In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI,

Respondent,

v.

HOWARD D. JOHNSON,

Appellant.

WD70167

OPINION FILED:

July 13, 2010

Appeal from the Circuit Court of Daviess County, Missouri
The Honorable Warren L. McElwain, Judge

Before Mark D. Pfeiffer, P.J., James Edward Welsh, and Karen King Mitchell, JJ.

Howard D. Johnson appeals from a judgment of conviction following a jury trial. He was convicted of the class A misdemeanor of operating a motor vehicle upon a highway without a valid license, in violation of section 302.020, RSMo 2000, and the class C felony of possession of a controlled substance, in violation of section 195.202, RSMo 2000. We affirm in part and reverse in part.

Factual and Procedural Background

On July 14, 2007, Deputy Larry Todd Watson stopped a van that was travelling on I-35 in Daviess County because the van did not display proper license plates. Watson made contact with the driver of the van, who identified himself as Johnson. Johnson gave Watson a bill of sale for

the van, the title to the van, and proof of insurance, but explained to the deputy that he had just recently purchased the van and had not yet had an opportunity to get the van registered. Johnson told Watson that he had already been pulled over once that day for not having the van properly licensed.

Johnson also gave Watson his temporary Missouri driver's permit. Although Johnson had held a valid driver's license in Texas, when he recently moved to Missouri, he was issued a temporary permit. Johnson had a passenger in the van with him, Joyce Washington, but Washington's Kansas driver's license had been revoked. Watson instructed Johnson to exit the van and come with him to his patrol car. Washington remained in the van while the deputy questioned Johnson.

Once in the patrol car, Watson attempted to verify whether Johnson's temporary driver's permit required the presence of a licensed driver, as would be the case with a typical learner's permit. Johnson apparently told Watson that he was aware that he was in violation of the permit's terms. Deputy Watson then informed Johnson that he was under arrest for operating a motor vehicle without a license and that he was going to search the van incident to Johnson's arrest. Watson told Johnson that, if the search did not yield anything illegal, then Johnson could make bond of $150 at the scene and he would be allowed to go. Watson asked Johnson whether he had anything illegal on his person or in the van, and Johnson responded that he did not. Watson had Johnson step out of the patrol car. Watson patted down Johnson and placed him back in the patrol car.

While Watson was questioning Johnson in the patrol car, Highway Patrol Trooper Maudlin appeared on the scene. Maudlin had heard Watson on the police radio and stopped at the scene to inform Watson that he was the trooper who had stopped the van earlier in the day.

At the first stop, a third occupant, who was a licensed driver, was operating the van. Maudlin told Watson that, during the earlier stop, he had suspected that drugs were being transported, but because the occupants of the van had refused to consent to a search of the van, he let them go. Maudlin had Washington exit the van, and he stayed with her while Watson searched the vehicle.

Watson began his search on the passenger side of the van. He immediately noticed small pieces of a white rock-type substance on the dash console area and in a cup holder on the passenger side of the console. Watson believed the substance to be either cocaine or methamphetamine. A later lab report confirmed that the substance was .08 grams of cocaine.

When Watson asked Johnson about the substance, Johnson denied any knowledge of its identity or presence in the van. Maudlin questioned Washington, who also denied any knowledge of the substance. Both Johnson and Washington were then read the *Miranda*[1] warnings and were handcuffed and placed back in the patrol vehicle. Maudlin and Watson continued to search the van. They found a broken piece of car antenna inside a cigarette box in a pocket on the passenger door. They also found a Pepsi can, both ends of which had been cut off, and the can had been rolled into a tube. A burnt residue was on both the antenna and the Pepsi can.

Johnson was charged with driving without a valid license, possession of a controlled substance, and possession of drug paraphernalia. Johnson filed a motion to suppress the evidence on the basis that it was unlawfully obtained. The circuit court denied the motion after a hearing. At trial, defense counsel renewed the objections to the admissibility of the evidence found during the search. The evidence was admitted. The jury found Johnson guilty of driving

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

without a valid license and possession of a controlled substance. He was sentenced, respectively, to two weeks and one year of imprisonment in the county jail, with the sentences to run consecutively. Johnson appeals.

Standard of Review

We review the denial of a motion to suppress evidence to determine whether substantial evidence supports the denial. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). When the circuit court denies a motion to suppress evidence and the defendant properly objects to the admission of the evidence at trial, we consider the evidence presented both at the suppression hearing and at trial to determine whether the motion was properly denied. *State v. Reed*, 157 S.W.3d 353, 356 (Mo. App. 2005). We review the evidence and any inferences derived therefrom in the light most favorable to the verdict, accepting the jury's determinations as to the credibility of witnesses. *State v. Brashier*, 301 S.W.3d 598, 599 (Mo. App. 2010). "The ultimate issue of whether the Fourth Amendment was violated is a question of law, however, which this court reviews *de novo*." *State v. Ramires*, 152 S.W.3d 385, 391 (Mo. App. 2004). Similarly, the retroactivity of a constitutional decision and the scope of the good-faith exception to the exclusionary rule are questions of law that we review *de novo.*

Legal Analysis

Johnson's first point on appeal is that the circuit court improperly admitted the evidence found during the search of the van because the search violated his rights to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments of the United

States Constitution and article I, section 15 of the Missouri Constitution.[2] Specifically, Johnson argues that Watson was not entitled to perform the vehicle search incident to his arrest for driving without a valid license because Johnson was secured in the patrol car at the time of the search, and it was not reasonable for Watson to believe that the vehicle would contain evidence relevant to the offense for which Johnson had been arrested--driving without a valid license.

I. Search Incident to Arrest

Generally, the Fourth Amendment prohibits a law enforcement officer from conducting a search unless he has "first convince[d] a neutral magistrate that there is probable cause to do so." *New York v. Belton*, 453 U.S. 454, 457 (1981). The courts have recognized, however, that "the exigencies of the situation may sometimes make exemption from the warrant requirement imperative." *Id.* (quotation marks and citation omitted). In *Chimel v. California*, the United States Supreme Court held that police may, incident to a person's arrest, search the arrestee's person and the area within the arrestee's "immediate control" without a warrant. 395 U.S. 752, 762-63 (1969). The Court articulated two reasons why a warrantless search was permitted incident to arrest: (1) to prevent the arrestee from gaining access to a weapon, which might be used to assault an officer or effect an escape; or (2) to prevent the arrestee from destroying or concealing evidence of his crime. *Id.* at 763-64. The Court extended this rule to the passenger compartment of a vehicle when the arrestee is arrested in or around the vehicle. *Belton*, 453 U.S. at 460.

[2]Article I, section 15 of the Missouri Constitution provides the same guarantee against unreasonable searches and seizures as does the Fourth Amendment to the United States Constitution (as applied to the states by the Fourteenth Amendment). The same analysis, therefore, applies to cases under the Missouri Constitution as to the United States Constitution. State v. Oliver, 293 S.W.3d 437, 442 (Mo. banc 2009).

Noting the need for a "workable rule" to guide law enforcement officers in applying *Chimel*, the Supreme Court in *Belton* held that, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* (footnote omitted). While the facts of *Belton* clearly supported at least one of the two rationales articulated in *Chimel* as justifying a search incident to arrest,[3] the Supreme Court in *Belton* used broad language in describing the circumstances under which the search of a vehicle incident to an arrest may occur.

Because of its broad language and express intent to provide a bright-line rule to aid police officers, *Belton* was generally interpreted to allow the search of the passenger compartment incident to arrest even when the arrestee did not have access to the compartment. Although legal commentators questioned the wisdom of the *Belton* rule, they acknowledged that "clearly it is unnecessary that [the arrestee] have continuing access to the car." 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.7(a), at 270 (3rd ed. 2007). "Thus, a search of a vehicle under *Belton* is permissible even after [the arrestee] has been removed from the car, handcuffed and placed in a squad car, and even if he is in the custody of several officers." *Id*. (footnote omitted). Similarly, most courts interpreted *Belton* as allowing searches of the entire passenger compartment of vehicles whenever an occupant was arrested, as long as the search was "roughly contemporaneous with the arrest." *United States v. Weaver*, 433 F.3d 1104, 1106 (9th Cir. 2006) (quotation marks and citation omitted); *see United States v. Gonzalez*, 71 F.3d 819, 825 (11th Cir. 1996). The Supreme Court acknowledged that *Belton* was "widely understood to allow a vehicle

[3]In *Belton*, a single officer was attempting to arrest four suspects. 453 U.S. at 455-56. The suspects were outside of the vehicle, separated, and seated on the ground. *Id.* at 456. Although there is no evidence that any of them could reach the passenger compartment, there was a risk that the suspects could have overpowered the officer and accessed the interior of the vehicle.

search incident to the arrest of a recent occupant even if there [were] no possibility the arrestee could gain access to the vehicle at the time of the arrest." *Arizona v. Gant*, 129 S.Ct. 1710, 1718 (2009).

Missouri courts have also interpreted the law in this way.[4] In *State v. Harvey*, 648 S.W.2d 87, 89 (Mo. banc 1983), the Missouri Supreme Court acknowledged that the case before it was distinguishable from *Belton* factually, in that the single arrestee had been secured by two police officers at the time that the search occurred. Nevertheless, the Missouri Supreme Court expressly stated that a more narrow interpretation of *Belton* "would flout the Court's avowed purpose of fashioning 'the workable rule this category of cases requires.'" *Id*. (quoting *Belton*, 453 U.S. at 460). Finding that the intent of the *Belton* Court was that its holding be applied broadly, our Supreme Court concluded that, even if the defendant and the other three occupants of the vehicle in *Belton* had been handcuffed and placed in the patrol vehicle, "'the result would presumably [have been] the same." *Id*. (quoting *Belton*, 453 U.S. at 468 (Brennan, J., dissenting)).

Relying on *Belton*, *Harvey*, and *Thornton v. United States*, 541 U.S. 615, 632 (2004) (addressed *infra*), this court found that the arrest of a defendant for driving with a revoked license justified "performing a warrantless search incident to arrest of the passenger compartment of the automobile [defendant] had shortly before been driving." *Reed*, 157 S.W.3d at 359. After *Reed*, the Eastern District of this court decided *State v. Scott*, in which the defendant was arrested for driving while suspended, had been handcuffed, and was secured in a

[4]The United States Eighth Circuit Court of Appeals applied the same interpretation of *Belton.* United States v. Grooms, 506 F.3d 1088, 1091 (8th Cir. 2007), *vacated and remanded for further consideration in light of Gant,* 129 S.Ct. 1981 (2009); United States v. Ball, 499 F.3d 890, 896 (8th Cir. 2007), *vacated and remanded on other grounds by* Ball v. United States, 129 S.Ct. 2049 (2009); United States v. Jones, 479 F.3d 975, 978 (8th Cir. 2007).

patrol car at the time that his vehicle was searched. 200 S.W.3d 41, 42 (Mo. App. 2006). The court in *Scott* upheld the search, stating that "the fact of arrest alone justifies the search." *Id.* at 44. In situations such as these, neither rationale for the search incident to arrest stated in *Chimel* was expressly found to apply. Yet, based upon the expansive interpretation universally accorded *Belton* by inferior courts, law enforcement officers had been trained to search the entire passenger compartment of every vehicle having occupants who have been arrested. *Gant*, 129 S.Ct. at 1722.

Despite its apparent pervasiveness in both court opinions and law enforcement practices, there were warning signs that this interpretation of *Belton* might be too broad. Various legal commentators and court opinions had questioned such a broad interpretation of *Belton*. For example, a concurring opinion in the Missouri Supreme Court's *Harvey* case complained that "*Belton* departs from the test of necessity, justifying the departure only in terms of what really amounts to a rule of thumb for the convenience of the police." 648 S.W.2d at 91 (Seiler, J., concurring). Doubting *Belton*'s professed need for a bright-line rule in the application of the *Chimel* rationale, Judge Seiler's concurrence continued:

> A trained professional should have no more difficulty in deciding when he and evidence are endangered than he does in making the decisions he must make every day regarding probable cause to arrest, existence of exigent circumstances, and use of his firearm.
>
> Protection of constitutional liberties ought not to be governed by rules of thumb. The courts should be as tightfisted as possible with the rights of the people, not giving them away, diluting them or sliding over them as though they did not exist. Long before *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), this court en banc held that upon proper motion by defendant, under the Constitution of Missouri, evidence discovered by an unlawful warrantless search must be suppressed. *State v. Owens*, 302 Mo. 348, 259 S.W. 100 (1924).

Id. (Seiler, J., concurring).

The United States Supreme Court expressed similar misgivings. In *Thornton,* the Supreme Court found that the Fourth Amendment allowed an officer to search a vehicle's passenger compartment incident to an arrest even when the officer did not make contact with the arrestee until after the arrestee had exited the vehicle. 541 U.S. at 617. The Court described *Belton* as holding that, "when 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 the vehicle as a contemporaneous incident of arrest." *Id.* In his concurring opinion, however, Justice Scalia wrote that, in his view, *Chimel* and *Belton* should be read together to approve vehicle searches incident to arrest only when "officer safety or imminent evidence concealment or destruction is at issue." *Id.* at 632 (Scalia, J., concurring). In a separate concurrence in *Thornton*, Justice O'Connor observed, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Id.* at 624 (O'Connor, J., concurring). Legal commentators, while finding that *Thornton* revealed "further doubts about the soundness of *Belton*'s theoretical underpinnings[,]" nevertheless concluded that *Thornton* "broadly construed" the *Belton* rule so as to "maintain its bright-line character." LAFAVE ET AL., *supra* at §3.7(a), at 271 (footnote omitted). The Supreme Court had not addressed the appropriate application of *Belton* to an arrestee that has been restrained so as to limit his access to the vehicle compartment, until it did so recently in *Arizona v. Gant*, 129 S.Ct. 1710 (2009).

In *Gant*, the Court affirmed a decision by the Arizona Supreme Court overturning a conviction for possession of a narcotic drug for sale. *Id.* at 1714. The defendant drove to a house where two of his acquaintances had just been arrested. *Id.* at 1715. The police had already determined that Gant's driver's license had been suspended. *Id.* Upon arriving at the house, Gant

exited his car and walked about ten to twelve feet away from the vehicle when he was stopped by the police and arrested for driving with a suspended license. *Id.* The police handcuffed Gant, placed him in the back of a patrol car, and then searched his vehicle, where they found cocaine in the zipped pocket of a jacket on the backseat. *Id.*

The Arizona Supreme Court and, in affirming, the United States Supreme Court recalled the rationale of *Chimel*, how it applied to *Belton*, and then how it compared to the facts of the *Gant* case, finding that the search of Gant's car incident to his arrest was unlawful. *Id.* at 1715-19. Justice Stevens, writing for the Court, noted that, "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception [safety of the officer(s) and preservation of evidence] are absent and the rule does not apply." *Id.* at 1716. He clarified this remark with an observation that "circumstances unique to the vehicle context justify a search incident to a lawful arrest [even when the arrestee has been secured] when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

Accordingly, as the law now stands, a search of the passenger compartment of an automobile incident to the arrest of one of the vehicle's occupants[5] is lawful only when the arrestee is within reaching distance of his vehicle, he has not been secured by law enforcement

[5]Or, as in the *Thornton* case, one of the vehicle's recent occupants. 541 U.S. at 618.

(and thus there is a risk that he could access the vehicle compartment),[6] or when law enforcement has reason to believe that evidence of the offense for which the occupant has been arrested is likely to be found in the vehicle. Since none of these applies to Johnson, the search of his van incident to his arrest for driving without a valid license, after he had been secured in the patrol car, was unlawful. Both parties seem to agree that, had Johnson been arrested and his van searched *after* the *Gant* opinion was handed down, *Gant* would have controlled and required that the motion to suppress the evidence be sustained.

II. Retroactive Application of *Gant*

Johnson argues that, since his case is on direct appeal, *Gant* should be applied retroactively, his conviction overturned, and the circuit court directed to suppress the evidence obtained in the search of the van. In support of this argument, Johnson cites another line of United States Supreme Court cases, beginning with *United States v. Johnson*, 457 U.S. 537 (1982).[7] In *United States v. Johnson*, the defendant sought to exclude incriminating statements made during a warrantless arrest at his home. *Id.* at 539-40. While *United States v. Johnson* was pending, the Supreme Court decided *Payton v. New York*, 445 U.S. 573, 574-76 (1980), holding for the first time that the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home to make a routine arrest. *United States v. Johnson*,

[6]We note that in this case there appeared to be no concern for officer safety even though there was an arguably unsecured passenger in the van. Neither officer had reason to believe that the passenger presented a danger and, in any event, Maudlin was present and was attending to the passenger by the time the search commenced. If the officers had "reasonably believed" the passenger to be dangerous and able to "'gain immediate control of weapons,'" the officers would have been permitted to search the car. *See Gant*, 129 S.Ct. at 1724 (Scalia, J., concurring) (quoting Michigan v. Long, 463 U.S. 1032, 1049 (1983)). In this case, it does not appear that Johnson was handcuffed when his vehicle was searched. He was, however, in the patrol vehicle, and the State does not contest that he was secured at the time.

[7]To avoid confusion with the defendant in this case, who is also named Johnson, we will not use the short citation for United States v. Johnson.

457 U.S. at 540. Thus, if *Payton* were applied retroactively, the incriminating statements in *United States v. Johnson* would be excluded as the result of an illegal arrest.

After a lengthy analysis of the Supreme Court's historical approach to the retrospective application of its decisions, Justice Blackmun wrote that "[r]etroactivity must be rethought." *United States v. Johnson*, 457 U.S. at 548 (quoting *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting)) (quotation marks omitted). He cited the unfairness of "'[s]imply fishing one case from a stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'" *Id.* at 547 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., dissenting)). The ultimate holding of *United States v. Johnson* was that, subject to certain limited exceptions, Supreme Court decisions construing the Fourth Amendment are to be applied retroactively to any case pending on direct appeal at the time of the decision. 457 U.S. at 562-63.[8]

The main exception to retroactivity that Justice Blackmun outlined in *United States v. Johnson* was when the Supreme Court decision represented a "clear break" with past law--either former Supreme Court cases or "a near-unanimous body of lower court authority." *Id.* at 551-52, 558. A limited exception to retroactivity in this situation was supported by the fact that the exclusionary rule is a court-created remedy designed to deter unlawful police conduct and, therefore, the "retroactive application of a Fourth Amendment ruling that worked a 'sharp break' in the law . . . would have little deterrent effect, because law enforcement officers would rarely be deterred from engaging in a practice they never expected to be invalidated." *Id.* at 560 (citing

[8]In Shea v. Louisiana, 470 U.S. 51, 59 (1985), this rule was extended to cases interpreting the Fifth Amendment.

United States v. Peltier, 422 U.S. 531, 541-42 (1975)). But, the Court concluded that this logic did not apply in *United States v. Johnson* because *Payton* resolved a previously-unsettled point of Fourth Amendment law and because, long before *Payton*, the Court had questioned the constitutionality of a warrantless home arrest. *Id.* Thus, in *United States v. Johnson*, the Court addressed, but did not find applicable, the clear break exception to retroactivity.

Five years later, in *Griffith v. Kentucky*, 479 U.S. 314, 326 (1987), the Supreme Court had the opportunity to address directly the retroactive effect of a case that represented a clear break with established law. Griffith, an African-American man, raised a Fourteenth Amendment due process challenge to a prosecutor's use of peremptory strikes to remove African-American members from the jury venire. *Id.* at 316-17. *Griffith* addressed the retroactivity of the ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that a criminal defendant could establish a prima facie case of racial discrimination when the prosecution used its peremptory challenges to strike potential jurors of the defendant's race from the jury. *Id.* at 316. Prior to *Batson*, most courts allowed peremptory strikes without explanation or justification and, therefore, presumptively on any basis, including the race of the venireperson. Justice Blackmun, again writing for the Court, noted that failing to apply a newly-declared Supreme Court ruling on constitutional interpretation retroactively to cases on direct appeal presented the problem, addressed in *United States v. Johnson*, of treating similarly-situated defendants differently. *Griffith*, 479 U.S. at 327. Noting that the defendant in *Griffith* was convicted in the same court that the defendant in *Batson* had been just three months earlier, he remarked that it '"hardly comports with the ideal of "administration of justice with an even hand,"' when 'one chance beneficiary--the lucky individual whose case was chosen as the occasion for announcing the new principle--enjoys retroactive application, while others similarly situated have their claims

adjudicated under the old doctrine.'" *Id.* (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring)) (citation omitted).

The *Griffith* Court expressly addressed the deterrence rationale that supported the clear break exception to retroactivity discussed in *United States v. Johnson.* Noting that the Court in *United States v. Johnson* recognized that whether a new rule is a clear break with the past "is relevant primarily because it implicates . . . reliance by law enforcement officials and the burden on the administration of justice imposed by retroactive application," *Griffith* rejected this rationale for denying retroactive application because it "reintroduces precisely the type of case-specific analysis that Justice Harlan rejected as inappropriate for cases pending on direct review." *Griffith*, 479 U.S. at 326-27. "[T]he principle that this Court does not disregard current law, when it adjudicates a case pending before it on direct review, applies regardless of the specific characteristics of the particular new rule announced." *Id.* at 326. For these reasons, the Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328.

In the more than twenty years that have elapsed since *Griffith*, the Supreme Court has not had the occasion to apply its retroactivity rationale to an alleged Fourth Amendment violation. However, *Griffith*'s use of broad language in pronouncing its holding, *id*. at 328, and its reliance on *United States v. Johnson* and a number of other Fourth Amendment cases, *id.* at 326-27, counsels that its retroactivity ruling applies equally to Fourth Amendment cases. Therefore, because this case was pending when *Gant* was decided, the rule announced in *Gant* applies to the search of Johnson's vehicle. As noted above, the parties seem to agree that the search violated Johnson's Fourth Amendment rights as articulated in *Gant.* But the conclusion that Johnson's

Fourth Amendment rights were violated does not dictate the outcome of this case. The question before us is not whether the ruling in *Gant* applies to this case, but, rather, what the proper remedy is upon the application of *Gant*. In other words, although the Supreme Court's decision in *Griffith* dictates that the holding in *Gant* be applied retroactively to all pending cases, and thus Johnson's Fourth Amendment rights were violated, our analysis must continue to determine if the good-faith exception to the exclusionary rule would allow admission of evidence obtained during the search of Johnson's vehicle.

III. The Good-Faith Exception to the Exclusionary Rule

The State argues that, regardless of any retroactive effect of the *Gant* decision, this court should hold that the good-faith exception to the exclusionary rule applies and, therefore, that the circuit court's denial of the motion to suppress should be affirmed. The good-faith exception comes from another line of Supreme Court cases beginning with *United States v. Leon*, 468 U.S. 897 (1984), and recently applied in *Herring v. United States*, 129 S.Ct. 695 (2009). In *Leon*, the Supreme Court noted that, because "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, . . . [the exclusionary rule] operates as a 'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" 468 U.S. at 906 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Thus, in some instances, when law enforcement officers act in the good-faith belief that a search is legal, even if it is ultimately determined to be unlawful, the evidence is admissible because to exclude it would have no deterrent effect on future law enforcement conduct. *Id.* at 922-23.

In *Leon*, the Court found that the exclusionary rule should not be applied when an officer reasonably relied on a warrant issued by a detached and neutral magistrate, and the warrant is

later determined to have been issued without an adequate showing of probable cause. *Id.* Later the same year, the good-faith exception was applied in the case of a warrant that erroneously described the items to be seized. *Massachusetts v. Sheppard*, 468 U.S. 981, 990-91 (1984). Although the good-faith exception was initially applied in the context of searches conducted pursuant to a warrant, the rationale has been applied to warrantless searches as well.

In *Herring*, a more recent good-faith case, a police officer arrested the defendant based on information provided by a police department employee that there was a valid outstanding warrant for the defendant's arrest. 129 S.Ct. at 698. In a search incident to the defendant's arrest, the officer found methamphetamine in the defendant's pocket and a pistol (which the defendant, a felon, could not possess) in his vehicle. *Id.* It was later learned that the arrest warrant had been recalled five months earlier. *Id.* In affirming the admission of the evidence discovered in the search, Chief Justice Roberts, writing for the Court, stressed that the police officer relied in good faith upon what he reasonably believed was a valid arrest warrant. *Id*. at 700. *See also Arizona v. Evans*, 514 U.S. 1, 3-4 (1995) (Court refused to exclude evidence obtained during a routine traffic stop that was initiated by an officer relying on mistaken information provided by court employees that indicated there was an outstanding arrest warrant for the driver of the vehicle); *Illinois v. Krull*, 480 U.S. 340, 355-57 (1987) (officer's objectively reasonable reliance upon a statute authorizing warrantless administrative searches supported applying the good-faith exception to exclusion of evidence even though the statute was subsequently found to violate the Fourth Amendment).

In each of these cases, evidence obtained in an unlawful search was nevertheless found to be admissible because of good faith reliance on either *a warrant or a statute* authorizing a warrantless search. The primary justification for the good-faith exception to the exclusionary

rule in these cases is that exclusion is meant to curb police conduct and not judicial or legislative conduct. *Herring*, 129 S.Ct. at 701. Court employees and legislators are, theoretically, less likely "to try to subvert the Fourth Amendment; and 'most important, there [is] no basis for believing that application of the exclusionary rule in [those] circumstances' would have any significant effect in deterring the errors." *Id.* (quoting *Evans*, 514 U.S. at 15).

The good-faith exception, like the pre-*Griffith* clear break exception, would allow for the admission of evidence obtained as a result of a search that violates the Fourth Amendment, because to exclude the evidence would not further the deterrence rationale that underlies the exclusionary rule. As such, the good-faith and the clear break exceptions are parallel doctrines that achieve the same goal but apply in different contexts. We note that, while the Supreme Court has never applied retroactivity after a clear break to a Fourth Amendment situation, it has also not applied the *Leon* good-faith exception to a case where law enforcement relied on court precedent, rather than on a warrant or a statute.

A. Application of the Good-Faith Exception to Reasonable Reliance on Case Law

The State urges us to apply the good-faith exception in Johnson's case, because the officers reasonably relied on *Belton* and cases interpreting *Belton* that sanctioned vehicle searches incident to arrests for traffic offenses. It does not appear that the Supreme Court has ever applied the good-faith exception to a case before it when articulating a new rule of constitutional interpretation, nor has the Court relied on pre-existing case law alone to support the application of the good-faith exception when retroactively applying a new rule of

constitutional interpretation.[9] Thus, the State asks us to go a step further and extend the Supreme Court's good-faith exception to allow a warrantless search undertaken by an officer in reliance on case law.

We agree with other courts that have found the distinction between good-faith reliance on case precedent and good-faith reliance on warrants or statutes to be an important one:

> [G]ood-faith reliance on case law is materially different than good-faith reliance on a warrant. A warrant is specifically addressed to the particular facts and targets at issue, and it is issued in advance of the actual search by the executive branch. Case law, in contrast, is inherently retrospective and focused on a situation other than the one at hand. Reliance on case law necessarily would require an officer to extrapolate from prior scenarios and determine, in the first instance, whether the prior cases are sufficient to establish probable cause in the new matter. This process would be significantly different from excusing the officer's reasonable belief that a warrant exists, reasonable reliance on a later invalidated warrant, or reasonable reliance on a later invalidated statute.

United States v. Peoples, 668 F. Supp. 2d 1042, 1048-49 (W.D. Mich. 2009). Extending *Leon*'s good-faith doctrine to include reliance on court precedent creates the danger of injecting "an interpretive step on the part of the police that is totally absent from and unjustified by any previous Supreme Court application of a good faith exception to the exclusionary rule." *Id.* at 1050. *See also United States v. Debruhl*, 993 A.2d 571, 587-89 (D.C. 2010).

[9]In *Peltier*, the Court refused to apply a new interpretation of the Fourth Amendment retroactively to a case pending on appeal when the decision was announced. 422 U.S. 532-35. Two hundred and seventy pounds of marijuana were found in Peltier's vehicle during a warrantless search undertaken by border patrol agents within a certain distance of the Mexican border. *Id.* at 532. The search took place four months before the United States Supreme Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), which held that warrantless searches conducted within twenty-five miles of the Mexican border by border patrol agents acting without probable cause violated the Fourth Amendment. *Peltier*, 422 U.S. at 532-33. The Court in *Peltier* found that the policies underlying the exclusionary rule did not require retroactive application of *Almeida-Sanchez* because the agents were acting in reliance upon a federal statute supported by "longstanding administrative regulations and continuous judicial approval." *Id.* at 541. Because *Peltier* was decided before the seminal decision on retroactivity, *Griffith*, its retroactivity analysis is no longer persuasive. And, while the decision may reflect that precedent is a factor that can be considered in determining whether an officer acts in good faith, the officer's reliance on authority other than case precedent renders the significance of this case questionable.

B. Retroactivity and the Good-Faith Exception

In *Griffith*, the Supreme Court rejected reasonable reliance on case law as a basis for avoiding the retroactive application of a new constitutional rule when it rejected the clear break exception. 479 U.S. at 326-27. While we recognize the fundamental difference between these two doctrines--the good-faith exception concerns the admissibility of evidence, while the clear break exception concerns the retroactive application of substantive law--if the good-faith exception is applied to objectively reasonable reliance on precedent so as to avoid any remedy for the retroactive application of new constitutional rules interpreting the Fourth Amendment, the effect would be the same as resurrecting the clear break exception in the context of the Fourth Amendment.

If the good-faith exception to the exclusionary rule is found to apply to police reliance on well-settled case law, both the good-faith exception and the pre-*Griffith* clear break exception to retroactivity would rest on the same factual and legal underpinning. As noted above, the main exception to retroactivity Justice Blackmun outlined in *United States v. Johnson* was when the Supreme Court decision being applied represented a clear break with past law--either former Supreme Court cases or "a near-unanimous body of lower court authority." 457 U.S. at 551-52, 559. It is hard to imagine a case that would meet the requirement of objectively reasonable reliance on existing case law for purposes of applying the good-faith exception that would not also have met the necessary prerequisite for application of the clear break exception.

The effect of using objectively reasonable reliance on case law as a basis for applying the good-faith exception would be to ignore the Supreme Court's retroactivity rules, set forth above, in the context of Fourth Amendment cases. While truly "new" rules interpreting the Fourth Amendment might *technically* be applied retroactively, they could have no retroactive effect

because a new constitutional rule interpreting the Fourth Amendment would in every case result in a good-faith exception to the exclusionary rule. We would recognize that the individual's rights were violated, but we would afford him no remedy. Therefore, applying the good-faith exception to reasonable reliance on precedent would cause a tension between the good-faith exception and the retroactivity doctrine that we find unacceptable. *See United States v. Gonzales*, 578 F.3d 1130, 1132 (9th Cir. 2009) (in a case factually similar to Johnson's, holding that to apply the good-faith exception would conflict with the Supreme Court's retroactivity precedents); *United States v. Buford*, 623 F. Supp. 2d 923, 926-27 (M.D. Tenn. 2009).[10] Applying the good-faith exception to reasonable reliance on precedent would require that we ignore the spirit, if not the letter, of Supreme Court precedent by interpreting *Gant* as having "fish[ed] one case from the stream of appellate review" while "permitting a stream of similar cases… to flow by unaffected."[11] *Mackey*, 401 U.S. at 679 (Harlan J., dissenting). Thus, the State, in asking us to apply the good-faith exception to reliance on case law, is effectively asking us to reinvigorate the clear break rationale, albeit under a new name, "good faith," for new constitutional rules affecting the Fourth Amendment.

[10]The State cites United States v. McCane, 573 F.3d 1037, 1039 (10th Cir. 2009), where the Tenth Circuit held that, regardless of any retroactive effect of *Gant*, the good-faith exception should be used to admit evidence found during a search incident to arrest that *Gant* would deem unconstitutional. Because we believe that both the United States Supreme Court and the Missouri Supreme Court would apply the *Griffith* retroactivity rule over *Leon*'s good-faith exception in cases where the two doctrines conflict, we do not find *McCane* persuasive. However, we acknowledge that a number of other courts have applied the good-faith exception to post-*Gant* motions to suppress. *See, e.g.*, United States v. Allison, 637 F. Supp. 2d 657 (S.D. Iowa 2009); United States v. Lopez, Crim. Action No. 6:06-120-DCR, 2009 WL 3112127 (E.D.Ky. Sept. 23, 2009); Brown v. State, 24 So.3d 671 (Fla. Dist. Ct. App. 2009). *See also* United States v. Grote, No. CR-08-6057-LRS, 2009 WL 2068023 (E.D. Wash. July 15, 2009) (ruled in the alternative that, even if the search of defendant's vehicle was not a valid search incident to arrest, evidence obtained from the search should not be excluded because the officer conducted the search in objective good faith based on pre-*Gant* case law).

[11]We acknowledge that the good-faith exception was not raised before the Supreme Court by the State in *Gant.* Therefore, arguably the underpinning of the retroactivity doctrine, that similarly-situated defendants be treated similarly, is not present. But the question we must address is whether finding that reliance on case law can support the application of the good-faith exception creates a tension between the retroactivity doctrine and the good-faith exception.

Also, in determining whether the application of the good-faith exception can be supported by reliance on case law, we must consider the possible consequences, intended or otherwise, of such an application. Applying the good-faith exception based on reasonable reliance on case law may make it difficult, if not impossible, for the Supreme Court to correct erroneous precedent. If reliance on case law were to support the application of the good-faith exception, there would be no reason the exception would not apply equally to the defendant in the case before the Court that provides the vehicle for the Court to consider adopting a new constitutional rule. However, the Court has determined that new constitutional rules cannot be applied purely prospectively:

> [I]t is a settled principle that [the Supreme] Court adjudicates only "cases" and "controversies." Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule.

Griffith, 479 U.S. at 322 (citation omitted). That a litigant whose case becomes the vehicle for announcing a new rule of constitutional interpretation is given the benefit of the new rule is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Stovall v. Denno*, 388 U.S. 293, 301 (1967) (*abrogated in part by Griffith*, 479 U.S. at 326-28). Therefore, the language of *Gant* strongly suggests that the Court anticipated that its holding would apply retroactively without the overlay of the good-faith doctrine.

C. *Gant*'s Failure to Discuss Good Faith

When the Supreme Court has applied the good-faith exception, it has done so to the cases immediately before it, as in *Leon* and *Herring*. Therefore, the problem of treating similarly-situated defendants differently is not present. Rather, the good-faith exception will be applied to

each new case as it is presented, presumably with the same result.[12] By contrast, the Supreme Court did not apply the good-faith exception to the *Gant* case itself. As noted *supra*, it was not raised by the parties. *Gant*, 129 S.Ct. 1710.[13] In fact, none of the four opinions issued in *Gant* conducts the *Leon* good-faith analysis. Even Justice Alito's dissent, which stresses law enforcement's virtually unanimous reliance on a broad interpretation of *Belton* in conducting routine vehicle searches incident to all arrests, does so in support of his disagreement with what he sees as the majority's reversal of *Belton*, and not specifically because he believes that the *Leon* good-faith doctrine should dictate a contrary result. *Id.* at 1728 (Alito, J., dissenting). Indeed, his opinion, fairly read, assumes that *Gant*'s new rule and the exclusion of any resulting evidence will be applied retroactively, without application of the good-faith exception. He states that, "[t]he Court's decision *will cause the suppression* of evidence gathered *in many searches* carried out in good-faith reliance on well-settled case law." *Id.* at 1726 (Alito, J., dissenting).

Moreover, Justice Stevens's opinion specifically notes that law enforcement's practice of relying upon the broader interpretation of *Belton* was not always "justified by the reasons underlying the *Chimel* exception." *Id.* at 1722. Thus, the Supreme Court decided that the search

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[12]While *Leon* and *Herring* present isolated, fact-specific Fourth Amendment violations, the Supreme Court has noted that the good-faith exception to the exclusionary rule may be applied even when the Court's decision might affect a number of citizens. *See Krull*, 480 U.S. at 353 (applying the good-faith exception to a case declaring a statute unconstitutional even though the statute, which authorized warrantless administrative searches, affected an entire industry and a large number of citizens). Presumably, in the *Krull* statutory context, if other citizens challenged the application of the statute to them, the same good-faith analysis would be done in each case.

[13]Further, even though the good-faith exception was not raised by the State in *Gant*, it is not clear that the Court would have given Gant the benefit of the new rule if the Court believed it would not apply to others because of the good-faith exception. In Teague v. Lane, the defendant attempted to argue in a *habeas* petition that the Sixth Amendment fair-cross-section requirement should be applied to the petit jury. 489 U.S. 288, 292 (1989). The Court concluded that any new constitutional rule could not be applied to other similarly-situated individuals, in that new rules are generally applied only to persons whose cases are pending, but that it would have to give the petitioner the benefit of the new rule or else its opinion would stand as mere dictum. *Id*. at 315. Recognizing that this result was contrary to its retroactivity doctrine articulated in *Griffith*, the Court held that there was a "more principled way of dealing with the problem. We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated." *Id*. at 316.

incident to Gant's arrest violated his Fourth Amendment rights and warranted exclusion of the evidence against Gant that was found in the search, regardless of law enforcement's reliance on contrary legal authority. And, *Griffith* expressly rejects "reliance by law enforcement officials and the burden on the administration of justice" as factors that support the continued application of the clear break exception to retroactivity. 479 U.S. at 326-27. Therefore, it appears that, in weighing the reliance of law enforcement officers against the danger of treating defendants whose rights had been similarly violated differently from each other, the Court has found the latter to be of greater concern.

D. Conclusion

In summary, the retroactive application of *Gant* to this case renders the search of Johnson's car incident to his arrest unconstitutional and the good-faith exception does not apply to permit admission of the evidence in this case. Therefore, we hold that the search of Johnson's vehicle was invalid as a search incident to his arrest, and the evidence obtained during the search was inadmissible on that basis.

IV. Inevitable Discovery

The State argues that, even if the evidence seized from Johnson's vehicle is inadmissible as obtained in the search incident to his arrest, it would inevitably have been discovered during an inventory search of Johnson's vehicle. *See Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery doctrine); and *Colorado v. Bertine*, 479 U.S. 367 (1987) (inventory search of an automobile prior to impoundment). It is the State's burden to prove, by a preponderance of the evidence, that an inventory search would inevitably have been conducted and that such a search would have yielded the evidence admitted at trial. § 542.296.6, RSMo 2000; *see Ramires*, 152 S.W.3d at 394-95. The State failed to meet this burden.

Section 304.155.1(5), RSMo Cum. Supp. 2005, sets forth the criterion for the decision to impound a vehicle. That statute permits a law enforcement officer to remove an abandoned vehicle when "the person operating such property is arrested for an alleged offense for which the officer is *required* to take the person into custody and where such person is unable to arrange for the property's timely removal." *Id.* (emphasis added). Johnson was initially arrested for driving without a valid license. The State did not prove that it was "required" to take Johnson into custody for that offense. On the contrary, Watson testified that, had he not found anything illegal in his search of the van, he was going to let Johnson bond out at the scene. Johnson would have been free to go and, even if he had not been allowed to drive his vehicle, we cannot presume that he would have been unable to make arrangements for someone to come get him, his passenger, and his van. Watson stated at trial that it was *likely* that he would have impounded the van anyway, because there was no one on the scene who was legally able to drive it. This conflicts with section 304.155.1(5), which allows the arrestee to make arrangements for someone else to remove the vehicle. In any event, the State did not show that Watson had definitively decided to impound the vehicle "'in accordance with *standard procedures*,'" thus making discovery of the evidence during an inventory search inevitable. *See State v. Milliorn*, 794 S.W.2d 181, 186 (Mo. banc 1990) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 375 (1976)).

Because the search of Johnson's van was unlawful and the State failed to show by a preponderance of the evidence that an inventory search would inevitably have occurred, we hold that the circuit court should have excluded the evidence found in the search of Johnson's van.

V. Insufficient Evidence to Support Conviction

Johnson's second point on appeal is that there was insufficient evidence to support his conviction for possession of a controlled substance. Because the evidence supporting this conviction was improperly admitted, we agree that there was insufficient evidence to convict Johnson of this offense, and his conviction for possession of a controlled substance is reversed.

VI. Improper Jury Instructions

Johnson's final point on appeal is that the circuit court erred in submitting Instruction No. 5, the verdict directing instruction for driving without a valid license in violation of section 302.020 (a misdemeanor), because the instruction failed to require the jury to determine if Johnson committed the charged act while in possession of a valid learner's permit under section 302.130, RSMo Cum. Supp. 2005 (an infraction).

While Johnson's argument is stated in terms of instructional error, he is, in fact, claiming that he was erroneously *charged* with the wrong offense. The instruction given at trial followed the language of MAI-CR 3d 332.49, which is the proper instruction for the charge of driving without a valid license. Johnson cannot now attempt to couch his claim that he should have been charged with the offense of violating the terms of his learner's permit in terms of an erroneous jury instruction. His claim that he was charged with the wrong offense was not preserved for review and is not argued on appeal.

Conclusion

We, therefore, reverse the judgment of the circuit court with respect to Johnson's conviction for possession of a controlled substance. We affirm the circuit court's judgment convicting him of driving without a valid license.

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James Edward Welsh, Judge

James E. Welsh, Judge, writes for the majority. Mark D. Pfeiffer, Presiding Judge concurs. Karen King Mitchell, Judge, writes a dissent.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	**WD70167**
Respondent,	)	
v.	)	**OPINION FILED:**
	)	**July 13, 2010**
HOWARD D. JOHNSON,	)	
	)	
Appellant.	)	

Dissenting Opinion

In a series of cases beginning with *United States v. Leon*, 468 U.S. 897, 922 (1984), and most recently in *Herring v. United States*, 129 S.Ct. 695, 699 (2009) ("the *Leon/Herring* cases"), the Supreme Court has defined the parameters of the Fourth Amendment exclusionary rule and has created and applied a "good-faith exception" to that rule.[1] These cases establish the standard for the exclusion of evidence obtained in violation of the Fourth Amendment and, in the alternative, the standard for the application of the good-faith exception to the exclusionary rule.

[1] In each of these cases, evidence obtained in an unlawful search was nevertheless found to be admissible because the officer relied in good faith on: (1) a statute authorizing a warrantless search that was later declared unconstitutional; (2) a warrant that was later found to be improperly issued; or (3) mistaken information that a valid arrest warrant existed. *Leon*, 468 U.S. at 922 (exclusionary rule does not apply to a warrant signed by a judge that is later determined to have been issued without an adequate showing of probable cause); *Massachusetts v. Sheppard*, 468 U.S. 981, 989-90 (1984) (exclusionary rule does not apply to "evidence obtained in good faith reliance on" a warrant that erroneously described items to be seized); *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (exclusionary rule does not apply when an officer reasonably relied upon a statute authorizing warrantless administrative searches); *Arizona v. Evans*, 514 U.S. 1, 15-16 (1995) (exclusionary rule does not apply to evidence obtained during a traffic stop initiated by an officer relying on mistaken information provided by court employees that indicated there was an outstanding arrest warrant for the driver); *Herring*, 129 S.Ct. at 699 (exclusionary rule does not apply to evidence obtained in a search incident to arrest when the officer made the arrest based on mistaken information provided by a police department employee that there was a valid outstanding warrant for the defendant's arrest).

The *Leon/Herring* cases make it clear that the exclusion of evidence is disfavored and that the application of the exclusionary rule is justified only when a law enforcement officer engages in culpable conduct, so that exclusion of the evidence is likely to have a significant deterrent effect on future police misconduct. Although the Supreme Court has not addressed the application of the good-faith exception in a situation in which a police officer relied in objective good faith on case precedent, I believe I am bound to apply the standard articulated by the Court in the *Leon/Herring* cases. Because the officer in this case searched Johnson's vehicle in objective good-faith reliance on well-established case law that allowed the search of the passenger compartment of a vehicle incident to arrest, there was no officer misconduct and thus no justification for applying the exclusionary rule. Therefore, I respectfully dissent.

A. Application of the Good-Faith Exception to Reasonable Reliance on Case Law

In *Leon*, the Supreme Court noted that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands." 468 U.S. at 906 (citing *United States v. Calandra*, 414 U.S. 338, 354 (1974)). Rather, the exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its *deterrent effect*, rather than a personal constitutional right of the party aggrieved.'" *Id.* (emphasis added) (quoting *Calandra*, 414 U.S. at 348). Therefore, that a search violated the Fourth Amendment "does not necessarily mean that the exclusionary rule applies." *Herring*, 129 S.Ct. at 700. In fact, the Supreme Court has applied the exclusionary rule only as a last resort. *Id*.

In determining whether the exclusionary rule applies, the Supreme Court has "focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." *Id.* "In

addition, the benefits of deterrence must outweigh the costs." *Id.* (citing *Leon*, 468 U.S. at 910). "The extent to which the exclusionary rule is justified by these deterrence principles varies with the *culpability* of the law enforcement conduct." *Id*. at 701 (emphasis added). "'[A]n assessment of the flagrancy of the *police misconduct* constitutes an important step in the calculus' of applying the exclusionary rule." *Id.* (emphasis added) (quoting *Leon*, 468 U.S. at 911). Mere negligence on the part of the police officer is not enough. "To trigger the exclusionary rule, 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." *Id.* at 702 (emphasis added). Thus, the exclusionary rule is applied only when it is needed to deter *police misconduct.* In contrast, when law enforcement officers act in the objective good-faith belief that a search is legal, even if it was ultimately determined to be unlawful, the good-faith exception to the exclusionary rule applies and the evidence is admissible because excluding it would have no deterrent effect on future law enforcement conduct. *Leon*, 468 U.S. at 913.

The Supreme Court has not addressed the application of the good-faith exception to a police officer's reliance on case precedent. Prior to *Arizona v. Gant*, 129 S.Ct. 1710 (2008), other courts had split on the question of whether reliance on case precedent can provide the basis for applying the good-faith exception to the exclusionary rule. *See United States v. Jackson*, 825 F.2d 853, 866 (5th Cir. 1987) (border patrol agent's good-faith reliance on prior decisions by panels of the Fifth Circuit upholding searches at a checkpoint fourteen miles from the Mexican border precluded application of the exclusionary rule to evidence discovered at that checkpoint, even though the court *en banc* changed the law with delivery of this opinion). *But see United States v. 15324 Cnty. Highway E.*, 332 F.3d 1070, 1075-76 (7th Cir. 2003) (upheld search but

rejected government's alternative rationale because extending the good-faith exception in this way would invite officers to engage in legal analysis best left to the judiciary and members of the bar).

Since the Supreme Court's decision in *Gant*, a number of courts have addressed whether the good-faith exception to the exclusionary rule applies to allow the admission of evidence discovered by an officer who relied on pre-*Gant* precedent interpreting *Belton* to mean that police were permitted to search a vehicle incident to a recent occupant's arrest, regardless of the occupant's actual control over the passenger compartment. Although new cases are decided nearly every week, it appears that the majority of courts that have addressed this issue have found that the good-faith exception applies and have refused to suppress the evidence obtained during a search subsequently determined to have violated the holding in *Gant*.[2] Among those courts that have found the good-faith exception applicable post-*Gant* is the United States District Court for the Western District of Missouri. *United States v. Lee*, No. 07-04050-01-CR-C-NKL, 2009 U.S. DIST.LEXIS 104590, at *6 (W.D. Mo. Nov. 10, 2009)[3] (citing *United States v. Hrasky*, 567 F.3d

[2] *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *United States v. Davis*, 598 F.3d 1259 (11th Cir. 2010); *United States v. Owens*, No. 5:09-cr-14/RS, 2009 WL 2584570 (N.D. Fla. Aug. 20, 2009); *United States v. Allison*, 637 F. Supp. 2d 657 (S.D. Iowa 2009); *United States v. Lopez*, Ct. Crim. Action No. 6:06-120-DCR, 2009 WL 3112127 (E.D. Ky. Sept. 23, 2009); *Brown v. State*, 24 So.3d 671 (Fla. Dist. Ct. App. 2009); *see also United States v. Grote*, No. CR-08.6057-LRS, 2009 WL 2068023 (E.D. Wash. July 15, 2009) (ruled in the alternative that even if the search of defendant's vehicle was not a valid search incident to arrest, the fruits of the search should not be excluded because the officer conducted the search in objective good faith based on pre-*Gant* case law).

[3] *Lee* does not directly address a suppression motion but rather the defendant's request to withdraw a prior guilty plea. After concluding that the statements by family members concerning a gun in Lee's car gave the police officer probable cause to search the car of Lee, a felon, the Court went on to note that "[m]oreover, the good faith of officers relying on pre-*Gant* precedent supports a search otherwise indefensible under *Gant*." *Id.* at *5 (citing *McCane*, 573 F.3d 1037).

367 (8th Cir. 2009)) (noting that the Eighth Circuit Court of Appeals granted a petition for rehearing on suppression where the government conceded that *Gant* invalidated the search "but suggest[ed] that good-faith reliance on *pre-Gant* precedent may justify an exception to the exclusionary rule"). I believe that this court should join those courts that have held that reliance on well-established case law can provide the basis for the application of the good-faith exception to the Fourth Amendment exclusionary rule.

Although the Supreme Court has not considered whether reasonable reliance on case law alone can support applying the good-faith doctrine, the standard for application of the doctrine, as articulated by the Supreme Court in other contexts, supports its application when an officer relies in reasonable objective good faith on well-settled case law. In *Herring*, the Supreme Court's most recent case analyzing the good-faith doctrine, the Court emphasized that the application of the exclusionary rule to a Fourth Amendment violation has always been '"our last resort, not our first impulse."' 129 S.Ct. at 700 (quoting *Hudson*, 547 U.S. at 591). The Court articulated the factors which justify application of the exclusionary rule. Rejection of the good-faith doctrine in favor of application of the exclusionary rule is appropriate when: (1) the officer engages in culpable conduct; (2) its application would deter future police misconduct; and (3) the benefits of deterrence outweigh the rule's '"costly toll upon truth-seeking."' *Id.* at 700-01 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364-65 (1998)). None of these factors is present where an officer relies in objective good faith on well-settled case law. Thus, while applying the good-faith exception to reliance on case law may extend the Court's good-faith doctrine to a factual scenario not previously addressed, it is an extension that is completely consistent with the rationale underpinning the Court's good-faith jurisprudence.

In addition, the Supreme Court's good-faith cases "clearly indicate[ ] that the reach of the exclusionary rule does not extend beyond police conduct to punish the mistakes of others." *McCane*, 573 F.3d at 1045 (citing *Evans*, 514 U.S. at 14; *Krull*, 480 U.S. at 350; and *Leon*, 468 U.S. at 916). In the case of mistakes by judicial officers, the Supreme Court has stated that "there exists no evidence suggesting that judges . . . are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Leon*, 468 U.S. at 916. "Thus there is no basis for believing that excluding evidence resulting from an error of the court will 'have a significant deterrent effect on the issuing judge[s].'" *McCane*, 573 F.3d at 1045 (quoting *Leon*, 468 U.S. at 916). As "'neutral judicial officers,'" judges are not "'adjuncts to the law enforcement team.'" *Krull*, 480 U.S. at 350-51 (quoting *Leon*, 468 U.S. at 917). The rule that mistakes made by judicial officers do not support the application of the exclusionary rule should apply equally to mistakes in interpreting and applying the law as it does to mistakes in issuing warrants.

Because the Supreme Court has declined to apply the exclusionary rule when the purpose of the rule, deterrence of police misconduct, would not be served, *McCane*, 573 F.3d at 1045, and because the Supreme Court has been willing to apply the good-faith exception in cases involving warrantless searches, *see Krull*, 480 U.S. 340, I see no reason to impose a blanket rule refusing to apply the good-faith exception to evidence obtained during a warrantless search undertaken in reliance on case law. The suppression of such evidence would not further the purpose of deterring police misconduct any more than does applying the exclusionary rule in the

case of a mistakenly issued warrant.[4] Therefore, the good-faith exception to the exclusionary rule should apply to police reliance on case law, but only if the officer acted *reasonably*.

B. Retroactivity and the Exclusionary Rule

The majority holds that application of the good-faith exception would create an unacceptable tension between the two doctrines of good-faith and retroactivity. Concluding that applying the good-faith exception would conflict with the Supreme Court's retroactivity precedents, the majority holds that the Supreme Court's long-standing precedent requiring the application of a new rule announced by the Court to cases not yet final mandates that *Gant* be applied to cases pending on direct appeal without the overlay of the good-faith exception.

I decline to adopt this approach for two reasons. First, I disagree that a tension exists between the Court's good-faith and retroactivity doctrines. The retroactivity doctrine mandates the application of *substantive law* to similarly situated litigants whose cases are pending at the time the Supreme Court pronounces a new rule of constitutional interpretation. Therefore, the ruling of *Gant* is applied retroactively so that anyone subjected to a warrantless search incident to arrest unsupported by probable cause has suffered a violation of his or her Fourth Amendment rights. The retroactivity doctrine, however, does not dictate what, if any, *remedy* exists for litigants in pending cases. The good-faith doctrine, as an exception to the exclusionary rule, addresses what *remedy* is available for a constitutional violation. As such, the retroactivity and the good-faith doctrines address two distinct legal issues.

[4] *But see United States v. Gonzales*, 578 F.3d 1130, 1132 (9th Cir. 2009) (refusing to apply the good-faith exception when law enforcement relied on case law because the court found it would have been at odds with the Supreme Court's retroactivity precedent); *United States v. Peoples*, 668 F. Supp. 2d 1042, 1048-49 (W.D. Mich. 2009); *United States v. Debruhl*, 993 A.2d 571, 589 (D.C. 2010).

Second, Johnson is not, in fact, similarly situated to Gant, and therefore the application of the good-faith doctrine does not violate the '"basic norms of constitutional adjudication,"' the linchpin for the retroactivity doctrine. *Gonzalez*, 578 F.3d at 1132 (quoting *Griffith*, 479 U.S. at 322). The theoretical underpinning of the retroactivity doctrine, as articulated in *United States v. Johnson*, 457 U.S. 537 (1982), and *Griffith*, is that it "hardly comports with the ideal of administration of justice with an even hand, when one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others *similarly situated* have their claims adjudicated under the old doctrine." *Griffith*, 479 U.S. at 327 (emphasis added) (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977)) (internal quotation marks omitted). However, the doctrine assumes that the individual whose case was chosen as the vehicle for announcing a new principle will in fact be similarly situated to others whose cases are pending. While the facts of Johnson's case are similar to those in *Gant*, the legal posture of the two cases is quite different.

The Supreme Court did not consider whether the good-faith exception applied in *Gant.* The Supreme Court granted *certiorari* on the following question: "Does the Fourth Amendment require 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?" *Arizona v. Gant*, 552 U.S. 1230 (2008) (mem.). The parties in *Gant* did not brief and the Court did not address the applicability of the good-faith exception to the exclusionary rule. Holdings of the United States Supreme Court are confined to the questions on which *certiorari* is granted. *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992); Sup.Ct. R. 14.1(a). Therefore, the fact that the good-faith doctrine was not addressed by the Supreme Court does not speak to its

applicability. In fact, that good faith was not raised in *Gant* leaves unsupported Johnson's argument that application of the good-faith exception post-*Gant* undercuts the retroactivity doctrine. The good-faith doctrine should be addressed here and may result in Johnson being subject to different treatment than Gant because the government in *Gant* did not raise the same issues as are raised here. To hold otherwise would mean that simply because the government failed to raise an issue in a case that was a vehicle for applying a new Supreme Court rule, that issue could not be raised in future cases. That is an unnecessary expansion of the retroactivity doctrine.

Therefore, I would not conclude that Johnson is similarly situated to Gant or that retroactivity dictates that the holding of *Gant* be applied without the overlay of the good-faith doctrine. Rather, I conclude that, while the *substantive holding* in *Gant* must be applied retroactively, the question of the *proper remedy*, upon application of *Gant* to the facts of this case, remains.

C. Application of the good-faith exception to this case

The Supreme Court has explained that '"evidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."'" *Herring*, 129 S.Ct. at 701 (quoting *Krull*, 480 U.S. at 348-49). Thus, "'[the] good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all the circumstances.'" *Id*. at 703 (quoting *Leon*, 468 U.S. at 922 n.23). Based on the principles underlying the exclusionary rule, I would find that the officer acted reasonably in searching Johnson's vehicle if he relied in good faith on *well-settled* case law.

In the case of the pre-*Gant* interpretation of the Supreme Court's decision in *Belton*, there can be no doubt that the law was well-settled.[5] *Belton* itself was the product of an attempt to devise a "workable rule" to "guide" police in conducting automobile searches incident to arrest. *Belton*, 453 U.S. at 460; *see United States v. Owens*, No. 5:09-cr-14/RS, 2009 WL 2584570, at *3 (N.D. Fla. Aug. 20, 2009); *Brown*, 24 So.3d at 680. Given the articulated purpose of *Belton* and its broad language, it is not surprising that for more than a quarter-century the courts of this country, state and federal, were nearly uniform in applying *Belton* to allow officers to conduct vehicle searches incident to arrest even when the defendant was secured so that he could not reach the passenger compartment. *See Brown*, 24 So.3d at 681. Although the principle opinion in *Gant* attempts to cast doubt on the meaning of *Belton*, five of the nine justices in *Gant* expressly found that *Belton* permitted a warrantless search of the passenger compartment of an automobile incident to the lawful arrest of an occupant regardless of whether the arrested individual posed a danger to the officer. *Gant*, 129 S.Ct. at 1724 (Scalia, J., concurring), 1725 (Breyer, J., dissenting), and 1727 (Alito, Roberts, & Kennedy, JJ., dissenting).[6] Not only judges, but also legal scholars interpreted *Belton* broadly to permit the search of a vehicle "even after [the arrestee] has been removed from the car, handcuffed and placed in a squad car, and even if

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[5] *But see Debruhl*, 993 A.2d at 586, *State v. Gant*, 162 P.3d 640, 645-46 (Ariz. 2001).

[6] *Gant* is a plurality opinion with only three justices joining the principal opinion authored by Justice Stevens. The principal opinion becomes the majority only because Justice Scalia concurs in the outcome. Justice Scalia did not, however, concur in the reasoning of Judge Stevens:

> It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice Stevens. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.

Gant, 129 S.Ct. at 1725 (Scalia, J., concurring).

he is in the custody of several officers." 2 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 3.7, at 270 (3rd ed. 2007). As the Supreme Court noted in *Gant*, the broad interpretation of the *Belton* holding was widely taught in police academies. *Gant*, 129 S.Ct. at 1722.

In addition, *Belton* was interpreted by Missouri courts to allow a search of a vehicle's passenger compartment incident to arrest. As noted in the principal opinion, our Supreme Court, and the Western and Eastern Districts of this court have found that *Belton* allowed a search of a vehicle's passenger compartment even after the arrestee had been secured. *State v. Harvey*, 648 S.W.2d 87, 89 (Mo. banc 1983); *State v. Reed*, 157 S.W.3d 353, 359 (Mo. App. W.D. 2005); *State v. Scott*, 200 S.W.3d 41, 43 (Mo. App. E.D. 2006). The Eighth Circuit Court of Appeals interpreted *Belton* in the same way. *United States v. Grooms*, 506 F.3d 1088, 1091 (8th Cir. 2007); *United States v. Ball*, 499 F.3d 890, 896-97 (8th Cir. 2007); *United States v. Jones*, 479 F.3d 975, 978 (8th Cir. 2007).

The exclusionary rule "should not be applied[ ] to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 919. Relying upon well-settled case law that is intended to provide guidance to law enforcement officers is objectively reasonable law enforcement behavior. I do stress, however, that I would apply the good-faith exception only to reliance on controlling precedent that is, as in this case, unambiguous and unequivocal.[7] Allowing police officers to conduct their own analysis of applicable case law and then decide whether a search is appropriate would run afoul of the justifications for the good-faith exception set forth in *Leon*. *See United States v. Davis*, 598 F.3d 1259, 1266-67 (11th Cir. 2010).

[7] The majority opinion cites the concurrence by Judge Seiler in *Harvey*, 648 S.W.2d at 91, in which he expressed doubt as to "*Belton's* professed need for a bright-line rule in the application of the *Chimel* rationale." *Supra*, at 8. While some judges and legal commentators expressed concern about the justification for the holding in *Belton*, they did not disagree as to its meaning.

Nevertheless, police officers do not run afoul of *Leon* when they follow a bright-line rule established by Supreme Court case law and applied by the courts of this state, which is precisely what the officer did here.

D. Conclusion

The United States Supreme Court's retroactivity doctrine requires that the substantive holding of *Gant* be applied retroactively to all pending cases, including the appeal of Johnson's conviction. Therefore, there can be no question but that the search of Johnson's vehicle violated Johnson's rights under the United States and Missouri Constitutions. *Gant*, however, does not dictate the appropriate remedy for this constitutional violation. Because an officer's actions are objectively reasonable when he acts in reliance on well-settled case law, and because prior to *Gant* well-settled case law from the United States Supreme Court and the courts of this state allowed the search of the passenger compartment of a vehicle incident to arrest regardless of whether the arrestee or other passenger could access the compartment, I would find that the good-faith exception to the exclusionary rule applies in this case and would affirm the trial court's denial of Johnson's motion to suppress evidence.

Karen King Mitchell, Judge