

George Mason University Civil Rights Law Journal  
Fall 2009

## Articles

**\*1 GOOD ENOUGH FOR GOVERNMENT WORK: THE COURT'S DANGEROUS DECISION, IN HERRING V. UNITED STATES, TO LIMIT THE EXCLUSIONARY RULE TO ONLY THE MOST CULPABLE POLICE BEHAVIOR**

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## Introduction

Imagine that a police officer violated your Fourth Amendment rights against unreasonable search and seizure [FN1] by relying upon a faulty computer record. [FN2] One person faced just this predicament when he found himself listed on a computer report as committing “numerous crimes he never committed.” [FN3] Specifically, the computer report listed him as a female prostitute in Florida, an inmate currently incarcerated in Texas for manslaughter, a stolen goods dealer in New Mexico, a witness tamperer in Oregon, and a registered sex offender in Nevada. [FN4] Another example of a faulty criminal record came from a news reporter who looked up his own file on a particular databroker. He discovered that his record inaccurately described him as a criminal \*2 charged with child molestation. [FN5] Still another example of faulty records came to light when a person checking his record found that he had supposedly died back in 1976. [FN6]

When police do violate a person's Fourth Amendment rights, often the remedy for such a wrong is exclusion of any evidence obtained by the violation. For nearly a half-century, the exclusionary rule has served as the most powerful deterrent to Fourth Amendment violations. [FN7] The rule derives its rationale from the fact that when officers obtain evidence in violation of a person's right against unreasonable search and seizure, the evidence gathered cannot be presented at trial. [FN8] Thus, by suppressing the evidence, the exclusionary rule removes the incentive to violate the Fourth Amendment. [FN9]

The Supreme Court has limited the reach of its exclusionary rule over the years. The most notable limitation created is the good faith exception announced in *United States v. Leon*. [FN10] *Leon*'s good faith exception allowed otherwise suppressible evidence to be entered if it were obtained by an officer reasonably relying on a warrant later deemed invalid due to a magistrate's error. [FN11] Recently, however, the exclusionary rule's reach has been further eroded in *Herring v. United States*. [FN12] In *Herring*, the Supreme Court expanded *Leon*'s good faith exception to include mistakes made not only by judges but also by law enforcement officers. Due to *Herring*'s expansion of the good faith exception, evidence suppression is now limited to only the most flagrant cases where police perform “deliberate, reckless, or grossly negligent conduct, or in some cases recurring or systemic negligence.” [FN13] Such sparing use of exclusion allows negligent police behavior, which would have previously violated the Fourth Amendment, to go unpunished. Thus, by removing negligence from the exclu-

sionary rule, the \*3 Court has sidelined the most efficacious restraint on careless use of records technology and increased the likelihood that anyone, guilty or innocent, can be improperly seized based on a government's computer snafu.

Part I of this Article reviews the creation and development of the good faith exception to the exclusionary rule. Part II then critically examines Herring's expansion of Leon's good faith exception to the exclusionary rule to include wrongdoing by police officers. Finally, Part III explores Herring's flawed reasoning and its implications for future Fourth Amendment litigation.

## I. History of the Good Faith Exception to the Exclusionary Rule

### A. In Creating the Good Faith Exception, *United States v. Leon* Established a Template for Analysis Which Future Cases Followed

The Court created its good faith exception to the exclusionary rule in *United States v. Leon*. [FN14] Leon presented the Court with a warrant obtained with diligence and care. In *Leon*, Burbank Police Department officers pursued an “extensive investigation” after learning that an informant had seen a person sell illegal drugs in a home five months earlier. [FN15] Police corroborated the first names of the persons suspected of drug dealing by investigating the cars parked at the suspects' residence; then they observed several people, “at least one of whom had prior drug involvement,” arrive at the house and leave with “small packages.” [FN16] The police then expanded their investigation to other residences and the vehicles that visited those homes; upon doing so, officers saw “a variety” of “material” and “relevant” activity. [FN17] One of the cars in particular belonged to Ricardo Del Castillo, who had “previously been arrested for possession of fifty pounds of marihuana.” [FN18] Police observed Del Castillo arrive at the residence, enter it, and come back out “carrying a small paper sack.” [FN19] Del Castillo eventually led police to Alberto Leon because his probation \*4 records listed Leon as his employer, [FN20] and prior to the current investigation, Burbank police had learned from the Glendale police that, according to an informant, Leon stored large quantities of methaqualone at a residence in Glendale. [FN21] Police learned that Leon currently resided in Burbank. [FN22]

As a result of this investigation, Officer Cyril Rombach, an “experienced and well-trained narcotics investigator,” prepared an affidavit for a search warrant of Leon's home. [FN23] Several deputy district attorneys reviewed the application before it was submitted to a superior court judge who then issued it. [FN24] “Large quantities of drugs” were found at Leon's residence. [FN25] The defendant was arrested; at trial, he moved to suppress the evidence. [FN26] Despite deeming the case “a close one” and recognizing that Officer Rombach “acted in good faith,” the trial court found that the warrant affidavit lacked probable cause and, therefore, suppressed the evidence. [FN27] The Ninth Circuit affirmed this ruling and found the warrant invalid by measuring probable cause under the Aguillar-Spinelli test, a standard deemed obsolete by the time the case reached the Supreme Court. [FN28]

Leon's facts presented the Court with an opportunity to flesh out the new “totality of circumstances” test of probable cause it had crafted the year before in *Illinois v. Gates*. [FN29] The factors of this newly created test centered on an “all the facts” analysis, which included two key considerations: (1) Whether there was a “fair probability” [FN30] that contraband or evidence of a crime would be found in the location searched; and (2) Whether the issuing magistrate had a “substantial basis” for finding probable cause. [FN31] Justice White, writ-

ing for Leon's majority, recognized that "it undoubtedly is within our power to consider\*5 the question whether probable cause existed under the totality of the circumstances test announced last Term." [FN32] The Court, however, chose to forgo an assessment of whether probable cause existed in Leon, simply declaring: "[T]hat question has not been briefed or argued." [FN33] The dissent viewed Leon's avoidance of the probable cause issue as a calculated choice. [FN34] It believed that "the Court's unwillingness to remand . . . for reconsideration in light of Gates" was due to the fact that the lower court likely "would find no violation of the Fourth Amendment, thereby demonstrating that the supposed need for the good faith exception in this context is more apparent than real." [FN35] Thus, the dissent found the refusal to first assess the legality of the warrant in terms of probable cause particularly curious in light of the Court's long established maxim that cases should be decided with established law when possible in order to avoid creating new and unnecessary constitutional rules. [FN36] Despite the dissent's vigorous challenge, the Leon majority chose to consider the new constitutional issue of whether the Court should adopt a good faith exception to the exclusionary rule. [FN37]

### 1. Leon 's Cost Benefit Perspective of the Exclusionary Rule

The Court eagerly decided to employ Leon as a vehicle to "somewhat" modify the Fourth Amendment's exclusionary rule. [FN38] Justice White began by noting the unfortunate language of some "opinions of this Court and of individual Justices" that "implied that the exclusionary rule is a necessary corollary of the Fourth Amendment." [FN39] To correct the impression left by such loose language and to put the exclusionary rule in its proper place, Leon first resorted to the Fourth \*6 Amendment's text and then to the exclusionary rule's "origin and purposes." [FN40]

Concerning the Fourth Amendment's text, Justice White highlighted the fact that the exclusionary rule lacked a textual basis. He noted that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands." [FN41] As for analysis of the origins and purposes of the exclusionary rule, the Court reasoned that it was neither intended nor able to actually cure the invasion of a person's rights. [FN42] Rather, the Fourth Amendment was originally intended to deter future violations because the possible suppression of unlawfully obtained evidence removed the incentive to commit violations to obtain that evidence. [FN43] Thus, both the Fourth Amendment's text and the rationale underlying exclusion indicate that the exclusionary rule was intended to serve not as "a personal constitutional right," but merely as a "judicially created remedy." [FN44]

Because the Court characterized the exclusionary rule as a judicial remedy rather than a constitutional right, it reasoned that the remedy should be used only when its benefits outweigh its costs. [FN45] The exclusionary rule's costs can be characterized as primary and secondary. The Court was substantially concerned with the primary cost of "preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence." [FN46] However, secondary costs were also disconcerting because exclusion harmed the "truth-finding functions" of the courts, enabled some guilty suspects to go free, and generated disrespect for the law and legal system. [FN47]

The Leon majority found the benefits of the exclusionary rule to be few and limited in comparison to the rule's costs. [FN48] While exclusion is unquestionably proper when a Fourth Amendment violation is \*7 "substantial and deliberate," Justice White recognized several situations where the benefits of suppressing evidence fell short of the substantial costs. [FN49] For instance, the Court had previously "declined to allow grand jury witnesses to refuse to answer questions based on evidence" [FN50] obtained illegally because "any incremental deterrent effect" from exclusion was "uncertain at best." [FN51] Reasoning that suppression would not

result in “appreciable deterrence,” the Court had also refused to exclude evidence illegally obtained by state officials from federal civil proceedings. [FN52] Furthermore, the Court had previously been inclined to admit otherwise excludable evidence when the person claiming the violation lacked “standing,” [FN53] where the illegally obtained evidence was offered for impeachment purposes only, [FN54] or where any taint flowing from the violation had become “sufficiently attenuated” such that the evidence was no longer tarnished by the original Fourth Amendment violation. [FN55] Although suppression could have had some deterrent effect, the Court ultimately rejected exclusion as a remedy in these cases, dismissing the notion that “anything which deters illegal searches is thereby commanded by the Fourth Amendment.” [FN56] Instead, the Court adopted the approach that the deterrence effect would have to be so strong as to outweigh the exclusionary rule's substantial costs. [FN57]

## 2. Leon Emphasized the Different Roles of Judges and Police Officers When It Established the Good Faith Exception

After considering the nature and purpose of the exclusionary rule, the Leon Court then performed a practical assessment of the costs and benefits of the rule when an officer had relied on a warrant \*8 later deemed invalid. [FN58] The Court focused on the impact that suppressing the evidence would have on the two types of officials involved: the detached, neutral magistrate and the police officer. [FN59]

The Leon Court was skeptical that exclusion would affect judicial behavior. [FN60] The Court found that suppressing evidence due to a judge's error was inappropriate for three reasons. First, the exclusionary rule's aim was to deter unlawful police conduct, not judicial error. [FN61] Second, no evidence indicated that judicial officers were lawless actors inclined to ignore the Fourth Amendment. [FN62] Third, exclusion of evidence would have no measurable deterrent effect on judges or magistrates. [FN63] According to Leon, the exclusionary rule “clearly” could not have a systemic deterrent effect on “individuals empowered to issue search warrants,” because such individuals were “not adjuncts to the law enforcement team,” but rather “neutral judicial officers.” [FN64] Moreover, judicial officers were immune to any “threat of exclusion” because they had “no stake in the outcome of particular criminal prosecutions.” [FN65] The Court in Leon doubted that neutral judges were “more desirous of avoiding exclusion” than they were of “avoiding invasions of privacy.” [FN66] Rather, Leon found that these magistrates would be more concerned over removal by the supervising district \*9 courts for “incompetency, misconduct, neglect of duty, or physical or mental disability.” [FN67]

After establishing the exclusionary rule's minimal influence on the behavior of judges, the Court next considered the rule's impact on the behavior of police. [FN68] Justice White questioned whether excluding evidence “obtained pursuant to a subsequently invalidated warrant” would have “any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.” [FN69] He feared that excluding evidence obtained by an officer who thought he was acting properly would only make the officer “less willing to do his duty.” [FN70] In addition, Justice White believed that because the exclusionary rule's deterrence purpose “necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct,” objective good faith would drain the rule's rationale of “much of its force.” [FN71]

Thus, the effect of the exclusionary rule depended, in large part, on the identity of the government official at fault. If, as is the case involving good faith reliance on a search warrant, the police acted properly and the magistrate did not, then it made little sense to exclude the evidence because such an exclusion would punish the innocent officer instead of the offending magistrate. In essence, the officer would be harmed as a result of the ma-

gistrate's blunder. [FN72] Leon therefore relied heavily on this “judicial officer versus police officer” distinction by concluding that “the officer's reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.” [FN73]

#### B. Every Subsequent Good Faith Exception Case Adhered to Leon's Template

Despite a variety of factual circumstances in later cases, the Court has steadfastly followed Leon as the model in deciding issues based on \*10 the good faith exception. [FN74] The first case to do so was *Massachusetts v. Sheppard*, which was decided in the same Term as Leon. [FN75] In *Sheppard*, an officer was investigating a murder and sought to secure a search warrant for the home of the victim's boyfriend. [FN76] However, because the officer was unable to obtain the proper form, he submitted a warrant application on a different form, which incidentally had some technical errors. [FN77] When the detective alerted the judge of the problems in the application, the judge responded that he would make the necessary corrections so as to issue a proper warrant. [FN78] The judge, however, failed to make all the needed changes, and as a result, the executed warrant was technically defective. [FN79] For the Court, the issue was whether a warrant containing a clerical error that a judge failed to correct fell under the good faith exception to the exclusionary rule. [FN80]

Next, in *Illinois v. Krull*, [FN81] the issue was again whether the state could enter otherwise suppressible evidence obtained when police acted unknowingly in acquiring evidence in an unlawful manner. In this case, the officers relied on the actions of the legislature rather than the judiciary. [FN82] Officers entered an automobile wrecking yard pursuant to an Illinois statute empowering police to “examine the premises” of any business dealing with automobiles, parts, or scrap metal “at any reasonable time during the night or day” and asked to see the business's license and records. [FN83] In compliance with the statute, the police began to examine the serial numbers of cars in the yard. [FN84] In the process of investigating, the detectives discovered four stolen vehicles and, subsequently, arrested the owner of the yard. [FN85] The Court again found the issue to be whether the good faith exception\*11 applied, although in a context different from Leon and *Sheppard* because the police lacked any kind of warrant. [FN86]

The final good faith exception case to arise before *Herring* was *Arizona v. Evans*. [FN87] In *Evans*, a Phoenix police officer stopped the defendant for a traffic violation and, upon running his information through the computer, discovered that the defendant had an outstanding warrant for his arrest. [FN88] Based on this information the officer arrested the defendant and searched his car, where the officer found marijuana. [FN89] Unbeknownst to the officer, the warrant in the computer system was a bench warrant that had been quashed 17 days earlier; as a result, the officer had no legal basis for the arrest. [FN90] It appeared that the record-keeping error came from the court clerk's office. [FN91] The Court was thus faced with the question of whether the good faith exception applied in cases where a faulty computer record misstated the status of a warrant against a defendant. [FN92] As exemplified by this lineage of cases, the good faith exception cases after Leon covered diverse situations, including defective search warrants, statutes, and computer records. Yet, despite the factual variances of the cases, each of the opinions honored the analysis laid down by Leon.

#### 1. Subsequent Good Faith Cases Adhered to Leon 's Characterization of the Exclusionary Rule as a Judicially Created Remedy Justified Only When Its Benefits Outweighed Its Costs

The good faith precedent between Leon and *Herring* showed remarkable consistency in characterizing the exclusionary rule. *Sheppard* simply adopted Leon's analysis wholesale, moving directly to employ Leon's rule to the facts in its own case. [FN93] Meanwhile, the Court in both *Krull* and *Evans* steered so closely to Leon that

it simply\*12 echoed many of Leon's propositions. For example, as in Leon, the Court in Evans cautioned that the exclusionary rule lacked a textual basis because there was no provision in the Fourth Amendment "precluding the use of evidence obtained in violation of its commands." [FN94] The Court in Krull also borrowed from Leon [FN95] by finding that the exclusionary rule was not a "personal constitutional right of the party aggrieved." [FN96] Hence, both cases adopted Leon's characterization of exclusion as merely a judicially created remedy [FN97] and dutifully followed Leon's command that, as with "any remedial device," the rule's application is properly restricted to those instances where its remedial aims are most efficaciously served. [FN98] Finally, Krull and Evans pursued the cost-benefit analysis mentioned in Leon to determine whether the benefits in light of the costs in those cases warranted employing the exclusionary rule. [FN99] Thus, from Leon through Evans, the Court consistently maintained the integrity of the good faith exception analysis.

## 2. Later Cases Honored Leon's Distinction Between the Role of Judge and Police Officer When Determining Whether to Apply the Good Faith Exception

The cases regarding the good faith exception before Herring bound themselves to the distinction Leon established between the executive and judicial branches of government. For example, Sheppard essentially incorporated Leon's analysis by reference, [FN100] and Krull not only embraced Leon's distinction between police and courts, [FN101] but also adapted it to distinguish between police and legislators. [FN102]

The Court in Krull held that a **police** officer's reasonable reliance on a state statute was analogous to an officer's reliance on a warrant.\*13 [FN103] The majority noted that, although judges and legislators served "different functions in the criminal justice system," such differences were "not controlling for purposes of this case." [FN104] Considering Leon's first issue regarding the exclusionary rule's "behavioral effects" on erring officials, [FN105] the majority in Krull found that judges and legislators were similar because neither were the "focus of the rule," which sought to deter "**police misconduct**." [FN106] As for Leon's second behavioral issue, [FN107] the Court in Krull found no evidence of "lawlessness" among legislators that would necessitate the "extreme sanction of exclusion." [FN108] The Court acknowledged that legislators were not "neutral judicial officers as are judges and magistrates," but ultimately held that legislators enjoyed the same exception because they are not "adjuncts to the law enforcement team." [FN109] In fact, unlike **police** officers who are hurried into action in the "often competitive enterprise of ferreting out crime," [FN110] legislators have the luxury of utilizing the deliberative process to enact laws to establish and perpetuate the criminal justice system. [FN111] State legislators have to "take an oath to support the Federal Constitution." Furthermore, the courts, by "according laws a presumption of constitutional validity," presume that "legislatures act in a constitutional manner." [FN112] Krull then concluded by finding "no evidence that Congress or state legislatures have enacted a significant number of statutes permitting warrantless administrative searches violative of the Fourth Amendment." [FN113] The Court in Krull went through this laborious analysis in order to answer \*14 Leon's second inquiry of whether legislators, like judges, were "inclined to ignore or subvert the Fourth Amendment." [FN114]

After evaluating the similarity of judiciary and legislative officers in the context of the exclusionary rule, Krull then dutifully went on to consider the third behavioral issue out of Leon: Whether exclusion of evidence due to a Fourth Amendment violation would "have a significant deterrent effect" on errant officials, namely legislators. [FN115] Krull found no evidence of such an impact, noting that legislators were concerned with the big picture of policy rather than the particulars of any individual case. [FN116] Krull instead determined that "[l]egislators enact statutes for broad, programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations." [FN117] Courts therefore signal a constitutional error to the legislature by simply invalidating the offending statute and allowing lawmakers to correct the error with new legislation.

[FN118] In considering Leon's third inquiry, Krull believed that exclusion was “unjustified” to control legislators, just as it was unjustified to control judges. [FN119]

Decided after Krull, Evans presented a return to consideration of whether to allow the good faith exception to apply in cases where the police were relying on a warrant. Yet, the Court in Evans, like that in Krull, had to expend considerable effort to make its facts fit within the Leon framework. The disputed evidence in Evans centered on an erroneous computer record indicating that the defendant had an outstanding arrest warrant. [FN120] The Court attempted to take on the task of finding out exactly which branch of government made the mistake by reviewing the “standard court procedure for quashing a warrant” in Phoenix, Arizona. [FN121] In considering the mechanics involved in quashing a warrant, the Court noted:

The Chief Clerk also testified regarding the standard court procedure for quashing a warrant. Under that procedure a justice court clerk calls and informs the warrant section of the Sheriff's Office when a warrant has been quashed. The Sheriff's Office then removes the warrant\***15** from its computer records. After calling the Sheriff's Office, the clerk makes a note in the individual's file indicating the clerk who made the phone call and the person at the Sheriff's Office to whom the clerk spoke. The Chief Clerk testified that there was no indication in [Evans'] file that a clerk had called and notified the Sheriff's Office that his arrest warrant had been quashed. A records clerk from the Sheriff's Office also testified that the Sheriff's Office had no record of a telephone call informing it that [Evans'] arrest warrant had been quashed. [FN122]

With ambiguities in the record about the source of the failure, the Evans Court framed the issue in the broad terms: “[W]hether the exclusionary rule requires suppression of evidence seized incident to an arrest resulting from an inaccurate computer record, regardless of whether police personnel or court personnel were responsible for the record's continued presence in the police computer.” [FN123]

The reasoning employed by the Evans Court, however, was premised on the fact that the error appeared to occur in the court clerk's office. This assumption caused Evans to emphasize the differences between judicial and police officers. [FN124] The Court dutifully reiterated Leon's “three factors” establishing that the exclusionary rule was an inappropriate device to shape judicial officers' conduct. [FN125] The Court then turned to consider the separate issue of the exclusion's impact on police behavior, worrying that it might cause a future officer to be “less willing to do his duty.” [FN126] In its examination, the Evans Court explicitly rejected the Arizona Supreme Court's refusal to distinguish “between clerical errors committed by law enforcement personnel and similar mistakes by court employees.” [FN127] The remainder of the Evans opinion then assessed the exclusion question in the context of an error by court employees. [FN128] Once again applying Leon's three factors, the Evans Court first surmised that “if court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter errors so as to warrant a severe sanction.”\***16** [FN129] Applying Leon's second factor, the Court noted that no evidence was offered to show “that court employees are inclined to ignore or subvert the Fourth Amendment.” [FN130] Finally, Evans applied Leon's third “and most important” factor to determine that “there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees.” [FN131] Evans therefore concluded that application of “the Leon framework supports a categorical exception to the exclusionary rule for clerical errors of court employees.” [FN132] The Court recognized that its opinion did not apply a similar analysis to police personnel, explaining that, since “the State has not made any such argument here . . . the record in this case . . . does not adequately present that issue for the Court's consideration.” [FN133] Thus, in a footnote, Evans quietly restricted the scope of its holding [FN134] in spite of its earlier determination to decide the case “regardless of whether police personnel or court personnel were responsible for the record's continued presence in the police

computer.” [FN135] Evans, like Sheppard and Krull, thus ultimately found Leon's distinction between the branches of government determinative of whether to apply the good faith exception.

## II. Herring v. United States

### A. Facts

On July 7, 2004, Bernie Dean Herring arrived at the Coffee County Sheriff's Department in Alabama to retrieve some items from his impounded truck. [FN136] Investigator Mark Anderson of the Sheriff's Department learned from another officer that Herring was at the impound lot at the Sheriff's station. [FN137] Apparently, there was mutual animosity between Anderson and Herring because Herring had “repeatedly alleged to the district attorney that Anderson was \*17 involved in the unsolved murder of a local teenager.” [FN138] In fact, shortly before the incident in question, “Inspector Anderson and another officer had appeared at [Herring's] house, pressing him to drop his complaints.” [FN139]

Upon hearing of Herring's presence, Anderson asked Sandy Pope, the Coffee County Sheriff's Office warrant clerk, to check for any outstanding warrants on Herring. [FN140] When she found none, Anderson asked her to call Sharon Morgan, the Sheriff's Office warrant clerk in neighboring Dale County, to look for arrest warrants. [FN141] After checking her own county's database, Sharon Morgan reported that an “active arrest warrant for Herring's failure to appear on a felony charge” did indeed exist. [FN142] Pope requested that Morgan fax over a copy of the warrant and also informed Anderson of its existence. [FN143]

Anderson and Deputy Neil Bradley immediately pursued Herring, pulling over his truck less than a mile from the Sheriff's station. [FN144] When told he was under arrest, Herring asked, “Under arrest for what?” [FN145] Bradley then told Herring about the active arrest warrant in Dale County. [FN146] Herring explained that he had seen the Dale County Circuit Judge and that no such warrant existed. [FN147] The officers handcuffed and searched Herring incident to arrest, discovering a “small bag in [his] pocket with powder residue that tested positive for methamphetamine” and a handgun and ammunition in his truck. [FN148]

Meanwhile, Morgan of the Dale County Sheriff's office was searching in vain for the actual warrant in the office files. [FN149] She phoned the court clerk who informed her that “the warrant had been recalled five months earlier.” [FN150] The source of this confusion would later be traced by the district court, who explained:

\*18 Normally, Morgan will receive a call from the Clerk's Office, or sometimes from a judge's chambers, alerting her that a warrant has been recalled. Morgan then looks in her computer, finds where the warrant is physically located, and disposes of it. In this instance, however, Morgan had no notice of the recall in her computer. According to Morgan, Herring's recalled warrant had been returned to the Dale County Clerk's Office without there being a notation of it in the Sheriff's Department's computer system. Morgan admits the mistake was probably the fault of the Dale County Sheriff's Department, not that of the Dale County Clerk's Office. [FN151]

Morgan immediately called Pope to alert her about the error, who in turn contacted Anderson. [FN152] However, in the ten to fifteen minutes that it took to correct the mistake, the officers had already arrested Herring and found his methamphetamine and the gun. [FN153] Following the arrest, Herring was indicted in federal court for illegal possession of the gun and drugs. [FN154]

## B. Disposition at the Trial and Appellate Levels

Judge Thompson of the District Court for the Middle District of Alabama refused to suppress the gun and methamphetamine collected upon Herring's arrest. [FN155] The decision relied in large measure on Evans, which the court read unambiguously as involving an error committed by court employees. [FN156] In line with its reliance on Evans, the court considered the identity of the wrongdoer to be an integral part of the analysis and distinguished Herring's case from Evans on the grounds that it involved “a mistake on the part of law enforcement personnel.” [FN157] The court therefore framed the issue as “whether the good-faith exception to the exclusionary rule, as articulated in Evans, should be extended to mistakes by police personnel.” [FN158]

\*19 Judge Thompson considered appellate opinions, both published and unpublished, indicating that the good faith exception should be extended to cover police mistakes in certain circumstances. [FN159] The court also looked to Justice O'Connor's concurrence in Evans that shifted the inquiry away from the individual police clerk's mistake to the overall reliability of the system. [FN160] The reasonableness of police officers' reliance on the record-keeping system itself could be undermined when there was “no mechanism to ensure [the record-keeping] system's accuracy over time and where the system routinely leads to false arrests.” [FN161] Judge Thompson found “no credible evidence of routine problems with disposing of recalled warrants.” [FN162] Upon weighing all testimony and recognizing that, in the current case, the mistake was corrected “within ten to fifteen minutes,” the court deemed the county's system to be “reliable.” [FN163]

The Eleventh Circuit affirmed the district court's conclusion, but not its rationale. [FN164] Justice Carnes, who wrote the appellate court's opinion, considered the use of Evans to justify capturing “Herring red-handed” to be relying on a “red herring.” [FN165] He noted that the Evans Court “expressly declined to address whether the exclusionary rule should be applied when **police** personnel rather than court employees are the source of the error.” [FN166] Justice Carnes instead viewed Leon as the proper guide. [FN167] The Court of Appeals read Leon as creating “three conditions that must occur” before evidence could be excluded: “First, there must be **misconduct** by the **police** or by adjuncts to the law enforcement team. Second, application of the rule must result in appreciable deterrence of that misconduct. Finally, the benefits of the rule's application must not outweigh its costs.” [FN168]

\*20 The court determined that the instant case fulfilled the first condition because it assumed that “the negligent actor, who is unidentified in the record, is an adjunct to law enforcement.” [FN169] The second condition was not fulfilled, however, because applying the exclusionary rule would “not deter bad record-keeping to any appreciable extent, if at all.” [FN170] Because the clerical error was a “negligent failure to act, not a deliberate or tactical choice to act,” there was no reason to believe anyone in the Sheriff's office “weighed the possible ramifications of being negligent and decided to be careless in record-keeping.” [FN171] The exclusionary rule's deterrent effect would thus “work best where the targeted conduct results from conscious decision making, because only if the decision maker considers the possible results of her actions can she be deterred.” [FN172] Herring's case also failed to fulfill Leon's third condition because “any minimal deterrence that might result” from excluding evidence “would not outweigh the heavy cost” of losing “highly probative evidence.” [FN173] Thus, the firearm and methamphetamine were admissible evidence because not all of Leon's three conditions for exclusion were met. [FN174] The Court did allow for the possibility that, if “faulty record-keeping were to become endemic,” then officers “might have a difficult time” establishing reasonable reliance. [FN175]

## C. Herring in the Supreme Court

The Herring Court's majority opinion, authored by Chief Justice Roberts, began with a clear statement of the issue: "What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee?" [FN176] Initially, Herring approached this inquiry by devotedly following good faith exception precedent. As it had previously done in Leon and Evans, the Court in Herring recognized that the Fourth Amendment itself lacked any provision excluding \*21 illegally obtained evidence. [FN177] Furthermore, Herring followed Krull and Leon in refusing to characterize the exclusionary rule as a constitutional right. [FN178] The Court adhered to Evans and Leon by instead labeling the rule as a judicially created remedy. [FN179] Finally, as did all good faith precedent, Herring limited evidentiary exclusions to situations where the benefits outweighed the costs. [FN180]

However, after consistently adhering to exclusionary rule precedent, the Herring Court took a dramatic departure from its past decisions. The departure began with an acknowledgment that the most recent good faith case, Evans, "left unresolved 'whether the evidence should be suppressed if police personnel were responsible for the error.'" [FN181] Choosing to "confront" this issue, the Court, which had previously honored Leon's three factors distinguishing police officers from judicial officers, now chose to forego a full discussion regarding: (1) The fact that the exclusionary rule was designed specifically for deterring police misbehavior; (2) The concern that haste and competition might pressure police into ignoring or subverting the Fourth Amendment; and (3) The existence of a basis for believing application of the exclusionary rule might deter police wrongdoing. [FN182] Instead of focusing on the identity of the wrongdoer, the Herring Court turned its attention to considering the degree of wrongdoing.

Focusing on the level of police impropriety, the Court reasoned that the "extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct." [FN183] The more aware the officer is of his misconduct, the more his behavior is the result of a calculated choice, and the more sensitive he is to the deterrent effect of exclusion. [FN184] "Assessment of flagrancy" was thus "an important step in the calculus" of the exclusionary rule's deterrence value; [FN185] suppression was "most likely to be effective when official conduct was flagrantly abusive of Fourth \*22 Amendment rights." [FN186] Chief Justice Roberts determined that, to "trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it." [FN187]

Herring's focus on flagrancy had a second benefit: it ensured that the official conduct was "sufficiently culpable" to be "worth the price paid by the justice system" for excluding evidence. [FN188] The Court reasoned that since the exclusionary rule exacted such "substantial social costs," [FN189] it should be reserved for "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." [FN190] Suppression based on mere negligence, therefore, did "not 'pay its way.'" [FN191]

The Court ultimately ruled that the Dale County Sheriff's Office clerk's failure to remove Herring's arrest warrant from the computer was an error that failed to reach the level of wrongdoing justifying the suppression of evidence. [FN192] Excluding evidence in this case would harm the justice system by failing to deter negligence; thus, suppression was not warranted. [FN193]

### III. Concerns Raised by Herring's Alteration of the Leon Analysis

#### A. The Herring Court Strayed from the Fourth Amendment's Text Prohibiting Unreasonable Searches and

## Seizures

In considering the appropriateness of applying the exclusionary rule, the Herring Court placed great emphasis on examining the text of the Fourth Amendment. [FN194] For instance, Chief Justice Roberts noted that the Amendment “contains no provision expressly precluding the use of evidence obtained in violation of its commands.” [FN195] \*23 Curiously, though, the Court chose to forego a similar consideration of the Fourth Amendment's text when it limited exclusion to wrongdoing which rose to the level of “deliberate, reckless, or grossly negligent conduct” or “recurring or systemic negligence.” [FN196] The Fourth Amendment does not make any reference to an improper search or seizure that arises from an officer acting deliberately, recklessly, with gross negligence, or as part of a failed system. [FN197] However, the Fourth Amendment does explicitly involve reasonableness by prohibiting “unreasonable searches and seizures.” [FN198]

In accord with the explicit language of reasonableness, the Court in Leon framed its inquiry around whether an “officer's reliance on the magistrate's probable-cause determination” was “objectively reasonable.” [FN199] Likewise, in Sheppard, the Court acknowledged the reasonableness language in the text itself and declared that its “sole issue” was whether “officers reasonably believed that the search they conducted was authorized by a valid warrant.” [FN200] Krull also focused on whether the good faith exception should be extended to “objectively reasonable reliance upon a statute.” [FN201] Finally, in Evans, the Court decided the case by noting that there was “no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record.” [FN202] Thus, although the Court had consistently adhered to reasonableness as the standard, Herring applied exclusions only to cases of wrongdoing that go beyond unreasonableness.

The Court previously explained the meaning of “reasonableness,” recognizing that the standard did not mandate perfection. Instead, the Court has ruled that, “in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.” [FN203] Furthermore, the “touchstone of reasonableness under the Fourth Amendment” is “sufficient \*24 probability, not certainty.” [FN204] The Court explained that the rationale behind its realistic definition of reasonableness is the fact that “many situations which confront officers in the course of executing their duties are more or less ambiguous”; therefore, “room must be allowed for some mistakes on their part.” [FN205]

The Court, however, placed an explicit limit on the kind of mistake that could still qualify as reasonable. Reasonable errors were “those of reasonable men, acting on facts leading sensibly to their conclusions of probability.” [FN206] Additionally, the Court declared that in making the reasonableness assessment, “[I]t is imperative that the facts be judged against an objective standard: [W]ould the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” [FN207] For instance, as applied to police behavior, the Court expects police to act in a “reasonable” manner, [FN208] relying on the “objective facts available” to them at the time of action. [FN209] In short, Fourth Amendment reasonableness is measured by what “reasonable and prudent men” should do. [FN210] Because the Court has declared that “the ‘reasonable person’ test presupposes an innocent person,” [FN211] acting improperly with deliberate, reckless, or gross negligence is behavior well outside the realm of responsible and sensible conduct envisioned in the Court's own precedent. Furthermore, Herring's new “deliberate, reckless, or grossly negligent conduct” [FN212] language is remarkably incongruous with its own reference to what the “reasonably well trained officer would have known” standard it mentioned only one page earlier in its opinion. [FN213]

The Court offered a behavioral theory as support for its abandonment of the reasonableness standard when considering evidentiary exclusions. The Court posited that people might be most effectively \*25 deterred from violating a rule when they are considering intentionally violating that rule, rather than when they are merely acting carelessly. [FN214] In such circumstances, because a person consciously chooses to do wrong, he is more sensitive to a deterrent because it can be included as part of the conscious decision making. Although social science may be able to bear this out, policy is not supposed to be the Court's inspiration in undertaking constitutional analyses. Rather, the point of constitutional reasoning is that it is actually based on the Constitution.

Moreover, Herring's declaration that “[t]he extent to which the exclusionary rule is justified by these principles varies with the culpability of the law enforcement conduct” [FN215] could open up exclusionary rule litigation to an undesirable and complex sliding scale approach. For instance, if police carelessness does not rise to a level that requires any exclusion, perhaps future cases could hold that an officer's gross negligence would exclude the mention of the illegally obtained, though duly admitted, evidence only from the prosecutor's closing argument. Likewise, reckless behavior by an officer would require exclusion of evidence from the prosecution's case-in-chief, while deliberate official wrongdoing might be deterred by exclusion of evidence from the entire case. Such an outcome would unduly complicate Fourth Amendment litigation and further weaken the exclusionary rule.

#### B. Herring's Shift from Leon's “Judge Versus Police Officer” Distinction to Assessment of the Level of Police Culpability Required to Trigger Exclusion Could Dilute Fourth Amendment Protections

As noted in Part I above, in its pre-Herring precedent, the Court analyzed good faith issues by first establishing the limited nature of the exclusionary rule and then by distinguishing the two types of government officials—those in the judiciary and those in law enforcement. [FN216] In contrast, the Herring Court adopted only that portion of good faith analysis supporting its expansion of the exception (that concerning the limited nature of the exclusionary rule) and ignored \*26 the rest of the analysis that cut against expanding the exception (that involving the differences between courts and police).

Thus, when Leon and its progeny provided language emphasizing the limits of exclusion, Herring was alert and attentive to every phrase. For instance, Chief Justice Roberts dutifully noted that exclusion was without textual basis, [FN217] was not a constitutional right, [FN218] and was only a judicially created remedy [FN219] only to be used when its benefits outweighed its costs. [FN220] However, when the Court was finally faced with all the prior good faith precedent considering the differences between **police** officers and judges, it chose to minimize the value placed on precedent and forge its own path instead. Thus, although Chief Justice Roberts listed Leon's three factors distinguishing the judiciary from the **police**, the opinion largely ignored them. [FN221] As for Leon's first factor that “the exclusionary rule is designed to deter **police misconduct** rather than to punish the errors of judges and magistrates,” [FN222] Herring made no mention that, since its facts did indeed present a wrong committed by a law enforcement employee, exclusion here would directly impact law enforcement behavior without causing any collateral damage to the innocent judiciary. [FN223] Likewise, Herring did not do justice to Leon's second distinction that “there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.” [FN224] In contrast to the decisions of trustworthy judges and magistrates, the judgments of **police** officers are pressured by the “often competitive enterprise of ferreting out crime” and, therefore, must be more closely scrutinized. [FN225] Because law enforcement made the mistake in Herring, its error did not merit the deference granted by Leon to judges and magistrates. Herring, however, avoided mention

of such inconvenient matters.

When the Court finally did more than pay lip service to Leon's third factor regarding the "deterrent effect" on the erring official, it \*27 merely altered the level of wrongdoing required to trigger an evidentiary exclusion rather than strictly adhere to precedent. Herring's end result was to shift inquiry from the identity of the wrongdoer to the degree of culpability. It was as if, while running a relay race, upon realizing it would not win because it fumbled the baton transfer, the Court changed the rules mid-race to award victory not to the fastest team, but to the team that dropped the baton the most times.

Not only did Herring change the focus of analysis from identity of the wrongdoer to the level of government culpability, but it also lowered the standards that apply to the wrongdoing. With the spotlight on law enforcement rather than the judiciary, the Court no longer found careless mistakes to be a problem. In fact, the Court explicitly rejected the contention that "negligence automatically triggers suppression," ruling instead that when "police mistakes are the result of negligence such as described here," any "marginal deterrence" from exclusion simply [FN226] "does not 'pay its way.'" [FN227] Providing examples justifying suppression of evidence, Chief Justice Roberts offered police recklessly "maintaining a warrant system, or . . . knowingly [making] false entries to lay the groundwork for future arrests." [FN228]

Herring signaled to police nationwide that they need not avoid negligence by an individual law enforcement agent; as long as the mistake was not intentional or reckless, evidence obtained through a defective process will not be excluded. The Fourth Amendment standards that officers should now aspire to avoid are 'flagrant or deliberate violation[s] of rights,' [FN229] "intentional conduct that [is] patently unconstitutional," [FN230] acting 'without a shadow of authority,' [FN231] and making statements that are a 'deliberate falsehood or a reckless disregard\*28 for the truth.' [FN232] Incidentally, the Herring Court garnered support for its new and curious stance by taking the "deliberate falsehood" and "reckless statement" language from *Franks v. Delaware*, a case where it was contended that such statements were material and placed in a sworn search warrant affidavit. [FN233] The statements that Herring points to as triggering the exclusionary rule potentially constitute perjury. The Court has hardly set a high bar for constitutionally sanctioned police work.

Herring's standards for assessing systemic wrongdoing were little better. The Court decided that exclusion would be justified only if "police have been shown to be reckless in maintaining a warrant system or to have knowingly made false entries to lay the groundwork for future false arrests." [FN234] Such reference to laying groundwork for future wrongdoing appears to go beyond intentional action in the present to include deliberation or premeditation of future impropriety. Moreover, even recklessness might be pushed to its limit before triggering evidence suppression because Herring used the reliance on computer systems that "routinely leads to false arrests" or "a widespread pattern of violations" as examples of proper situations to suppress evidence. [FN235] Chief Justice Roberts here was describing an enforcement mechanism that was so sparingly used that many people, by definition, had to suffer Fourth Amendment violations before it could be triggered for use.

### C. By Extending the Good Faith Exception to Law Enforcement Wrongdoing, the Court has Undermined One of the Initial Rationales for Recognizing the Good Faith Exception to the Exclusionary Rule

Herring sliced passages out of the precedent on good faith exceptions without fully appreciating the context of the case law. In particular, the reason that the Leon Court created the good faith exception was in part due to its adherence to the "warrant requirement" doctrine.\*29 [FN236] As the Leon Court explained, the Court in prior cases "expressed a strong preference for warrants, and declared that 'in a doubtful or marginal case a search

under a warrant may be sustainable where without one it would fail.” [FN237] The Leon Court therefore admitted the evidence obtained under an invalid warrant partly because it feared creating a disincentive for officers who went to the trouble of getting a warrant, only to find out that it was subsequently deemed invalid. [FN238] Indeed, Leon expressed the concern that “excluding the evidence can in no way affect [the Officer's] future conduct unless it is to make him less willing to do his duty.” [FN239]

Katz v. United States supported Leon's stance on the warrant requirement, stating that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” [FN240] Terry v. Ohio also reaffirmed the Court's dedication to the warrant requirement in holding, “We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.” [FN241] In fact, two years before Leon was decided, in United States v. Ross, the Court referred to the warrant requirement as a “cardinal principle.” [FN242]

In aiming to make the warrant requirement more palatable to officers, the Court offered incentives other than Leon's good faith exception to encourage police to brave the tedious paperwork in seeking prior judicial approval. In Illinois v. Gates, the Court rejected the “rigid” [FN243] and “excessively technical” old Aguilar/Spinelli formulation of probable cause in warrants [FN244] in favor of a new, easier, practical, and nontechnical “totality-of-the-circumstances” test. [FN245] Furthermore, Gates deemed that magistrates' probable cause determinations be \*30 assessed by the less demanding “substantial basis” standard of review, [FN246] noting that “[a] grudging or negative attitude by reviewing courts toward warrants' . . . is inconsistent with the strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrant[s] by interpreting affidavit[s] in a hyper technical, rather than commonsense, manner.” [FN247] Gates' totality-of-the-circumstances test for probable cause in warrants and its “substantial basis” [FN248] review of issuing magistrates' decisions were both created with an eye to encourage warrant use. [FN249] The Court made this connection more apparent in Ornelas v. United States by clarifying that:

The Fourth Amendment demonstrates a “strong preference for searches conducted pursuant to a warrant” . . . and the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive. [FN250]

Delaware v. Franks offers yet another example of an instance where the Court crafted a rule designed to fulfill the goals of the warrant requirement. [FN251] In Franks, the Court characterized the Warrant Clause as the “bulwark of Fourth Amendment protection” because it requires that, in most cases, “police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search.” [FN252] Franks involved a defendant who challenged a warrant by attacking the truthfulness of the warrant affidavit and asserting that the inaccuracies were made in “bad faith.” [FN253] This contention required the Court to thread a course between two extremes.

The Franks Court recognized that it had to be cautious because allowing such attacks on an officer's veracity might make such challenges routine and lead defendants to abuse these warrant challenges as a “convenient source of discovery.” [FN254] On the other hand, the \*31 Court in Franks felt that the Warrant Clause itself required some vehicle to keep officers honest in applying for warrants. [FN255] The Court therefore allowed for a motion to challenge a warrant affiant's veracity but attached a host of limitations to prevent its misuse by defendants. First, Franks noted that the affidavit supporting the warrant enjoyed a presumption of validity. [FN256] To even obtain an evidentiary hearing in the first place, the challenger had to offer “allegations of de-

liberate falsehood or of reckless disregard for the truth” rather than just present conclusory allegations supported only by a “desire to cross-examine.” [FN257] Such contentions had to be accompanied by proof detailing the specific portions of the affidavit that were false and required corroboration through sworn witness statements. [FN258]

Hence, even if a defendant could meet all these factors, he still will not get an evidentiary hearing unless the untruthful statements are deemed “material.” [FN259] If the defendant can prove materiality, he is then entitled to a chance to be heard, but “whether he will prevail at that hearing [is] another issue.” [FN260] At the evidentiary hearing, the defendant is entitled to have evidence excluded only if he establishes, by a preponderance of the evidence, that (1) the warrant was obtained by perjury or reckless disregard; and (2) such inaccuracies were material to establishing probable cause. [FN261] The Court created this daunting gauntlet in order to prevent misuse of challenges attacking the truthfulness of warrant applicants. [FN262]

In *Leon*, *Gates*, and *Franks*, the Court understood that the Warrant Clause offered protection by placing a neutral and detached judge between a zealous officer and the citizen. *Leon* encouraged the use of warrants by providing officers with the assurance that if they obtained a warrant and reasonably relied on it in gathering evidence, such evidence would be protected from suppression even if the warrant later turned out to be invalid. [FN263] *Gates* gave officers who legitimately obtained a warrant a simpler standard to determine probable cause--a totality of the circumstances standard [FN264]--and provided a deferential standard of assessing the magistrate's determination of probable cause--the substantial basis standard-- not available to officers who acted without a warrant. [FN265] *Franks* then essentially offered officers who acquired a warrant procedural protection from an attack on their character. [FN266]

After decades of guiding officers toward fulfilling the Warrant Requirement, the Court in *Herring* sapped its own precedent's incentives of their strength. Instead of promoting *Leon*'s protection of officers who diligently applied for a search warrant and reasonably relied on a judge's negligence, *Herring* expanded the good faith exception to law enforcement's negligence in fishing for an arrest warrant. The two aims of encouraging police to work hard in seeking prior judicial approval and of avoiding punishing the police for a magistrate's mistake evaporated in an instant.

This devolution of the good faith rule is particularly troubling in light of *Herring*'s facts. In contrast to *Herring*, *Leon* involved a mistake by a judge that was beyond the officer's role to prevent. [FN267] The *Leon* Court explained the officer's quandary when a warrant is issued: “An officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.” [FN268] In *Herring*, the Sheriff's warrant clerk was operating under no such structural restraint on her duties. The clerk could have manually checked the actual physical file before reporting that a warrant existed and, indeed, did perform such a correction only fifteen minutes after her mistake. [FN269] Not only was there something more that the law enforcement employee could have done, but she also could have done it with extreme ease.

Additionally, the Sheriff's Investigator was not the officer for which *Leon* created the good faith exception. Quite simply, the Investigator did not expend the effort the Court had originally envisioned would be required in obtaining a warrant. Unlike in *Leon*, the arrest \*33 of the defendant was not the result of cultivation of a confidential informant, patient stake outs of various locations, checks of probation records, preparation of a warrant application, review of that application by several prosecutors, and submission of the documents to a ma-

gistrate. [FN270] Rather, the Investigator happened to hear from fellow officers that the defendant was on the premises to pick up some property and that there was an outstanding warrant for his arrest. [FN271] Although it is commendable that the Investigator took the initiative to follow up on an outstanding warrant, his actions were not of the kind that Leon sought or needed to promote. Rather than being something that police would be reluctant to do because of the added effort, drudgery, and investment of time, an immediate arrest based on a previously created warrant would be the kind of activity officers would be happy to perform in pursuit of the “often competitive enterprise of ferreting out crime.” [FN272]

Moreover, the facts in Herring hint at official behavior that could be something less than objective good faith. Apparently, the Investigator and defendant had a past history in which the defendant had repeatedly told the prosecutor that the Investigator “was involved in the unsolved murder of a local teenager.” [FN273] Regardless of its truth, the accusation seemed to have stung the Investigator, for “shortly before the events leading to [Herring's] arrest, Inspector Anderson and another officer had appeared at [Herring's] house, pressing him to drop his complaints.” [FN274] In ruling on a case having little ability to promote police diligence and tinged with the possibility of a government official's personal animosity, the Court chose a curious vehicle to expand the good faith exception to include law enforcement error.

#### Conclusion

Bennie Herring, as the Herring Court sanctimoniously noted, was “no stranger to law enforcement.” [FN275] In November 2003, he had failed to appear in court on a felony charge, which caused a judge to issue a warrant for his arrest. [FN276] Five months later, he was found illegally possessing\*34 guns and drugs. [FN277] Most people would agree that it was about time someone took Herring off the streets. Chief Justice Roberts certainly seemed to be of this mindset, for he concluded the Court's opinion with a flourish by quoting Justice Cardozo's famous adage that the criminal should not “go free because the constable has blundered.” [FN278]

Yet in refusing to exclude the evidence gained from Herring's illegal arrest and search, the Court diminished everyone's rights against unreasonable search and seizure. The Court itself had already recognized the need to employ the exclusionary rule to enforce the Fourth Amendment. *Mapp v. Ohio* regarded the exclusionary rule as so crucial that it surmised that failure to use it would reduce the right against unreasonable search and seizure to “a form of words, valueless and undeserving of mention in a perpetual charter of inestimable human liberties.” [FN279] In *Elkins v. United States*, the Court determined that the threat of exclusion “compel[led] respect” for the rule. [FN280] The *Mapp* Court scoffed at alternative remedies as “worthless and futile” because they had failed to secure official compliance with constitutional rights. [FN281] Justice Potter Stewart echoed this lack of faith in alternative remedies, whether they were civil suits, administrative sanctions, or criminal prosecutions of offending officers, due to their impracticality. [FN282] By forbidding use of the Fourth Amendment's most effective remedy to deter law enforcement's careless computer errors, Herring signaled to police that negligent maintenance of records has no practical consequences. An invalid arrest based on a false computer record can pass this newly lowered bar.

On July 7, 2004, law enforcement laxity cost a lone criminal his Fourth Amendment rights. [FN283] The Court's condoning of this sloppy police work and its refusal to step in until such mistakes become widespread and routine [FN284] should offer law-abiding citizens little comfort. In *Evans*, Justice Ginsburg warned of a “potential for Orwellian mischief\*35 in government's increasing reliance on computer technology in law enforcement.” [FN285] She worried that “widespread reliance on computers to store and convey information gen-

erates, along with manifold benefits, new possibilities of error, due to both computer malfunctions and operator mistakes. . . . [C]omputerization greatly amplifies an error's effect, and correspondingly intensifies the need for prompt correction.” [FN286] Fifteen years later, Justice Ginsburg's fears were not allayed in *Herring*. [FN287] She reiterated, “‘The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base’ is evocative of the use of general warrants that so outraged the authors of our Bill of Rights.” [FN288] Sadly, the Court's expansion of the good faith exception in *Herring* has taken government wrongdoing that would have incensed our Founders and transformed it into something that is basically good enough for government work.

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[FN1]. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

[FN2]. Not only does the government keep its own computer records, but also it “has increasingly relied upon [commercial] databases in its law enforcement activities.” Brief of Amici Curiae Electronic Privacy Information Center (EPIC), Privacy and Civil Rights Organizations, and Legal Scholars and Technical Experts in Support of Petitioner at 18-19, *Herring v. United States*, 129 S. Ct. 695 (2009) (No. 07-513), 2008 WL 2095709.

[FN3]. *Id.*

[FN4]. *Id.*

[FN5]. *Id.* at 20.

[FN6]. *Id.* at 19.

[FN7]. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be ‘a form of words,’ valueless and undeserving of mention in a perpetual charter of inestimable human liberties.”).

[FN8]. See *id.* at 649, 655.

[FN9]. *Id.* at 656.

[FN10]. *United States v. Leon*, 468 U.S. 897 (1984).

[FN11]. *Id.* at 922-23.

[FN12]. 129 S. Ct. 695 (2009).

[FN13]. *Id.* at 702.

[FN14]. *Leon*, 468 U.S. 897.

[FN15]. *Id.* at 901.

[FN16]. *Id.* at 902.

[FN17]. *Id.* at 901-02.

[FN18]. *Id.* at 901.

[FN19]. *Id.*

[FN20]. *United States v. Leon*, 468 U.S. 897, 901 (1984).

[FN21]. *Id.* at 901-02.

[FN22]. *Id.* at 902.

[FN23]. *Id.*

[FN24]. *Id.*

[FN25]. *Id.*

[FN26]. *United States v. Leon*, 468 U.S. 897, 902 (1984).

[FN27]. *Id.* at 903.

[FN28]. *Id.* at 904-05. As the *Leon* Court noted, “In *Illinois v. Gates*, 462 U.S. 213 (1983), decided last Term, the Court abandoned the two-pronged Aguillar-Spinelli test for determining whether an informant's tip suffices to establish probable cause for the issuance of a warrant and substituted in its place a ‘totality of the circumstances’ approach.” *Id.* at 904 n.5.

[FN29]. See *id.*

[FN30]. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[FN31]. *Id.* at 239 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

[FN32]. *Leon*, 468 U.S. at 905.

[FN33]. *Id.*

[FN34]. *Id.* at 928-29 (Brennan, J., dissenting).

[FN35]. *Id.* at 929.

[FN36]. Id. In 1936, the Court noted that it would “not anticipate a question of constitutional law in advance of the necessity of deciding it.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (citing *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)). The Court believed that “[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.” Id. (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)).

[FN37]. See *Leon*, 468 U.S. at 905.

[FN38]. Id. at 905.

[FN39]. Id. (citing *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961); *Olmstead v. United States*, 277 U.S. 438, 462-63 (1928)).

[FN40]. Id. at 906.

[FN41]. Id.

[FN42]. Id.

[FN43]. *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

[FN44]. Id.

[FN45]. Id. at 906-07. *Leon* noted that “[a]ccordingly, ‘[as] with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.’” Id. at 908 (quoting *Calandra*, 414 U.S. at 348).

[FN46]. Id. at 907.

[FN47]. Id. at 907-08 (quoting *United States v. Payner*, 447 U.S. 727, 734 (1980)).

[FN48]. Id. at 908-09.

[FN49]. *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *Stone v. Powell*, 428 U.S. 465, 492 (1976)).

[FN50]. Id.

[FN51]. Id. (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

[FN52]. Id. (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)).

[FN53]. Id. at 910 (citing *Rakas v. Illinois*, 439 U.S. 128 (1978); *Wong Sun v. United States*, 371 U.S. 471, 491-92 (1963)).

[FN54]. Id.; see also *Harris v. New York*, 401 U.S. 222 (1971).

[FN55]. *United States v. Leon*, 468 U.S. 897, 911 (1984) (citing *Dunaway v. New York*, 442 U.S. 200, 217-18 (1979); *United States v. Ceccolini*, 435 U.S. 268, 279 (1978)).

[FN56]. *Id.* at 910 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

[FN57]. See *id.*

[FN58]. See *id.* at 914.

[FN59]. See *id.* at 914-16.

[FN60]. Justice White declared, “To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas, their reliance is misplaced.” *Id.* at 916.

[FN61]. Leon noted, “First, the exclusionary rule is designed to deter **police misconduct** rather than to punish the errors of judges and magistrates.” *United States v. Leon*, 468 U.S. 897, 916 (1984).

[FN62]. Leon stated as its second rationale that “there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.” *Id.*

[FN63]. Finally, Leon offered, “Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.” *Id.* The Court did acknowledge “assertions that some magistrates become rubber stamps for the police and others may be unable effectively to screen police conduct,” but was “not convinced that this is a problem of major proportions.” *Id.* at 916 n.14.

[FN64]. *Id.* at 917.

[FN65]. Leon specified that the exclusionary rule “may be ill-fitted to the job-created motivation of judges ... [because ideally] a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to police.” *Id.* at 917 n.15.

[FN66]. *Id.* at 917 n.18.

[FN67]. *United States v. Leon*, 468 U.S. 897, 917 n.18 (1984).

[FN68]. *Id.* at 918.

[FN69]. *Id.*

[FN70]. *Id.* at 920 (quoting *Stone v. Powell*, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).

[FN71]. *Id.* at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)).

[FN72]. In refusing to exclude evidence, Justice Cardozo famously wrote, “The criminal is to go free because the constable has blundered.” *New York v. Defore*, 150 N.E. 585, 587 (1926).

[FN73]. *Leon*, 468 U.S. at 926.

[FN74]. See, e.g., *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

[FN75]. See generally *id.*

[FN76]. *Id.* at 984-85.

[FN77]. *Id.* at 985-86.

[FN78]. *Id.* at 986.

[FN79]. *Id.*

[FN80]. *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984).

[FN81]. *Illinois v. Krull*, 480 U.S. 340 (1987).

[FN82]. *Id.* at 342.

[FN83]. *Id.* at 343 (quoting Ill. Rev. Stat., ch. 95 1/2, para. 5-401(e) (1981)) (“Paragraph 5-401 of the 1981 compilation was repealed by 1983 Ill. Laws No. 83-1473, § 2, effective Jan. 1, 1985. Its current compilation replacement bears the same paragraph number.”).

[FN84]. *Id.* at 343.

[FN85]. *Id.*

[FN86]. *Id.* at 342.

[FN87]. See *Arizona v. Evans*, 514 U.S. 1, 3 (1995).

[FN88]. *Id.* at 4.

[FN89]. *Id.*

[FN90]. *Id.*

[FN91]. *Id.* at 5.

[FN92]. *Id.*

[FN93]. *Massachusetts v. Sheppard*, 468 U.S. 981, 988-89 (1984) (“Having already decided that the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid, the sole issue before us in this case is whether the officers reasonably believed that the search they conducted was authorized by a valid warrant.”).

[FN94]. *Evans*, 514 U.S. at 10; *United States v. Leon*, 468 U.S. 897, 906 (1984).

[FN95]. *Leon*, 468 U.S. at 906.

[FN96]. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citing *Leon*, 468 U.S. at 906 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974))).

[FN97]. See *id.*; *Evans*, 514 U.S. at 10; *Leon*, 468 U.S. at 906.

[FN98]. *Leon*, 468 U.S. at 908 (internal citations omitted); *Evans*, 514 U.S. at 11 (citing *Leon*, 468 U.S. at 908); *Krull*, 480 U.S. at 347.

[FN99]. *Leon*, 468 U.S. at 906-07; *Evans*, 514 U.S. at 13-14; *Krull*, 480 U.S. at 347.

[FN100]. *Massachusetts v. Sheppard*, 468 U.S. 981, 987-88 (1984) (citing *Leon*, 468 U.S. at 922-23).

[FN101]. *Krull*, 480 U.S. at 348.

[FN102]. *Id.* at 350-51.

[FN103]. *Id.* at 356-57.

[FN104]. *Id.* at 350.

[FN105]. The Court in *Leon* considered, for this first issue, the identity of the official who was to be deterred by exclusion of evidence. See *Leon*, 468 U.S. at 916. The Court noted specifically, “First, the exclusionary rule is designed to deter **police misconduct** rather than to punish the errors of judges and magistrates.” *Id.*

[FN106]. *Krull*, 480 U.S. at 350 (citing *Leon*, 468 U.S. at 916).

[FN107]. The second issue considered by the court in *Leon* was whether there was evidence to suggest that “judges and magistrates 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.

[FN108]. *Krull*, 480 U.S. at 351.

[FN109]. *Id.* at 350-51 (internal quotations and citations omitted).

[FN110]. *Id.* at 351.

[FN111]. *Id.*

[FN112]. *Id.*; see also U.S. Const. art. VI, cl. 3.

[FN113]. *Krull*, 480 U.S. at 351.

[FN114]. *Id.*

[FN115]. *Id.* at 350-51 (citing *United States v. Leon*, 468 U.S. 897, 916 (1984)).

[FN116]. *Id.* at 352 (citing *Leon*, 468 U.S. at 916).

[FN117]. *Id.*

[FN118]. *Id.*

[FN119]. *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987).

[FN120]. [Arizona v. Evans](#), 514 U.S. 1, 3-4 (1995).

[FN121]. [Id.](#)

[FN122]. [Id.](#)

[FN123]. [Id.](#) at 6 (emphasis added).

[FN124]. [Id.](#) at 11.

[FN125]. [Id.](#)

[FN126]. [Arizona v. Evans](#), 514 U.S. 1, 11-12 (1995) (quoting [United States v. Leon](#), 468 U.S. 897, 916 (1984)).

[FN127]. [Id.](#) at 14.

[FN128]. [Id.](#) at 14-16.

[FN129]. [Id.](#) at 14 (emphasis added).

[FN130]. [Id.](#) at 14-15 (emphasis added).

[FN131]. [Id.](#) at 15 (emphasis added).

[FN132]. [Arizona v. Evans](#), 514 U.S. 1, 16 (1995) (emphasis added).

[FN133]. [Id.](#) at 16 n.5 (internal quotations and citations omitted).

[FN134]. [Id.](#)

[FN135]. [Id.](#) at 6.

[FN136]. [Herring v. United States](#), 129 S. Ct. 695, 698 (2009).

[FN137]. Brief for the [United States](#) at 2, [Herring](#), 129 S. Ct. 695 (No. 07-513), 2008 WL 2847070.

[FN138]. Brief for Petitioner at 4 n.2, [Herring](#), 129 S. Ct. 695 (No. 07-513), 2008 WL 2043967.

[FN139]. [Id.](#)

[FN140]. [Id.](#)

[FN141]. [Herring](#), 129 S. Ct. at 698.

[FN142]. [Id.](#) [Herring](#) contended that the “initial issuance of the warrant had been mistaken.” Brief for Petitioner, [supra](#) note 138, at 3 n.1.

[FN143]. [Herring](#), 129 S. Ct. at 698.

[FN144]. Brief for the [United States](#), [supra](#) note 137, at 3.

[FN145]. Brief for Petitioner, *supra* note 138, at 5.

[FN146]. *Id.*

[FN147]. *Id.*

[FN148]. *Id.*

[FN149]. *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

[FN150]. *Id.*

[FN151]. *United States v. Herring*, 451 F. Supp. 2d 1290, 1291 (2005).

[FN152]. *Herring*, 129 S. Ct. at 698.

[FN153]. *Id.*

[FN154]. *Id.* at 699.

[FN155]. *Herring*, 451 F. Supp. 2d at 1291.

[FN156]. *Id.* at 1292. In referring to Evans, Judge Thompson noted that “[t]he Court declined to determine whether its holding would apply if police personnel were responsible for the error.” *Id.*

[FN157]. *Id.*

[FN158]. *Id.*

[FN159]. *Id.*

[FN160]. *Id.*

[FN161]. *United States v. Herring*, 451 F. Supp. 2d 1290, 1292 (2005) (internal citations and quotations omitted).

[FN162]. *Id.* The district court reached this conclusion in spite of the fact that one of the Sheriff's Department warrant clerks, when questioned whether the county had suffered “problems with communicating about warrants,” had testified in the affirmative “several times.” *Id.*

[FN163]. *Id.* at 1292-93.

[FN164]. See *United States v. Herring*, 492 F.3d 1212, 1216 (2007).

[FN165]. *Id.*

[FN166]. *Id.*

[FN167]. *Id.*

[FN168]. *Id.* at 1217 (internal citations omitted).

[FN169]. *Id.*

[FN170]. *United States v. Herring*, 492 F.3d 1212, 1218 (2007).

[FN171]. *Id.*

[FN172]. *Id.*

[FN173]. *Id.*

[FN174]. *Id.* at 1218-19.

[FN175]. *Id.*

[FN176]. *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

[FN177]. *Id.* at 699.

[FN178]. *Id.* at 700 (citing *United States v. Leon*, 468 U.S. 897, 906 (1984)).

[FN179]. *Id.* at 699 (internal citations omitted); *Arizona v. Evans*, 514 U.S. 1, 10 (1995); *Leon*, 468 U.S. at 906.

[FN180]. *Herring*, 129 S. Ct. at 700 (internal citations omitted).

[FN181]. *Id.* at 701 (quoting *Evans*, 514 U.S. at 16).

[FN182]. *Id.*

[FN183]. *Id.*

[FN184]. *Id.*

[FN185]. *Id.* at 701 (quoting *United States v. Leon*, 468 U.S. 897, 911 (1984)).

[FN186]. *Herring v. United States*, 129 S. Ct. 695, 702 (2009) (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

[FN187]. *Id.* at 702.

[FN188]. *Id.*

[FN189]. *Id.* at 700-01 (quoting *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987) (internal citations omitted)).

[FN190]. *Id.* at 702.

[FN191]. *Id.* at 704 (quoting *United States v. Leon*, 468 U.S. 897, 907-08 n.6 (1984) (internal citations omitted)).

[FN192]. *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

[FN193]. *Id.* at 704.

[FN194]. *Id.* at 699.

[FN195]. *Id.* (quoting *Arizona v. Evans*, 514 U.S. 1, 10 (1995)).

[FN196]. *Id.* at 702.

[FN197]. U.S. Const. amend. IV.

[FN198]. U.S. Const. amend. IV.

[FN199]. *United States v. Leon*, 468 U.S. 897, 922 (1984).

[FN200]. *Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984).

[FN201]. *Illinois v. Krull*, 480 U.S. 340, 342 (1987).

[FN202]. *Arizona v. Evans*, 514 U.S. 1, 15-16 (1995).

[FN203]. *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).

[FN204]. *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (quoting *Hill v. California*, 401 U.S. 797, 803-04 (1971) ).

[FN205]. *Rodriguez*, 497 U.S. at 186 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

[FN206]. *Id.*

[FN207]. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1967).

[FN208]. *Rodriguez*, 497 U.S. at 184.

[FN209]. *Id.* at 185 (quoting *Garrison*, 480 U.S. at 88).

[FN210]. *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar*, 338 U.S. at 175).

[FN211]. *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

[FN212]. *Herring v. United States*, 129 S. Ct. 695, 703 (2009).

[FN213]. *Id.* at 702.

[FN214]. See *id.* at 701-02.

[FN215]. *Id.* at 701.

[FN216]. See discussion *supra* Part I.A-B.

[FN217]. *Herring*, 129 S. Ct. at 699.

[FN218]. *Id.* at 700.

[FN219]. *Id.*

[FN220]. *Id.*

[FN221]. See *id.* at 701.

[FN222]. *United States v. Leon*, 468 U.S. 897, 916 (1984).

[FN223]. See *Herring*, 129 S. Ct. at 701.

[FN224]. *Leon*, 468 U.S. at 916.

[FN225]. *Johnson v. United States*, 333 U.S. 10, 14 (1947).

[FN226]. *Herring*, 129 S. Ct. at 704.

[FN227]. *Id.* (quoting *Leon*, 468 U.S. at 907-08 n.6) (internal citations omitted). Consistent with its conception of the exclusionary rule as a mere remedy, *Herring* extended of the good faith exception to the exclusionary rule by assessing benefit versus cost. *Id.* at 702 n.4. On the benefit side, the Court had to concede Justice Ginsberg's point in dissent that "liability for negligence ... creates an incentive to act with greater care," and thus excluding evidence did have some deterrent value. *Id.* at 702. Yet, such a small upside was outweighed by the exclusionary rule's substantial, and seemingly fixed, costs to society, the principal one being "letting guilty and possibly dangerous defendants go free--something that 'offends basic concepts of the criminal justice system.'" *Id.* at 701 (quoting *Leon*, 468 U.S. at 908).

[FN228]. *Id.* at 703.

[FN229]. *Id.* at 702 (quoting Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929, 953 (1965)).

[FN230]. *Id.*

[FN231]. *Id.* (quoting *Weeks v. United States*, 232 U.S. 383, 390 (1914)).

[FN232]. *Herring v. United States*, 129 S. Ct. 695, 703 (2009) (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978)).

[FN233]. *Franks v. Delaware*, 138 U.S. 154, 171 (1978).

[FN234]. *Herring*, 129 S. Ct. at 703.

[FN235]. *Id.* at 704 (2009) (quoting *Arizona v. Evans*, 514 U.S. 1, 17 (1995) (O'Connor, J., concurring); *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring)).

[FN236]. See *United States v. Leon*, 468 U.S. 897, 914-17 (1984). For a cogent discussion of the warrant requirement, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468 (1985).

[FN237]. *Leon*, 468 U.S. at 914 (quoting *United States v. Ventresca*, 380 U.S. 102, 106 (1965)).

[FN238]. *Id.* at 920-21.

[FN239]. *Id.* at 920 (quoting *Stone v. Powell*, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).

[FN240]. *Katz v. United States*, 389 U.S. 347, 357 (1967).

[FN241]. *Terry v. Ohio*, 392 U.S. 1, 20 (1967).

[FN242]. *United States v. Ross*, 456 U.S. 798, 825 (1982).

[FN243]. *Illinois v. Gates*, 462 U.S. 213, 231 (1983).

[FN244]. *Id.* at 234.

[FN245]. *Id.* at 230-31.

[FN246]. *Id.* at 246.

[FN247]. *Id.* at 236 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).

[FN248]. *Id.* at 236, 246.

[FN249]. *Ornelas v. United States*, 517 U.S. 690, 698-99 (1996).

[FN250]. *Id.* at 699 (quoting *Gates*, 462 U.S. at 236).

[FN251]. *Franks v. Delaware*, 438 U.S. 154, 164 (1978).

[FN252]. *Id.*

[FN253]. *Id.* at 158 (internal citations omitted).

[FN254]. *Id.* at 167 (noting that “none of these considerations is trivial.”).

[FN255]. *Id.* at 164-65.

[FN256]. *Id.* at 171.

[FN257]. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

[FN258]. *Id.*

[FN259]. *Id.* at 171-72.

[FN260]. *Id.* at 172.

[FN261]. *Id.* at 155-56.

[FN262]. *Id.* at 170.

[FN263]. See *United States v. Leon*, 468 U.S. 897, 926 (1984).

[FN264]. See *Illinois v. Gates*, 462 U.S. 213, 230-31, 236 (1983).

[FN265]. *Id.* at 246; see also *Ornelas v. United States*, 517 U.S. 690, 698-99 (1996).

[FN266]. See *Franks*, 438 U.S. at 170.

[FN267]. *Leon*, 468 U.S. at 921.

[FN268]. *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring)).

[FN269]. *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

[FN270]. See *Leon*, 468 U.S. at 901-02.

[FN271]. Brief for the United States, *supra* note 137, at 2.

[FN272]. *Johnson v. United States*, 333 U.S. 10, 14 (1947).

[FN273]. Brief for Petitioner, *supra* note 138, at 4 n.2.

[FN274]. *Id.*

[FN275]. *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

[FN276]. Brief for Petitioner, *supra* note 138, at 2.

[FN277]. *Herring*, 129 S. Ct. at 698-99.

[FN278]. *Id.* at 704 (quoting *New York v. Defore*, 150 N.E. 585, 587 (1926)).

[FN279]. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

[FN280]. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

[FN281]. *Mapp*, 367 U.S. at 652.

[FN282]. *Herring*, 129 S. Ct. at 707-08 (Ginsburg, J., dissenting) (citing Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1386-88 (1983)).

[FN283]. Brief for Petitioner, *supra* note 138, at 4.

[FN284]. *Herring*, 129 S. Ct. at 704.

[FN285]. *Arizona v. Evans*, 514 U.S. 1, 25 (1995) (Ginsburg, J., dissenting) (quoting *Arizona v. Evans*, 866 P.2d 869, 872 (1994)).

[FN286]. *Id.* at 26.

[FN287]. See *Herring*, 129 S. Ct. at 708-09 (Ginsburg, J., dissenting).

[FN288]. *Id.* at 709.

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