Excluding Exclusion: How Herring Jeopardizes
the Fourth Amendment's Protections Against
Unreasonable Search and Seizure

Hariqbal Basi
EXCLUDING EXCLUSION: HOW HERRING JEOPARDIZES THE FOURTH AMENDMENT’S PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES

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Abstract- For nearly a half-century, the exclusionary rule has remained an important mechanism for ensuring police compliance with the Fourth Amendment and deterring unconstitutional searches and seizures. In January 2009, the Supreme Court held in Herring v. United States that the exclusionary rule does not apply to good faith negligent police behavior. This significantly broadened the law, and severely limits the future application of the exclusionary rule. Furthermore, this holding has strong potential for abuse by police departments. By analogizing to Fifth Amendment jurisprudence and Miranda rights, I argue that the ruling in Herring needs to be limited in order to preserve core Fourth Amendment values.

INTRODUCTION

Chief Justice Roberts has had a long and interesting history with the exclusionary rule. In January 1983, as lawyer under the Reagan Administration he wrote a memorandum for the Reagan Administration titled “The campaign to amend or abolish the exclusionary rule”—that is,

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the court-created remedy excluding evidence at trial which was obtained by police officers’ failure to comply with constitutional search procedures.¹ The Reagan administration was vehemently opposed to the exclusionary rule, and aggressively lobbied to limit the application of the remedy.² The Nixon administration, and subsequently the Reagan administration, criticized the Warren Court’s creation of the remedy as giving too many rights to criminal defendants and allowing “countless guilty criminals” to escape conviction.³

In his memo to his superior counselor to the President,⁴ Roberts cited research from the National Institute of Justice (NIJ) that suggested the number of guilty defendants allowed to go free because of the exclusionary rule was much higher than previously thought.⁵ This NIJ study has since been invalidated with evidence suggesting the data was heavily distorted by the Reagan administration.⁶ The findings of the NIJ study, the opinion articles published by the Reagan administration, and the proposed legislation against the exclusionary rule never gained much traction during its time, but this did not discourage Roberts from his quest.⁷

Now, as Chief Justice of the United States Supreme Court, Justice Roberts has resurrected the Reagan administration’s attempts to eliminate the exclusionary remedy. In January 2009, twenty-six years after he wrote the memo on the campaign to abolish the exclusionary rule, Justice Roberts wrote the majority opinion in Herring v. United States,⁸ a decision that threatens to severely limit any practical application of the exclusionary rule as it has traditionally been invoked.

The exclusionary rule was solidified under Chief Justice Earl Warren in Mapp v. Ohio as a constitutionally mandated remedy against unreasonable government searches and seizures. This Fourth Amendment doctrine was designed to deter police officers from violating constitutional rights in pursuit of criminal evidence. To preserve the integrity of the judicial system and keep the government from benefitting from its own wrongdoings, the Court declared that evidence obtained as a result of an unconstitutional search and seizure is inadmissible against a defendant at trial. Since its inception, the rule has been subject to a number of limitations and exceptions. Herring v. United States is the most recent Supreme Court ruling regarding the limitations of the exclusionary rule. Chief Justice Roberts delivered the majority opinion of the Court, and ruled that ordinary negligent police behavior, assuming the officer is acting in good faith, cannot be deterred and therefore should not be subject to the exclusionary remedy. This decision has significantly expanded the scope of the good faith exception to the rule recognized in United States v. Leon, and threatens to eliminate the well-established remedy altogether. Before Herring, ordinary police negligence did not preclude application of the exclusionary rule if the police had nonetheless violated the Fourth Amendment in obtaining evidence.

The majority in Herring framed the opinion as a standard and logical application of the exclusionary rule doctrine—a characterization, I argue, that is grossly misleading. Without overruling prior case law, Herring has taken a giant leap beyond what has been justified in Fourth Amendment jurisprudence, and has signaled the demise of the exclusionary rule as it has been applied for nearly half of the last century. Critical steps must be taken to revitalize the doctrine. In this Comment, I argue that for the exclusionary remedy to survive, application of the good

⁵. Id.
⁶. Davies, supra note 3, at 635.
⁷. Liptak, supra note 1.
faith exception expanded in *Herring* should be limited to preserve the Fourth Amendment’s guarantees against unreasonable government conduct. I analogize the jurisprudence in this area of law to that which has developed in the context of *Miranda* warnings to propose how the good faith exception should be limited.

In Part I, I outline the history of the exclusionary rule, from its inception to its modern-day application. I include an analysis of how the exclusionary remedy has evolved from a bright-line rule to a fact-sensitive standard, which has contributed to its continued erosion. In Part II, I describe the facts, ruling, and reasoning of *Herring*, and the Court’s attempt to reconcile their newly created doctrine with prior Fourth Amendment jurisprudence. In Part III, I discuss the implications of *Herring* on future criminal prosecutions and individual liberties and why a broad interpretation of the ruling is more likely than a narrow one. I also discuss *Herring*’s implications for future police training and behavior and its impact on a defendant’s burden of proof. In Part IV, I reanalyze the facts of *Herring* to demonstrate why the case was wrongly decided, and how the broadened exception may lead to police abuse. In Part V, I analyze arguments for and against the rule, and rebut the arguments against the rule with empirical evidence demonstrating why the rule is still necessary. I also argue that *Herring*’s expanded good faith exception should be limited if the rule is going to survive and continue to protect individuals against unreasonable government conduct. I conclude with my proposal to limit the good faith exception and state why such limitation is necessary for the future protection of Fourth Amendment values.

I. **HISTORY OF THE EXCLUSIONARY RULE**

A. **Constitutional and Legal Foundations**

The Fourth Amendment protects individuals against unreasonable searches and seizures of their persons, houses, papers, and effects. Although it was ratified in 1791, the Fourth Amendment had limited application throughout much of the United States’ early history because it was not originally applied to the states and because it lacks any textual mechanism for enforcement. As is commonly noted, the framers intended the Bill of Rights to protect individual liberties against the federal government. Consequently, the Fourth Amendment was not originally applied to individuals involved in state criminal prosecutions. Since most criminal prosecutions are state and local, the Fourth Amendment was infrequently invoked in criminal cases. The basis for applying the Bill of Rights to the states comes from the Fourteenth Amendment’s Due Process Clause, and, more specifically, the Warren Court’s interpretation of the Clause to apply the Bill of Rights to the states.9

Even in federal criminal prosecutions, the protection against unreasonable searches and seizures had little application because the text of the Fourth Amendment provides no remedy. Without clear guidance for enforcement, the protection against unreasonable searches and seizures,10 to the extent it was recognized and litigated, was largely remedied through tort law and civil damages. Based upon common law, the framers of the Constitution likely believed actions for damages would adequately redress Fourth Amendment violations.12 Yet, there is little Fourth Amendment jurisprudence in the United States’ early history, indicating that such civil suits were uncommon. As legal scholars such as Patrick Alexander note, despite the framers’ vision that the judiciary would be the guardian of the Bill of Rights and rectify violations against it, for over a

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11. *Text of the 4th amendment.*
B. Development of the Exclusionary Rule

In 1914, the Supreme Court formally acknowledged for the first time that in order to maintain Fourth Amendment’s protections against unreasonable searches and seizures, certain forms of improperly seized evidence must be excluded at trial against the defendant. In Weeks v. United States, the Supreme Court held that the protections of the Fourth Amendment would be meaningless if there were no judicial remedy to curb unlawful government behavior violating the Fourth Amendment.

After arresting Freemont Weeks for illegally selling lottery tickets, federal officers broke into his home and seized a number of documents to use as evidence against him. No warrant was obtained in the search of his home, a place that the Fourth Amendment specifically protects against both unreasonable and warrantless searches. While originally seeking the return of his illegally seized property, Weeks’ case for replevin gave rise to the idea that the government should not benefit from its own wrongdoing. The Court recognized the value of placing Weeks and the government in an ex ante position—the position both would have been in had the evidence illegally obtained against Weeks been returned and not admitted against him. Without this evidence, Weeks would not have been convicted. The exclusionary rule did not appear without any actual constitutional basis, as critics often argue; it has historical underpinnings in the long-recognized remedy of replevin. A decision with significant precedential value, Weeks nonetheless provided little clarity about how to apply the newly recognized exclusionary remedy, which was still limited to violations by federal officers.

Nearly a half century later, the Warren court solidified the exclusionary rule in the controversial decision of Mapp v. Ohio. Hailed as a victory for individual privacy rights and criticized simultaneously as protecting known criminals against prosecution, Mapp firmly established, and applied to the states, the exclusionary remedy as a constitutional requirement for “all evidence obtained by searches and seizures in violation of the Constitution.”

In Mapp, Cleveland police officers, investigating a tip, forcibly entered Dollree Mapp’s home and engaged in a warrantless search of her house. The officers ultimately found obscene...
books and pictures sufficient to secure a conviction for possessing lewd and lascivious materials in violation of state law.\textsuperscript{23} The Supreme Court reversed Mapp’s conviction, holding that the only evidence establishing guilt was inadmissible as the product of a constitutional violation.\textsuperscript{24} In applying the exclusionary remedy to the states, the Court emphasized the necessity of the exclusionary rule to preserve Fourth Amendment guarantees and noted that remedial alternatives were ineffective.\textsuperscript{25}

C. Vulnerability of Mapp

A controversial decision from the beginning,\textsuperscript{26} Mapp arguably could be overruled on the outdated basis on which it achieved Justice Black’s key fifth vote. Justice Black rested his agreement with the majority on the premise that the constitutional violation was an amalgamation of the Fourth Amendment’s ban against unreasonable searches and seizures as well as the Fifth Amendment’s ban against compelled self-incrimination.\textsuperscript{27} The type of evidence found in Mapp, considered physical evidence, is now considered to be outside the scope of the Fifth Amendment.\textsuperscript{28} The majority’s holding, based on Justice Black’s fifth vote, is now arguably resting on an invalidated premise.

Not surprisingly, then, courts across the United States have grappled with issues of how to apply the exclusionary remedy and define its scope. The purposes of the exclusionary rule have never been clearly laid out in a Supreme Court decision. The main justifications rely on the value of the remedy to deter unconstitutional searches and seizures by government officials and the placement of the defendant and the government in an \textit{ex ante} position had the constitutional violation not occurred. As Patrick Alexander notes, the exclusionary rule has been justified as a “constitutional mandate, necessary for maintaining judicial integrity,”\textsuperscript{29} a constitutional remedy, and a general deterrent for unconstitutional searches and seizures by government officials.\textsuperscript{30}

The deterrence value of the remedy became the most compelling, and is now the exclusive defense of the rule.\textsuperscript{31} The deterrence rationale has given rise to a balancing analysis to determine when and how the exclusionary remedy should be applied. This deterrence rationale, while potentially the most compelling, may account for this bright-line rule’s diminution to a fact-sensitive standard.

D. Exceptions to the Rule

The Warren court tended to favor bright-line rules over standards, and an automatic exclusion triggered by an unconstitutional search and seizure is an example of such a bright-line rule. Later applications of the rule have reduced it to a fact-sensitive standard, primarily based on whether exclusion will serve the deterrence rationale.

\begin{itemize}
\item \textsuperscript{23} \textit{Id.} at 644.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} Mapp overruled the Supreme Court’s prior decision in \textit{Wolf v. Colorado}, 338 U.S. 25 (1949), holding that the exclusionary remedy was not constitutionally required in state prosecutions.
\item \textsuperscript{27} Mapp at 660.
\item \textsuperscript{28} See Schmerber v. California, 384 U.S. 757, 757 (1966), holding that physical evidence is not considered testimonial for purposes of 5th amendment self-incrimination.
\item \textsuperscript{29} Mapp at 660. Justice Clark regarded the rule as a constitutional requirement and one necessary for the maintenance of judicial integrity.
\item \textsuperscript{30} Alexander, \textit{supra} note 13, at 100.
\end{itemize}
1. **Calandra and the Balancing Approach**

Thirteen years after *Mapp* was decided, the Supreme Court revisited the application of the exclusionary remedy in *United States v. Calandra*. In *Calandra*, the Court explicitly stated that the rule serves as a punitive deterrent, thus emphasizing deterrence as the primary rationale behind the rule over other justifications. Rather than opt for automatic application of the rule every time a constitutional violation occurred, the Court articulated an idea it had suggested in dicta in other cases: to serve adequately its deterrence purpose and simultaneously promote justice and effective law enforcement, the application of the exclusionary rule must carefully balance the high costs associated with excluding evidence against the potential deterrence served against the government for unlawful behavior. Using this balancing approach, the *Calandra* court determined that the rule should not be applied in grand jury proceedings.

2. **The Good Faith Exception**

Having carved an exception for applying the rule in grand jury proceedings, the Court reaffirmed its adherence to this balancing test in *United States v. Leon*, where it recognized an additional exception to the application of the rule in instances where officers act in good faith. In *Leon*, police officers, after conducting their own investigatory work regarding a tip informing them of criminal drug-related activity, applied for and secured a facially valid search warrant. On this basis, they found substantial incriminating evidence of drug paraphernalia, and Alberto Leon was charged with conspiracy to possess and distribute cocaine.

While the lower court applied the exclusionary remedy because the affidavit supporting the warrant was insufficient to establish the requisite probable cause, the Supreme Court held that, despite the insufficiency of the warrant, exclusion of the evidence was unnecessary because the police officers were engaged in “objectively reasonable law enforcement activity” and relied in “good faith” on the search warrant without exceeding its scope. Notably, the Court stressed that the “Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands,” and that the exclusionary rule cannot cure the invasion of rights the defendant has already suffered.

Ignoring the other rationales offered by the Warren Court in *Mapp*, the Court in *Leon* relied almost exclusively on the deterrence function of the remedy. In doing so, the Court reasoned that the deterrent effect on officers acting in objective good faith within the scope of a warrant they reasonably believe to be valid would be minimal, and would impair the truth seeking function of the court, potentially allowing guilty defendants to go free. Exclusion in this case would not have deterred police officers, for which the deterrence is designed, but rather would have punished the magistrate for erroneously issuing a warrant. Since neutral judges and magistrates

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32. See also the Warren Court’s bright-line rule in *Miranda v. Arizona*, 384 U.S. 436 (1966), holding violations of Miranda warnings to be sufficient grounds for excluding testimonial evidence obtained as a direct result of the violation.


34. *Id.* at 347 (1974); *Alexander*, *supra* note 13, at 76.


36. In *Alderman v. United States*, 394 U.S. 165 (1969), the Supreme Court suggested that determining whether to apply the exclusionary rule would require the balancing of costs and benefits of the exclusion.

37. *Calandra*, *supra* note 33, at 254; *Alexander*, *supra* note 13, at 76.

38. *Calandra*, *supra* note 33, at 254, *In Calandra*, the court refused to apply the rule in grand jury proceedings, reasoning that the deterrent effect would not be jeopardized because the evidence would remain inadmissible during a criminal trial, and the application of the rule would unduly burden the fact-finding function of grand juries.


40. *Id.*

41. *Id.*

42. *Id.* at 916.

43. *Id.* at 906, 908 (citing Stone v. Powell, 428 U.S. 465, 486).

44. *Id.* at 898.
have no stake in the outcome of particular criminal prosecutions, the threat of exclusion is neither expected nor designed to discourage their misconduct or negligence.\footnote{Id.}  

It could be argued that applying the exclusionary rule in cases in which the police failed to demonstrate probable cause in the warrant application deters both future inadequate presentations by the police to magistrates and “magistrate shopping” for those magistrates who will approve warrants based on inadequate probable cause. The Court, while recognizing the existence of such arguments, dismissed them as speculative.\footnote{Id. at 918.}  

The Leon Court reduced application of the remedy to instances where three criteria are met. First, misconduct by the police or adjuncts of the police must be present in the facts of the case.\footnote{The Court did not consider magistrates and judges to be adjuncts of the police. \textit{Id.} at 917.} Secondly, excluding the evidence should serve to effectively deter future such misconduct. Finally, in following the balancing approach laid out by \textit{Calandra}, the benefits of excluding the evidence from trial must outweigh the costs, such as letting guilty defendants go free.\footnote{Id. at 2.}  

In \textit{Arizona v Evans}, the Court considered a similar situation in which the error in question was made by a court employee. As discussed further in Part III, the police in \textit{Evans} made a traffic stop, entered the defendant’s name into a computer terminal, and learned of an outstanding warrant for the defendant’s arrest.\footnote{Id. at 1.} In fact, there was no outstanding warrant and the information in the computer was the result of an error in the court clerk’s office.\footnote{Id.} The Court held the exclusionary rule to be inapplicable to errors committed by non-police actors.\footnote{Id. at 2.} Thus, the exclusionary rule was reaffirmed to be limited only to police conduct and not that of court employees.  

E. The Backdrop for \textit{Herring}  

As outlined above, the exclusionary rule has been reduced from a bright-line rule to a factsensitive balancing test. While courts originally articulated several functions served by the rule, the remedy now is seen as exclusively serving the purpose of deterring police misconduct.\footnote{RONALD JAY ALLEN ET AL., \textit{COMPREHENSIVE CRIMINAL PROCEDURE} 346 (Aspen Publishers 2005) (2005).} Recognizing the remedy but continuing to carve exceptions, the Supreme Court has slowly eroded the Warren Court’s original attempt to firmly secure a remedy against unconstitutional government searches and seizures.\footnote{The Supreme Court has recognized other forms of the good faith exception, expanding situations in which police conduct can be seen as objectively reasonable and the exclusionary remedy would have little deterrence value. The Court in \textit{Hudson v. Michigan}, 547 U.S. 586 (2006), ruled that a minor violation of the knock and announce rule, where the officers waited five seconds rather than the prescribed twenty after announcing their arrival and prior to entering the premises, was not sufficient grounds to suppress evidence obtained from a resulting lawful search. \textit{In Illinois v. Krull}, 480 U.S. 340 (1987), the Supreme Court further solidified the good faith exception by holding that officers relying on a statute later found to be unconstitutional for their search authority cannot be deterred by the suppression of evidence.} It is against this backdrop that Bennie Dean Herring sought suppression of evidence found as an immediate product of his illegal arrest.\footnote{Herring v. United States, 129 S. Ct. 695, 695 (2009).}  

45. \textit{Id.}  
46. \textit{Id.} at 918.  
47. The Court did not consider magistrates and judges to be adjuncts of the police. \textit{Id.} at 917.  
50. \textit{Id.} at 1.  
51. \textit{Id.}  
52. \textit{Id.} at 2.  
54. The Supreme Court has recognized other forms of the good faith exception, expanding situations in which police conduct can be seen as objectively reasonable and the exclusionary remedy would have little deterrence value. The Court in \textit{Hudson v. Michigan}, 547 U.S. 586 (2006), ruled that a minor violation of the knock and announce rule, where the officers waited five seconds rather than the prescribed twenty after announcing their arrival and prior to entering the premises, was not sufficient grounds to suppress evidence obtained from a resulting lawful search. \textit{In Illinois v. Krull}, 480 U.S. 340 (1987), the Supreme Court further solidified the good faith exception by holding that officers relying on a statute later found to be unconstitutional for their search authority cannot be deterred by the suppression of evidence.  
II. **HERRING v. UNITED STATES**

A. The Facts

On July 7, 2004, Bennie Dean Herring visited the Coffee County Sheriff’s Department in Alabama to retrieve belongings from his impounded vehicle. His arrival caught the attention of Coffee County investigator Mark Anderson, who had been involved in prior law enforcement encounters with Herring. Anderson phoned the Coffee County warrant clerk to inquire about any outstanding warrants for Herring’s arrest. The warrant clerk, Sandy Pope, did not find anything in Coffee County’s database. Anderson, persistent in his quest to find a reason to arrest Herring, asked Pope to check with the warrant clerk for Dale County, Sharon Morgan. In her database, Morgan found an active arrest warrant for Herring’s failure to appear in court, a misdemeanor. Pope immediately notified Anderson, who proceeded to follow Herring out of the impound lot and arrest him. A search incident to that arrest revealed methamphetamine in Herring’s pocket, and a pistol, which he was not allowed to possess as a convicted felon, in his vehicle.

When Morgan went to obtain the actual warrant to fax Pope as confirmation, it was not there. The warrant had been recalled several months earlier, but had not been removed from the database. The information about the warrant’s recall had not been updated in the database and the mistake led to the misinformation Morgan relayed Pope, and Pope to Anderson. Within minutes, Morgan called Pope regarding the error, and Pope informed Anderson of the situation. However, by that point, Herring was under arrest, and the drugs and gun had been seized from him.

The evidence seized from Herring led to his indictment for illegal possession of a firearm and methamphetamine. Prior to his trial, Herring made a timely motion to suppress the evidence on the basis that it was a product of his illegal, warrantless arrest which did not give Anderson the authority to search him. Analyzing the facts under Leon’s good faith exception, the district court and the Eleventh Circuit denied the suppression of evidence on the grounds that the exclusionary remedy would serve little to no deterrent purpose. The Eleventh Circuit concluded that the arresting officers were “entirely innocent of any wrongdoing or carelessness.” Acknowledging that “whoever failed to update the Dale County Sheriff’s records was also a law enforcement official,” and thus an adjunct of the police, the Eleventh Circuit conceded that the first factor identified in Leon was met. However, the Court reasoned that

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56. **Id.** at 698.
58. **Herring, supra** note 55, at 698.
59. **Id.**
60. **Id.**
61. **Id.**
62. **Id.**
63. Officers may search the area within the immediate vicinity of an arrestee without a warrant provided that the arrest is lawful. *Chimel v. California*, 395 U.S. 752 (1969).
64. Illegal stimulant drug popularly known as “crystal meth.”
65. **Herring, supra** note 55, at 698.
66. **Id.**
67. **Id.**
68. **Id.**
69. **Id.**
70. **Id.** at 699. Herring was found in violation of 18 U.S.C. § 922(g)(1) (felon in possession of a firearm) and 21 U.S.C. § 844(a) (possession of a controlled substance, viz. methamphetamine).
72. **Id.**
74. It is important to note the recognition that a warrant clerk is a police actor because of the distinction the court made in *Leon* regarding neutral judges and magistrates, who are not considered adjuncts of the police.
because the error was a negligent omission, rather than a deliberate “choice to act,” the suppression of evidence would not effectively deter future misconduct.  

The Supreme Court was compelled to grant certiorari to establish a clear legal precedent in the area.  

Other courts had granted suppression motions in factually similar cases, ruling that the good faith exception did not necessarily preclude the exclusion of evidence when the error committed was by law enforcement personnel themselves.  

In resolving this conflict in the application of the exclusionary remedy, the Supreme Court affirmed the Eleventh Circuit’s judgment in Herring, and extended the Leon good faith exception to officers relying on negligent recordkeeping errors by law enforcement officials or adjuncts of the police in the sheriff’s office.

B. The Good Faith Exception on Steroids

The Herring opinion, written by Chief Justice Roberts, is a major expansion of the previously established good faith exception. Reasoning that the rule is not an automatic consequence of a Fourth Amendment violation, and that exclusion has always been the court’s “last resort” rather than its “first impulse,” Chief Justice Roberts reaffirmed the Court’s stance that the rule is “not an individual right and only applies where it results in appreciable deterrence.”  

Roberts went on to reference the Court’s use of the balancing test in previous Fourth Amendment jurisprudence. The cost of applying the rule is always the possibility that guilty and potentially dangerous defendants will go free, something that “offends basic concepts of the criminal justice system.”  

The rule’s “costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application.”

In order for the exclusionary rule to be applicable, Roberts noted that police misconduct must be “sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” The deterrence function is only adequately served, according to the Court, when police conduct is “deliberate, reckless, grossly negligent, or in some cases recurring or systematically negligent.”

In Herring, the police conduct was too attenuated from the subsequent search and seizure. In sum, finding no police culpability and refusing to apply the rule in cases of negligent good faith police conduct, the Herring Court broadened the good faith exception to a point where it is difficult to imagine instances when an officer’s conduct it is not covered by it.

III. IMPLICATIONS OF HERRING

A. Narrow or Broad Holding?

Read narrowly, Herring may very well be limited to the facts of this specific case: the exclusionary remedy does not serve any valid function in cases in which police personnel relied on a reasonable belief that an arrest warrant existed. The logic presented in this reading of the case is that it is impossible to deter a police adjunct who was not aware of the recalled warrant.

75. Herring, supra note 55, at 699.
76. Herring at 699, referencing Hoay, infra note 77.
77. Id. See, for example, Hoay v. State, 348 Ark. 80, 86–87 (2002), stating that the exclusionary rule could apply if it was law enforcement personnel in the sheriff’s department rather than court personnel who were at fault for defective recordkeeping in failing to void an arrest warrant.
78. Herring, supra note 55, at 699.
79. Id. at 700.
80. Id.
81. Id. at 701 (quoting Leon, supra note 39).
82. Id. (quoting Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998)).
83. Herring, supra note 55, at 702.
84. Id.
and appears to have made a genuine, negligent mistake instead of a deliberate recordkeeping error.

85. Neither the briefs nor the oral argument raised the issue of a general good faith exception, so it would seem inconsistent to apply the Court’s holding as such.86 Furthermore, the holding applies only to negligence that is “attenuated”87 from the subsequent search and seizure,88 and most illegal searches will not be so far removed from the constitutional violation itself.89 Reading Herring narrowly, the Court merely may have been considering whether to extend its prior ruling in Evans-- since recordkeeping errors by judicial clerks do not trigger the exclusionary rule, then recordkeeping errors by police clerks shouldn’t either.90 This seemed like a logical and predictable decision given the Evans ruling.91 For the foregoing reasons, some legal scholars have suggested that Herring should be read narrowly, and is best considered an “interstitial decision.”

On the other hand, the decision has been seen as a major “assault” on the future application of the exclusionary remedy92 and scholars have labeled it as a step towards destroying the exclusionary rule altogether.93 That the issue of a general good faith exception was not raised in the parties’ briefs or oral argument does not mean the court’s recognition of the exception is a fabrication by critics of the decision; many Supreme Court precedents, including Mapp, are noted for rulings on issues barely raised in the oral arguments or briefs.94

On the day of the Herring decision, Tom Goldstein, one of Bennie Herring’s lawyers and Supreme Court blogger,95 declared the decision as “one of the most important rulings [concerning the Fourth Amendment] in the last quarter century.”96 The significance lies not within the specific holding of Herring, but the extraordinarily broad reasoning the court applied to reach its conclusion. The Supreme Court’s broad language suggested that negligent errors by police do not trigger the exclusionary rule.97 When police mistakes “are the result of negligence and not systematic error or reckless disregard for constitutional requirements, the exclusionary rule does not apply.”98 Instead of focusing on the nature of the error in the instant case (that of

85. Orin Kerr, professor of Law at George Washington University, believes the holding of Herring is a narrow one, and does not agree that a “general good faith exception for police conduct” is being recognized by the Supreme Court. Otherwise, the dissent would have sounded more concerned for future applications of the rule than they did. Orin Kerr, Responding to Tom Goldstein on Herring, The Volokh Conspiracy, Jan. 14, 2009, http://volokh.com/archives/archive_2009_01_11-2009_01_14_2009_01_14_113838_pst.html (Jan. 14, 2009, 11:38 PST).

86. Id. Kerr noted that the issue was not raised in the briefs or oral argument, so creating a general good faith exception for police conduct “would be an extraordinary shift in Fourth Amendment law” and not likely what the court intended. However, cases often establish precedential value for issues not originally raised or litigated. Mapp was originally characterized as a First amendment case, with almost no Fourth Amendment discussion in the parties’ briefs and oral argument. Allen, supra note 53, at 344.

87 Herring at 698.


89. Craig M. Bradley, Red Herring or the Death of the Exclusionary Rule?, TRIAL, Apr. 2009, at 54.


92. LaFave, supra note 88. LaFave refers to the decision as the Supreme Court’s latest assault on the exclusionary remedy.

93. Bradley, supra note 89, notes that Herring “inched closer to destroying the constitutional protection of the exclusionary rule.”; Alschuler supra note 91 at 473.

94. As mentioned in note 85 infra, Mapp was originally litigated as a First Amendment, and Fourth Amendment issues were rarely mentioned in the parties’ briefs and oral arguments. Allen, supra note 53, at 344.

95. Goldstein, supra note 90.

96. Id.

97. Id.

98. Id.; Herring, supra note 55, at 695.
recordkeeping), the reasoning applies broadly to negligence by law enforcement.\textsuperscript{99} Objectively reasonable police conduct is no longer subject to the exclusionary rule, and this development is a significant expansion of the good faith exception as previously established in \textit{Leon} and \textit{Evans}.\textsuperscript{100}

B. Why the Broad Interpretation of \textit{Herring} Is More Likely

Given the recency of the decision, few courts have interpreted \textit{Herring} thus far.\textsuperscript{101} However, courts that have applied \textit{Herring} appear to be favoring the broader interpretation.\textsuperscript{102} This phenomenon is a natural consequence of Chief Justice Roberts’ broad language. As Dean Erwin Chemerinsky notes, had the Supreme Court wanted to limit \textit{Herring} to its facts and set a narrow precedent, they easily could have done so. \textit{Evans} held the exclusionary rule inapplicable when a police department acts in good faith based on erroneously received information from a magistrate.\textsuperscript{103} In \textit{Herring}, the Court could have applied \textit{Evans} and held the exclusionary rule inapplicable when a police department acts in good faith based on a negligent clerical error from another police department.\textsuperscript{104} Instead, the Court extended its ruling well beyond the facts of \textit{Herring} and held the exclusionary rule to be inapplicable to all negligent good faith police conduct.\textsuperscript{105} Consistent with Justice Roberts’ thirty-year campaign to abolish the remedy altogether, the language in \textit{Herring} has been interpreted broadly by lower courts nationwide.

In \textit{United States v. Otero},\textsuperscript{106} the Tenth Circuit ruled that, although evidence was obtained as a result of an invalid warrant in violation of the Fourth Amendment’s particularity requirement, the seized evidence need not be excluded because the officer was not reckless. The Court quoted \textit{Herring} stating that there was no “flagrant or deliberate violation of rights” that would justify the exclusionary remedy.\textsuperscript{107} In \textit{Logan v. Commonwealth},\textsuperscript{108} the Court of Appeals in Virginia found that although the police officer obtained the evidence in question through a warrantless search in violation of the Fourth Amendment, exclusion was inappropriate in light of \textit{Herring} since his conduct fell under the decision’s broadened good faith exception.\textsuperscript{109}

As other scholars and publications analyzing the application of \textit{Herring} have noted, even courts permitting exclusion have relied on \textit{Herring}’s broad approach in their holdings.\textsuperscript{110} In \textit{United States v. Toledo}\textsuperscript{111} the court analyzed the case under \textit{Herring} but concluded that, because the officer arrested an individual based on the suspicion he was an illegal alien and despite having been told by an INS agent that no arrest authority existed, the officer’s behavior was “reckless, or

\begin{itemize}
\item \textsuperscript{99} Goldstein, \textit{supra} note 90.
\item \textsuperscript{100} \textit{Id}.
\item \textsuperscript{101} No Supreme Court decision since \textit{Herring} has applied the good faith exception in a factually similar situation. But the Court has decided other cases concerning the exclusionary rule since \textit{Herring}. In April 2009, the Supreme Court decided \textit{Corley v. United States}, 129 S. Ct. 1558 (2009), ruling that when federal police do not bring an arrested suspect before a magistrate judge (a process known as “presentment”) within six hours of the arrest, and have no excuse for that delay, confessions made by the defendant after that six hour time limit should be excluded from evidence during the suspect’s trial. Around the same time, the Supreme Court in \textit{Arizona v. Gant}, 129 S. Ct. 1710 (2009) limited the vehicular search incident to arrest power of police officers. The latest Supreme Court decision regarding the exclusionary remedy is \textit{Michigan v. Fisher}, 130 S. Ct. 546 (2009), which held that a warrantless search of a home was justified under an emergency aid exception.
\item \textsuperscript{102} Harvard Law Review Association, \textit{supra} note 48, at 160.
\item \textsuperscript{103} Erwin Chemerinsky, Dean, University of California, Irvine School of Law, Address to University of California, Los Angeles School of Law: The Present and Future of the Roberts Court (Jan. 27, 2010).
\item \textsuperscript{104} \textit{Id}.
\item \textsuperscript{105} \textit{Id}.
\item \textsuperscript{106} 563 F.3d 1127 (10th Cir. 2009).
\item \textsuperscript{107} \textit{Id} at 1134 (quoting \textit{Herring}, 129 S. Ct. at 702); Harvard Law Review Association, \textit{supra} note 48, at 161.
\item \textsuperscript{108} 673 S.E.2d 496 (Va. Ct. App. 2009).
\item \textsuperscript{109} \textit{Id} at 498; Harvard Law Review Association, \textit{supra} note 48, at 161.
\item \textsuperscript{110} \textit{Id}.
\item \textsuperscript{111} 615 F. Supp. 2d 453 (S.D. W. Va. 2009).
\end{itemize}
grossly negligent” under *Herring*, warranting the exclusionary remedy. Notice the focus of the reasoning in these cases has been on the broader language in *Herring* of deliberate, reckless, or grossly negligent conduct rather than the narrower, limiting language of “attenuated” negligence.

Lower courts’ broad interpretation of *Herring*, combined with the Supreme Court’s gradual limitation and erosion of the exclusionary rule since *Mapp*, indicates that further limitations on the application of the exclusionary remedy are likely to continue absent any guidance from the Supreme Court to the contrary. While many advocate for a narrow reading of the opinion, a growing consensus of scholars acknowledges that the broader interpretation of *Herring* is more likely to be applied, weakening the constitutional footing of the exclusionary rule.

Legislative attorney Anna C. Henning reported to Congress that the focus of exclusionary rule analysis has become one of “deliberateness and culpability” after *Herring*. *Herring*’s broad language has already been incorporated into law enforcement practice. Training manuals released by the United States Department of Justice since the decision reflect only the broader language of *Herring*, noting that an unconstitutional search does not automatically lead to suppression of evidence and that the exclusionary rule only applies if the police conduct is sufficiently deliberate and culpable. The training manuals make no mention of *Herring*’s narrower language of attenuated negligence. The language referencing *Herring* is a recent addition to the manual. There is considerable indication, therefore, that the broader language and interpretation of *Herring* is being given greater deference, likely as Chief Justice Roberts intended. With good reason, this conservative ruling concerns an increasing number of proponents of the exclusionary rule.

C. Distinguishing *Herring* From Precedent

The good faith exception recognized previously by the court in *Leon* and *Evans* applied only to negligent non-police conduct, and the officers’ reasonable reliance on that conduct. In *Leon*, the error was made by the magistrate, and penalizing police who reasonably relied on the magistrate’s determination would not serve a deterrence purpose. In *Evans*, a court clerk made the error, and again penalizing reasonable police relying on that error would not have deterred future police misconduct. The rationale in both cases rested on the premise that exclusion would not deter police misconduct, since the errors in question were not made by the police or law enforcement adjuncts.


116. Id.

117. A panel of law professors at the University of Virginia called this decision part of the Roberts’ court’s incremental move towards a more conservative legacy. Professor Armacost stated that “if the court means what it said, there will be a lot less exclusion in future cases.” University of Virginia School of Law, Roberts Court Makes Incremental Moves Toward More Conservative Legacy, Professors Say, http://www.law.virginia.edu/html/news/2009_fall/scotus_roundup.htm (last visited Jan. 14, 2010).

118. *See* discussion regarding *Leon* above.

119. *See* discussion of *Evans* above.
In *Herring*, the key distinction is that the error was made by law enforcement personnel. Before *Herring*, the Supreme Court had recognized the application of the remedy in instances of police negligence.\(^{120}\) Even when the exceptions of *Leon* and *Evans* applied, ordinary negligence by the police had traditionally led to suppression.\(^{121}\)

Without specifically overruling these cases, the Court has nonetheless precluded the future application of the remedy when the basis of misconduct is police negligence. The only constraint on this holding is the Court’s qualification of the negligent behavior: the negligent conduct in *Herring* was too *attenuated* from the arrest and search.\(^{122}\) This qualification of negligence suggests the possibility that police negligence may trigger the exclusionary remedy if the negligent conduct is not attenuated from the search, and the search is an immediate consequence of it.\(^{123}\)

Nonetheless, the significance of attenuation is given cursory treatment in the opinion. Critics fear the language suggesting general exemption of police negligence may be the precedential significance assigned to *Herring* in the future.\(^{124}\) As noted above, the language of attenuation has been given little deference in the interpretation of the decision, while language of police negligence and culpability has been favored. Mentioned only three times in the entire opinion, the term attenuated is easily overshadowed by the discussion of negligence, mentioned over ten times in the majority opinion.\(^{125}\) The three instances where the attenuation limitation is discussed, it serves to qualify the type of negligence at issue in *Herring*.\(^{126}\) The Court does not define attenuated negligence outside of the specific circumstances of the instant case, leaving room for the possibility that future courts will rely more heavily on the negligence and culpable conduct prong of the Court’s reasoning.

Professor Alschuler of Northwestern University has suggested that the attenuation limitation may have been added to the majority opinion to secure Justice Kennedy’s critical fifth vote and satisfy concerns of an overly broad holding.\(^{127}\) Professor Alschuler also suggests that the inclusion of a limited discussion of attenuated negligence is likely a strategic choice by Justice Roberts to maintain support in existing law for his otherwise extremely broad holding.\(^{128}\)

D. Increased Burden of Proof for Defendants

One of the major implications of the holding that has received surprisingly little attention is the increased burden *Herring* signals for criminal defendants. The Supreme Court has steadily raised the bar for criminal defendants in terms of what they must show to successfully invoke the exclusionary remedy. *Mapp* implied that the exclusionary rule would apply automatically whenever the Fourth Amendment was violated through an unconstitutional search. This established the original burden of proof which only required the defendant to demonstrate the unconstitutionality of the search or seizure. Later, in *Calandra*, the burden was raised, requiring the defendant to demonstrate both that an unconstitutional search or seizure occurred, and that the suppression of evidence would significantly deter police from engaging in such violations in the future.

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120. See e.g. *United States v. Peltier*, 422 U.S. 531, 538 (1975), holding that when police have engaged in “willful, or at the very least negligent, conduct,” courts refuse to “admit evidence gained as a result of such conduct” in order to “instill in those particular investigating officers, or their future counterparts, a greater degree of care towards the rights of the accused.”; *Herring*, supra note *, at 709- Ginsburg dissent. *Language of footnote from Goldstein, supra note 90.*

122. *Herring*, supra note 55, at 698.; *Goldstein, supra note 89.*
123. Goldstein, supra note 89.
124. *Id.*
125. *See generally Herring, supra note 55.*
126. Alschuler, supra note 120, at 481.
127. *Id.* at 476.
128. *Id.*; “The one limitation on the Court’s opinion—and it will be the key to determining whether it reworks Fourth Amendment jurisprudence very significantly—is the Court’s statement that its rule applies to police conduct ‘attenuated from the arrest.’ Those statements constrain today’s holding largely to the bounds of existing law.”  *Goldstein, supra note 90.*
future. After Leon and Evans, defendants had to further show that the illegal conduct was committed by the police or an adjunct of law enforcement.

After Herring, defendants face an additional burden. They must show that the conduct of officers surpassed the standard of ordinary negligence and rose to the level of grossly negligence or recklessness. The majority opinion makes no reference to this increased burden. It is brought up only in Justice Ginsburg’s dissent, where she raises the question of how an “impecunious defendant” is to make the required showing of deliberate or reckless conduct. Proving this culpable state of mind is a significant added burden for the defendant.

With little guidance from the Supreme Court, courts across the country will have to make increasingly speculative determinations as to what conduct constitutes gross negligence or recklessness, and to what degree the Fourth Amendment violation must be attenuated from the evidence seized before application of the exclusionary remedy is barred.

These determinations are further complicated by the Supreme Court’s prior holdings that application of the exclusionary rule should not involve “inquiry into the mental state of the police.” Yet, the determination as to whether the officer was reckless or grossly negligent necessarily involves a subjective inquiry into the officer’s mental state. This is not merely what the officer should have known, but rather what the officer consciously disregarded. The establishment of recklessness or gross negligence will likely depend on both what the officer knew and how a reasonable officer would have acted with that knowledge. This inherently implicates the mental state of the officers and disregards the Court’s prior rulings holding mental states irrelevant to the application of the exclusionary rule.

IV. WHY HERRING WAS WRONGLY DECIDED

A. Merits of the Dissent

The merits of the dissents, in which four justices partook, are worth noting in Herring. A close case, it is clear that Justice Kennedy, with his critical fifth vote, was key in making the law of Herring, and may have rested his vote on the “attenuation” qualification the holding gives to negligent police behavior.

The two Herring dissents the omission of critical facts in the majority’s analysis. One key fact omitted in the majority opinion that Justice Ginsburg emphasizes in her dissent is the prior interactions between Herring and officer Anderson. Anderson knew Herring before the day of the altercation on July 7. Herring had told the district attorney of his belief that Anderson had some involvement with the death of a local teenager. Anderson had pursued Herring in an effort to make him recant the accusations against him. With this added facts, the perception of the situation and the officer’s conduct changes, and becomes a scenario of vengeance.

129. See discussion of U.S. v. Calandra above.
131. Herring, supra note 55, at 710.
132. The majority opinion in Herring did not provide examples for what would be considered grossly negligent conduct, or what level of attenuation from the constitutional violation is sufficient to bar the application of the exclusionary remedy.
133. See, e.g., Whren v. United States, 517 U.S. 806, 812–13 ( ), referenced in Herring in Ginsburg’s dissent, at 710.
134. For an explanation of recklessness in the criminal law context, see American Jurisprudence, 21 AM. JUR. 2d Criminal Law § 127.
135. Id.
136. Alschuler, supra note 121, at 476.
137. One written by Justice Ginsburg and the other by Justice Breyer. Herring, supra note 55.
138. Herring, supra note 55, at 705.
139. Id.
B. Classic Bad Faith Negligence

Investigator Anderson was looking for a way to get Herring in custody. It appeared to be a collective effort involving more law enforcement actors than just Anderson. When Herring drove to the Sheriff’s Department to retrieve belongings from his impounded truck, someone working with Anderson alerted him of Herring’s arrival. Seeing an opportunity to book Herring, Anderson searched for any outstanding warrants for Herring’s arrest. In his discussions with the warrant clerk, Anderson expressed no suspicion or probable cause to believe Herring was in any way engaging in or about to engage in criminal activity. When no warrant was found in Coffee County, Anderson decided to check another county. Fortunately for him, the error in Dale County yielded what he wanted: an outdated warrant for Herring’s failure to appear in court. The undisputed facts show that nothing could legally justify Herring’s arrest. It is unconvincing that the steps taken by Anderson were in the good faith of effective crime control and law enforcement.

Even if these actions demonstrated good faith by a reasonable officer engaged in law enforcement, as the majority in *Herring* assumed, Anderson’s subsequent conduct is questionable. He did not wait for any confirmation of the warrant from Dale County before proceeding to arrest Herring. The Dale County warrant clerk quickly discovered that the warrant had actually been recalled. Anderson received notification of this error within fifteen minutes of his initial inquiry. Rather than waiting for confirmation, Anderson immediately arrested Herring, and he had already conducted the search when he was notified of the error. An analysis of these facts, which the majority opinion avoided, suggests that Anderson acted in bad faith, deliberately attempting to arrest Herring for anything he could find. He had no suspicion of criminal activity, and the recalled warrant was only for a misdemeanor, yet he conducted a full search and was able to secure charges against Herring for federal criminal violations.

Failure to acknowledge bad faith police negligence is a significant departure from prior case law. There are two distinct examples of bad faith police behavior in *Herring*: (1) Anderson’s motivation to arrest Herring for the sole purpose of taking Herring into custody and not to prevent or punish any criminal conduct, and (2) Anderson’s subsequent failure to obtain a confirmation of the reported warrant for Herring’s arrest. This is not the same type of behavior that was characterized as good faith police behavior in *Leon* and *Evans*.

The police in *Leon* investigated a tip for specific criminal activity, and when they had good reason to believe criminal activity was occurring, they applied for a warrant. The magistrate erred in issuing the warrant based on insufficient probable cause, but the police could not be held responsible for a mistake made by the magistrate. They reasonably, and in good faith, relied on the erroneous warrant.

In *Evans*, the police stopped the defendant for a traffic violation. During the course of the stop, the police entered the defendant’s name into a computer terminal in the police car, and found an outstanding warrant for the defendant’s arrest. The subsequent search incident to the arrest found drugs on the defendant, resulting in criminal charges. As it turned out, there was no outstanding warrant, and the information in the computer was the result of an error in the court clerk’s office. The Supreme Court nonetheless held that the officers had acted in good faith and the drugs found were therefore admissible, since the error was made by court employees and not the police. The officers in both *Leon* and *Evans* thus had reasonable beliefs they had

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140. *Id.* at 705; Alschuler, *supra* note 121, at 466.
142. See discussion above regarding *Leon*.
144. “If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future error as to warrant such a severe sanction.” *Id.* at 14–16.
reason to investigate, stop, or arrest the individual, and the warrants later found to be erroneous were not due to any police error.

*Herring* is distinguishable from *Leon* and *Evans* for two reasons. First, Anderson had no reason to be suspicious of Herring, but rather was looking for one. Unlike the warrants in *Leon* and *Evans*, the warrant for Herring’s arrest was not found through the course of ordinary crime control procedures. Second, the error in *Herring* was made by a law enforcement employee and not a court employee as in *Leon* and *Evans*. This latter distinction prompted Justice Breyer to write a separate dissent, joined by Justice Souter, in which he heavily relied on distinguishing police errors from judicial errors, which he believed was the basis of the *Leon* and *Evans* holdings. The exclusionary remedy serves to deter police misconduct and errors, and in *Herring* we have the requisite police error by a police adjunct.

C. Was Torts Class a Lie, or Can Negligence Actually Be Deterred?

Perhaps the most flawed part of the court’s opinion is the argument that the exclusionary remedy would not deter misconduct in this case. While the dissent raises other justifications for the exclusionary rule, calling it “a remedy necessary to ensure that the Fourth Amendment’s prohibitions are observed in fact,” it is well established that the primary purpose of the rule is its deterrent function. The majority concluded that because the type of conduct that occurred in *Herring* was negligent, it cannot be deterred by the exclusionary rule. This conclusion ignores principles of tort law.

First, ordinary negligence is considered deterrollable in other areas of the law. The deterrence of negligence is commonly regarded as the underlying basis of tort law. Because negligence has formed the basis for an entire area of law, its deterrence is legally valuable. Revisiting the misconduct that occurred in *Herring*, there is a substantial need for deterrence for such types of police misbehavior.

Assuming that Anderson did not act in deliberate bad faith and the majority’s characterization was correct, negligent conduct nonetheless can and should be deterred. Two types of negligent conduct occurred in this case.

The first is a police recordkeeping error. The dissent notes that “electronic databases form the nervous system of contemporary criminal justice operations.” Inaccurate databases leading to illegal arrests are unacceptable. The record in *Herring* indicated “no routine practice of checking the database for accuracy.” What incentive does the sheriff’s department have after this decision to remedy this situation and ensure its database is accurate and up-to-date?

While the majority characterized this error as an isolated instance, the Dale County Sheriff Department’s warrant clerk had reported earlier in a suppression hearing that miscommunications about warrants had occurred several times. Therefore, this instance may not be as isolated as the

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145. *Herring*, supra note 55, at 710. “The rationale for our decision was premised on a distinction between judicial errors and police errors, and we gave several reasons for recognizing that distinction.”

146. Alschuler argues that the warrant clerk in *Herring*, who is a police employee, and the court clerk in *Evans*, are functionally equivalent, and drawing a distinction between the two would make the distinction between police officers and everyone else appear “especially artificial” if the court had drawn a distinction in *Herring* based merely on titles. Alschuler, supra note 121, at 469.

147. *Herring*, supra note 55, at 707; Justice Ginsburg refers to more justifications for the exclusionary rule than simple deterrence. “It enables the judiciary to avoid the taint of partnership in official lawlessness, and it assures the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”

148. The dissent in *Herring* concedes this as well: “Beyond doubt, the main objective of the rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Id.*


151. *Id.*

majority treats it. Such negligence must be deterred to prevent future invasions on individual liberty. With no legally recognized repercussions for inaccurate police databases, police departments have little incentive to pressure their employees to keep records up-to-date. This logic applies in tort law under the doctrine of *respondeat superior* liability; the risk of being penalized encourages employers, in this case police departments, to carefully supervise the conduct of their employees.\(^{153}\) Without the exclusionary remedy, there is no adequate deterrence for such negligent police recordkeeping.

The second incidence of negligence is Anderson’s failure to receive confirmation of the warrant before proceeding with the arrest. Arresting without a confirmed warrant, only justified in extreme circumstances, is an additional example of behavior that should be deterred. The warrant requirement is a well-established constitutional safeguard for arrest, and only limited emergency circumstances can excuse the failure to obtain one. While Anderson might have argued that he needed to arrest Herring immediately to prevent him from driving away, the recalled arrest warrant was for a misdemeanor, which is not a serious crime. In the instant case, there was no emergency justifying Anderson’s failure to obtain confirmation of the warrant to arrest Herring for a misdemeanor.\(^{154}\)\(^{155}\) Such behavior can and should be deterred. Police officers should be required to exercise care and receive confirmation of warrants before executing potentially illegal arrests unless emergency circumstances excuse this requirement.

### D. The Problem of Recurring Negligence

The majority’s suggestion that the court may be inclined to apply the exclusionary remedy if such errors were widespread or recurrent is also problematic. As already noted, this instance of negligence may not be as isolated as the majority characterized it. But more importantly, the same fact scenario recurring several more times might eventually warrant the application of the exclusionary rule. The infringement on civil liberties and the potential deterrence to police conduct is the exact same, but someone in Herring’s exact position may benefit from the exclusionary rule merely because such negligent mistakes occurred a few more times in the interim.

Conversely, an argument can be made that the fact that the majority opinion left room for the application of the remedy in the future if similar negligent acts become widespread or recurring may serve its own deterrent effect; police officers would know that the evidence they find as a result of a recordkeeping error may be subject to suppression at some point in the future. Law enforcement officers can thus rely on negligent recordkeeping errors until the Supreme Court decides the problem has become widespread. The *Herring* decision leaves no measure in place to prevent the problem from recurring or becoming widespread. The requirement that negligence must be widespread also appears to be a new imposition by the majority. Evidence of widespread abuse or recurring police misconduct was not required in earlier cases that applied the exclusionary remedy.\(^{156}\) If deterrence is the primary justification, any conduct infringing on civil liberties that could be deterred *should* be deterred.

As Ginsburg’s dissent notes, “negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied

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153. For an explanation of *respondeat superior* liability see generally Roy K. Lisko, *Hospital Liability under Theories of Respondeat Superior and Corporate Negligence*, 47 UMKC L. REV. 171 (1979). The doctrine holds employers responsible for the mistakes of their employees committed in the scope of employment; see Ginsburg’s dissent in *Evans* for the *respondeat superior* analogy to the exclusionary remedy. *Evans*, 514 U.S. at 29, n.5.

154. Exigency analysis applies in situations in which police need to obtain a warrant but fail to do so because of an emergency that justifies their warrantless conduct.

155. U.S. CONST. amend. IV (“...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.”).

156. See *Mapp v Ohio*, 367 U.S. 643 (1961) and its progeny. There is no mention of widespread violations in the case as a justification for creating and applying the rule.
effectively through other means." This is consistent with the rule’s core concerns, and its primary function of deterrence.

E. Potential for Abuse

The good faith exception, as extended by the court in Herring, has significant potential for abuse. Police officers can always argue that they were acting in good faith and on objectively reasonable beliefs. If an individual becomes a person of interest to a police officer, just as Herring had become to Anderson, the officer could even encourage faulty recordkeeping by other police employees so that the officer would have reason to arrest the individual. While this may seem far-fetched, such facts would be difficult to prove and a court would likely still find good faith behavior.

Good faith exceptions in other areas of police regulation have led to similar abuse. In the context of Miranda warnings, the Supreme Court ruled in Oregon v. Elstad that good faith violations of a police officer’s obligation to give Miranda warnings should not necessarily result in the exclusion of derivative evidence found as a result of the violation. In Elstad, the defendant made an incriminating statement elicited by the police before adequate Miranda warnings were given, and subsequently made a more detailed incriminating statement after the warnings were given, thinking he had already admitted his guilt during the first statement. While normally the immediate evidentiary product of a Miranda violation is inadmissible, the court ruled that the police had been acting in good faith, and the second incriminating statement need not be excluded. The Court reasoned that the police gave adequate Miranda warnings before the second statement was secured, and regardless of whether the defendant felt more inclined to repeat incriminating statements after having already admitted guilt, the second statement could be admitted against him.

As a result of this case, police designed their interrogation practices to disregard Miranda by questioning defendants before giving the requisite Miranda warnings. If defendants admitted something during the initial questioning, the police would then give the requisite Miranda warnings, ask the same questions again, and the defendants would often make the same admissions, thinking the cat was already out of the bag. These subsequent admissions, after the Miranda warnings were given, could be used against the defendants. Police training manuals even laid out the potential benefits of violating Miranda.

The Supreme Court finally drew a line to control this police behavior that disregarded Miranda. Nearly twenty years after Elstad, the Court in Missouri v. Seibert struck down the police practice of questioning first and warning later. The court ruled that deliberately delaying Miranda warnings for the purposes of securing an unwarned admission undermines the efficacy of the warnings and is bad faith behavior. In such instances, the second post-warning admission would also be inadmissible.

If left without any limits, the broad good faith exception created by the Herring court may result in similar manipulative police tactics. For example, police may conduct searches and

157. See Ginsburg’s dissenting opinion in Herring for further discussion of why negligent recordkeeping can and should be deterred. Herring, supra note 55, at 710.
158. The Supreme Court’s decision in Miranda v. Arizona, 384 U.S. 436 (1966), created what are known as the Miranda warnings as a constitutional safeguard to protect against self-incrimination.
160. Id.
161. Id.
164. In his concurring opinion, Justice Kennedy believed the bad faith behavior by the officers was itself enough to justify exclusion of the second admission. Id. at 618.
165. Id. at 617.
seizures without probable cause and then justify their actions as good faith reliance on negligent record-keeping errors. As mentioned in Part III.B, the Justice Department added Herring’s “deliberate” and “culpable” conduct standard into training manuals, noting that evidence obtained as a result of a Fourth Amendment violation is not automatically excluded unless this Herring standard is met. Suppression motions only arise when incriminating evidence has been found, so in hindsight, officers can claim to be right about their justification for having probable cause for the search and seizure. Empirical evidence has found police perjury at suppression hearings to be relatively common, since the only oppositional testimony comes from the defendant, who has significant incentive to lie in seeking the suppression of the evidence.  

V. SAVING THE EXCLUSIONARY REMEDY

A. Why the Rule Is Necessary; Arguments Against the Rule and Why They Are Problematic

Just as the Supreme Court stepped in to control the abuse of the good faith exception to Miranda, similarly the Court will need to confine the parameters of this broadened good faith exception to the exclusionary rule. The exclusionary remedy has traditionally been and still is the only adequate form of deterrence for police violations of the Fourth Amendment.  

There are a number of reasons why we still need the remedy.  

Justice Scalia’s majority opinion called the entire remedy into question a few years ago in Hudson v. Michigan, where the Supreme Court ruled that violations of the knock-and-announce rule do not automatically trigger the exclusionary remedy. Justice Scalia emphasized that much had changed since the Court’s decision in Mapp. People whose rights were violated could now sue police officers for civil damages, a remedy unavailable in the 1960s. Furthermore, police departments have become more professional in their internal training procedures and no longer require such stringent judicial supervision. Whereas police officers did not receive training in Fourth Amendment jurisprudence prior to the 1960s, they now do.  

Justice Scalia referenced criminologist Samuel Walker to support his assertion of increased police professionalism, who soon after published an opinion piece in the Los Angeles Times saying that Justice Scalia had misrepresented his work and that better police professionalism was a consequence of the exclusionary rule, not a reason to minimize it. Other empirical studies similarly support the conclusion that the exclusionary rule forces police to pay more attention to the Fourth Amendment than they otherwise would if no remedy against illegal searches existed.  

Prior to the threat of the exclusionary rule as established in Mapp, police officers did not receive Fourth Amendment training; there was no need for it. The reaction to Mapp by law

167. United States Department of Justice, supra note 115.  
169. Some scholars have argued that new techniques, such as recording all police behavior and searches to determine reasonability, might serve as adequate alternatives to the exclusionary remedy. See generally David A. Harris, How Accountability Based Policing Can Reinforce or Replace the Fourth Amendment Exclusionary Rule, 7 OHIO ST. J. CRIM. L. 149 (2009). I find this to be an impractical and untested solution, and replacing a well-established remedy with it seems presumptuous, to say the least.  
170. Hudson, supra note 54, at 586.  
171 Liptak, supra note 1.  
172. Liptak, supra note 1.  
173. Id.  
174. Id.  
175. Slobogin, supra note 20, at 368.
enforcement officials is perhaps the best evidence of this. The New York City Police Commissioner said the decision created “tidal waves and earthquakes,” requiring the retraining of his entire department “from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily law enforcement function.”

Was there no training at all in the search and seizure context before the exclusionary rule? It is not as if the decision had just added the Fourth Amendment to the Constitution; the text had been there for nearly two centuries, but many law enforcement personnel just might have been seeing it for the first time. It is the deterrent effect of the exclusionary rule that has triggered the Fourth Amendment training Scalia posits as a rationale for why the remedy is no longer necessary. If we revert back to a time without the exclusionary remedy, police training and behavior might similarly regress.

Justice Scalia’s argument that individuals may sue police officers for civil damages when Fourth Amendment violations occur is also problematic. The Rehnquist court effectively destroyed the possibility of civil suits against officers, available under the civil rights statute 42 U.S.C. § 1983, when it expanded the concept of qualified immunity available to police officers in such lawsuits. Furthermore, even if an individual’s §1983 claim is successful, it provides an inadequate remedy for an individual who has already been convicted based on a constitutional violation.

The principal argument against the rule is that it allows guilty defendants to go free. Empirical studies have placed significant doubt on this statement, however. Exactly how many go free is a matter of controversy. One study, described by Professor Wayne LaFave as “the most careful and balanced assessment of all available empirical data,” found that the vast majority of cases in which exclusion of evidence occurred during the period studied were drug cases, and little evidence was excluded in cases involving violent crimes. Another study found an overall suppression rate of slightly less than five percent in warrant-related prosecutions. It also concluded that even in seventy percent of the cases in which evidence was suppressed, convictions were obtained. Overall, the rule prevented conviction in no more than 1.4 percent of the cases studied. So it does not seem that the rule allows very many guilty defendants to go free, but it does serve to protect important civil liberties.

Another argument against the exclusionary rule is that it impedes the “truth-seeking function” of the courts. The exclusionary rule has posed a unique ethical dilemma for lawyers. As officers of the court, attorneys’ duties necessarily include avoiding conduct that undermines the integrity of the adjudicative process. The criminal justice system seeks to accommodate the values of truth-seeking on the one hand and the protection of a defendant’s individual autonomy and dignity on the other.


177. Id.

178. Davies, supra note 3, at 619. “In particular, Anderson v. Creighton, 483 U.S. 635 (1987), ruled that officers are entitled to immunity, and thus to the pretrial dismissal of such suits prior to discovery, unless case law existing at the time of the police misconduct clearly established that the police conduct at issue violated the Constitution.”

179. Both Calandra and Leon discussed this as the primary cost of the rule.

180. Bandes, supra note 176.

181. See discussion above of Leon.


attorney must balance obligations to the client as well as to the system of justice. As judicial integrity is a purpose served by the exclusionary rule, and that this integrity could be compromised if guilty defendants are allowed to go free, attorneys arguing to suppress evidence of guilt are simultaneously impeding the truth-seeking function of the court and the integrity of the judicial justice system while attempting to protect the liberty interests of their client.

While this may seem to be an argument against the legitimacy of the exclusionary remedy, this dissonance can be resolved. The judiciary necessarily has a truth-seeking function, but not one that comes at the expense of constitutional violations. Upholding the values promulgated by the Constitution is the foremost responsibility of the Judiciary. As “officers of the court,” attorneys’ priorities should coincide with the priorities of the court. In arguing for the suppression of evidence obtained as a result of a constitutional violation, lawyers are advocating to uphold the values inherent in the Constitution, and thus adequately serving their function as officers of the court.

As illustrated above, many compelling justifications for the exclusionary rule still exist. Therefore, the erosion the exclusionary rule has suffered as a result of Herring must be restored. The Court should address the potential for abuse in the Fourth Amendment context to prevent the type of abuse that occurred in the Fifth Amendment context after the Court’s ruling in Elstad.

B. The Solution: Confining the Good Faith Exception

The Miranda warnings provide a helpful analogy to the exclusionary rule for several reasons. Like the exclusionary rule, the Miranda warnings are not dictated by the text of the Bill of Rights; rather, they are seen as a “prophylactic safeguard” put in place to regulate police conduct and protect the defendant from state compulsion to provide self-incriminating testimony in violation of the Fifth Amendment. While the Miranda warnings themselves are not seen as constitutional requirements, the immediate testimonial product of a Miranda violation is nonetheless inadmissible, ensuring that the government does not benefit from a constitutional violation. Similarly, the Constitution does not mandate in its text an exclusionary remedy for Fourth Amendment violations, yet the rule has been formulated to regulate police conduct and ensure the government does not profit from unconstitutional behavior.

Both the Miranda warnings and the exclusionary rule were created by the Warren court as bright-line rules to regulate and deter unconstitutional police behavior. Both have been subsequently subject to limitations taking into account good faith police conduct. While the Court has never expressly characterized it as such, the exclusionary remedy should similarly be considered a prophylactic safeguard to regulate police conduct and protect individuals against unreasonable searches and seizures in violation of the Fourth Amendment. If ensuring compliance with the Bill of Rights and the proscriptions of the Constitution is of utmost importance, the Court should address the potential for abuse in the Fourth Amendment context to prevent the type of abuse that occurred in the Fifth Amendment context after the Court’s ruling in Elstad.

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184. Scholars have noted other legal principles that lead to this same dissonance experienced by attorneys. The attorney-client privilege is one; the privilege is “inconsistent with the general duty to disclose and may impede the truth seeking function.” Jennifer A. Hardgrove, Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts, 998 U. ILL. L. REV. 643, 643 (1998).

185. But see discussion supra of empirical data showing less than two percent of successful invocations of the exclusionary rule prevented conviction. Bandes, supra note 176.


188. Elstad, supra note 159, at 309.

189. Weisselberg, supra note 162, at 187. The derivative product of Miranda violations may still be admissible, particularly if the evidence is physical and not testimonial, and is subject to its own analysis.

190. Liptak, supra note 1.

191. See above discussion regarding the limitations imposed on the exclusionary rule by the Supreme Court. For a similar analysis of limitations on the requirement to provide Miranda warnings, see generally Weisselberg supra note 162.
importance, it is unclear how a balancing approach that determines whether deterrence outweighs the costs of exclusion achieves this goal. *Miranda* expressly rejected the notion that society’s need for interrogation outweighs the privilege *Miranda* protects, reasoning that “the Constitution has prescribed the rights of the individual when confronted by the power of the government,” and that right “cannot be abridged.” 192 This represents a clear preference for Fifth Amendment values over the interests of law enforcement officers in obtaining incriminating statements. 193

The same preference should to be given to Fourth Amendment values. The Court should limit the good faith exception based on ordinary police negligence in *Herring* as it limited its ruling in *Elsstad* through *Seibert*. Deliberately delaying Miranda warnings to secure an unwarned confession had to be prohibited. While it is too soon to tell how police behavior will change as a result of *Herring*, it does appear that police can argue good faith behavior and ordinary negligence more easily than before, thereby successfully precluding the application of the exclusionary remedy. This exception should be limited to prevent police departments from training their officers to search and arrest before receiving confirmation of a warrant, so long as the police error in conducting the illegal search or arrest cannot be proven to be reckless or grossly negligent.

Law enforcement personnel should only be able to rely on the good faith exception if their conduct was *indeed* in good faith. When an arrest itself is designed to generate incriminating evidence where no verifiable basis for criminal suspicion exists, and the officer has not waited to receive confirmation of an existing warrant absent emergency circumstances, the exclusionary rule must render inadmissible evidence found as a result of the unlawful arrest. Applying this approach to *Herring*, officer Anderson had no individualized suspicion of Herring to stop him. In seeking the requisite suspicion he obtained notice of a faulty warrant for a misdemeanor. No emergency circumstances justified his arrest of Herring without confirmation of the warrant. The search incident to Herring’s unlawful arrest was an automatic consequence of the arrest, thereby making the drug paraphernalia and gun immediate, and not attenuated, products of the illegal arrest. Therefore, they should have been excluded and Herring’s motion to suppress should have been granted.

Critics seeking to distinguish the court-created safeguard of the Miranda warnings from the exclusionary rule might argue that the Fifth Amendment specifically prohibits government compelled self-incrimination and *Miranda* directly protects this right. However, the text of the Fifth Amendment does not state specifically anywhere that if a person is compelled to testify against oneself by the state, that testimony should necessarily be excluded. 194 The requirement of exclusion is thus a court-created remedy, one the Court considers “indispensable to the protection of the Fifth Amendment privilege.” 195 The Fourth Amendment guarantee against unreasonable searches and seizures is likewise a constitutionally proscribed right of the individual against the government, and the exclusionary rule has been developed as a court created remedy for protecting this right. Since exclusion of immediate testimonial evidence based on a violation of Miranda warnings is an automatic consequence of the violation, when the Miranda warnings themselves aren’t constitutionally mandated by text, why shouldn’t the exclusion of evidence that is an immediate consequence of an illegal arrest or search be subject to automatic exclusion, when unreasonable searches and seizures by the government are textually prohibited by the Constitution?

Even absent automatic exclusion, the Court’s preferred balancing analysis should limit this good faith exception based on negligence. The benefit of deterring officers from arresting a suspect without obtaining confirmation of a warrant, absent emergency circumstances, and the

192. Weisselberg, supra note 162, at 121 (quoting *Miranda*, 384 U.S. at 479).
193. Weisselberg, supra note 162, at 121.
194. Pertinent part of the Fifth amendment reads “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.
benefit of requiring police to maintain accurate databases, far exceed the cost of excluding evidence that a defendant was in possession of illegal drugs. To effectively deter police misconduct in the future, the Supreme Court must limit the good faith exception of ordinary negligence, define the ambiguity of what constitutes a search and seizure that is attenuated from the negligent conduct, and recognize the need for protecting the inherent values of the Fourth Amendment. The good faith exception should be limited to exclude behavior in which a police officer neglected to obtain confirmation of a warrant absent emergency circumstances and had no original suspicion of criminal activity when seeking to stop the suspect.

CONCLUSION

If the Miranda warnings are any indicator, the good faith exception now broadened by the ruling in *Herring* is an invitation for covert police abuse of the values and individual liberties the Fourth Amendment seeks to protect. If the exclusionary remedy is going to survive and continue to adequately protect citizens against unreasonable searches and seizures by the government, this good faith exception based on ordinary negligence the Supreme Court has carved out needs to be limited. Bad faith, suspicionless arrests by police should be discouraged, along with negligent record keeping in police departments. The scope of the good faith exception should be confined so that arresting officers cannot claim good faith when the arrest was based on an unconfirmed warrant and no reasonable suspicion of criminal activity existed.