prosecutor’s case-in-chief for the reason that they fit within the rationale of the good-faith exception to the exclusionary rule. The Court’s analyses

48. Green, 324 F.3d at 379.
50. For example, McCane, like Edwards, was a Tenth Circuit case in which the search was conducted after the defendant was handcuffed. United States v. McCane, 573 F.3d 1037 (10th Cir. 2009). The McCane analysis reasoned that prior to Gant, “the Tenth Circuit jurisprudence supporting the search was settled,” apparently believing Edward’s holding inapposite. Id. at 1045 n.6. Similarly, the Louisiana Court of Appeals commented in dicta that Green was on shaky ground, in consideration of Thornton soon after the Thornton decision was rendered. See State v. Lawrence, 925 So. 2d 727, 741 n.3 (La. Ct. App. 2006).
52. See Craig M. Bradley, Two and a Half Cheers for the Court, TRIAL Aug. 2009, at 48, 49.
53. See, e.g., United States v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009), McCane, 573 F.3d 1037; United States v. Buford, 623 F. Supp. 2d 923 (M.D. Tenn. 2009).
have turned largely on the pillars of that exception as defined by the cases of United States v. Leon,54 Illinois v. Krull,55 Arizona v. Evans,56 and more recently, Herring.57

III. THE INTERPLAY OF GOOD FAITH AND THE EXCLUSION OF EVIDENCE

Ever since Mapp v. Ohio pronounced that the exclusionary rule was “constitutionally required,”58 the Court has steadily backed away from the implication that the exclusion of evidence is automatic in response to a constitutional violation,59 even expressly repudiating the constitutional basis of the rule.60 One area that represents an increasingly growing barrier to the enforcement of the exclusionary rule is the good-faith exception, which has permitted the prosecution to admit evidence obtained in violation of the constitutional prohibitions in certain circumstances when police officers have acted in “objectively reasonable reliance” on some third-party mistake.61 Following Hudson v. Michigan62 and Herring, the exact status of the good-faith exception and its interaction with the exclusionary rule is uncertain. Although it is certain that the exception has yet to swallow the rule,63 it is equally certain that the exception is broader than it ever has been, and under the rationale proffered by the Herring majority, it promises to continue its growth.64 A brief history of this area

59. Lawrence Crocker, Can the Exclusionary Rule Be Saved?, 84 J. CRIM. L. & CRIMINOLOGY 310, 313 (1993) (“Mapp v. Ohio[] represents the high water mark of Supreme Court regard for the constitutional credentials of the exclusionary rule.”).
61. Leon, 468 U.S. at 927.
63. The Herring Court repeatedly asserted that deliberate, reckless, grossly negligent, and recurring or systemically negligent conduct was not at issue. Herring v. United States, 129 S. Ct. 695, 702 (2009).
64. Id. at 703 (expanding the good-faith exception, which applies when “negligent police miscommunications” are involved in the acquisition of a warrant, and further holding that even when these miscommunications occur “after the
demonstrates that the good-faith exception is built on a handful of important principles and conclusions, all of which support an extension of the exception to police reliance on case law when applied to Belton-permissible but Gant-impermissible searches.

A. The History of the Good-Faith Exception

The modern incarnation of the good-faith exception to the exclusionary rule, as it is now known, stems primarily from the Court’s decisions in the companion cases of Leon and Massachusetts v. Sheppard, but its roots are deeper. In Mapp, the Court not only held that the exclusionary rule was a constitutional necessity, but also offered three separate justifications for the rule, touting it as (1) an implied privilege; (2) an action necessary to the prevention of extended constitutional violations; and (3) an essential deterrence sanction. The first argument stood on the reasoning that failing to exclude the evidence would be “to grant the right but in reality to withhold its privilege and enjoyment.” The second rooted itself in the indictment that “admission . . . furthers the purposes of the police officer who ‘chooses to suspend the Fourth Amendment’s enjoyment.’” Finally, the familiar deterrence rationale was originally phrased in the absolute language that failing to provide the sanction of exclusion would reduce the Fourth Amendment to a mere “form of words.” By the time United States v. Calandra was decided twelve years later, the Court had abandoned the first two justifications and settled on a sedated version of the rule according to which deterrence is posited as its sole justification.

warrant had been issued and recalled, the evidence obtained should not be excluded).

65. 468 U.S. 981 (1984) (argued and decided on the same day as Leon).
68. Mapp, 367 U.S. at 656.
69. Crocker, supra note 59, at 315.
70. Mapp, 367 U.S. at 648 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).
72. Crocker, supra note 59, at 318 (“The single mindedly deterrent theory of United States v. Calandra was the death warrant for the first two Mapp arguments.”).
In *Leon*, the Court held that the exclusionary rule did not prohibit the introduction of evidence resulting from a warranted search where the warrant was facially valid but subsequently held to be unsupported by probable cause. 73 After an extensive investigation of a suspected drug ring by the Burbank police, a California State Superior Court judge issued the police a facially valid search warrant. 74 The resulting search produced large quantities of drugs and led to the indictment of the case’s several respondents in federal district court, 75 but the district court then suppressed the evidence after finding that the warrant was unsupported by probable cause and rejected the government’s argument that the officer’s good-faith reliance on the warrant precluded exclusion. 76

Ultimately, the U.S. Supreme Court reversed the district court’s ruling on that point, explaining that the Court’s Fourth Amendment jurisprudence had modified the exclusionary rule without harm to its intended function and that the circumstances in that case similarly favored modification. 77 The Court rejected its previous holdings, implying that “the exclusionary rule is a necessary corollary of the Fourth Amendment,” 78 separating the application of the exclusionary rule from the question of whether a defendant’s constitutional rights have been infringed, 79 and applying a cost-benefit analysis based on the “social costs” exacted by the exclusion of evidence in determining when to apply the rule. 80 Particularly stressing the neutrality of judicial magistrates in relation to law enforcement, the Court noted that “[j]udges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions.” 81 The Court therefore held that an officer was entitled to rely on the magistrate’s judgment in this area, remarking that “an officer cannot be expected to question the magistrate’s probable-cause determination or his judgment that the form of the warrant is technically sufficient.” 82

The companion case of *Sheppard*, decided the same day as *Leon*, similarly held that the exclusionary rule was inapplicable where a warrant that was believed to be valid turned out to be invalid because the issuing

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74. *Id.* at 901-02.
75. *Id.* at 902.
76. *Id.* at 903-04.
77. *Id.* at 905.
78. *Id.* (citations omitted).
79. *Id.* at 906.
80. *Id.* at 907-08.
81. *Id.* at 917.
82. *Id.* at 921.
judge neglected to correct clerical errors. \(^{83}\) Significantly, like in \textit{Leon}, the Court stressed that a police officer is entitled to rely on judicial opinions in that context, stating that “we refuse to rule that an officer is required to disbelieve a judge who has just advised him . . . that the warrant he possesses authorizes him to conduct the search he has requested.” \(^{84}\) Concluding its decision, the Court again noted that “[a]n error of constitutional dimensions may have been committed . . . but it was the judge, not the police officers, who made the critical mistake.” \(^{85}\) Accordingly, the Court again refused to demand the exclusion of evidence when the police acted in objectively reasonable reliance (or good faith) on a magistrate’s determination. \(^{86}\)

Two years after the decisions in \textit{Leon} and \textit{Sheppard}, the Court in \textit{Illinois v. Krull} was asked to extend the good-faith exception to warrantless administrative searches conducted in reliance on a statute that authorized the searches but was subsequently declared unconstitutional on judicial review. \(^{87}\) Drawing from \textit{Calandra}, the Court confirmed that the “prime purpose” of the judicially created remedy of exclusion is “to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment.” \(^{88}\) The Court emphasized \textit{Leon}’s holding as embodying the broad principle, “Where the officer’s conduct is objectively reasonable . . . ‘[e]xcluding the evidence will not further the ends of the exclusionary rule in any appreciable way . . . .’” \(^{89}\) Likening the circumstances to the approach in \textit{Leon}, the Court found that applying the exclusionary rule would “have as little deterrent effect” on an officer relying upon the legislature’s judgment in passing a statute as it would have upon officers relying on a magistrate’s judgment in issuing a warrant. \(^{90}\) The Court accordingly extended good faith to reliance upon a statute, holding that “[u]nless a statute is \textit{clearly} unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law.” \(^{91}\)

The final important case expanding good faith prior to \textit{Herring} was \textit{Arizona v. Evans}, in which the Court held that evidence obtained as a result of the police’s objectively reasonable reliance upon a record-keeping error made by a court clerk, which indicated that an arrest warrant was still

\(^{84}\) \textit{Id.} at 989-90.
\(^{85}\) \textit{Id.} at 990 (emphasis added).
\(^{86}\) \textit{Id.}
\(^{89}\) \textit{Id.} at 349 (quoting \textit{United States v. Leon}, 468 U.S. 897, 920 (1984)).
\(^{90}\) \textit{Id.}
\(^{91}\) \textit{Id.} at 349-50 (emphasis added).
outstanding, was not subject to suppression.\textsuperscript{92} Noting, as \textit{Leon} had, the distinction between the issues of whether a Fourth Amendment violation occurs and whether exclusion is the appropriate remedy,\textsuperscript{93} the Court ruled that exclusion was inappropriate because of what it perceived as the inability to deter court employees’ mistakes with the sanction of exclusion.\textsuperscript{94} The Court reasoned that the exclusionary rule was historically applicable only to police misconduct and not applicable to court staff.\textsuperscript{95} Opining that court staff had no particular motive for subverting the Fourth Amendment, it determined that there was no basis for believing that the application of the exclusionary rule would have a significant effect on police conduct.\textsuperscript{96} On these grounds, the Court held that an extension of good faith to clerical errors made by court clerks was merited.\textsuperscript{97}

The \textit{Leon}, \textit{Sheppard}, \textit{Krull}, and \textit{Evans} cases erected the framework that \textit{Herring} would later build upon by expounding the reasoning and breadth of the good-faith exception. Its pillars were (1) the \textit{Calandra} viewpoint that deterrence alone justified the exclusionary rule;\textsuperscript{98} (2) the separation of Fourth Amendment violations and the mechanism of exclusion;\textsuperscript{99} (3) the utilization of a cost-benefit balancing test to determine the appropriateness of exclusion;\textsuperscript{100} (4) the assumption that actors other than the police could not be deterred by the exclusionary sanction;\textsuperscript{101} and (5) the conclusion that

\begin{itemize}
  \item \textsuperscript{92} Arizona v. Evans, 514 U.S. 1, 6 (1995).
  \item \textsuperscript{93} Id. at 10.
  \item \textsuperscript{94} Id. at 14.
  \item \textsuperscript{95} Id. at 14-15.
  \item \textsuperscript{96} Id. at 15.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{99} \textit{See} William C. Heffernan & Richard W. Lovely, \textit{Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law}, 24 U. Mich. J.L. Reform 311, 315-16 (noting three core features of the Court’s exclusion analysis post-\textit{Mapp} and denoting one as the conclusion that “exclusion is temporally and analytically distinct from fourth amendment rights themselves” (footnote omitted)).
  \item \textsuperscript{100} \textit{Krull}, 480 U.S. at 353-53; \textit{Leon}, 468 U.S. at 906-07.
  \item \textsuperscript{101} United States v. McCane, 573 F.3d 1037, 1044 (10th Cir. 2009)

[T]he 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.

\textit{Id}.
police are justified in relying on information supplied to them by neutral third parties if such reliance is objectively reasonable. Drawing on this foundation, *Herring* expounded and codified a robust good-faith exception to the exclusionary rule using reasoning supports extending the application of that exception to cover police reliance on case law.

**B. A Robust Exception for Good Faith Under Herring**

When *Herring* came before the Court, both parties agreed that the Fourth Amendment had been violated, and the sole issue for decision was whether or not the exclusionary rule applied when a police officer relied upon the negligent recordkeeping error of a fellow police employee that indicated that there was an outstanding warrant for the defendant’s arrest. Thus, in many ways, the case looked quite similar to the *Evans* case—with the glaring exception that the recordkeeping mistake was that of a police employee not shielded by the neutrality available to the third-party errors that the Court had previously addressed. Despite this distinction, the Court held that the absence of officer culpability for the error and the minimal potential for deterrence mandated an extension of good faith to those factual circumstances.

Like the Court had done in *Hudson* three years earlier, the *Herring* majority made a point of rejecting *Mapp*’s premise that exclusion is a necessary consequence of constitutional violations, vehemently defending the opposite view. Speaking for the Court, Chief Justice Roberts axiomatically decreed that “[o]ur cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation,” and the issue instead “turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.” Invoking *Hudson*, the opinion later reiterated this strain of thought by asserting that exclusion has historically been “our last resort, not our first impulse,” and its application is constrained by the important principles of deterrence and the cost-benefit analysis that weighs the likely deterrent effect of applying the rule against the societal costs of exclusion. In gauging the deterrent effect, the

104. *Id.* at 704.
107. *Id.*
108. *Id.* at 700.
“flagrancy of the police misconduct” is central,\textsuperscript{109} and the “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.”\textsuperscript{110} Thus, the “good faith inquiry is confined to the objectively ascertainable question [of] whether a reasonably well trained officer would have known that the search was illegal . . . .”\textsuperscript{111} Applying these principles to Herring’s case, the Court determined that “the conduct at issue was not so objectively culpable as to require exclusion.”\textsuperscript{112} And if “systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system,”\textsuperscript{113} but in this case the “isolated negligence”\textsuperscript{114} of the police did not “pay its way” in the cost-benefit analysis.\textsuperscript{115}

The 	extit{Herring} decision left the status of the exclusionary rule somewhat uncertain.\textsuperscript{116} Undoubtedly, 	extit{Herring} did not come close to abolishing the exclusionary rule off hand,\textsuperscript{117} and the Court emphasized that the application of the rule to deliberate or reckless conduct was not at issue.\textsuperscript{118} But there has been some ambiguity concerning the precise meaning of the decision. For instance, renowned criminal-procedure scholar Wayne LaFave proposed six potential interpretations of the Court’s holding, all depending on how a person construes the Court’s use of the word 	extit{attenuated}.\textsuperscript{119}

Despite any ambiguity, the central message of 	extit{Herring} is clearly the adoption of a robust good-faith exception and the model of balancing the costs and benefits of deterrence in carrying out the exclusionary-rule inquiry, with a requirement of a substantial level of police culpability. By concluding that the police themselves could commit the error (though in

\begin{itemize}
\item \textsuperscript{109} Id. at 701 (“The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct.”).
\item \textsuperscript{110} Id. at 702.
\item \textsuperscript{111} Id. at 703 (quoting United States v. Leon 468 U.S. 897, 922 (1984)).
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id. at 704.
\item \textsuperscript{114} Id. at 698.
\item \textsuperscript{115} Id. at 704.
\item \textsuperscript{116} See Harris, supra note 14, at 186.
\item \textsuperscript{117} Bradley, supra note 12, at 54 (“Herring itself represents another chip out of the exclusionary rule, albeit a minor one since most illegal searches will not be attenuated from the error that caused them.”).
\item \textsuperscript{118} Herring, 129 S. Ct. at 702.
\end{itemize}
this case not the officers), the Court’s decision in \textit{Herring} went well beyond merely permitting the police to rely upon the judgment of a magistrate in issuing a warrant or relying upon the judgment of a legislature in passing a statute.\footnote{See \textit{Herring}, 129 S. Ct. at 698, 704.} Blurring the neutral third-party requirement, \textit{Herring} permitted police to rely on the presumed competence of police-support staff in a neighboring county who were responsible both for checking on the existence of warrants and ostensibly for updating the database that mistakenly showed a recalled warrant.\footnote{Id.} The Court rejected Justice Ruth Bader Ginsburg and the dissenters’ “more majestic conception” of the exclusionary rule and instead embraced a robust vision of good faith, emphasizing that the exception was applicable not only where the extra checks of third-party, non-police conduct shielded the violation,\footnote{The U.S. Supreme Court seemed to hold as such. \textit{See Arizona v. Evans} 514 U.S. 1, 15 (1985).} but also wherever the violation at issue is not flagrant, reckless, grossly or systemically negligent, or otherwise unreasonable.\footnote{\textit{Herring}, 129 S. Ct. at 702.} Judging by the historical pillars of the exception, and especially this robust conception of good faith, an extension of its application to a police officer’s objectively reasonable reliance on settled case law is warranted.

\section*{IV. The Arguments for and Against a Good-Faith Exception for Case Law}

Although there certainly is not strict uniformity in favor of extending the good-faith exception to case law, a majority of the cases addressing the issue thus far have chosen to do so.\footnote{See, e.g., \textit{United States v. Lopez}, 655 F. Supp. 2d 720 (D. Ky. 2009) (siding in favor of the good-faith exception); \textit{United States v. Wesley}, 649 F. Supp. 2d 1232 (D. Kan. 2009) (following \textit{United States v. McCane}, 573 F.3d 1037 (10th Cir. 2009); \textit{United States v. Allison}, 637 F. Supp. 2d 657 (C.D. Iowa 2009) (siding in favor of the good-faith exception). \textit{But see} \textit{United States v. Taylor}, 656 F. Supp. 2d 998 (E.D. Mo. 2009) (siding against the good-faith exception).} As discussed in the following section, this trend is well-supported by several sound arguments, including that the deterrence rationale of the exclusionary rule and the cost-benefit analysis of \textit{Herring} weigh in favor of allowing the presentation of evidence in those circumstances and that reliance on a reasonable understanding of settled case law makes any fault in the illegal search a judicial error and not a police error. On the other hand, the primary argument against the exception, the supposed inconsistency between permitting such an extension and the retroactivity doctrine, proves to be poorly reasoned when
examined under the now-entrenched distinction that the courts have made between constitutional violations and their appropriate remedies. The further objection that such an exception will invite the police to engage in improper legal analysis is equally unfounded. Accordingly, an extension of the good-faith exception to objectively reasonable police reliance on settled case law should be permitted because it is, on the whole, consistent with the reasoning of both the good-faith exception and the exclusionary rule.

A. The Deterrence Rationale and the Balancing of the Costs of Exclusion

Since *Calandra*, the Court has singled out deterrence as the sole justification for the exclusionary rule, thereby mandating some level of deterrence-responsive, blameworthy police conduct for exclusion to be appropriate and necessitating that the judiciary engage in a cost-benefit analysis prior to excluding evidence by weighing the societal costs of exclusion against its deterrence value. Concordantly, *Herring* emphasized even more strongly than previous case precedents the necessity of blameworthy police conduct to “pay the way” for exclusion.125 In *Herring*, the Court made a distinction between “deliberate, reckless, or grossly negligent conduct, or . . . recurring or systematic negligence,” which it held mandates the exclusion of evidence, and the “isolated negligence” that was at issue in that case, which did not justify the costs of exclusion.126 Thus, with deterrence as the exclusionary rule’s singular concern, conduct that is less likely to be deterred by the consequence of exclusion is not subject to its costs.127

This distinction weighs strongly in favor of recognizing a good-faith exception to exclusion based upon reliance on case law. With deterrence as the goal of—and even a prerequisite to—exclusion, it is difficult to fathom how exclusion can accomplish the desired ends in those circumstances.128 Where the police have reasonably relied upon the constitutional interpretation elucidated by the courts, nothing more can be asked of them. They have not only acted non-negligently but in fact have also acted as reasonably as can be demanded by taking the precaution to make officers aware of the boundaries of the existing law. Although the various other purported goals of the exclusionary rule may yet make a good

126. *Id.* at 702.
127. *Id.*
128. Illinois v. Krull, 480 U.S. 340, 353 (1987) (“In determining whether to apply the exclusionary rule, a court should examine whether such application will advance the deterrent objective of the rule.”).
argument for the exclusion of evidence,\textsuperscript{129} from the viewpoint of deterrence, nothing can be gained. Because the “good-faith inquiry is confined to the objectively ascertainable question of whether a reasonably well-trained officer would have known that the search was illegal,”\textsuperscript{130} and in such circumstances the existing state of case law condones the activity, the \textit{Herring} standard would consider the potential deterrence insufficient to justify the costs of exclusion. The overall deterrence value is depreciated even further when it is noted that the error, as explained in the next section, is a third-party error and is made by those whom the Court has held cannot be deterred by the sanction of exclusion.\textsuperscript{131} Conversely, using \textit{Herring} as a guide for determining when evidence obtained in reliance on U.S. Supreme Court case law would be subject to the exclusionary rule, police conduct would clearly warrant exclusion when their reliance is unreasonable, i.e., at least negligent,\textsuperscript{132} assuring a fault-based system in accordance with the goal of deterrence. Consequently, applying the good-faith exception to police reliance on case law is consistent with the objective of the exception to forgive errors committed without sufficiently deliberate conduct to justify the cost of exclusion.

\textbf{B. Whose Mistake Is It Anyway?: The Judiciary as a Third-Party Safeguard}

Another historically significant rationale for the good-faith exception has been the recognition that where the error in a constitutional violation belongs in total to a neutral third party, and the police have not themselves partaken in the violation by deliberate misconduct or willful blindness, the fruits of that violation need not be suppressed both because of the perceived impossibility of deterring these third parties and because the actors themselves offer the police conduct a covering of neutrality.\textsuperscript{133} This element is evident in \textit{Herring}; most scholars who have had an opportunity to comment on \textit{Herring} have attempted to rein in the scope of its holding by focusing on the apparent requirement that the error be “attenuated” from

\begin{itemize}
\item \textsuperscript{129} For instance, one could make an argument on the basis of implied privilege that the violation itself justifies exclusion or on the basis of the extended-violation theory that a court’s acquiescence in the violation continues the wrong. However, the Court has already rendered these arguments nugatory.
\item \textsuperscript{130} \textit{Herring}, 129 S. Ct. at 703 (quoting United States v. Leon, 468 U.S. 897, 922 (1984)).
\item \textsuperscript{131} Arizona v. Evans, 514 U.S. 1, 14-15 (1995).
\item \textsuperscript{132} This type of negligence would no doubt pass scrutiny with the U.S. Supreme Court as a systemic problem in this context.
\item \textsuperscript{133} \textit{See} Evans, 514 U.S. at 14-15; Massachusetts v. Sheppard, 468 U.S. 981, 990 (1984).
\end{itemize}
the search in question. The substance of this requirement is admittedly ambiguous, but some analysts have suggested that one possibility is that the standard mandates that the error is not made by those officers who conducted the search. This reading, while perhaps unsupported by the sweeping language of the majority opinion, would nonetheless be consistent with the prior rulings of Evans, Krull, Sheppard, and Leon. Each of those cases permitted the police to rely on the judgments of third parties who themselves were perceived by the Court to be a safeguard of neutrality against any malicious intent of the police who are engaged in the “competitive enterprise of ferreting out crime.” Additionally, each of the cases equally denounced the implication that, if not permitted to rely on the opinions of these select third parties, the police would be forced to second-guess the judgment of these ostensibly neutral players. An extension of good faith to reliance on case law meets this requirement: that the error belongs to someone other than the police, because the error in such circumstances is judicial, and therefore, it is sufficiently attenuated from the searches in question.

Picking up on this pillar of the good-faith exception in United States v. McCane, the Tenth Circuit addressed the attenuation problem by taking the blame, advocating that the judiciary was at fault for the unconstitutionality of the search at issue, and concluding that an extension of the good-faith exception to reliance on case law was appropriate. According to McCane, when the police defer to settled case law from U.S. Courts of Appeals any mistake that the U.S. Supreme Court later corrects belongs not to the police but to the judicial officers who misinterpreted the

134. See LaFave, supra note 119; Bradley, supra note 12, at 53-54.
135. See LaFave, supra note 119, at 759-65; Bradley, supra note 12, at 53-54.
138. Leon, 468 U.S. at 913-14 (citations omitted).
139. Evans, 514 U.S. at 17 (holding that police officers are “entitled to enjoy the substantial advantages” of newly discovered “computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible”); Krull, 480 U.S. at 349-50 (holding that “[u]nless the statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law”); Sheppard, 468 U.S. 989-90 (refusing “to rule that an officer is required to disbelieve a judge who has just advised him”); Leon, 468 U.S. at 913 (holding that it is reasonable for officers who conducted the search to “rely[] on a warrant issued by a detached and neutral magistrate” (emphasis added)).
140. 573 F.3d 1037 (10th Cir. 2009).
141. Id. at 1045.
constitutional requirements, and it is, therefore, sufficiently attenuated to avoid the application of the exclusionary rule. By drawing on *Krull*, where the mistake was made by the legislature; *Evans*, where the mistake was made by a clerk; and especially *Leon*, where the mistake was made by judicial officers who the Court held are “not inclined to ignore or subvert the Fourth Amendment,” *McCane* thus reasoned that the mistake at issue was permissible because it was not the mistake of the police but instead the mistake of a third party. Thus representing the issue as a third-party error, the *McCane* court thereby framed the error so that it fell well within the established boundaries of the exception.

The *McCane* analysis correctly analogized police reliance on case law to police reliance on a statute or warrant. The point in the warrant context of *Leon* and the statute context of *Krull* is that the courtroom and legislature are neutral actors with specialty expertise, and it is not the province of police to second-guess determinations on the scope of the Constitution made by those who are better equipped to make those calls. A neutral and detached magistrate must weigh the evidence and determine the constitutional boundaries of a search. The third-party legislature must pass only such laws as it has the constitutional authority to author. In the good-faith-exception context, the U.S. Supreme Court has held that, by relying on the judgment of these functionaries, the police keep the authority for such decisions in their proper sphere.

In the same way, applying a good-faith exception to police reliance on settled case law encourages the police to rely on judges whose job it is to engage in the complex legal analysis required for constitutionality determinations. Appellate judges are no more “adjuncts to the law enforcement team” than are judicial magistrates or legislators and are equally neutral to the competitive enterprise of ferreting out crime, as they swear an oath to uphold the Constitution and have no special motivation to ignore that oath or improperly act in collusion with the police. In the

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142. *Id.* at 1044-45.
143. *Id.*
instance of police officers who rely on a reasonable understanding of settled case law that the U.S. Supreme Court or a U.S. Court of Appeals later overturns, it is proper to remark, as the U.S. Supreme Court did in Sheppard: “An error of constitutional dimensions may have been committed . . . but it was the judge, not the police officers, who made the critical mistake.” Any other rule would encourage police to second-guess the decisions of appellate judges and require them to make independent judgments on the constitutionality of searches, a task that they are not prepared to undertake.

C. The Fear of a “J.D.-P.D.”: Police Improperly Engaging in Legal Analysis

In declaring that police officers’ reliance on settled law of U.S. Courts of Appeals transforms the error into a judicial one, McCane also sidestepped a previously raised objection to this practice articulated by United States v. 15324 County Highway E., a U.S. Court of Appeals for the Seventh Circuit case that reached the opposite conclusion on the issue of extending good faith to reliance on case law (although decided well in advance of Herring). The Seventh Circuit speculated that extending the good-faith exception to cover police officers’ reliance on case law would serve as an invitation to the police to inappropriately engage in legal research and analysis. In response, the McCane court dismissed the objection saying that, in its case, “the . . . jurisprudence supporting the search was settled. Thus, there was no risk that law enforcement officers would engage in the type of complex legal research and analysis better left to the judiciary and members of the bar.”

The answer provided by McCane may have satisfied the concern to the extent necessitated by the facts of its case, but it hardly provides a blanket response to the objection. The answer to the broader objection is that police departments will engage in legal research and analysis, but it is the same type of legal research and analysis necessary if the police are to respect the proper boundaries of the Fourth Amendment. Accordingly, extending the good-faith exception to cover circumstances where the police department’s objectively reasonable understanding of case law turns out to be erroneous does not encourage any more legal research and analysis than is ordinarily demanded for the protection of Fourth Amendment values.

149. Sheppard, 468 U.S. at 990 (emphasis added).
150. 332 F.3d 1070, 1076 (7th Cir. 2003).
151. Id.
152. United States v. McCane, 573 F.3d 1037, 1045 n.6 (10th Cir. 2009).
Police departments as a whole must routinely engage in a degree of legal analysis.\footnote{Lisa Beisel, \textit{Area Police Adapt to Car Search Ruling}, \textit{The Capital} (Annapolis), June 24, 2009, at A5 (quoting a police chief’s comments after the \textit{Gant} decision: “There are rules out there, we have to be aware of them.”).} For instance, in \textit{Gant} the U.S. Supreme Court noted that when Officer Griffith, the arresting officer, was asked why the search was conducted, he responded, “Because the law says we can do it.”\footnote{Arizona v. \textit{Gant}, 129 S. Ct. 1710, 1715 (2009).} This police awareness of rules is not only required by the threat of exclusion,\footnote{Craig Bradley, \textit{The “Good Faith Exception” Cases: Reasonable Exercises in Futility}, 60 Ind. L.J. 287, 291 (1984) (noting that “unquestionably the rule has resulted in improved training and police awareness of fourth amendment requirements”); \textit{Heffernan & Lovely, supra} note 99, at 337 (noting that the development of the exclusionary rule “led to an expansion in police training programs”).} but it is also desirable to ensure that the Fourth Amendment guarantee is honored.\footnote{\textit{Heffernan & Lovely, supra} note 99, at 338 (concluding from a survey of police officers that “the amount of in-service training in search and seizure law was the most significant of the background characteristics influencing police knowledge of the law”); Wayne R. LaFave, \textit{Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication}, 89 Mich. L. Rev. 442, 451 (1990) (“Rulemaking offers the best hope we have for getting policemen consistently to obey and enforce constitutional norms . . . .”).} However, while the application of rules may be made by the officers at the scene of a search or seizure, the overall determination of what the law sanctions or forbids is not made by the individual officers but by the department’s administration or associated prosecutorial units that train the officers who are charged with observing the rules.\footnote{\textit{Heffernan & Lovely, supra} note 99, at 354 (explaining that the departments that train officers establish what the law allows, but that this ultimately “does not play a major role in shaping officers’ disposition to comply with the law, but it does at least play an important role in reducing actual violations of the law among officers who are already disposed to honor its prohibitions”).} Thus, the idea of police officers independently engaging in legal analysis is somewhat of a fiction. Moreover, the degree to which the police departments would have to engage in legal analysis if the good-faith exception is extended to their objectively reasonable reliance upon the then-existing state of case law is no different than what they are currently required to perform to ensure that constitutional rights are protected. Indeed, not permitting such an exception would in practice require the police to maintain a higher level of understanding of the Constitution’s requirements than the U.S. court of appeals judges, second-guessing those
who are more adequately prepared to handle the tasks of constitutional interpretation and legal analysis. Finally, any fear that the police, or their associated prosecutorial units, will interpret the case law to grant them the widest discretion possible is unwarranted because the nature of the good-faith exception requires that reliance must be “objectively reasonable.” Only reliance on what is legitimately the then-existing state of the law would provide a shelter. This objection accordingly fails.

D. The Retroactivity Doctrine

The most vociferous objection to extending the good-faith exception to reliance on case law has been one that argues that doing so violates the retroactivity doctrine and defeats the latent purposes of that rule. In the earliest post-Gant decision considering a potential good-faith exception to the exclusionary rule based on case law, United States v. Buford, the U.S. District Court for the Middle District of Tennessee dismissed the government’s argument for an extension of good faith to reliance on case law by advancing a counter-argument primarily founded on its alleged inconsistency with the retroactivity doctrine and what it termed “the basic norms of constitutional adjudication.”158 The Buford court held that because the retroactivity doctrine applies new rules of conduct for criminal prosecutions to all cases pending on direct or not yet final review, allowing such an exception would be inconsistent with both the retroactivity doctrine and the underlying “norms of constitutional adjudication,” because a defendant such as Gant would receive merely the “hollow relief” of having a court declare the search unconstitutional while allowing the evidence to be used against him nonetheless.159 Moreover, the Buford opinion contended that this would permit “perverse results” to occur, as the petitioner whose case reaches the high court would receive relief for the violation while the remaining defendants would not, despite a lack of a legitimate distinction between them.160

Echoing the concerns of Buford in United States v. Gonzalez,161 the Ninth Circuit similarly relied heavily upon retroactivity as expressed in Griffith v. Kentucky162 and United States v. Johnson163 in deciding against an extension of good faith.164 The court advanced a nearly identical

159. Id.
160. See id. at 926-27.
161. 578 F.3d 1130 (9th Cir. 2009).
164. Gonzalez, 578 F.3d at 1132.
argument for excluding the evidence as Buford had. The court argued that failing to apply the newly announced rule would violate basic norms of constitutional adjudication for two reasons. First, it would violate the integrity of the judicial review process which, as Griffith noted, is constrained by the case-and-controversy requirement of Article III, "by turning the court into, in effect, a legislative body announcing new rules but not applying them . . . ." Second, it would violate "the principle of treating similarly situated defendants the same" by permitting the defendant in the adjudicated case to benefit from the new rule while denying that safe haven to other defendants.

In response to the retroactivity argument, a few courts, including the Tenth Circuit in McCane, have parried that the U.S. Supreme Court has long distinguished between the retroactive application of new rules and the law of remedies, or the existence of a remedy for a constitutional violation. This distinction is a staple of the good-faith exception and accounts for the arguments offered by those who claim that the exception violates retroactivity. For example, the Herring Court hailed it as axiomatic that the suppression of evidence through the exclusionary rule

165. Compare Buford, 623 F. Supp. 2d at 927 with Gonzalez, 578 F.3d at 1132 (both cases asserting that not applying newly declared constitutional rules to criminal cases pending on direct review is not consistent with "the basic norms of constitutional adjudication" (quoting Griffith, 479 U.S. at 322)).
166. See Gonzalez, 578 F.3d at 1132.
167. See Griffith, 479 U.S. at 322 (citing U.S. CONST. art. III, § 2) (explaining that it is a settled principle that the Supreme Court adjudicates only cases and controversies and does not legislate new rules of criminal procedure on a broad basis).
168. Gonzalez, 578 F.3d at 1132.
169. See id. at 1132 (quoting Griffith, 479 U.S. at 323).
170. See United States v. McCane, 573 F.3d 1037, 1042-44 (10th Cir. 2009) (arguing that a Fourth Amendment violation does not always mean that the exclusionary rule applies and holding that there is a good-faith exception to a search justified under settled case law of the U.S. Court of Appeals, but later rendered unconstitutional by a Supreme Court decision); see also United States v. Lopez, 655 F. Supp. 2d 720, 732 (E.D. Ky. 2009) (agreeing with the Tenth Circuit’s analysis in McCane).
171. The distinction is recognized in the jurisprudence of the retroactivity doctrine itself, which "is primarily concerned, not with the question of whether a constitutional violation occurred, but with the availability or nonavailability of remedies." Danforth v. Minnesota, 552 U.S. 264, 290-91 (2008). As the Court has noted in that context, "A decision by this Court that a new rule does not apply retroactively . . . does not imply that there was no right and thus no violation of that right . . . only that no remedy will be provided in federal habeas courts." Id.
not an automatic consequence of a Fourth Amendment violation.\footnote{Herring v. United States, 129 S. Ct. 695 (2009).} In other words, the incongruity between the relief accorded to two supposedly similarly situated defendants happens often where one receives full relief—the suppression of evidence—and the other receives the “hollow relief” described by \textit{Buford}, because the Court has rejected the notion that exclusion is a necessary corollary of constitutional violations and because a factual difference shows the defendants not to be quite as similarly situated as they may appear at first glance. Such “hollow relief” is not contrary to Article III either, as the Court decides a genuine controversy and acts out a judicial, and not a legislative, function and simply decides two points of analysis: the first of which recognizes that the Constitution has been violated and the second of which denies that exclusion is the appropriate relief for that violation.

There are, of course, material factual differences that justify the variant treatment in those circumstances. There are not such differences in \textit{Buford}’s assumed hypothetical where the Court allows the named defendant relief but does not do so for those who followed after him when the same exact error, or reliance upon the same mistaken cases, has occurred. But that argument is a straw-man, as the scenario is not necessarily consistent with the facts of \textit{Gant} and need not be the case in subsequent decisions if an extension of good faith to police reliance on case law were allowed. In \textit{Gant}, the sole question for the Court was whether the search complied with the Fourth Amendment.\footnote{Arizona v. Gant, 128 S. Ct. 1443, 1444 (2008) (granting cert.).} The Court did not directly address the further question of whether suppression was the appropriate remedy, leaving the issue hypothetically open upon remand of the \textit{Gant} case itself. Additionally, the problem of unequal treatment would be less likely in future decisions, because after having recognized such an extension of good faith the Court would be required to answer the question of whether suppression was the appropriate remedy when it decides that a violation has occurred and circumstances give rise to the argument that good-faith reliance by police on existing law reduces the deterrence value of exclusion.

In light of these considerations, the argument that the proposed exception violates the retroactivity doctrine does not provide a solid basis for objecting to an extension of the good-faith exception to reliance on case law. There is also no basis for the Seventh Circuit’s objection that police will be required to improperly engage in legal analysis. Therefore, because the deterrence-focused cost-benefit analysis weighs heavily in favor of such an exception and the error is cloaked with the neutrality of a third party upon whom the police are entitled to rely, such an extension is justified by
the principles of the good-faith exception, and the Court is likely to find in favor of such an extension.

V. THE SCOPE OF A GOOD-FAITH EXCEPTION FOR RELIANCE ON CASE LAW

When it is conceded that the application of the good-faith exception should be extended to include police reliance on case law, the most crucial issue facing the courts concerning such an exception is how to define its scope. However, none of the cases permitting the exception thus far have overtly grappled with this question. While *Herring* and the other good-faith cases offer some guidance by limiting the issue to “‘the objectively ascertainable question [of] whether a reasonably well trained officer would have known that the search was illegal’ in light of ‘all the circumstances,’” the unique application of this test to the often-fluctuating realm of case law will require the courts to articulate some more specific and tangible guidelines based upon when it is reasonable to rely on case law to determine the appropriate boundaries of a search. What I propose is a framework for the exception that remains strictly limited by the requirement that the police reliance must be “objectively reasonable” and by the neutrality safeguard of requiring that the error belong to a third party. Two questions are involved. The first one inspects the language of the authorization, asking whether the error is really a third-party error and deciding that issue by determining whether the decision or decisions relied on clearly authorized the search at issue. The second scrutinizes the strength of the authority, asking whether it is reasonable to rely on the holding of the particular court.

Generally, the first question will focus on whether, as one district court has suggested, the case law unambiguously approved of the search or seizure at issue because any ambiguity in the law they are relying on would make the police culpable of at least negligence, if not recklessness, in relying on the cases. Because the exception is justified in part by the third-party element of the error—as in the case of reliance on a warrant or statute or by its attenuation from the search, as *Herring* phrased it—the error must in actuality belong to the third party. If a court decision does not clearly approve the search, the error is a police error. Thus, for the police to ignore any ambiguity in a judicial opinion would be plainly as unreasonable as it would be for them to ignore facial defects in the warrant.

176. *Herring*, 129 S. Ct. at 698 (calling the error “the result of isolated negligence attenuated from the arrest”).
context—and similarly prohibited. Moreover, given that the police will rely on their understanding of what is permissible for a search or seizure in more than one circumstance, the negligence of a mistaken understanding of case law would be inexcusable because such negligence would have much greater costs than the “isolated” negligence at issue in *Herring* and would likely constitute a “systemic” error as *Herring* described that category.\(^{177}\)

Although *Herring* developed an even broader good-faith exception, the Court did assert that higher levels of police culpability than the isolated negligence at issue in that case, such as “recurring or systemic negligence,” would often require exclusion.\(^{178}\) Therefore, police attempts to push the boundaries of the Fourth Amendment requirements by relying on dicta or ambiguous language would clearly fall outside of the scope of this application of the good-faith exception.

In the context of the *Belton–Gant* evolution, the requirement of a clear authority for the search would be met, as *Belton* and its line of U.S. Supreme Court decisions unambiguously spoke of the holding as a “bright-line rule.” Further, a majority of the circuits had themselves come to an identical conclusion. Thus, despite the Court’s unwillingness to expressly acknowledge that it was overruling its prior holding, ample evidence would support a judgment that the law unambiguously approved searches of recent occupants of automobiles per se without additional cause to search.

In addition to the requirement that the authorization is unambiguous, it must also be reasonable to rely on such authority, taking into account the character of the court issuing the opinion. For instance, the unique role of the Court as the final arbiter of the Constitution, and also of what its own decisions mean, mandates that mistaken police reliance on court decisions may only be excused when the Court widely departs from its prior holdings. Unless it explicitly acknowledges that it is overruling itself or contradicting prior rulings, a mere change in the Court’s prior decisions by itself cannot justify withholding the remedy of exclusion on the basis of the police’s good-faith reliance. As the Court’s jurisprudence asserts, it is the final arbiter of what the Constitution says,\(^{179}\) and its constitutional interpretations are by extension the supreme law of the land.\(^{180}\) Consequently, unless the Court flatly contradicts its prior decisions, it

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177. The *Herring* majority repeatedly distinguished the “isolated” negligence at issue from what it labeled “recurring or systemic negligence,” “systemic errors,” and “routine or widespread” error. *Herring*, 129 S. Ct. at 698, 702, 704.
178. *Id.* at 702.
180. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (“[T]he interpretation of [the Constitution] enunciated by this Court in [its decisions] is the supreme law of the land . . . .”).
cannot be objectively reasonable for the police to believe that a search is warranted on the sole basis of Supreme Court decisions.

Thus, in a context like the Belton–Gant decisions where the Court claims to be merely “clarifying” its precedent, interstitial circuit-court rulings are likely to be dispositive absent convincing a judge that the Court has made a tongue-in-cheek overruling—which an advocate may be able to do because in that line of decisions, the Court previously referred to Belton as a bright-line rule. This notion has been implicit in the analysis of many of the courts grappling with the issue at this point. For example, in McCane, the issue as conceived by the Court was not that Gant upset the existing structure of Belton but that the Tenth Circuit law prior to Gant had clearly construed Belton as a bright-line rule. Similarly, in People v Mungo, a Michigan Court of Appeals decision, the Court considered the appropriate inquiry to be whether Michigan law was settled as to the legal question involved. Consequently, it is clear that in the absence of an express overruling by the U.S. Supreme Court, the law of the proper appellate jurisdiction—whether the U.S. Circuit Court or state appellate courts—will be dispositive on whether settled precedent has been upset.

In contrast, opinions by U.S. District Court judges would not justify police reliance because relying upon the district-court opinions would be unreasonable. While the district judges’ opinions may appear to meet all of the same essential requirements of the good-faith exception—being the decision of a neutral third party with no motivation to violate a defendant’s Fourth Amendment rights, like a magistrate’s determination on a warrant, and having binding precedential value—pragmatic concerns make such reliance unreasonable. For one, where the appellate courts have yet to consider the issue, a district judge’s opinion is much more open to correction than a decision by a panel of circuit judges and can rarely, if ever, be said to be the final word on a given legal issue. Consequently, police reliance on the opinions of district-court judges would be unreasonable, and the exception would not extend protection to such behavior.

181. United States v. McCane, 573 F.3d 1037 (10th Cir. 2009).
182. People v. Mungo, 789 N.W.2d 666, 666 (Mich. 2010) (reasoning that “[a]ssuming without deciding that reliance on Michigan case law can form a basis to invoke the good faith exception to the exclusionary rule, we conclude that the exception does not apply in the present case. Unlike Lopez and McCane, where the case law in each circuit was established and clear, the instant case represented the first published case in Michigan to address the applicability and extension of Belton to a vehicle search solely incident to a passenger's arrest.”).
Using these guidelines, the exception is limited to (1) police behavior that is unambiguously condoned by the settled case law of federal circuit courts but which is later deemed unconstitutional; and (2) behavior unambiguously condoned by U.S. Supreme Court cases that are later disavowed by the Court. The guidelines provide a framework for the extension that affirms the reasoning behind the good-faith exception and limit the discretion of the police, while respecting the deterrent purpose of the exclusionary rule.

VI. CONCLUSION

In consideration of the historical basis for the exclusionary rule and the good-faith exception, a narrow extension of that exception to permit the introduction of evidence obtained by the police in good-faith reliance on unambiguous case law is justified. The deterrence rationale of the rule and the accompanying cost-benefit analysis strongly weigh in favor of such an exception, as does the presence of a third-party safeguard established through review by neutral judicial officers. Moreover, neither the fear that such an exception will empower the police to engage in improper legal analysis nor the exception’s ostensible inconsistency with the retroactivity doctrine raise legitimate objections, because police understanding of the law must be objectively reasonable, and the Court routinely divorces violations of the Fourth Amendment from the remedy of exclusion. While fleshing out this extension of the good-faith exception will require the Court to articulate clearer guidelines for its application, its scope must remain tied to the overall justifications of the good-faith exception and must be decided by examining the language of the decision authorizing the searches, taking into account the nature of the issuing court. The lower court progeny of the Gant and Herring marriage have already begun to, and will undoubtedly continue to, assist in staking out the boundaries for when police reliance on case law is permissible. However, given the competing opinions in this debate, it is likely to remain a contentious area until the U.S. Supreme Court ultimately settles the matter.183

183. See supra note 17.