

No. SC91182

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Appellant,

v.

ANDREA M. HICKS,

Respondent.

**Appeal from the Howell County Circuit Court
Thirty-seventh Judicial Circuit
The Honorable David P. Evans, Judge**

APPELLANT'S SUBSTITUTE BRIEF

**JOSHUA N. CORMAN
Assistant Prosecuting Attorney
Howell County
Missouri Bar No. 58608**

**326 Courthouse
West Plains, MO 65775
Phone: (417) 256-2317
Fax: (417) 256-6756**

**ATTORNEY FOR APPELLANT
STATE OF MISSOURI**

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

JURISDICTIONAL STATEMENT..... 6

STATEMENT OF FACTS..... 7

ARGUMENT..... 9

 The trial court erred in suppressing the methamphetamine found during the search of
 Defendant's vehicle incident to arrest because the evidence is not subject to the
 exclusionary rule in that the search was conducted in objectively reasonable reliance
 on binding appellate precedent 9

CONCLUSION 31

CERTIFICATE OF COMPLIANCE 32

APPENDIX 33

TABLE OF AUTHORITIES

Cases

<i>Adams v. New York</i> , 192 U.S. 585 (1904)	16-18
<i>Arizona v. Evans</i> , 514 U.S. 1 (1995)	16, 20
<i>Arizona v. Gant</i> , 129 S.Ct. 1710 (2009)	10, 28
<i>Chimel v. California</i> , 395 U.S. 752 (1969)	10
<i>Davis v. United States</i> , 131 S.Ct. 2419 (2011).....	9, 11, 12-15, 16, 19, 28-30
<i>Elkins v. United States</i> , 364 U.S. 206 (1960).....	19
<i>Groh v. Ramirez</i> , 540 U.S. 551 (2004)	29
<i>Herring v. United States</i> , 129 S. Ct. 695 (2009)	10, 20, 22-23, 30
<i>Hudson v. Michigan</i> , 547 U.S. 586 (2006)	20
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	18, 20
<i>Illinois v. Krull</i> , 480 U.S. 340 (1987)	19, 21, 22, 24-25
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	16, 18, 23
<i>Massachusetts v. Shephard</i> , 468 U.S. 981 (1984)	18, 22
<i>Michigan v. DeFillippo</i> , 443 U.S. 31 (1979)	23-24
<i>New York v. Belton</i> , 453 U.S. 454 (1981)	10-11
<i>Pearson v. Callahan</i> , 129 S.Ct. 808 (2009)	29
<i>Pennsylvania Bd. Of Probation and Parole v. Scott</i> , 524 U.S. 357 (1998)	21
<i>Richards v. Wisconsin</i> , 520 U.S. 385 (1997)	26
<i>Shapiro v. Columbia Union National Bank & Trust Co.</i> , 576 S.W.2d 310 (Mo. banc 1978)	28

<i>State v. Brown</i> , 708 S.W.2d 140 (Mo. banc 1986)	18
<i>State v. Conti</i> , 573 S.W.2d 95 (Mo. App. 1978)	27-28
<i>State v. Damask</i> , 936 S.W.2d 565 (Mo. banc 1996)	15
<i>State v. Darrington</i> , 896 S.W.2d 27 (Mo. App. W.D. 1995)	11
<i>State v. Harvey</i> , 648 S.W.2d 87 (Mo. banc 1983)	11
<i>State v. Herrick</i> , 588 N.W.2d 847 (N.D. 1999)	26-27
<i>State v. Hunt</i> , 280 S.W.2d 37 (Mo. 1955)	18
<i>State v. Kriley</i> , 976 S.W.2d 16 (Mo. App. W.D. 1998)	9
<i>State v. Oliver</i> , 293 S.W.3d 437 (Mo. banc 2009)	15
<i>State v. Owens</i> , 259 S.W. 100 (Mo. banc 1924)	18
<i>State v. Pike</i> , 162 S.W.3d 464 (Mo. banc 2005)	15
<i>State v. Reed</i> , 157 S.W.3d 353 (Mo. App. W.D. 2005)	11
<i>State v. Remrey</i> , 824 S.W.2d 106 (Mo. App. E.D. 1992)	11
<i>State v. Rushing</i> , 935 S.W.2d 30 (Mo. banc 1996)	15
<i>State v. Scott</i> , 200 S.W.3d 41 (Mo. App. E.D. 2006)	11
<i>State v. Sund</i> , 215 S.W.3d 719 (Mo. banc 2007)	9
<i>State v. Taylor</i> , 216 S.W.3d 187 (Mo. App. E.D. 2007)	11
<i>State v. Ward</i> , 604 N.W.2d 617 (Wis. 2000)	26-27
<i>State v. Woods</i> , 284 S.W.3d 630 (Mo. App. W.D. 2009)	9
<i>Stone v. Powell</i> , 428 U.S. 465 (1976)	21
<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	19, 21
<i>United States v. Chadwick</i> , 433 U.S. 1 (1977)	27

<i>United States v. Havens</i> , 446 U.S. 620 (1980)	21
<i>United States v. Hrasky</i> , 453 F.3d 1099 (8th Cir. 2006)	11
<i>United States v. Jackson</i> , 825 F.2d 853 (5th Cir. 1987)	25
<i>United States v. Janis</i> , 428 U.S. 433 (1976)	20
<i>United States v. LaJeune</i> , 26 F.Cas 832 (C.C.D. Mass. 1822)	16
<i>United States v. Leon</i> , 468 U.S. 897 (1984)	13, 16, 19, 21, 22
<i>United States v. Morgan</i> , 835 F.2d 79 (5th Cir. 1987)	26
<i>United States v. Orozco-Castillo</i> , 404 F.3d 1101 (8th Cir. 2005)	12
<i>United States v. Payner</i> , 447 U.S. 727 (1980)	21
<i>United States v. Peltier</i> , 422 U.S. 531 (1975)	19, 28
<i>United States v. Searcy</i> , 181 F.3d 975 (8th Cir. 1999)	12
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985)	15
<i>Weeks v. United States</i> , 232 U.S. 383 (1914)	18
<i>Wolf v. Colorado</i> , 338 U.S. 25 (1948)	18

Rules, Statutes, and Other Authorities

United States Const. Amend IV	15
Art. I, §15, Missouri Constitution (as amended 1982)	15, 18
Article V, §3, Missouri Constitution (as amended 1982)	6
Section 195.202, RSMo	7
Section 547.200, RSMo	6

JURISDICTIONAL STATEMENT

This appeal was made pursuant to §547.200, RSMo, from an Order suppressing evidence in the Howell County Circuit Court, the Honorable David P. Evans presiding. On September 8, 2010, following en banc review pursuant to Court Operating Rule 22.01, the Missouri Court of Appeals for the Southern District reversed the Order of the Howell County Circuit Court; however, a dissenting judge transferred this cause to this Court pursuant to Rule 83.03. Therefore, jurisdiction lies in this Court under Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Respondent, Andrea M. Hicks, was charged by information with felony possession of a controlled substance, methamphetamine, §195.202.¹ (L.F. 4). On October 28, 2009, Respondent filed a Motion to Suppress Evidence in the Howell County Circuit Court. (L.F. 6-14). A suppression hearing on Respondent's motion was heard on November 6, 2009. (L.F. 2; Tr. 2-21). Viewed in the light most favorable to the trial court's ruling, the following evidence was adduced:

On September 13, 2008, Officer Ivie Powell of the West Plains Police Department initiated a traffic stop of Respondent for failure to display a current state license plate. (Tr. 4). Powell advised Respondent of the reason for the stop and asked Respondent for her driver's license. (Tr. 5). Respondent informed Powell that she did not have a license because her license had been suspended. (Tr. 5). Powell obtained Respondent's information and relayed it to dispatch to verify the status of Respondent's driving privileges. (Tr. 5). Dispatch informed Powell that Respondent's driving privileges had been suspended. (Tr. 5). Powell then advised Respondent that she was under arrest for driving while suspended. (Tr. 5).

After placing Respondent under arrest, Respondent was seated on the curb while Powell searched the vehicle incident to arrest. (Tr. 5-6). In the floorboard of the passenger side of the vehicle, Powell discovered a syringe containing methamphetamine. (Tr. 6).

¹ The abbreviations "L.F." and "Tr." refer to the legal file and suppression hearing transcript, respectively. All statutory references are to RSMo 2000 unless otherwise noted.

Powell testified that at the time of the incident, his understanding of the law – based on his training and what he had been taught – was that an officer was authorized to search a vehicle incident to arrest. (Tr. 7).

On December 22, 2009, the trial court issued an order sustaining the motion to suppress. (L.F. 31-32). On December 23, 2009, Appellant timely filed a notice of appeal. (L.F. 33-34). On September 8, 2010, following en banc review pursuant to Court Operating Rule 22.01, the Missouri Court of Appeals for the Southern District held that the good faith exception precluded application of the exclusionary rule. *State v. Hicks*, 2010 WL 3280092 at *8. A dissenting judge of the Southern District deemed the majority opinion contrary to a previous decision of an appellate court of this state and this cause was transferred to this Court in accordance with the provisions of Supreme Court Rule 83.03.

ARGUMENT

The trial court erred in suppressing the methamphetamine found during the search of Defendant’s vehicle incident to arrest because the evidence is not subject to the exclusionary rule in that the search was conducted in objectively reasonable reliance on binding appellate precedent.

The trial court erred in ruling that based on the decision in *Arizona v. Gant*, 129 S.Ct. 1710 (2009), the evidence in this case, which resulted from a search incident to arrest that occurred prior to the decision in *Gant*, should be suppressed. (L.F. 31-32). As the United States Supreme Court recently held in addressing the precise issue before this Court, searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. *Davis v. United States*, 131 S.Ct. 2419 (2011).

A. Standard of Review

This Court defers to the trial court’s findings of fact, but makes an independent evaluation of the conclusions of law the trial court draws from its factual findings. *State v. Kriley*, 976 S.W.2d 16, 19 (Mo. App. W.D. 1998). “Where there is no dispute as to the underlying facts, the determination of the reasonableness of a search and seizure, under the Fourth Amendment, is a question of law.” *Id.* “Whether conduct violates the Fourth Amendment is an issue of law that this Court reviews *de novo*.” *State v. Woods*, 284 S.W.3d 630, 634 (Mo. App. W.D. 2009) (*quoting State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007)).

B. Analysis

On April 21, 2009, the United States Supreme Court decided *Arizona v. Gant*, 129 S.Ct. 1710 (2009). *Gant* involved the search incident to arrest exception to the Fourth Amendment's warrant requirement, as the Supreme Court had previously defined in *Chimel v. California*, 395 U.S. 752 (1969), and applied to automobile searches in *New York v. Belton*, 453 U.S. 454 (1981). In *Gant*, the Court held that the search incident to arrest exception does not authorize a vehicle to be searched incident to a suspect's arrest after an arrestee has been secured and can no longer access the interior of the vehicle unless there is reason to believe evidence relevant to the crime of arrest might be found in the vehicle. *Gant*, 129 S.Ct. at 1720.

In the case at bar, the trial court held that based on the decision in *Gant*, the evidence in Defendant's case should be suppressed. (L.F. 31-32). The suppression of evidence, however, "is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Herring v. United States*, 129 S.Ct. 695, 698 (2009). The State has always conceded (as the Government did in *Herring*, and as the Supreme Court held in *Davis*) that Officer Powell's search of the car did not meet the standards for a valid search incident to arrest under the new rule articulated in *Gant*. Officer Powell's search of the car, however, was a valid search incident to Defendant's arrest under settled Missouri law and Eighth Circuit case law existing at the time of the search, prior to the decision in *Gant*.

The *Gant* Court acknowledged that its prior decision in *Belton* had been "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there

is no possibility the arrestee could gain access to the vehicle at the time of the search.” *Gant*, 129 S.Ct. at 1718. The *Gant* Court went on to note that the predominant interpretation of *Belton* authorized a vehicle search incident to every arrest of a recent occupant. *Id.* at 1718-19. This interpretation was also in accord with the holdings in nearly every other court in the country. *See Davis, supra*, at 2435 (SOTOMAYOR, S., concurring). The *Gant* Court further noted that the broad rule of *Belton* had been taught and relied on by law enforcement officers in conducting vehicle searches during the past 28 years. *Gant, supra*, at 1722.

Indeed, that is how this Court had interpreted *Belton*. *See State v. Harvey*, 648 S.W.2d 87, 88-90 (Mo. banc 1983). Similarly in *State v. Scott*, 200 S.W.3d 41, 42-44 (Mo. App. E.D. 2006), the Eastern District Court of Appeals upheld a search-incident-to-arrest occurring under almost identical circumstances to *Gant* where the search took place after the defendant was arrested for a traffic violation and placed in a patrol car. As the *Scott* court explained, “the fact of arrest alone justifies the search.” *Id.* at 44. *See also, State v. Taylor*, 216 S.W.3d 187 (Mo. App. E.D. 2007); *State v. Reed*, 157 S.W.3d 353, 357-59 (Mo. App. W.D. 2005); *State v. Darrington*, 896 S.W.2d 27 (Mo. App. W.D. 1995); *State v. Remrey*, 824 S.W.2d 106 (Mo. App. E.D. 1992).

The United States Court of Appeals for the Eighth Circuit also described *Belton* as a “bright-line test” and described a search incident to arrest as not just an exception to the warrant requirement of the Fourth Amendment, but as a reasonable search under that Amendment. *United States v. Hrasky*, 453 F.3d 1099, 1100-01 (8th Cir. 2006). The Eighth Circuit has thus upheld searches incident to arrest where the arrestee has exited the car and been handcuffed and placed in a patrol car, and in cases where the arrestee has been removed

from the scene entirely. *Id.* at 1101 (citations omitted). In *United States v. Orozco-Castillo*, 404 F.3d 1101 (8th Cir. 2005), the court found that a search of the passenger compartment of a vehicle which was searched incident to the arrest of the driver for careless driving was authorized under its interpretation of *Belton*. *See also, United States v. Searcy*, 181 F.3d 975, 979 (8th Cir. 1999).

On June 16, 2011, the United States Supreme Court addressed the very issue before this Court: whether to apply the sanction of the exclusionary rule when the police conduct a search in compliance with binding precedent that is later overruled. *Davis v. United States*, 131 S.Ct. 2419, 2423 (2011). The Supreme Court explained that the “sole purpose” of the exclusionary rule is to deter future police misconduct and the suppression of evidence would do nothing to deter police misconduct in these circumstances. *Id.* at 2432, 2434. Therefore, the Court held that “when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.” *Id.* at 2434.

The Court found that at the time of the search in *Davis*, as in the case here, the binding appellate precedent established a bright-line rule authorizing the search of a vehicle incident to a recent occupant’s arrest. *Id.* at 2428. And “when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances.” *Id.* at 2429 (internal quotations and citations omitted) (emphasis in original).

The *Davis* Court explained that the exclusionary rule is a “prudential” doctrine, “not a personal constitutional right,” and it is not designed to “redress the injury” occasioned by an unconstitutional search; rather, the exclusionary rule’s “sole purpose” is to deter future Fourth Amendment violations. *Id.* at 2426 (internal citations omitted). When the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, the deterrence rationale loses its force and exclusion cannot “pay its way.” *Id.* at 2427-28 (quoting *United States v. Leon*, 468 U.S. 897, 908-09(1984)).

The *Davis* Court found that although the officer’s search turned out to be unconstitutional under *Gant*, the search was in strict compliance with then-binding precedent and the officers were not culpable in any way. *Id.* at 2428. As the Court explained:

Under our exclusionary rule precedents, this acknowledged absence of police culpability dooms Davis’s claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield “meaningful[1]” deterrence, and culpable enough to be “worth the price paid by the justice system.” The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis’s Fourth Amendment rights deliberately, recklessly, or with gross negligence. Nor does this case involve any “recurring or systemic negligence” on the part of law enforcement. The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.

Id. at 2428-29 (internal citations omitted). As such, the Court found that “[a]bout all that exclusion would deter” in such cases would be to discourage “conscientious police work.” *Id.* at 2429. “That is not the kind of deterrence the exclusionary rule seeks to foster.” *Id.* The Court reaffirmed that the sanction of the exclusionary rule should not be expanded beyond deterrence of culpable police conduct. *Id.* “It is one thing for the criminal “to go free because the constable has blundered. It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.” *Id.* at 2434 (internal citations omitted). Therefore, the Court held that “when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rules does not apply.” *Id.*

Davis is directly on point and is controlling. The search in this case occurred on September 13, 2008, seven months before the *Gant* Court announced its new rule. Officer Powell testified that at the time of the search, it was his understanding of the law, based on his training and what he had been taught, that an officer was authorized to search a vehicle incident to arrest. (Tr. 7). Like nearly every other jurisdiction in this country, Missouri and the Eighth Circuit Court of Appeals had long read *Belton* to establish a bright-line rule authorizing vehicle searches incident to arrests of recent occupants. The State has always conceded, as held in *Davis*, that *Gant* applies retroactively; however, “the exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred.” *Id.* at 2431. Although the search turned out to be unconstitutional under *Gant*, Officer Powell’s conduct was in strict compliance with then-binding appellate precedent and

he was not culpable in any way. The exclusionary rule has never been applied to suppress evidence obtained as a result of nonculpable, innocent police conduct, and applying it in this case would not serve the deterrent purpose of the exclusionary rule, but would only be an attempt to “penalize the officer for the appellate judge’s error.” *Id.* at 2429 (internal citations and quotations omitted). Therefore, as held in *Davis*, “when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.” *Id.*

The same analysis applied by the *Davis* Court applies here. Article I, Section 15 of the Missouri Constitution parallels the language of the Fourth Amendment and is coextensive with the Fourth Amendment to the United States Constitution. *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996). “The Missouri Constitution offers the same level of protection; the same analysis applies to cases under the Missouri Constitution as under the United States Constitution.” *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005). *See also*, *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009) (“the same analysis applies to cases under the Missouri Constitution as under the United States Constitution.”); *State v. Damask*, 936 S.W.2d 565, 570 (Mo. banc 1996). In light of *Davis* and this Court’s adherence to applying the same analysis to cases under the Missouri Constitution as under the United States Constitution, the trial court erred in applying the exclusionary rule and suppressing the methamphetamine found in Defendant’s car.

The Supreme Court’s holding in *Davis* is wholly consistent with the historical application of the judicially created exclusionary rule. The Fourth Amendment to the United States Constitution guarantees against unreasonable searches and seizures. U.S. Const.

Amend IV; *United States v. Sharpe*, 470 U.S. 675, 682 (1985). Although the Fourth Amendment guarantees against unreasonable searches and seizures, the enforcement of the right, or remedy for its violation, is absent from the Fourth Amendment, or any other clause in the Constitution. The Fourth Amendment itself “contains no provision expressly precluding the use of evidence obtained in violation of its commands.” *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)). See also *Mapp v. Ohio*, 367 U.S. 643, 661-62 (1961) (Black, J., concurring) (noting there is no express provision precluding use of such evidence and “extremely doubtful” that such a provision could properly be inferred); *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011) (Fourth Amendment silent about how the right is to be enforced and says nothing about suppressing evidence obtained in violation of its command).

In fact, for over a century after the Constitution was ratified, unreasonable searches and seizures could be redressed through a suit for trespass, but the evidence itself was nonetheless deemed admissible. In *United States v. La Jeune*, 26 F. Cas. 832, 842 (C.C.D. Mass. 1822), for instance, the court explained:

the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained. If it is competent evidence ... the evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means.

Id. at 842. Similarly, in *Adams v. New York*, 192 U.S. 585, 594-96 (1904), the defendant, who was convicted of possessing gambling paraphernalia, argued that the evidence seized

during the raid of his premises was admitted in error and in violation of his Fourth Amendment rights. *Id.* at 587. The United States Supreme Court rejected the argument and held that even if the materials were illegally seized,

this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question.

Id. at 595. The *Adams* Court explained that in such cases, the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained.” *Id.* As the Court explained in articulating the “rule”:

It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.

Id. at 595 (internal citation omitted).

But in 1914, one hundred and twenty-five years after the Fourth Amendment was adopted, the Supreme Court made the Fourth Amendment's guarantee enforceable through the judicially created remedy of The Exclusionary Rule of evidence in *Weeks v. United States*, 232 U.S. 383 (1914). See *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *State v. Brown*, 708 S.W.2d 140, 145-46 (Mo. banc 1986) (noting that the exclusionary rule was judicially created, and neither an expressed provision of Mo. Const. Art I, §15, or the Fourth Amendment).

Although Missouri adopted the exclusionary rule in *State v. Owens*, 259 S.W.100 (Mo. banc 1924), and *State v. Hunt*, 280 S.W.2d 37, 39 (Mo. 1955), the exclusionary rule was not extended to the states via the Fourteenth Amendment until *Mapp v. Ohio*, 367 U.S. 643 (1961), when the Supreme Court overruled its prior decision in *Wolf v. Colorado*, 338 U.S. 25, 27-29 (1948), which held that in a state prosecution the Fourteenth Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. This Court also modified Missouri's judicially created exclusionary rule to allow for a good-faith exception in *State v. Brown*, 708 S.W.2d 140, 145, fn10 (Mo. banc 1986). As the Court explained, "We have determined it most wise to modify this judicially created doctrine to allow a good-faith exception." *Id.*

Under the judicially created exclusionary rule, evidence obtained in violation of the Fourth Amendment *may* preclude its use in a criminal prosecution; however, whether the exclusion is an appropriate remedy is "an issue separate from the question whether the Fourth Amendment rights of the party" have been violated. *Illinois v. Gates*, 462 U.S. 213,

223 (1983). “The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guarantee in the only effectively available way – by removing the incentive to disregard it.” *Elkins v. United States*, 364 U.S. 206, 217 (1960). The exclusionary rule is “neither intended nor able to cure” an invasion of a defendant’s rights which has already been suffered. *United States v. Leon*, 468 U.S. 897, 906 (1984). 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.” *Calandra*, 414 U.S. at 348.

The Supreme Court has said “time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement.” *Davis v. United States*, 131 S.Ct. at 2432 (emphasis in original). *See e.g., Illinois v. Krull*, 480 U.S. 340, 347 (1987); *United States v. Calandra*, 414 U.S. 338, 347 (1974). As the Court has declared, “If ... the exclusionary rule does not result in appreciable deterrence, then, clearly, its use ... is unwarranted.” *United States v. Leon, supra*, at 909 (internal citation omitted). “[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.” *Id.* at 916. Moreover, “it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity. *Id.* at 919. “If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search 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.” *Id.* at 919 (*quoting United States v. Peltier*, 422 U.S. 531, 542 (1975)). “In short, where the officer’s conduct is objectively reasonable, excluding evidence will not

further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.” *Id.* at 919-20 (internal quotations and citations omitted). “Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” *Id.* at 920.

The purpose, history, and application of the exclusionary rule was also recently analyzed by the Supreme Court in *Herring v. United States*, 129 S.Ct. 695 (2009). As the Court explained:

The fact that a Fourth Amendment violation occurred- *i.e.*, that a search or arrest was unreasonable-does not necessarily mean that the exclusionary rule applies. *Illinois v. Gates*, 462 U.S. 213, 223, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Indeed, exclusion “has always been our last resort, not our first impulse,” *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it ““result[s] in appreciable deterrence.’” *Leon, supra*, at 909, 104 S.Ct. 3405 (quoting *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)). We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. *Leon, supra*, at 905-906, 104 S.Ct. 3405; *Evans, supra*, at 13-14; *Pennsylvania Bd.*

of Probation and Parole v. Scott, 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future. *See Calandra, supra*, at 347-355, 94 S.Ct. 613; *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

In addition, the benefits of deterrence must outweigh the costs. *Leon, supra*, at 910, 104 S.Ct. 3405. “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” *Scott, supra*, at 368, 118 S.Ct. 2014. “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” *Illinois v. Krull*, 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (internal quotation marks omitted). The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that “offends basic concepts of the criminal justice system.” *Leon, supra*, at 908, 104 S.Ct. 3405. “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” *Scott, supra*, at 364-365, 118 S.Ct. 2014 (internal quotation marks omitted); *see also United States v. Havens*, 446 U.S. 620, 626-627, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980); *United States v. Payner*, 447 U.S. 727, 734, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980).

Id. at 700-01.

Based on the rationale and historical application of the exclusionary rule, the mistakes of those other than law enforcement officers do not trigger the extreme sanction of the exclusionary rule. In *Herring*, for instance, the defendant was arrested based on what was believed to be an active arrest warrant, and a search incident to the arrest revealed methamphetamine and a pistol. *Id.* at 698. It was later learned that there was a mistake in the database and the warrant had been recalled five months earlier. *Id.* The defendant moved to suppress the evidence based on the error, and the United States Supreme Court agreed that a Fourth Amendment violation had occurred, but found that the officers did nothing improper, and that fact was “crucial” to holding that the error was not enough to require “the extreme sanction of exclusion.” *Id.* at 699-700. “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. “Our 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 of the circumstances.” *Id.* at 703 (internal quotations and citations omitted). *See also e.g., United States v. Leon*, 468 U.S. 897, 910 (1984) (when police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted “in objectively reasonable reliance” on the subsequently invalidated search warrant); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (exclusionary rule did not apply when a warrant was invalid due to judge failing to make clerical correction); *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987) (no exclusionary rule where warrantless administrative search performed in good-faith reliance on a statute later declared unconstitutional, and elaborating

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.”); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (the subsequent determination that ordinance was unconstitutional does not undermine the validity of an arrest and the evidence discovered in the search incident to the arrest); *compare to Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule to intentional and flagrant conduct by officers in brandishing a false warrant to gain entry and search a house).

Similarly, in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), the defendant, who was taken into custody for an ordinance violation, was searched incident to the arrest and an officer found drugs on the defendant. *Id.* at 34. The trial court denied the defendant’s motion to suppress the drugs, but the Michigan Court of Appeals later decided that the ordinance upon which the defendant had been arrested, was unconstitutional. *Id.* The appellate court concluded that because the defendant was arrested pursuant to an unconstitutional ordinance, both the arrest and the search were invalid and thus, the evidence should have been suppressed. *Id.* The United States Supreme Court, however, reversed and held that because the arrest was made in good-faith reliance on the ordinance, which at the time had not been declared unconstitutional, the arrest was valid regardless of the subsequent judicial determination of its unconstitutionality, and therefore, the drugs obtained in the search should not have been suppressed. *Id.* at 40. As the Court explained:

A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality-with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

Id. at 37-38. The Court added:

The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the [defendant], was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

Id. at 38, fn3.

In *Illinois v. Krull*, the Supreme Court was also confronted with whether the exclusionary rule should be applied when officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute is later found

to violate the Fourth Amendment. *Krull*, 480 U.S. at 342. The Supreme Court held that the “approach used in *Leon*” was “equally applicable.” *Id.* at 349. As the Court explained:

The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer’s actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.

Id. at 349-50. As a result, the Court held that at the time of the search, the detective relied in objective good-faith on a statute that appeared to legitimately allow a warrantless administrative search of the business, and therefore, the exclusionary rule did not apply. *Id.* at 360.

Additionally, in other federal and state cases, and even a Missouri state case, courts have found that the good-faith exception applies when an officer relies on case law which is subsequently overturned. For instance, Fifth Circuit precedent had previously allowed warrantless searches at a checkpoint under the border search exception to the Fourth Amendment. *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987). The Fifth Circuit later ruled that checkpoint searches were unconstitutional; however, the *Jackson* court applied the

good-faith exception and affirmed the convictions in light of the officers' reasonable reliance on Fifth Circuit law existing at the time of the search. *Id.* at 866. The court explained that officers who relied on then-existing precedent were not acting lawlessly and did not need to be deterred, and as a result, "the exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to the change of that law[.]" *Id.* See also, *United States v. Morgan*, 835 F.2d 79, 80-81 (5th Cir. 1987) (applying the good-faith exception for changed interpretations of law recognized by *Jackson*).

The Supreme Courts of Wisconsin and North Dakota also adopted this same approach to changes in the law. In both *State v. Ward*, 604 N.W.2d 617 (Wis. 2000), and *State v. Herrick*, 588 N.W.2d 847 (N.D. 1999), "no-knock" searches had been allowed by state court precedents authorizing no-knock warrants in all felony drug investigations. But in *Richards v. Wisconsin*, 520 U.S. 385 (1997), the United States Supreme Court rejected a *per se* exception to the knock-and-announce rule and instead required a case-by-case analysis to determine whether a no-knock warrant was necessary. *Id.* at 393-94. After *Richards*, when defendants attempted to invoke the exclusionary rule based on the ruling in *Richards*, the Supreme Courts of Wisconsin and North Dakota each held that the good-faith exception applied to pre-*Richards* searches in light of state court precedents allowing no-knock searches. See *Ward, supra*, at 749-50; *Herrick, supra*, at 850-51. As the Wisconsin Supreme Court explained:

[W]e cannot say now that the subsequent change in Fourth Amendment jurisprudence has somehow transformed the character of the evidence seized at the [] home into something so tainted that it mars judicial integrity. Nor

will any remedial purpose be achieved through exclusion of the evidence when the officers and magistrate followed, rather than defied, the rule of law.

Ward, 604 N.W.2d at 750. *See also Herrick*, 588 N.W.2d at 850-51 (holding that the good-faith exception applied because the officers “operated under the belief that if drugs were present a no-knock warrant was justifiable,” a belief “directly traceable to our prior rulings,” so that “law enforcement officers would have no reason to doubt the validity of a no-knock warrant issued in a drug case by a magistrate or judge.”).

Missouri previously used this rationale and applied the good-faith exception to a case involving “then existing law.” *State v. Conti*, 573 S.W.2d 95 (Mo. App. 1978). In *State v. Conti*, an appeal alleging that drugs were admitted in violation of the defendant’s Fourth Amendment rights, the Court of Appeals, in rejecting the defendant’s claim, stated:

As the search under scrutiny antedated *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), the police officer, after placing defendant under custodial arrest at the scene for possession of marijuana, was justified under the facts confronting him and the then existing law in reasonably believing in good faith that he could rightfully take possession of the “canvas-like” green bag as incident to defendant’s arrest[.]

Id. at 100. The *Conti* court further noted:

If the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the ‘imperative of judicial integrity’ is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary

rule to encompass evidence seized in that manner. If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search 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.

Id. at 101 [fn4] (quoting *United States v. Peltier*, 422 U.S. 531 (1975)).

In the case at bar, similar to the rationale and holdings of the long-line of cases discussed above, and specifically as held in *Davis*, the exclusionary rule does not apply. Although the search was unconstitutional under *Gant*, Officer Powell’s conduct was in strict compliance with then-binding appellate precedent of this Court, the Missouri Courts of Appeals, and the Eighth Circuit; thus, his conduct was “not culpable in any way.” *Davis*, *supra*, at 2428. A search conducted in objectively reasonable reliance on binding appellate authority “is not the kind of deterrence the exclusionary rule seeks to foster.” *Id.* at 2429.

Furthermore, the State would note that in *Gant*, the Court stated that although the decades of reliance on the *Belton* rule did not justify continuing it, the wide acceptance of that rule would shield officers from liability based on the doctrine of qualified immunity for searches conducted in reasonable reliance on that understanding.² *Gant*, *supra*, at 1723,

² Normally, a remedy other than application of the exclusionary rule exists in Missouri by which a person can obtain redress for a constitutional violation. *See Shapiro v. Columbia Union National Bank & Trust Co.*, 576 S.W.2d 310 (Mo. banc 1978) (holding that §1983 claims are cognizable in the State courts of Missouri).

n.11. The rationale underlying qualified immunity for law enforcement officers – balancing the need to hold officers accountable when they exercise power irresponsibly against the need to shield officers when they perform their duties reasonably³ – is the same as exclusionary rule jurisprudence that excludes evidence obtained through police misconduct, while permitting the use of evidence where police acted reasonably. As the Supreme Court previously explained, “the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer.” *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004). Therefore, *Gant*’s conclusion that qualified immunity will protect officers from liability for reasonably relying on pre-*Gant* case law involving searches incident to arrest, further supports the holding in *Davis* that the exclusionary rule does not apply to searches conducted in objectively reasonable reliance on binding appellate precedent.

In sum, Officer Powell acted in objectively reasonable reliance on binding appellate precedent as it existed at the time of the search. As the United States Supreme Court recently held in addressing the very issue before this Court, “Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.” *Davis, supra*, at 2429. Officer Powell followed binding appellate precedent that specifically authorized the search, a tool which a well-trained officer would and should use to fulfill their crime-detection and public safety responsibilities. *Id.* “Society would be ill-served if its police officers took it upon themselves to determine which laws are

³ *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

and which are not constitutionally entitled to enforcement.” *Michigan v. DeFillippo, supra*, at 38. In this case, excluding evidence resulting from an error of the courts would serve no conceivable deterrence and was “never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.” *Id.* The deterrent effect of exclusion in this case would only be to deter “conscientious police work.” *Davis, supra*, at 2429. Applying this “extreme sanction” of exclusion is inappropriate and “offends basic concepts of the criminal justice system.” *Herring, supra*, at 699-701. As such, this Court should follow *Davis* and this Court’s settled precedent establishing that the same analysis applies to cases under the Missouri Constitution as under the United States Constitution, and reverse the trial court’s order suppressing the evidence.

CONCLUSION

In view of the foregoing, Appellant respectfully submits that the trial court's Order suppressing evidence should be reversed and remanded for further proceedings.

Respectfully submitted,

JOSHUA N. CORMAN
Assistant Prosecuting Attorney
Howell County
Missouri Bar No. 58608

326 Courthouse
West Plains, MO 65775
Phone: (417) 256-2317
Fax: (417) 256-6756
ATTORNEY FOR APPELLANT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,333 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of July, 2011, to:

Matthew Ward
Office of State Public Defender
Woodrail Centre
1000 Nifong, Building 7, Suite 100
Columbia, Missouri 65203
Attorney for Respondent

JOSHUA N. CORMAN
Assistant Prosecuting Attorney
Howell County
Missouri Bar No. 58608

326 Courthouse
West Plains, Missouri 65775
Phone: (417) 256-2317
Fax (417) 256-6756

ATTORNEY FOR APPELLANT
STATE OF MISSOURI

APPENDIX

Order A1