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## Is the Exclusionary Rule Dead?

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## Article summary

In three recent decisions, *Hudson v. Michigan*, *Herring v. United States*, and *Davis v. United States*, decided last Term, the Supreme Court has indicated a desire to severely restrict the Fourth Amendment exclusionary rule. They want to limit its application to cases where the police have violated the Fourth Amendment “purposely, knowingly or recklessly” but not where they have engaged in “simple, isolated negligence” or where negligence is “attenuated” from the discovery of the evidence. They have further suggested that evidence should not be excluded where the police have behaved as “reasonable policemen,” using the approach from *United States v. Leon*, which created an exception to the exclusionary rule when police acted in reasonable reliance on a search warrant, later determined not to be based on probable cause.

The Court’s new approach, based on the culpability of the police, is subjective, yet the Court insists that it doesn’t probe the police’ mind. The new approach seems to reject negligence as the basis of exclusion, yet *Leon* is a negligence-based approach. The new approach assumes that “reckless” behavior can be deterred more readily than negligent behavior, but that is not obvious.

This article reviews *Hudson*, *Herring*, and *Davis* as well as the Court of Appeals cases that have applied *Herring*. It suggests that the Supreme Court has not forthrightly eliminated the exclusionary rule and argues that the rule should still be applied in cases of “substantial” as opposed to “simple isolated” negligence. That is when that negligence has substantially interfered with a suspect’s privacy rights, such as through an illegal arrest or an illegal search of his car or house. It notes that none of the three cases decided by the Court involved such a substantial intrusion. It concludes, through a careful reading of the three cases, as well as examination of successful defense appeals in the courts of appeals, that the exclusionary rule, though limited, is neither dead, nor unacceptably constrained.

## IS THE EXCLUSIONARY RULE DEAD?\*

In *Herring v. United States* in 2009<sup>1</sup> the Supreme Court cast serious doubt on the continued existence of the exclusionary rule in issuing a narrow holding that when police misconduct is “the result of isolated negligence attenuated from the arrest”<sup>2</sup> the evidence should not be excluded. The Court went on to suggest that only when evidence is obtained through “deliberate, reckless, or grossly negligent conduct, or, in some circumstances recurring or systemic negligence”<sup>3</sup> should it be excluded. In *Herring*, the application of this standard meant that when police relied on another county’s erroneous report that an arrest warrant was in effect for the defendant, evidence found during his subsequent arrest should not be excluded.

But few cases fall within the *Herring* holding. In most cases, the police mistake will not be “attenuated” from the arrest or search, nor will it be reckless, deliberate or grossly negligent. The Supreme Court has insisted, in numerous contexts, that the courts should not probe the minds of police officers in order to determine the reasonableness of police behavior.<sup>4</sup> Yet *Herring* in seeming to establish a test based on “deliberate or reckless conduct” “has sent courts rushing into the minds of police officers.”<sup>5</sup> Nor is it clear what “recklessness” means. Was the Court adopting the narrow Model Penal Code standard of “consciously disregarding a known risk” of a Fourth Amendment violation,<sup>6</sup> which would be virtually impossible for defendants to meet? Or was it establishing some lesser

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<sup>1</sup> 555 U.S. 135, 129 S. Ct. 695 (2009).

<sup>2</sup> *Id.* at p. 698

<sup>3</sup> *Id.* at p. 702.

<sup>4</sup> *E.g., Whren v. United States*, 517 U.S. 806 (1996).

<sup>5</sup> Alshuler *infra*, n.11 at p. 485.

<sup>6</sup> Model Penal Code sec. 2.02 (1985)

standard? Further, the Court assumed that recklessness by police could be deterred by exclusion but negligence could or should not. This is not obvious.

\*Thanks to Joe Hoffman, Yale Kamisar, and Ryan Scott for their helpful comments on an earlier draft of this article.

*Herring* thus raised many questions about the scope of the exclusionary rule that the Court was redefining.<sup>7</sup>

In *Davis v. United States*<sup>8</sup>, decided last Term, the Supreme Court answered one of these questions as to one type of case, and made it seem unlikely that *Herring* might be limited to its narrow holding. *Davis* held that when police searched a car incident to arrest, following existing circuit court precedent, the fact that the Supreme Court had subsequently invalidated that precedent did not mean that the evidence should be excluded. This seems easy since the police were not even negligent in this case. However, to what extent the exclusionary rule applies to various other kinds of scenarios remains unclear.<sup>9</sup> The post-*Herring* decisions of the Courts of Appeals suggest that the exclusionary rule is not dead but has been significantly limited by *Herring*.

This article will examine *Herring* and its predecessor *Hudson v. Michigan*,<sup>10</sup> the Courts of Appeals decisions interpreting them, and *Davis* in an attempt to determine the current status of the exclusionary rule. It proposes that “simple isolated negligence,” stated in *Davis* as not being a basis for exclusion, should be distinguished from “substantial negligence” in which the suspect’s privacy interests are seriously compromised by police negligence. In the three cases decided so far the police negligence has either not interfered with a substantial right, and been attenuated from the finding of the evidence (*Hudson*) or the arresting officers have acted entirely reasonably (*Herring* and *Davis*). Therefore we still don’t know how the Court will react to a case in which there is first police negligence and second, that negligence substantially interferes with a suspect’s

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<sup>7</sup> See e.g., Craig Bradley, *Red Herring or the Death of the Exclusionary Rule*, 45 Trial Magazine 52 (April, 2009).

<sup>8</sup> 131 S.Ct. 2419 (2011).

<sup>9</sup> See, e.g. opinion of Justice Sotomayor, concurring in the result in *Davis*, 131 S. Ct. at p. 2434.

<sup>10</sup> 547 U.S. 586 (2006)

privacy interests, such as an illegal arrest, a car search or a warrantless search of a home and is not “attenuated” from the finding of the evidence. There is, in short, still some hope for the exclusionary rule.

A. *Herring v. United States* and *Hudson v. Michigan*

Although *Herring* is considered the main case on the status of the exclusionary rule, its predecessor, *Hudson v. Michigan*,<sup>11</sup> fired the first shot of the current Court’s attack on the rule. In *Hudson*, police, executing a search warrant, failed to knock and announce before entry, thus admittedly violating a requirement of Fourth Amendment law.<sup>12</sup> However, the Court, per Justice Scalia, held that the exclusionary rule should only apply in cases “where its deterrent benefits outweigh its substantial social costs.”<sup>13</sup> The Court wrote off as “expansive dicta” the holding of *Mapp v. Ohio*<sup>14</sup> that “(A)ll evidence obtained from searches and seizures in violation of the Constitution is, by the same authority, inadmissible in state court.”<sup>15</sup> The Court suggested that knock and announce violations could be dealt with by civil suits, despite the fact that the 15-20 seconds of privacy<sup>16</sup> of which the suspect was deprived would be worth nothing in a civil suit. Thus, as a practical matter, the Fourth Amendment’s “knock and announce” requirement was dead, since police could violate it without consequence.

Further, the Court noted that evidence found after a knock and announce violation, is not found as a result of that violation, but would have been found anyway in the subsequent search, thus likening this case to the doctrines of inevitable discovery and independent source that have allowed evidence to be

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<sup>11</sup> *Id.* For a more detailed discussion of *Hudson*, see, Albert Alshuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 Iowa L Rev. 1741 (2008) and James Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 Iowa L Rev. 1819 (2008).

<sup>12</sup> *Wilson v. Arkansas*, 514 U.S. 927 (1995)

<sup>13</sup> 547 U.S. at p. 591 (citations omitted).

<sup>14</sup> 367 U.S. 643 (1961)

<sup>15</sup> *Id.* at p. 655, quoted in *Hudson* at p. 591.

<sup>16</sup> This was the Court’s estimate in *United States v. Banks*, 540 U.S. 31, 40-41 (2003)

admitted, despite a violation.<sup>17</sup> In other words, according to the Court, the finding of the evidence was “attenuated” from the violation.<sup>18</sup> (The Court was not willing to recognize that suspects can use that time to flush evidence down the toilet, throw it into a fire, etc.)

The exact scope of *Hudson* was rendered unclear by the concurring opinion of Justice Kennedy, the crucial fifth vote, who joined the pertinent parts of the majority opinion, but then declared that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today’s decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of the evidence to justify suppression.”<sup>19</sup> Since it is hard to imagine another 4<sup>th</sup> amendment violation whose consequences are as minor as the 15-20 seconds of privacy lost when police fail to knock and announce during execution of a search warrant, it is fair to deem *Hudson* a unique case, important only for what it says in dictum about the exclusionary rule, not for its holding.

Accordingly, it was necessary for the Court to decide *Herring* three years later to try to solidify its new conception of the exclusionary rule, and to get a majority to sign on to the opinion without reservation. In *Herring*, police in one county relied on a report from another county that there was an arrest warrant outstanding for Herring. They arrested him, searched him incident to arrest, and found a gun and drugs which were the basis of the federal charges against him. Shortly after the search, they discovered that the other county had made a mistake and that there was no warrant outstanding for Herring. Nevertheless he was prosecuted and the trial judge, affirmed by the 11<sup>th</sup> Circuit Court of Appeals, refused to exclude the evidence.<sup>20</sup>

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<sup>17</sup> 547 U.S. at pp. 592-93.

<sup>18</sup> *Id.*

<sup>19</sup> 547 U.S. at p. 603, opinion of Justice Kennedy, concurring in part and concurring in the result. However, Kennedy had joined that part of the opinion that limited the operation of the exclusionary rule.

<sup>20</sup> As related in *Herring*, *supra* at p. 699.

In agreeing that the evidence found should not have been suppressed, the Court, per the Chief Justice, reiterated its unfounded statement in *Hudson* that “exclusion has always been our last resort, not our first impulse.”<sup>21</sup> But this time it set forth a test for when evidence should, and when it should not, be suppressed. As noted earlier, the Court held narrowly that “here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.”<sup>22</sup>

On the other hand, the Court suggested that the exclusionary rule should only be employed “to deter deliberate, reckless or grossly negligent conduct or in some circumstances recurring or systemic negligence.”<sup>23</sup>

The Court went on:

We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. In *Leon*<sup>24</sup> we held that ‘the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.’ The same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant.<sup>25</sup>

As Prof. Albert Alshuler and I both pointed out<sup>26</sup>, this case could be read narrowly as holding that here, where the arresting officers and their chain of command were in no way at fault, and where the error in the other county was thus “attenuated” from the arrest, it made no sense to apply the exclusionary rule because there was no culpable behavior by police to deter. This reading, and the

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<sup>21</sup> *Herring*, supra, 129 S.Ct., at p. 700.

<sup>22</sup> 129 S.Ct. at p. 698.

<sup>23</sup> *Id.*

<sup>24</sup> *United States v. Leon*, 468 U.S. 897, 922 ((1984).

<sup>25</sup> *Id.* at p. 703, (citations omitted).

<sup>26</sup> Albert Alshuler, *Herring v. United States: A Minnow or a Shark*, 7 Ohio St. J. Crim. L. 463 (2009); Craig Bradley, *Red Herring*, supra n.3.

fact that Kennedy joined this opinion, is consistent with his statement in *Hudson* that he was not endorsing a wholesale remodeling of the exclusionary rule. A number of commentators, including Professors Wayne LaFave<sup>27</sup> and Orin Kerr<sup>28</sup>, also suggested that given the narrowness of the “holding” language, *Herring* itself was but a small extension of *Arizona v. Evans*,<sup>29</sup> which had previously held that evidence would not be excluded when police rely on a mistake in the court system’s database. The error was that of someone other than the arresting officers. But the commentators recognized that *Herring* boded ill for the future of the rule.<sup>30</sup>

*Herring* could also be read broadly as definitely establishing the new exclusionary formula discussed above, what Alshuler deems the “big blast” view of *Herring*:<sup>31</sup> that the defendant would have to prove recklessness, or gross or systemic negligence in each case in order to get the evidence suppressed, whether the seizure was “attenuated” from the violation or not. If so, as Alshuler pointed out<sup>32</sup>, why use the “attenuated” qualifier at all. Just say that negligence does not lead to exclusion in the holding.

Besides the lack of clarity as to whether this was a major incursion into the exclusionary rule, the critical issue of what level of culpability by the police leads to exclusion is obscure. The Court sets forth its “deliberate or reckless standard” and then insists that this is an “objective” standard even though it plainly calls for an examination of the culpability of the police and thus is subjective.<sup>33</sup> Then it

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<sup>27</sup> Wayne LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 *Jour. of Crim. L. and Criminology* 757 (2009).

<sup>28</sup> Orin Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 *Geo. L.J.* 1077 (2011). Professor Clancy also recognizes the *Herring* is unclear as to both the objective/subjective issue, as well as the broadness of the holding. Thomas Clancy, *The Irrelevance of the Fourth Amendment in the Roberts Court*, 85 *Chi.-Kent L. Rev.* 191, 203-204.

<sup>29</sup> 514 U.S. 1 (1995)

<sup>30</sup> LaFave, for instance, deemed *Herring* a “scary” decision because the Court’s analysis “far outruns the holding” and the case “seem(s) to set the table for a more ominous holding on some future occasion.” LaFave, *supra* n. 27 at p. 770.

<sup>31</sup> See, Alshuler, *supra* n. 26, throughout.

<sup>32</sup> *Id.* at p. 475.

<sup>33</sup> As Alshuler points out, “Even if there can be such a thing as ‘objective good faith’ there is no such thing as objectively deliberate wrongdoing.” Alshuler, *supra*, at p. 485. Moreover, “the word reckless... is ambiguous” as to whether it is objective or subjective. *Id.* p. 486, (citing Supreme Court cases).

sets forth the “objectively reasonable” standard of *Leon*, in the indented paragraph above, as if it were the same thing. But the *Leon* test is very different. It is, by definition, an objective standard that hinges on whether “a reasonably well-trained officer would have known that the search was illegal....”<sup>34</sup> This is a *negligence* standard—if police are negligent, evidence must be excluded.<sup>35</sup>

In addition to the issue of what level of police culpability gives rise to exclusion, *Herring* left numerous other issues unresolved. The most obvious is, what if the police are negligent in a way that is not attenuated from the seizure? This issue now seems settled in the government’s favor by dictum in *Davis*,<sup>36</sup> though, as I will discuss, there may be different types of negligence. The second is what if police follow precedent that was later overruled? This is the issue resolved in *Davis*. Third, suppose there is no clear precedent, but the courts conclude that the police judgment was wrong in determining the correct legal course of action.<sup>37</sup> Fourth, the police reach an erroneous conclusion based on the facts, such as that they have probable cause to search your car when they don't, or they have exigent circumstances to search your house without a warrant when they don't. Fifth, the police exceed the scope of their authority, such as holding someone too long in a "stop",<sup>38</sup> or searching beyond the limits of the search warrant.<sup>39</sup> Sixth, the police conclude that a consent is "voluntary" when the court

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<sup>34</sup> *Herring*, supra at p. 703, (quoting *Leon*).

<sup>35</sup> At another point the Court declared that the standard was “whether the police officer had knowledge, or may properly be charged with knowledge that the search was unconstitutional....” *Herring*, supra, at p. 701, quoting *Illinois v. Krull*, 480 U.S. 340, 348-49(1987). The Court also quoted Judge Friendly saying that exclusion should be limited to “flagrant or deliberate violations.” *Herring* at p. 702.

<sup>36</sup> See, discussion, test at note 40, infra.

<sup>37</sup> Such as in *Kyllo, v. United States*, 533 U.S. 27 (2001) where warrantless use of a heat sensor to detect heat emissions from a house was held to violate the Fourth Amendment and it followed that the evidence was excluded.

<sup>38</sup> *Florida v. Royer*, 460 U.S. 491 (1983) involved such a situation, and the Court invalidated a consent to search his luggage and excluded the evidence found therein.

<sup>39</sup> In *Leon*, supra n. at p. 918 n. 19, the Court stated that “our discussion ...assumes...that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant.” That is, if the police behaved “unreasonably” in this regard, the evidence must be suppressed.

concludes otherwise, or that the consentor had authority to consent when he didn't<sup>40</sup>. These issues will be discussed later in this article.

### B. *Davis v. United States*<sup>41</sup>

In *Davis*, police in Greenville Alabama conducted a routine traffic stop that eventually resulted in the arrest of the driver for driving while intoxicated and the passenger Davis for giving a false name to police. After the arrestees were handcuffed and placed in the back of patrol cars, police searched the passenger compartment of the vehicle and found a revolver inside Davis' jacket pocket. Davis was arrested and convicted of being a felon in possession of a firearm.

It is undisputed that the suspicionless search of the car incident to the arrest was in keeping with 11th Circuit precedent,<sup>42</sup> which was in turn based upon the Supreme Court decision in *New York v. Belton*.<sup>43</sup> However, subsequent to Davis' arrest, *Belton* was essentially overruled by *Arizona v. Gant*,<sup>44</sup> which required that, before police could search a car incident to arrest, when the suspects are under their control, they must have reason to believe that evidence of the crime for which the defendant was arrested will be found in the car. Such "reason to believe" was not present in *Davis*.

Thus the issue was whether evidence should be excluded when police follow existing law which is subsequently overruled. A seven-to-two majority concluded that it should not. *Davis* involves none of the mental states discussed in *Herring* as appropriate for evidentiary exclusion. The police were not deliberately violative of Fourth Amendment law, nor were they reckless. In fact, they were *not even "negligent."* They were simply following the law. Thus the issue of "attenuation" does not arise in this case. Rather this case is resolved by reference to *Leon*: the

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<sup>40</sup> *Illinois v. Rodriguez*, 497 U.S. 177 (1990), held that a "reasonable" belief in the consenters authority would be enough to validate the consent. Thus an "unreasonable" belief would lead to exclusion.

<sup>41</sup> 131 S.Ct. 2419 (2011)

<sup>42</sup> See, *United States v. Gonzales* 71 F.3d 819, 822(1996).

<sup>43</sup> 453 U.S. 454 (1981)

<sup>44</sup> 556 U.S. , 129 S. Ct.1710 (2009).

police acted in "objectively reasonable reliance" on a case later held invalid, just as the police in *Leon* had relied on a warrant later held invalid.<sup>45</sup>

*Davis*, written by Justice Alito, reiterates that the "good faith" test of *Leon* used by most of the courts of appeal post-*Herring*, is appropriate:

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion vary with the culpability of the police.... When the police exhibit "deliberate", "reckless", or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good faith belief" that their conduct is lawful, *or* when their conduct involves only simple "isolated" negligence...the "deterrence value of the exclusionary rule loses much of its force" and "exclusion cannot pay its way."<sup>46</sup>

Thus *Davis* declares that the exclusionary rule does not apply if *either* the police behaved as reasonably well trained officers, *or* they only committed "simple isolated negligence." But these are not the same tests. The *Leon* test is objective, and the "reasonable officer" by definition is not negligent. The "simple, isolated negligence" part of the test goes beyond the holding of *Herring* and *Leon* but is again dictum, since the police in *Davis* could not reasonably be considered even negligent. Following this paragraph the Court repeatedly refers to this as the "good faith exception" drawn directly from *Leon*.<sup>47</sup>

Why should negligence not be sufficient? In *Herring* the Court conceded Justice Ginsburg's claim that "liability for negligence...creates an incentive to act with greater care" and did "not suggest that the exclusion of evidence could have no deterrent effect." Rather it found that in *Herring* "exclusion is not worth the cost."<sup>48</sup> In *Davis* the Court exceeded its limited holding in *Herring* to state that

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<sup>45</sup> *Davis*, supra, p. 2427.

<sup>46</sup> *Davis*, supra, p. 2427-28. Citing *United States v. Leon* throughout. (emp. Added).

<sup>47</sup> *Id.* at p. 2428

<sup>48</sup> *Herring*, supra, p. 702, fn4, citations omitted.

“simple isolated negligence” is not enough to justify exclusion, even though it had conceded in *Herring* that negligence could be deterred.<sup>49</sup>

The other problem with the *Davis* formulation is the Court’s belief that recklessness is more deterrable than negligence. A reckless policeman *knows* that he may be violating the defendant’s Fourth Amendment rights but doesn’t care. It seems that such a person is less likely to be deterred by the threat of exclusion than is a policeman who is simply careless, even though, as noted above, the Court conceded in *Herring* that such a policeman could be deterred. The reckless policeman is more culpable, but not necessarily more deterrable, contrary to the Court’s stated belief: “The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion ‘vary with the culpability of the law enforcement conduct’ at issue.”<sup>50</sup>

But that is *not* the lesson of the *Leon* line of cases. The point of *Leon* is that if someone else, like the magistrate or the legislature has made a mistake, and the police simply act on that mistake in good faith, there is no bad police conduct to deter. The police were simply doing their job. Likewise, if the police are simply following a case that is later overruled as in *Davis*. That is not to suggest that, when the police are guilty of culpable conduct, they are more deterrable the more culpable that conduct becomes.

These terms of culpability are insufficient to capture a range of police behavior, some of which should lead to exclusion and some not. If police fail to, or inadequately, fill in the “things to be searched for” box on a search warrant, but then don’t use that error to unacceptably expand the scope of the search, this is clearly negligence, but minor and inconsequential and should not lead to exclusion.<sup>51</sup> On the other hand, if police, lacking probable cause to search a car, or to arrest someone, negligently conclude that they have it, they are not acting as “reasonably well trained” police officers, their error is not attenuated from the

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<sup>49</sup> While Justice Alito, the author of *Davis* was clearly doing this to eliminate any sense of confusion from *Herring* as to whether negligence was sufficient for exclusion, and thus speaking for the conservative majority, he may have slipped this one by Justices Kagan and Sotomayor, who joined the whole opinion..

<sup>50</sup> *Davis*, supra at p. 2427, quoting *Herring*, supra at p. 143.

<sup>51</sup> See, discussion of *Groh v. Ramirez*, 540 U.S. 551 (2004) infra.

subsequent search, and any evidence found should be excluded.<sup>52</sup> The defendant's rights have been violated in a much more significant fashion than in the "particularity" or the "knock and announce" violation. Thus it's possible that the Court's reference to "simple, isolated negligence" was referring only to minor mistakes that don't affect suspects very much. This factor should be the key!

Police "culpability" which, according to the Court, is the key issue,<sup>53</sup> should vary according to the impact of police negligence on the suspect. It is obviously less culpable to inadvertently fail to or mistakenly fill in a box on a search warrant, but not take advantage of that mistake, than it is to negligently conclude that a suspect is subject to arrest, search him, book him, and leave him in jail until he is arraigned the next day when, perhaps, his attorney can straighten things out. Likewise, a negligent assessment that exigent circumstances are present so that the police can dispense with a search warrant in searching someone's house is more culpable than failing to knock and announce when executing a search warrant.<sup>54</sup> If we're going to assess police culpability on a case-by-case basis, as *Herring* requires, we should at least take into account the extent of the intrusion on privacy that negligent police behavior leads to.

That culpability depends in part on the impact on the victim is a commonplace in criminal law. Murderers are punished much more severely than attempted murderers, even though they commit the same act with the same *mens rea*. Likewise manslaughter is punished more severely than reckless endangerment, as is theft of a purse when the amount inside happens to exceed the statutory limit for grand larceny.

Lest the Court has forgotten, the Fourth Amendment itself forbids "unreasonable searches and seizures." In my view the Fourth Amendment and the exclusionary rule should be co-extensive. If a search is "unreasonable" (i.e. negligent) then it both violates the Fourth Amendment and the evidence should be excluded. If it violates some Fourth Amendment based rule that the Court has

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<sup>52</sup> See further discussion of this issue under "Court of Appeals" decisions, *infra*.

<sup>53</sup> *Davis*, *supra* at p. 2427. "The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion vary with the culpability of the police."

<sup>54</sup> See, *Hudson v. MI*, *supra*.

developed over the years, such as “knock and announce”, but is not unreasonable, then the evidence should not be excluded.<sup>55</sup> Likewise, non-negligent reliance on then valid case law should not lead to exclusion. I do not object to a “simple isolated negligence” exception if it is meant to refer to minor breaches that do not substantially interfere with suspects’ rights, as opposed to illegal arrests with all their consequences, or searches of his house incorrectly based on exigent circumstances.

The Court’s discussion of whether or not “negligence” is enough to invoke the exclusionary rule is therefore dictum, as it was in *Herring*. As suggested above, it may be that “simple isolated negligence” referred to in *Davis*, a case in which there was no negligence at all, was not meant to apply to cases where police negligently interfere significantly with a suspect’s rights, which might be referred to as “substantial negligence.” Or at least Justice Kennedy, consistent with his concurring opinion in *Hudson*, may feel this way.

Justice Sotomayor concurred in the judgment in *Davis*, pointing out that “this case does not present the markedly different question of whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.”<sup>56</sup> Nor does it necessarily resolve the other scenarios, mentioned above, that *Herring* left unsettled.

However, as Justice Breyer pointed out in dissent,

(A)n officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the fourth amendment's bounds is no more culpable than an officer who follows erroneous "binding precedent." Nor is an officer more culpable where circuit precedent is simply suggestive rather than "binding", where it only describes how to treat roughly analogous precedent or where it just does not exist. Thus, if the court means what it now says, if it would place determinative weight upon the culpability of an individual officers conduct,

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<sup>55</sup> This argument is set forth in detail in Craig Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 Law And Contemp. Problems, 211 (2010).

<sup>56</sup> *Id.*, Opinion of Justice Sotomayor, concurring in the judgment, 131 S.Ct. at p. 2435.

and if it would apply the exclusionary rule only where a fourth amendment violation was "deliberate reckless, or grossly negligent," then the "good faith exception" will swallow the exclusionary rule.<sup>57</sup>

*Hudson*, *Herring*, and now *Davis* suggest that Breyer may be right as to the situations he discusses.<sup>58</sup> *Hudson* involved police misbehavior that was at least negligent, and possibly reckless or systemic in that it blatantly violated Supreme Court precedent. But the Court in that case refused to exclude the evidence because the Fourth Amendment right at issue was too minor and the violation was too "attenuated" from the finding of the evidence. In *Herring* and *Davis* by contrast, the conduct of the arresting police was blameless. There is still a large category of cases where the police conduct is clearly wrong, but does not amount to "substantial negligence" as I have defined it. It is in these cases where the exclusionary rule should still operate.

Thus, searches that the officer reasonably believes are legal but which fall "just outside the fourth amendment's bounds" or follow "suggestive rather than 'binding' precedent" are not really negligent acts that a "reasonably well-trained officer" would not undertake. In my view, these should not lead to exclusion. But searches involving a clear miscalculation of probable cause, exigent circumstances or consent, that, while perhaps not reckless, are not the sort of searches that a 'well-trained officer' undertakes, should lead to exclusion, if they substantially intrude on the suspect's privacy interests. Or the Court could just declare such searches "reckless," a term they have not yet defined.<sup>59</sup> We should not try to force courts to distinguish between reckless and negligent police behavior in making the exclusionary decision. Negligence plus significant intrusion on the suspect's privacy rights is enough.

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<sup>57</sup> Opinion of Justice Breyer, dissenting, 131 S.Ct. at p. 2439..

<sup>58</sup> Searches that the officer believes are legal but which fall "just outside the fourth amendment's bounds" or follow "suggestive rather than 'binding' precedent" are not really negligent acts that a "reasonably well-trained officer" would not undertake. In my view, these should not lead to exclusion. But searches involving a miscalculation of probable cause, exigent circumstances or consent, that, while not reckless, are not the sort of searches that a 'well-trained officer' undertakes, should lead to exclusion.

<sup>59</sup> See, *Monitor Patriot Co. v. Roy*, 401 U.S.265, 276: "The mental element of 'knowing or reckless disregard' required under *New York Times* is not always easy of ascertainment. Inevitably its outer limits will be marked out through case-by-case adjudication.

## 1. Retroactivity

There are two other issues considered in *Davis*, though unrelated to the theme of this article, that should be discussed. The reader who is not interested in these points could skip this discussion without losing the flow of the article. The first is retroactivity. The petitioner and dissent argue that *Gant*, decided while *Davis* was pending on appeal, should apply in this case, according to established retroactivity precedent, *Griffith v. Kentucky*.<sup>60</sup> The Court concedes that *Gant* applies here and that therefore the police violated the defendant's Fourth Amendment rights.<sup>61</sup> But "retroactive application does not determine what appropriate remedy (if any) defendant should obtain."<sup>62</sup> In *Davis*, he is denied exclusionary relief. To one not steeped in the mysteries of retroactivity doctrine, this sounds reasonable.

## 2. Stunting the Development of Fourth Amendment Law

The other issue is whether the difficulty of obtaining a remedy for Fourth Amendment violations will "stunt the development of fourth amendment law," as the petitioner argues.<sup>63</sup> "With no possibility of suppression criminal defendants will have no incentive, *Davis* maintains, to request that courts overrule precedent."<sup>64</sup> Alshuler<sup>65</sup> and Kerr<sup>66</sup> have also expressed concern about this issue.

The Court begins by disingenuously asserting that "this argument applies to an exceedingly small set of cases." "Decisions overruling this Court's Fourth Amendment precedents are rare,"<sup>67</sup> this not having happened since 1967 when

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<sup>60</sup> 479 U.S.314 (1987)

<sup>61</sup> *Davis*, supra, at p. 2431.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at p. 2432.

<sup>64</sup> *Id.*

<sup>65</sup> Alshuler, supra n. at pp. 489 *et seq.*

<sup>66</sup> Kerr, supra n. at p. .

<sup>67</sup> *Id.* at p. 2433

*Chimel v. California*<sup>68</sup> overruled *United States v. Rabinowitz*<sup>69</sup> and *Harris v. United States*.<sup>70</sup>

While this may be technically true, it overlooks *Gant* which Alito himself described as overruling *Belton v. New York*,<sup>71</sup> and *Herring* which effectively overruled a key part of *Mapp v. Ohio*<sup>72</sup> by deeming its holding “expansive dicta.”

Nevertheless, the majority correctly notes that “as a practical matter defense counsel will test this Court’s precedents in the same way that *Belton* was tested in *Gant*—by arguing that the precedent is distinguishable.”<sup>73</sup>

Also, if a court of appeals has binding precedent on which police rely, the Supreme Court can take a case from another circuit, or state, which disagrees.<sup>74</sup> Finally, as will be discussed, the courts of appeals are not shy about declaring certain police practices violative of the Fourth Amendment, even if they then refuse to exclude the evidence under *Herring*. Consequently, in the *next* case, the police will not be able to claim that they acted in good faith because circuit precedent is now clearly against them.

Suppose the Supreme Court has decided that it wants to overrule *Chimel v. California*<sup>75</sup> in light of *Arizona v. Gant*, as the *Gant* dissenters predicted they might.<sup>76</sup> That is, instead of allowing suspicionless searches incident to arrest of the area within the immediate control of arrestee in a dwelling, a majority of the Court would like to impose the *Gant* requirement of “reason to believe” that evidence of the crime of arrest will be found. However, based on *Davis*, no court of appeals will suppress evidence because the police relied on the then existing precedent of *Chimel*.

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<sup>68</sup> 395 U.S. 752

<sup>69</sup> 339 U.S. 56 (1950)

<sup>70</sup> 331 U.S. 145 (1947)

<sup>71</sup> 453 U.S. 454 (1981) It’s true that in *Gant* the Court didn’t overrule *Belton*, just confined it to its narrow facts. However, Alito repeats his characterization of *Gant* as overruling *Belton* in *Davis*, at p. 2425.

<sup>72</sup> N. supra.

<sup>73</sup> *Davis*, supra at p. 2433.

<sup>74</sup> Id.

<sup>75</sup> 395 U.S. 792 (1969).

<sup>76</sup> *Arizona v. Gant*, 129 S.Ct. 1710, 1731 (2010)(Opinion of Alito, J. dissenting): “If we are going to reexamine *Belton*, we should reexamine *Chimel*.”

But this would not stop a court of appeals, after reading *Gant*, to conclude that the suspicionless search of a house was unconstitutional under the Supreme Court’s new view of searches incident to arrest. Thus the validity of a suspicionless search incident to an arrest would be presented to the Supreme Court. Or, even if the lower courts did not feel it right to depart from *Chimel*, the Supreme Court itself could do so, while refusing to suppress the evidence in this case, as the Court suggests in *Davis*.<sup>77</sup>

### C. The Courts of Appeals Cases

Meanwhile the courts of appeals, while in disagreement on a number of post-*Herring* issues were, unlike the commentators, untroubled by what the appropriate test was after *Herring*.<sup>78</sup> They uniformly ignored the “attenuated” language of *Herring*<sup>79</sup> and instead treated that case as simply extending the “good faith exception” of *Leon* to non-warrant cases.<sup>80</sup> (In large part, no doubt, because no case presented to the courts of appeals seemed to present an “attenuation” issue). As noted, this *Leon*-based approach was invited by the Court in *Herring*, and subsequently endorsed in *Davis*.<sup>81</sup> Most importantly, the courts of appeals did not conclude that the exclusionary rule was effectively dead, yet. Rather a number of courts held that evidence must still be suppressed, following *Herring*.

The most common post-*Herring* case in the courts of appeals didn’t really involve a *Herring* issue at all. Rather, it involved police utilizing a defective search warrant and the courts uniformly ruling that under *United States v. Leon*, as well as *Herring*, the evidence should not be suppressed because the police had acted in good faith reliance on the warrant.<sup>82</sup>

It should be noted, however, that just because a case involves a warrant, does not necessarily exempt all evidence found from exclusion. *Leon* set forth at

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<sup>77</sup> Supra at p. 2433.

<sup>78</sup> This is based on a study of all cases in the courts of appeals citing *Herring*.

<sup>79</sup> Ignored it in the sense of not basing their decisions on “attenuation.”

<sup>80</sup> See, e.g. *United States v. Koch*, 625 F3d 470, 477-78 (8<sup>th</sup> Cir., 2010); *United States v. Song Jq Chu*, 597 F3d 995, 1004 (9<sup>th</sup> Cir., 2010).

<sup>81</sup> 131 S.Ct. at p. 2428.

<sup>82</sup> E.g. *United States v. Campbell*, 603 F3d 1218, 1235-36 (10<sup>th</sup> Cir., 2010); *United States v. Tracey*, 597 F.3d 140, 150-54 (3<sup>rd</sup> Cir., 2010);

least five situations in which evidence would be excluded despite the existence of a warrant. As summarized by the Third Circuit these are

- 1) where the affidavit relied on by the magistrate was deliberately or recklessly false, 2. Where the magistrate was not neutral or detached, 3) where the affidavit is so lacking in indicia of probable cause that no reasonable officer could rely on it and 4) when the warrant fails on its face to list the things to be seized or the person or the place to be searched.<sup>83</sup>

To this should be added a fifth: when the police unreasonably exceed the scope of the warrant—another negligence standard.<sup>84</sup>

A recent victory for a defendant in a court of appeals, despite a search warrant, was in *United States v. Song Ja Cho*.<sup>85</sup> In this case, Guam police responded to a claim that women were being prostituted against their will in a karaoke bar. They went to the bar and attached residence and found women who made this claim. The police inspected the bar and the house and obtained undisputed probable cause that these allegations were true.<sup>86</sup> They then seized the house and bar, excluding all occupants, and went for a search warrant. They were “nonchalant”<sup>87</sup> in this pursuit and didn’t return with the warrant until 26.5 hours later, having kept everyone out of the house in the interim, despite the owner’s need to get his medicine for diabetes. The Ninth Circuit deemed this conduct “deliberate, culpable and systematic”<sup>88</sup> and affirmed the suppression of evidence seized, consistently, the court held, with *Herring*.

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<sup>83</sup> *United States v. Tracy*, 597 F3d 140, 151 (3<sup>rd</sup> Cir., 2010). It could be argued that a magistrate’s abandonment of his judicial role is not a mistake for which the police should be held responsible, but *Leon* declared that “in such circumstances, no reasonably well-trained officer would rely on the warrant.” 468 U.S. at p. 923.

<sup>84</sup> See, *Leon*, supra, fn19 (“Our discussion...assumes...that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant.”).

<sup>85</sup> 597 F3d 995, 1004-07 (9<sup>th</sup> Cir., 2010).

<sup>86</sup> This inspection was not challenged as an invalid search.

<sup>87</sup> *Id.* at p. 1006.

<sup>88</sup> *Id.* at p. 1000. I’m not sure why the 9<sup>th</sup> Circuit termed this “systematic.”

Another issue, that has created a conflict in the circuits, is whether, when the police conducted a search incident to arrest of an automobile, consistently with *Belton v. New York*, the evidence should be suppressed because of the Supreme Court's subsequent decision in *Arizona v. Gant*.<sup>89</sup> This is the issue resolved in the government's favor in *Davis*.

Another conflict has been created over the exclusion issue, and I suspect that it is the next one that will be resolved by the Supreme Court: Should evidence be excluded if the police fail to meet the particularity requirement in a search warrant?

*Groh v. Ramirez*<sup>90</sup> seemed to make it clear that the *Leon* good faith exception would not apply in a case where the police neglected to fill in that portion of the search warrant in which they were to specify the items to be seized,<sup>91</sup> or to refer to the attached affidavit in this respect. Although *Groh* was a civil case, it made it clear that the *Leon* "good faith exception" was the same when the issue was qualified immunity.<sup>92</sup> *Groh* held that "no reasonable officer" could execute such a fatally defective warrant,<sup>93</sup> despite the fact that the officers did not expand the search beyond what they would have searched for had the "description" section been filled in properly<sup>94</sup>.

In *United States v. Lazar*<sup>95</sup> the Sixth Circuit dealt with a case in which police seized records of various hospital patients, some of whose names were not mentioned in the warrant. The court held that *Groh v. Ramirez* governed, rather than the "less on point" case of *Herring*.<sup>96</sup> "*Herring* does not purport to alter that aspect of the exclusionary rule that applies to warrants that are

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<sup>89</sup> 129 S.Ct. 1710 (2009). Compare, *United States v. Buford*, 632 F.3d 264, 270-77 (6<sup>th</sup> Cir., 2011) (Holding that the evidence should not be suppressed under *Herring*, and noting that three other circuits had resolved the case the same way) with *United States v. Gonzalez*, 578 F.3d, 1130, 1132 (9<sup>th</sup> Cir, 2009) (suppressing the evidence.)

<sup>90</sup> 500 U.S. 551 (2004).

<sup>91</sup> Actually the warrant repeated the description of the house in this section. *Id.* at p. 554.

<sup>92</sup> *Id.* at p. 565 fn. 8.

<sup>93</sup> *Id.* at p. 564.

<sup>94</sup> *Id.* at p. 561

<sup>95</sup> 604 F.3d 230 (6<sup>th</sup> Cir., 2010)

<sup>96</sup> *Id.* at p. 236.

facially deficient *ab initio*.<sup>97</sup> Consequently the evidence regarding those patients must be excluded. Note that this case, in which the police searched the records of people not named in the warrant, could be termed “substantial negligence” under my earlier analysis, and hence lead to exclusion even under *Davis*. It’s different from *Groh* in which the agents did not exceed the bounds of the allowed search because of their mistake.

In *United States v. Rosa*,<sup>98</sup> the Second Circuit dealt with a warrant for computers in a child porn case that did not specify the crime for which the police were searching. Thus, on its face, the warrant would allow a search of tax records, or other unrelated information.<sup>99</sup> However, the police did not search further than for child pornography.<sup>100</sup>

The court held that this warrant violated the Fourth Amendment, but that, under *Herring*, the evidence should not be suppressed. It found that this was “isolated negligence” and that this warrant did not suffer from the “glaring deficiencies” of the warrant in *Groh*.

Similarly, in *United States v. Otero*,<sup>101</sup> the court dealt with a warrant to search a postal employee’s computer for evidence of postal crimes. The warrant did not specify the crimes for which evidence was sought and was thus overbroad.<sup>102</sup> However, the court declined to suppress the evidence under *Herring* (without discussing *Groh*) on the ground that the authorities had in fact limited the search to the suspected crimes and believed that the warrant was so limited.<sup>103</sup> Thus they lacked “knowledge that the search was unconstitutional” under *Herring*.<sup>104</sup> According to my analysis, the police were clearly negligent, but since they didn’t take advantage of their mistake, it was not substantial. Had they exceeded the scope of their probable cause,

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<sup>97</sup> Id. at pp. 237-38.

<sup>98</sup> 626 F.3d 56 (2<sup>nd</sup> Cir. 2010)

<sup>99</sup> Id. at pp. 61-62.

<sup>100</sup> Id. at p. 66.

<sup>101</sup> 563 F3d 1127(10<sup>th</sup> Cir., 2009)

<sup>102</sup> Id. at p. 1132.

<sup>103</sup> Id. at pp. 1133-34.

<sup>104</sup> Id. at p. 1134. To similar effect, see also, *United States v. Tracey*, 597 F3d 140 (3<sup>rd</sup> Cir., 2010) and *United States v. Allen* 625 F3d 830 (5<sup>th</sup> Cir., 2010).

however, and searched for evidence of crimes for which they lacked probable cause, I would conclude that this was not “simple isolated negligence” but “substantial negligence” and suppressed any additional evidence found (but not the child pornography).

Despite *Groh*’s lack of sympathy when the police limited their search to what it would have been had the warrant been specific, I think this will be the deciding factor in these cases. When the police make, but do not take advantage of, these kinds of clerical errors, they are obviously acting negligently, not recklessly or knowledgeably as to Fourth Amendment rights. This is “simple isolated negligence.” If the Supreme Court takes up this issue, it will either overrule *Groh* outright, or limit it to the kind of glaring deficiency present in that case. Since Alito has replaced O’Connor, the author of the 5-4 decision in *Groh*, *Groh* is a dead *Herring*.

Another case involving a search warrant in which the defendant prevailed is *United States v. Brown*.<sup>105</sup> In *Brown* the FBI was investigating a bank robbery in which a mask was used. Having found the mask the FBI was seeking a search warrant to test Brown’s DNA to compare it to DNA on the mask. In preparing the affidavit for the search warrant, an agent, not directly involved in the investigation, made a false declaration that tied the defendant directly to the bank robbery and that was critical to probable cause. The court found that this statement was made with “reckless disregard for the truth,”<sup>106</sup> despite the fact that the affiant believed the statement.<sup>107</sup> Accordingly, the evidence was suppressed. But this would likely not be “reckless” under the narrow Model Penal Code definition, since the agent was apparently not “consciously disregarding substantial risk” that he was violating the suspect’s Fourth Amendment rights. But this is the sort of case where even after *Davis*, evidence should be suppressed.

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<sup>105</sup> 631 F3d 638 (3<sup>rd</sup> Cir., 2011).

<sup>106</sup> *Id.* at p. 641

<sup>107</sup> *Id.* at p.650.

A final post-*Herring* case deserves discussion, though it is from the New Jersey Supreme Court rather than a U.S. Court of Appeals. In *State v. Handy*<sup>108</sup> the police stopped a man for bicycling on the sidewalk in violation of a city ordinance. The officer did a warrant check with the police dispatcher, submitting the man's name, "Germaine" Handy, which he spelled out, address, 218 E. Broad Street, Millville, New Jersey, and date of birth, March 18, 1974. The dispatcher confirmed that there was an arrest warrant outstanding for Handy, and pursuant to this information Handy was arrested and cocaine was found.<sup>109</sup>

It turned out that the information that the dispatcher had in hand showed a 10 year old arrest warrant for a man named "Jermaine" Handy with a different date of birth, and an address in Los Angeles. When the arresting officer found this out at the station, he only arrested Handy for the cocaine found in the search, not the crime named in the supposed arrest warrant. The dispatcher was aware of these discrepancies, but failed to call them to the arresting officer's attention.<sup>110</sup>

The Court found that *Herring* was inapplicable because the police dispatcher was not "attenuated" from the arrest "but was literally a co-operative in its effectuation" and that his conduct was not "objectively reasonable." Accordingly, this kind of behavior could be deterred by exclusion and that was the appropriate remedy.<sup>111</sup> Also it led to a substantial incursion into a suspect's rights. In fact, even if this had been a dispatcher from another county, as in *Herring*, "attenuation" shouldn't have mattered given the culpability of the dispatcher.

Several observations can be made about the post-*Herring* cases. The first, unrelated to the subject of this article, is how many involve search warrants. This is encouraging, suggesting that police are regularly getting them.

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<sup>108</sup> 18 A3d 179 (NJ,2011).

<sup>109</sup> Id. at p. 181.

<sup>110</sup> Id. at p. 182.

<sup>111</sup> Id. at p. 187. The court recognized that it could refuse to follow *Herring* under the State constitution, but declined to consider this issue. Id. at p. 186.

However, *Herring* has now removed the incentive for police to get warrants—more lenient treatment of the exclusionary issue—which may cause warrant use to decline.

Second is the application of *Leon*'s “reasonably well-trained officer” standard which is, as noted, a negligence standard, which may be altered slightly now that *Davis* has rejected “simple isolated negligence” as the basis for exclusion. Still the courts are not suggesting that there is any burden of proof on the defendant on this issue. If the police make a mistake, the courts simply ask, “is this the sort of mistake that a reasonably well-trained officer would make?” This has led to exclusion in a number of cases. Thus the exclusionary rule is not dead.

Third most cases decide the Fourth Amendment issue first, and then decide the *Herring* issue. This means that in the *next* case, at least as to mistakes of law, if the police have lost on the Fourth Amendment issue, they cannot claim “good faith” if they commit the same mistake again.

#### D. Other Issues Left Open by *Herring* and *Davis*

Justice Sotomayor argues that the following issue is still unsettled after *Davis*:<sup>112</sup> What if the police are acting in a new area that is not governed by existing law? It will be difficult to find that the police were acting negligently in such a situation, as Breyer suggests.

In *Kyllo v. United States*,<sup>113</sup> the police beamed a “thermal imager” at a house to determine if it was emitting unusual amounts of heat, and then, finding that it was, used this information to get a search warrant based on probable cause of indoor marijuana growing. The Supreme Court held, 5-4 that this was an unreasonable intrusion into the home. If this case were arising today, presumably a district court could conclude that this did indeed violate the Fourth

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<sup>112</sup> *Davis*, supra, at p. 2434. (Opinion of Justice Sotomayor concurring in the judgment).

<sup>113</sup> 533 U.S. 27 (2001).

Amendment, but that, under *Herring*, the police mistake did not warrant exclusion, as they were not reckless, or even negligent, in their application of existing law, which was unclear as to this issue. Contrary to Sotomayor's argument, "whether or not a police officer's conduct can be characterized as culpable is dispositive."<sup>114</sup> The fact that this was a substantial intrusion into the suspect's privacy would be irrelevant because there was no police negligence in the first place.

But since the Supreme Court has now held that this police practice is not allowed, in the next case, the police can no longer claim that they were acting in good faith and the evidence must be excluded. Thus there can be no warrantless "good faith" use of thermal imagers after *Kyllo* or in any case where circuit precedent is established.

What about mistakes by the police in assessing facts.? Suppose the police search a car with what they believe is probable cause, but the trial court concludes that they lacked it? This is a particularly troubling case. It's one thing to rely on a magistrate's judgment that there is probable cause in a search warrant as *Leon* held. At least a judicial officer has intervened in the case. But here, the police are simply relying on their own judgment and seriously interfering with the suspect's rights.

It is possible that the Court would reassert its "attenuation" analysis from *Herring* in this situation, and hold that such a non-attenuated violation of the Fourth Amendment requires exclusion. Or it could call this "substantial negligence," as opposed to the "simple isolated negligence" rejected as a basis of exclusion in *Davis*. A negligent assessment of probable cause leading to the substantial intrusion of a car search should be the basis of exclusion.

A similar analysis would occur if the police were mistaken about a fact, such as the address of a house, that they put in a search warrant. If the factual error was found to be due to police negligence, obviously the harm to the innocent victim of

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<sup>114</sup> *Id.* p. 2435, arguing that it is "not dispositive." As the *Davis* majority made clear: "(T)he deterrence benefits of exclusion 'vary with the culpability of the police.'" *Id.* at p. 8, quoting *Herring*, 555 U.S. at p. 143.

the mistake would be substantial and any evidence found in his house should be suppressed.<sup>115</sup>

What if the police have a search warrant for stolen wide-screen television sets and during its execution look in drawers or other places where a television could not be, and find drugs. This strikes me as a substantial intrusion into the suspect's privacy and, if the police are negligent, as they would usually be in exceeding the written terms of the warrant, the evidence should be excluded. Surely the Court does not want such misbehavior to go unpunished, though they could also order exclusion by deeming this behavior "reckless."

Another issue is consent searches. If the police search a house based on consent, and the court later concludes that the defendant did not consent, or that the consent was involuntary, should the evidence be excluded automatically, or must the defendant still pass the *Herring* test to have the evidence excluded? Consent is somewhat different than other Fourth Amendment issues. The validity of a consent is not based on the voluntariness of this particular defendant, but rather on whether a "reasonable (innocent) person would (have felt) free to decline the officer's request or otherwise terminate the encounter."<sup>116</sup>

Thus, in finding a consent invalid, the court has already determined, in a sense,<sup>117</sup> that the police have behaved unreasonably, and it would not be right to then conclude that a reasonably well-trained officer would have made this mistake.<sup>118</sup> Similarly, if the police wrongly conclude that a particular individual has the authority to consent to a search, that wrongful conclusion has already

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<sup>115</sup> Cf. *Maryland v. Garrison*, 480 U.S. 79 (1987) where the Court upheld the search of a wrong apartment on the ground that the mistake was reasonable and it wasn't obvious to the police until afterwards that there were two apartments on the third floor of the building rather than one. Obviously if the police aren't negligent in the first place there's no exclusionary issue. *Garrison* was, in effect, the Court employing the "good faith" exception before it existed.

<sup>116</sup> *United States v. Drayton*, 536 U.S. 194, 202 (2002)

<sup>117</sup> It's not precisely the same issue since one involves the "reasonable person's" attitude and the other involves the "reasonable policeman's attitude."

<sup>118</sup> See, *United States v. Stokely*, 733 F.Supp. 2d 868,905 (E.D. TN, 2010) holding that a consent was involuntary when made by a suspect placed in handcuffs, as was his young child, prior to the consent. *Herring* did not change this outcome because here the police were trying to rely on their own mistake in concluding that the handcuffing was justified, rather than on a computer mistake as in *Herring*. Cited with approval in *United States v. Barclay*, 2011 WL 1595065 (E.D. Mich., 2011).

violated the test of *Illinois v. Rodriguez*<sup>119</sup> that “the facts available to the officer...warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.”<sup>120</sup> Thus the police have already failed the “reasonable officer” test, and don’t get to relitigate it again with a *Herring* argument.

In sum, although the Court in *Davis* edges even closer to effectively abolishing the exclusionary rule except in really extreme cases, it hasn’t done so yet. In neither *Herring* nor *Davis* could the police behavior even be termed “negligent,” much less anything worse. We are still waiting for a case where the police have made a negligent mistake that substantially interferes with a suspect’s constitutional rights, such as an arrest not based on probable cause or a warrantless search of a house where police evaluation of exigent circumstances is clearly wrong.

#### E. CONCLUSION

I have long been a supporter of the mandatory exclusionary rule. If the police violate the suspect’s rights, the evidence should be excluded without further ado. As a former prosecutor I did not find that the rule exacted a high price on law enforcement as the Supreme Court now claims. It was rare for exclusionary claims to be successful, and when they were, the police deserved it. Thus the courts were not, as a general rule, excluding evidence based on minor, technical violations of the Fourth Amendment.

However, it was I who discovered, and brought to the Supreme Court’s attention, the fact that “the automatic exclusionary rule as applied in our courts is...’universally rejected’ by other countries.”<sup>121</sup> Realizing that perfectly civilized countries like England, Canada and Germany don’t automatically apply the exclusionary rule to all search and seizure violations, but rather do so on a discretionary basis when the “ends of justice” demand it (or some similar

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<sup>119</sup> 497 U.S. 177 (1990)

<sup>120</sup> *Id.* at p. 188.

<sup>121</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 (2006), quoting Craig Bradley, *Mapp Goes Abroad*, 52 Case W. Res. L.R. 375, 399-400 (2001)

language) does give one pause about the need for a mandatory rule. Therefore, I don't necessarily criticize the Court's attempt to limit the scope of the rule.

But so far, they have enunciated neither a clear nor a fair alternative rule. They are unclear about whether their rule is an objective one based on the behavior of a hypothetical "reasonable policeman" or a subjective one based on the culpability of the officers in this case. They are unclear about just what level of culpability by the police will justify exclusion and who bears the burden of proof. And they misconceive the connection between police culpability and deterrence of future police misconduct by assuming that "punishing" reckless officers with exclusion will deter police misconduct more than punishing negligent ones.

To the extent that the Court endorses the "reasonable good faith" objective negligence approach of *Leon*, simply extending it to warrantless searches, I don't necessarily disagree with them. In short, despite the loose talk in these cases about severely limiting the exclusionary rule, I don't disagree with the outcomes in *Hudson*, *Herring* or *Davis*. The police in *Hudson*, though negligent or worse, didn't substantially interfere with the suspect's privacy rights, and in *Herring* and *Davis* their conduct was completely reasonable.

But when the police, through negligence or recklessness, substantially interfere with suspect's privacy rights, and in the process obtain evidence to which they would not otherwise have access, that evidence should be suppressed. That is simple justice.

