

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIE GENE DAVIS

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN
AS AMICUS CURIAE IN SUPPORT OF
RESPONDENT

KYML. WORTHY

Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN *

Chief of Research, Training and Appeals

11th Floor, 1441 St. Antoine

Detroit, Michigan 48226

Phone: (313) 224-5792

E-Mail: tbaughma@co.wayne.mi.us

* Counsel of Record

STATEMENT OF QUESTIONS
PRESENTED FOR REVIEW

I.

Whether the good-faith exception to the exclusionary rule applies to a search authorized by precedent from the United States Supreme at the time of the search that is subsequently overruled by that Court?

Table of Contents

	PAGE
Index of Authorities	-3-
Statement of Questions Presented for Review . .	-1-
Interest of the Amicus	-5-
Summary of Argument	-6-
Argument	-7-
Conclusion	-24-

Index of Authorities

STATE CASES

<u>CASE</u>	<u>PAGE</u>
Ashford v State, 807 A2d 732 (Md.App., 2002).....	16
People v Short, __Mich App__, 2010 WL 3389252 (2010) (lv grted 2010 WL 4272701).....	11
People v McCarty, 229 P3d 1041 (Co., 2010).....	11
State v Dearborn, 786 NW2d 97 (Wis., 2010).....	11
State v Karson, 235 P3d 1260 (Kan.App, 2010).....	11
State v. Klingenstein, 608 A.2d 792, 800 (Md.App.,1992) (Moylan, J.) (aff'd in part, rev'd in part on other grounds, Klingenstein v. State, 624 A.2d 532 (Md., 1993)).....	7

FEDERAL CASES

Arizona v Evans, 514 US 1, 115, S Ct 1185 (1995).....	16
Arizona v Gant, __US__, 129 S Ct 1710 (2009).....	8
Chimel v California, 395 US 752, 89 S Ct 2034 (1969).....	9

Grider, v City of Auburn, Ala., 618 F3d 1240 (CA 11, 2010).....	18
Griffith v Kentucky, 479 US 314, 107 S Ct 708 (1987).....	12
Johnson v United States, 520 US 461, 117 S Ct 1544 (1997).....	12
Herring v United States, __US__, 129 S Ct 695 (2009).....	13
Illinois v Krull, 480 US 340, 107 S Ct 1160 (1987).....	13
Kyllo v United States, 533 US 27, 121 S Ct 2038 (2001).....	17
New York v Belton, 453 US 454, 101 S Ct 2680 (1981).....	7
Thornton v United States, 541 US 615, 124 S Ct 2127 (2004).....	9
United States v Gonzalez, 478 F3d 1130 (CA 9, 2010).....	11
United States v Leon, 468 US 897, 104 S Ct 3405 (1984).....	19
United States v McCane, 573 F3d 1037 (CA 10, 2009).....	11

OTHER AUTHORITY

Kerr, “Good Faith, New Law, and The Scope of the Exclusionary Rule,” 99 Georgetown L J (forthcoming, 2011).....	17
---	----

Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Summary of the Argument

The exclusionary rule is not a part of the Fourth Amendment, but a judicially created sanction for its violation. Nor is it a remedy for violation of the Fourth Amendment. The purpose of application of the sanction of exclusion is to deter insolent uses of police authority.

A good-faith exception has been applied to police conduct that is reasonable, and therefore would not be deterred by application of an exclusionary sanction, but only in certain circumstances: 1) where a search warrant is obtained, at least where that warrant is not so deficient that even a non-lawyer (a law-enforcement officer) could rely on it; 2) where the police officer's actions are consistent with statute, at least where the statute is not plainly unconstitutional; 3) where the police officer's actions are based on erroneous court records, and 4) where police officer's actions are based on erroneous law-enforcement records, where there has been no culpable negligence.

Police reliance on case authority from this Court is closely analogous to reliance on a statute. It is by definition reasonable, and when that case authority is later overturned no exclusionary sanction should be applied to police conduct occurring before that time. An innocent person filing a federal suit for damages could not collect under principles of qualified immunity, and it is perverse to exclude the truth from a criminal proceeding in precisely the same circumstances.

Argument

The good-faith exception to the exclusionary rule applies to a search authorized by precedent from the United States Supreme Court at the time of the search that is subsequently overruled by that Court.

“The . . . exclusionary sanction [is] . . . a carefully controlled scalpel rather than. . . an indiscriminate blunderbuss. . . .”¹

A. Belton and Gant

In *New York v Belton*² an officer pulled over a speeding car containing four occupants, one of whom was Belton. The officer smelt burned marijuana and saw an envelope marked “Supergold” that he associated with marijuana. The officer got the occupants out of the vehicle, arrested them, separated them at different spots away from the vehicle, and retrieved the envelope, which contained marijuana. He also searched the passenger compartment, found a black leather jacket belonging to Belton, searched it, and found cocaine. Belton moved to suppress the cocaine. This Court found it essential to establish a “single, familiar standard” to guide police officers. Concluding that “no straightforward rule” had arisen from the cases considering search of a vehicle incident the arrest of

1. *State v. Klingenstein*, 608 A.2d 792, 800 (Md.App., 1992) (Moylan, J.) (aff’d in part, rev’d in part on other grounds, *Klingenstein v. State*, 330 Md. 402, 624 A.2d 532 (Md., 1993)).

2. *New York v Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

an occupant, this Court held that where an officer makes a lawful custodial arrest of an occupant of a vehicle, a contemporaneous search incident that arrest of the passenger compartment of the vehicle, including all containers in that compartment, is permissible, even when the occupant or occupants are no longer in the vehicle³ (and what officer would execute the search with individuals still remaining in the vehicle; the occupants in *Belton* itself had been removed from the vehicle before the search).

In *Arizona v. Gant*⁴ the arrest was for driving on a suspended license, and the search of the passenger compartment of the vehicle incident the arrest occurred, as in *Belton*, after *Gant* had been removed from the vehicle, having been placed in the patrol car. Cocaine was found in a jacket in the car. Because at the time of the search *Gant* could not have accessed the jacket, the Arizona found the

3. “In order to establish the workable rule this category of cases requires, . . . we hold 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. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. . . . Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.” *New York v. Belton*, 453 U.S. 454, 460-461, 101 S.Ct. 2860, 2864.

4. *Arizona v. Gant*, __US__, 129 S.Ct. 1710 (2009).

search improper, even though at the time of the search in *Belton* Belton could not have accessed the jacket in which the cocaine was found. But rather than applying *Belton* to reverse the Arizona Supreme Court, this Court observed that there had been a “chorus” suggesting that the case be “revisited,” did so, and overturned it.⁵

The Court observed that the 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.”⁶ The majority went on to note that though it “is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in ‘this precise factual scenario ... are legion.”⁷ Rejecting the accepted view as inconsistent with *Chimel v California*,⁸ the majority concluded that the rationale of that case authorizes police to search a vehicle incident to a recent occupant's arrest only when the “arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search”; further, said the Court, “we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is

5. That *Belton* might be revisited was suggested by Justice Scalia, joined by Justice Ginsburg, in *Thornton v. United States*, 541 U.S. 615, 625, 124 S.Ct. 2127, 2133, 158 L Ed 2d 905 (2004).

6. *Arizona v. Gant*, 129 S.Ct. 1710, 1718.

7. *Arizona v. Gant*, 129 S.Ct. 1710, 1718.

8. *Chimel v California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁹ Four justices dissented on grounds of stare decisis, the majority on this point concluding that “We have never relied on stare decisis to justify the continuance of an unconstitutional police practice.”¹⁰ But the majority also said that “Because a broad reading of *Belton* has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding.”¹¹ In other words, “*Belton* compliant”/pre-*Gant* searches afford no right to damage remedies for those whose vehicles were searched, a point to which amicus will return.

B. Post-*Gant* Decisions

Application by appellate courts of the exclusionary rule to what might be termed “*Belton* compliant/pre-*Gant*” police conduct has not been uniform. *Gant* itself did not order the evidence suppressed—the opinion concludes “The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed,”¹² and the State of Arizona raised no exclusionary rule argument before this Court. In the present case the 11th Circuit held that the exclusionary rule should not be applied in these circumstances, and the 10th Circuit has

9. *Arizona v. Gant*, 129 S.Ct. 1710, 1719.

10. *Arizona v. Gant*, 129 S.Ct. 1710, 1722.

11. *Arizona v. Gant*, 129 S.Ct. 1710, 1723.

12. *Arizona v Gant*, 129 S Ct at 1724.

reached the same conclusion.¹³ The Ninth Circuit, on the other hand, has gone the other way.¹⁴ State courts are also divided, but the tendency appears to be in support of the view that where exclusion of evidence serves no deterrent purpose given the non-culpable conduct of the police, it will not be applied.¹⁵

C. The Issue Here Is Not One of Retroactivity
But of Application of Exclusionary Sanctions

(1) Retroactivity Principles

There is now a “new rule” concerning searches of the passenger compartments of automobiles incident arrest. The former rule was that a contemporaneous search of the passenger compartment was permissible upon the arrest of any occupant (not only the driver), including the search of any open or closed containers, whether the occupants were removed from the vehicle first or not (and they always would be, as no officer would search the interior of an automobile with people still in it). The new rule is that this search may occur only if 1)the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search (which will virtually never occur, as the Court acknowledged), or 2)it is reasonable to believe

13. *United States v McCane*, 573 F3d 1037 (CA 10, 2009).

14. *United States v Gonzalez*, 478 F3d 1130 (CA 9, 2010).

15. See e.g. *People v Short*, __Mich App__ (2010 WL 3389252,8-26-2010)(leave granted 2010 WL 4272701); *State v Karson*, 235 P3d 1260 (Kan.App., 2010); *State v Dearborn*, 786 NW2d 97 (Wis., 2010); *People v McCarty*, 229 P3d 1041 (Co., 2010).

evidence relevant to the crime of arrest might be found in the vehicle.

The present case was pending on direct appeal at the time of the decision in *Gant*. There is no “retroactivity” dispute involved in this case, now that *Gant* has been decided. New rules, including rules created by the overruling of prior rules (rather than new rules announced in situations of first impression), apply to all cases commenced after the rule is announced, and to those cases pending on appeal on direct review at the time of the announcement of the new rule.¹⁶ *Griffith* means that the substantive Fourth Amendment rule announced in *Gant* is applicable in this case. But it does not mean that the exclusionary rule is applicable here, as it is not part and parcel of the Fourth Amendment, nor, thus, of *Gant*; indeed to apply the sanction of exclusion to Belton compliant/pre-*Gant* conduct is wholly inconsistent with the principles underlying the exclusionary rule. The rule is not a remedy to the defendant (who could not gain one in a civil suit brought based on the police conduct in this case, as this Court in *Gant* so said, given that pre-*Gant* conduct consistent with Belton is by definition reasonable), but a sanction to deter an insolent use of power by the police. It is inescapable that no deterrent purpose is served by excluding reliable evidence in these circumstances; to exclude the truth in a criminal case under these facts simply inflicts gratuitous harm on the public interest, and fosters

16. “Under *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), a ‘new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review ..., with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.’” *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 1549 (1997).

disrespect for the law among police officers, as well as by the public.

(2) Administration of Exclusionary Sanctions

That the exclusionary rule is a sanction to deter future police error and not a remedy to the accused has been long established. The most recent explanation by this Court of the circumstances calling for its application is instructive here:

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. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.¹⁷

When the police conduct is consistent with the then extant pronouncements of this Court, it can hardly be said that the conduct is “sufficiently culpable”—indeed, culpable in any sense—so as to trigger the price paid by the justice system when exclusion of evidence occurs.

Illinois v Krull¹⁸ presents an analogous situation. There the rule of police conduct was supplied not by the nation’s highest Court but by the

17. See *Herring v. United States*, __US__, 129 S.Ct. 695, 702 (2009) (emphasis supplied).

18. *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed 2d 364 (1987).

legislature. State statute permitted warrantless administrative searches of dealers of used automobile parts, but the statute was held unconstitutional as vesting too much discretion in the investigating officers as to who, when, and how long to search. But the search in question had been effectuated in good-faith reliance on the statute. In language strikingly appropriate for the situation here, this Court held that exclusion was inappropriate:

As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced.”¹⁹

* * *

. . .because the purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment, 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.”. . .

The approach used in *Leon* is equally applicable to the present case. 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

19. *Illinois v. Krull*, 107 S.Ct. 1165-1166.

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 before 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. To paraphrase the Court's comment in *Leon*: "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."²⁰

The logic of the situation is even stronger when that which the police have faithfully followed is not a statute but a decision of this Court. Paraphrasing *Krull*, "an officer cannot be expected to question the judgment of the United States Supreme Court which created the constitutional rule followed. If the decision is subsequently declared by that Court to be mistaken, and the rule altered, excluding evidence obtained pursuant to it before such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility by following the rule established by the nation's highest Court. Penalizing the officer for the Court's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." That exclusion of evidence in this circumstance can have no deterrent

20. *Illinois v. Krull*, 480 U.S. 340, 348-350, 107 S.Ct. 1160, 1166 - 1167 (emphasis supplied).

effect on police officers is inescapable. Only if the exclusion of the truth in a criminal proceeding serves some purpose other than deterring culpable police error can exclusion in the present case be justified, but this Court has said time and again that deterrence of the insolent use of police power is that which justifies the exclusionary rule, which is not itself required by the constitution.

D. The Exclusionary Rule and Overruling Decisions

The good-faith exception to the exclusionary rule applies only to certain categories of police conduct: 1)where that conduct—a search—is commanded by a warrant, a judicial order, unless that order is so obviously bereft of merit that even one not a lawyer (a law enforcement officer) should so recognize²¹; 2)where that conduct is authorized by statute, unless that statute is “clearly unconstitutional”²²; 3)where that conduct is undertaken in reliance on court documents or records²³; and 4)where that conduct is undertaken in reliance on law-enforcement records that are

21. As Judge Moylan has put it in his inimitable style, “The actual appearances of such extreme situations, however, are about as rare as the appearances of Halley's Comet.” *Ashford v. State*, 807 A.2d 732, 745 (Md.App.,2002).

22. And the actual appearance of such a situation will likely be even more rare than the appearances of Halley's Comet.

23. *Arizona v. Evans*, 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995).

erroneous, in the absence of reckless or systematic negligence.²⁴

There exists no free standing “reasonable police conduct” good-faith exception. One learned commentator says that “Under the traditional good-faith standard, applying the good-faith exception requires asking whether a reasonable officer would recognize the search or seizure as unconstitutional.”²⁵ But this is not accurate (though the author may simply be referring to reasonableness within the recognized categories of good-faith exception, and not as a free standing good-faith standard, for outside of the categories mentioned above the reasonableness of the officer’s belief that his or her conduct was constitutional is wholly irrelevant in the exclusionary-rule context). And indeed, in a multitude of these situations where an innocent person (or even a guilty one, who could also sue) cannot obtain a remedy—damages—for the police conduct, exclusion of the evidence follows nonetheless as a matter of course. For example, if an officer arrests absent probable cause and evidence is discovered in a proper search incident that arrest, the evidence will be excluded upon a finding of a lack of probable cause, with the “good faith” of the officer

24. Herring, *supra*.

25. Kerr, “Good Faith, New Law, and The Scope of the Exclusionary Rule,” 99 *Georgetown L J* (forthcoming 2011), p. 45. And the question here concerning “Belton compliant/pre-Gant” police conduct is not one of “new law,” as in the resolution of some open question (such as this Court’s decision on thermal imaging in *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)), but “changed law,” where existing precedent is overruled (Professor Kerr’s article discusses “changing law” in the text).

being wholly irrelevant. But in a lawsuit based on those same facts, that officer would be entitled to a finding of qualified immunity and summary judgment—and thus the party suffering the constitutional wrong would receive no “remedy” for that violation—if the trial court found that the officer’s mistake was “reasonable”; that is, that though probable cause was lacking, probable cause was “arguable,” and so the mistake thus reasonable.²⁶ In a criminal case a finding that probable cause was lacking but the mistake “reasonable” because there is “arguable” probable cause results in suppression of any seized evidence incident the arrest. And this is true of all police conduct outside of that described above.²⁷ This seems a decidedly odd state of affairs.

Professor Kerr argues that the exclusionary rule should be applied to police conduct that relies on governing precedent from this Court at the time of the police conduct that is later overruled (so long as the case is on direct review), though admitting that the sanction of exclusion can have no deterrent effect

26. “To receive qualified immunity, an officer need not have actual probable cause, but only ‘arguable’ probable cause.” *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1257 (CA 11, 2010).

27. For example, decisions on exigent circumstances for warrantless entries to avoid the destruction or loss of evidence, on emergency circumstances for “community caretaking” entries, on reasonable suspicion for stops, and many others, all result in exclusion if mistaken, no matter if that same conduct would result in a summary judgment on the basis of qualified immunity because the mistake was reasonable. But if the mistake is reasonable, exclusion of evidence cannot deter it, and suppression of the truth in the criminal proceeding inflicts gratuitous harm on the interests of justice.

on the police, because application of the sanction of exclusion will have a deterrent effect on the “other actors” in the criminal justice system; namely, legislatures and courts, particularly appellate courts (and, one must assume, this Court is to be deterred from reaching erroneous criminal procedure decisions—at least ones that do not favor the accused—by application of the exclusionary rule to police conduct that relied on that decision before it was overruled). And it is his position that this Court “has consistently recognized that measuring the effect of the exclusionary rule looks to more than just deterrence of the officer on the street: It must consider how the exclusionary rule deters all the different participants in the system in all three branches of government.”²⁸

Kerr substantially overreads *Krull* and *United States v Leon*,²⁹ amicus submits. While this Court in *Leon* did carve out from the good-faith exception for warrants those warrants so deficient that even no reasonable non-lawyer could rely on them (those Judge Moylan refers to as “more rare than appearances of Halley’s comet”), and did seem also to carve out from the good-faith exception recognized in *Krull* statutes of criminal procedure that are “clearly unconstitutional” (likely rarer than the “exception to the exception” of *Leon*), in the end the Court was not concerned with deterring magistrates nor with deterring legislatures even with these exceptions to the good-faith exception, but was still focused on the good faith of the officer in those contexts. As the Court said in *Krull*, “We noted in *Leon* as an initial matter that the exclusionary rule was aimed at deterring police misconduct. . . . Thus, legislators, like

28. Kerr, p. 9.

29. *United States v Leon*, 468 U.S. 897, 907-908, n. 6, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

judicial officers, are not the focus of the rule.”³⁰ That this Court continued on to say that even if the effect on legislators of an exclusionary sanction applied to police conduct relying on a statute were to be considered, there would be no basis for its application, does not detract from this Court’s statement that “legislators, like judicial officers, are not the focus of the rule.” The notion that appellate courts would be deterred from making erroneous criminal procedure rulings disfavorable to criminal defendants if an exclusionary sanction were to be applied to police conduct occurring before an overruling of that erroneous precedent seems extremely fanciful. And to adapt that which this Court said with regard to legislators in *Krull* to appellate courts,

The role of appellate courts is to decide cases, and in deciding them to say what the law is. In order to fulfill this responsibility, appellate judges’ deliberations of necessity are significantly different from the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’ And before assuming office, appellate judges take an oath to support the Federal Constitution. The next inquiry necessitated by *Leon* is whether exclusion of evidence seized pursuant to existing precedent subsequently overruled will ‘have a significant deterrent effect’ on appellate judges. There is no reason to believe that applying the exclusionary rule will have such an effect. Appellate courts declare

30. *Krull*, 107 S Ct at 1167.

what the law is in order to decide cases, not for the purpose of procuring evidence in particular criminal investigations. Thus, it is logical to assume that the greatest deterrent to an erroneous statement of what the law is is the power of higher courts to overturn these decisions, and for ultimate courts of review to reconsider their own decisions. There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the governing precedent before its overruling will act as a significant, additional deterrent on appellate courts.

At bottom, the argument for applying an exclusionary sanction to police conduct that cannot be deterred by its application—that is, to police conduct consistent with existing precedent at the time that is later overruled—is that it is necessary to the development of Fourth Amendment law to give an incentive to criminal defendants to attack existing precedent, even though exclusion of the truth in the particular criminal proceeding serves no deterrent purpose at all. This Court has never expressed a view that the exclusionary rule has such a purpose. And if a “development of the law” purpose for exclusion is recognized, then, as it serves no deterrent purpose, and exacts a societal cost when evidence is excluded and cases, oftentimes serious violent felonies, are left unprosecutable, the damage to society should be limited as much as possible.

The bestowing of an unmerited benefit on one is not a penalty to others who do not receive that unmerited favor. Professor Kerr suggests the possibility of a “first-come, only” application of the exclusionary rule to police conduct consistent with

existent precedent which is then overruled,³¹ which he views as superior in a cost-benefit analysis to the other alternatives (i.e. evidence is excluded in every such case, or evidence is excluded in no such cases), though that one defendant would gain exclusion despite the lack of any deterrent effect. The stumbling block, as he sees it, is that this rule would seem to re-assert the retroactivity jurisprudence that has been discarded. But not in a case such as the present one,³² where the issue is exclusion of evidence (not all constitutional rules of criminal procedure go to the search for and seizure of evidence) as the result of that which is an undeniably new rule, given the overruling of existing precedent. This Court in this case need not consider the application of the exclusionary rule to cases involving “new law” where an unsettled question is decided, and it thus cannot be said that there was law-enforcement reliance on existing precedent (again, thermal imaging presents an example). Though police conduct in at least some of these situations may be completely reasonable, at present exclusion is the result if the “new rule” holds that police conduct to violate the constitution. That principle is not at issue in this case.³³

31. Kerr, at 53.

32. And again, the State of Arizona raised no exclusionary rule argument in Gant.

33. Amicus submits that at some point a reconsideration of the exclusionary rule so as to allow a good-faith exception for all circumstances where the police conduct is not subject to censure under the tenets outlined in Herring—is not “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence”—is in order, and there is no time like the present.

In the end, then, when a police officer follows the dictates of a statute concerning searches that is later found to violate the Fourth Amendment, no exclusion of evidence will result from that conduct despite the Fourth Amendment violation because the exclusion of evidence is a sanction not a remedy, and the officer has done nothing sanctionable by following the statute. If an officer executes the order of a court—a search warrant—then if that warrant is found to be constitutionally deficient as to probable cause so that the search violated the Fourth Amendment, no exclusion of evidence will result from that Fourth Amendment violation, unless the warrant is so woefully deficient that no reasonable officer could have relied on it, because the exclusion of evidence is a sanction not a remedy, and the officer has done nothing sanctionable by executing the order of the court. And if an officer carries out a search consistent with principles announced by our nation’s highest Court—this Court—and the Court later determines that it was mistaken in its view of the Fourth Amendment, that officer will not be subject to civil damages—though the plaintiff in the suit suffered a Fourth Amendment wrong—because the officer’s conduct was by definition reasonable given that the officer simply followed the law not as provided by statute, nor ordered by a court in a search warrant, but as announced by the ultimate Court of the nation.

Again, is it not perverse in this latter situation to impose a sanction on the officer—and to inflict gratuitous harm on the public—when the officer has faithfully carried out his duties as consistently with the pronouncements of the Supreme Court regarding the Fourth Amendment as the officer did in *Krull* with the pronouncements of the legislature through statute? Exclusion makes no sense in this case.

Conclusion

WHEREFORE, this Court should affirm the
11th Circuit Court of Appeals.

KYM L. WORTHY
Wayne County
Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research,
Training, & Appeals
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
Phone: 313-224-5792
E-Mail:
tbaughma@co.wayne.mi.us