TO EXCLUDE OR NOT TO EXCLUDE: 
THE FUTURE OF THE EXCLUSIONARY 
RULE AFTER HERRING 
V. UNITED STATES

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I. INTRODUCTION

In Herring v. United States, the Supreme Court of the United States issued what could be a landmark criminal procedure opinion that will reshape the meaning of the Fourth Amendment exclusionary rule. In Herring, the Court directly addressed whether the Fourth Amendment exclusionary rule applies when law enforcement personnel negligently provide erroneous information that eventually leads to an unlawful arrest. In a 5-4 opinion, the Court ruled in the negative, concluding that when police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply. While arguably a narrow decision, the far-reaching logic of the Herring opinion is hard to ignore. Accordingly, the decision in Herring has already sparked controversy amongst commentators, journalists, and courts, with

3. Herring, 129 S. Ct. at 698.
4. See id. at 704 ("We conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'") (quoting United States v. Leon, 468 U.S. 897, 907-08 n.6 (1984)).
some declaring *Herring* a landmark case and others dismissing the case as a blip on the constitutional radar.

The *Herring* decision could transform the exclusionary rule by making the exclusion of evidence the exception rather than the rule when police violate the Fourth Amendment. Although *Herring* directly concerned police recordkeeping errors, the Court's reasoning appears much broader. The Court generally established that officers' negligent errors do not trigger the exclusionary rule: "As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." In other words, the *Herring* decision arguably could apply to all police conduct, not simply recordkeeping errors made in the context of procuring a warrant.

At the same time, the *Herring* decision could be interpreted narrowly. On its facts, the *Herring* decision simply extended the Court's prior ruling that recordkeeping errors by judicial clerks do not trigger the exclusionary rule to errors made by police clerks. Also, this decision directly deals with police negligence "attenuated from the arrest," which potentially cabins the *Herring* opinion to negligent errors disconnected in time and person from the arrest. Finally, the Court emphasized, to some degree, the specific facts of the case when reaching its holding that negligent police conduct is not enough to trigger the exclusionary rule, an emphasis suggesting the case may be limited to the recordkeeping context.

The *Herring* decision came on the heels of the Court's 2006 decision in *Hudson v. Michigan,* which held that a violation of the Fourth Amendment requirement that officers knock, announce their presence, and wait a reasonable amount of time before entering a private residence (the "knock-and-announce requirement") does not require suppression of the evidence obtained in the ensuing search.

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7. See United States v. Thomas, Crim. No. 08-cr-87-bbc-02, 2009 WL 151180, at *8 (W.D. Wis. Jan. 20, 2009) ("'Paradigm shift' is a trite and often meaningless phrase, but it might be an apt description of the Supreme Court's recent curtailment of the exclusionary rule as illustrated by *Herring v. United States* . . . ").


9. See Arizona v. Evans, 514 U.S. 1, 14 (1995) (concluding that Fourth Amendment exclusionary rule does not apply to evidence obtained by police as result of judicial clerk error).


11. See *Herring*, 129 S. Ct. at 704 ("[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements," the exclusionary rule does not apply (emphasis added.).)


The majority opinion in *Hudson*, authored by Justice Scalia, broadly criticized the exclusionary rule in general, suggesting that the exclusionary rule may be eliminated altogether in the future. In fact, Justice Kennedy authored a concurring opinion to assure that "the continued operation of the exclusionary rule, as settled and defined by [the Court's] precedents, is not in doubt." The Court's decision in *Herring*, authored only two years after *Hudson*, has cast doubt again on the future vitality of the exclusionary rule.

In *Herring*, the Court's decision directly raised the issue of what the consequence should be when police violate the commands of the Fourth Amendment. As Chief Justice Roberts pointed out during oral arguments of the case, police have limited resources in the area of police recordkeeping and "probably don't have the latest version of WordPerfect, or whatever it is." Thus, the exclusion of highly probative evidence of guilt seems like an extreme sanction for technological error. On the other hand, as Stanford Law School Professor Pamela S. Karlan, who represented Herring, responded, "there's not a Barney Fife defense to the violation of the Fourth Amendment either." Thus, when evidence is excluded based on technological error, the police will do a better job of making sure such errors will not occur in the future.

The question after the *Herring* decision is not whether a "Barney Fife defense" exists but rather when the defense can be raised and what the contours of that defense are when the prosecution raises it. This Article addresses those issues and proceeds in five parts. In Part II, this Article outlines the "good-faith" exception to the Fourth Amendment exclusionary rule prior to the *Herring* decision. In Part III, this Article discusses the *Herring* decision in detail. In Part IV, this Article discusses the future of the Fourth Amendment exclusionary rule post-*Herring*, exploring the decision's limitations and poten-
tial breadth. In Part IV, this Article also addresses two particular complications courts will face in applying Herring to future cases, namely what courts should focus on in applying the Court's cost-benefit formulation of the exclusionary rule and how novel Fourth Amendment issues could pose particular problems in applying the exclusionary rule. Finally, in Part V, this Article summarizes the Herring decision's projected influence on the future of the exclusionary rule.

II. THE "GOOD-FAITH" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE PRE-HERRING

A. THE ORIGIN AND JUSTIFICATIONS OF THE FOURTH AMENDMENT EXCLUSIONARY RULE: A PUBLIC NOT A PRIVATE RIGHT

The Fourth Amendment, by its terms, does not require the exclusion of evidence when police violate the amendment. Nonetheless, the United States Supreme Court mandated the exclusionary rule for federal trials in Weeks v. United States in 1914 and applied the rule to the states in Mapp v. Ohio in 1961. Thus, the Fourth Amendment exclusionary rule, generally stated, excludes evidence from criminal trials when that evidence is obtained as a direct result of police conducting an illegal search or seizure in violation of the Fourth Amendment.

The justifications underlying the exclusionary rule have changed over the years. Originally, the Court justified the exclusionary rule in two primary ways. In Terry v. Ohio, the Court recognized that the exclusionary rule's "major thrust is a deterrent one," and serves as

20. See Herring, 129 S. Ct. 695, 699 ("The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' but 'contains no provision expressly precluding the use of evidence obtained in violation of its commands.'") (quoting Arizona v. Evans, 514 U.S. 1, 10 (1995)).
23. The very term "exclusionary rule," which suggests singularity, is somewhat of a misnomer because "there are several different rules and theories for exclusion based on the type and nature of the governmental misconduct at issue and the rights thereby transgressed." Eugene Milhizer, The Exclusionary Rule Lottery, 39 U. Tol. L. Rev. 755, 755 (2008). See id. (noting suppression can result from violations of the Sixth Amendment, Fourteenth Amendment, other statutes, and other constitutional violations). This Article focuses on the exclusion of evidence based on violations of the Fourth Amendment.
25. See generally Milhizer, supra note 23, at 756-57 (noting exclusionary rule evolved from individual right of defendant to public right designed to deter police misconduct).
26. Id. at 756-57.
27. 392 U.S. 1 (1968).
“a principal mode of discouraging lawless police conduct.”28 In addition to deterrence, the Court also described “another vital function” of the exclusionary rule, namely, “the imperative of judicial integrity.”29 As Justice Burger described the judicial integrity justification, “[a] ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.”30 Thus, the exclusionary rule originally served the dual role of deterring police misconduct and maintaining the criminal justice system’s integrity. The deterrence value of suppressing evidence procured as a result of illegal police conduct, while important, was not the only justification.

Over the next several decades, however, the deterrence of police misconduct ultimately became the primary, if not the sole, justification for the exclusionary rule.31 At the same time the Court emphasized the exclusionary rule’s deterrence objective, the Court also emphasized that the rule was not constitutionally mandated but rather a judicial creation. As the Court put it, the exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”32 Thus, the exclusionary rule is now considered “a Court-devised policy initiative premised on utilitarian calculations.”33

As the justifications for the exclusionary rule became more deterrence oriented, limitations and exceptions were imposed on the rule’s application. In particular, the standing doctrine limits the exclusionary rule’s application.34 The exclusionary rule is further limited as it only applies to criminal trials,35 has an impeachment exception,36 and

28. Id. at 12 (internal citations omitted).
29. Id. at 12-13 (quoting Elkins v. United States, 364 U.S. 206 (1960)).
30. Id. at 13. See also Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”).
31. See Stone v. Powell, 428 U.S. 465, 485 (1976) (stating that judicial integrity justification for exclusion has only “limited role [to play] . . . in the determination [of] whether to apply the [exclusionary] rule in a particular context.”); United States v. Janis, 428 U.S. 433, 446 (stating that deterrence is “prime purpose of the rule, if not the sole one”) (internal citation and quotation marks omitted).
33. Milhizer, supra note 23, at 757.
34. See Rakas v. Illinois, 439 U.S. 128, 134 (1978) (“A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.”).
is subject to the harmless error doctrine.\textsuperscript{37} The most far-reaching exception, which could eventually swallow the exclusionary rule, is the good-faith exception. The history and contours of the good-faith exception are outlined below.

B. THE "GOOD-FAITH EXCEPTION" TO THE FOURTH AMENDMENT EXCLUSIONARY RULE PRE-HERRING

Before \textit{Herring v. United States},\textsuperscript{38} the United States Supreme Court only applied the "good-faith" exception to the Fourth Amendment exclusionary rule in situations where police acted in reasonable reliance on a judicial or legislative representation that authorized the police conduct.\textsuperscript{39} An understanding of how the \textit{Herring} decision arguably extended the "good-faith" exception to a broader range of police conduct, requires a brief outline of the Court's jurisprudence of the good-faith exception.

1. \textit{United States v. Leon}

In 1984, the United States Supreme Court recognized what is often called the "good-faith exception"\textsuperscript{40} to the exclusionary rule.\textsuperscript{41} In \textit{United States v. Leon},\textsuperscript{42} a state court judge issued a search warrant on the basis of a detailed affidavit that an experienced investigator had prepared.\textsuperscript{43} However, the United States District Court for the Central
District of California subsequently concluded that the warrant was invalid because the affidavit failed to establish probable cause under the Court's then-existing test for assessing the reliability of an informant's tip.44 Thus, the district court suppressed the evidence obtained under the warrant.45

The Court reversed and held that the exclusionary rule could be "modified somewhat" under the particular circumstances of the case.46 In particular, the Court held that the evidence could be admitted because "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion [was therefore] inappropriate."47 In reaching this determination, the Court emphasized that the primary goal of the exclusionary rule is the deterrence of unconstitutional police conduct.48 The Court reasoned that the deterrent objective is not served when the police reasonably rely on the probable cause determination of a neutral and detached magistrate because the exclusion of evidence that later turns out to have been seized illegally will not "alter the behavior of individual law enforcement officers or the policies of their departments."49 The exclusionary remedy, the Court reminded, is directed against officers, not judges and magistrates who are "neutral judicial officers" and "have no stake in the outcome of particular criminal prosecutions."50 As the threat of exclusion cannot be expected to deter significantly judges and magistrates from constitutional infractions, it makes little sense to exclude evidence because of their mistakes.

2. *Massachusetts v. Sheppard*

In *Massachusetts v. Sheppard,*51 the United States Supreme Court broadened the good-faith exception to apply to a warrant that erroneously described the items to be seized.52 In *Sheppard,* officers conducting a homicide investigation applied for a warrant to search the defendant's residence for evidence connecting him to his girlfriend's murder.53 In the affidavit, the officers described the items sought as the murder weapon and rope used to bind the victim.54 The

44. *Id.* at 904-05 & n.5.
45. *Id.* at 904.
46. *Id.* at 905.
47. *Id.* at 926.
48. *Id.* at 916.
49. *Id.* at 918.
50. *Id.* at 917.
54. *Id.* at 985.
warrant, however, listed narcotics as the target of the search.\textsuperscript{55} The warrant erroneously described the items sought because the officers applied for the warrant over the weekend and the only standard application form the officers could locate was for a narcotics search.\textsuperscript{56} The officer requesting the warrant explained the problem to the judge and requested that the judge make the necessary changes to the warrant form.\textsuperscript{57} Although the judge assured the officer that he would make the required changes, the judge failed to do so.\textsuperscript{58}

The Court determined that suppression of evidence seized pursuant to the warrant was not required.\textsuperscript{59} As "it was the judge, not the officers, who made the critical mistake," the primary purpose of the exclusionary rule, the deterrence of police misconduct, would not be served by suppressing the evidence.\textsuperscript{60} As the Court reasoned, "[w]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possess authorizes him to conduct the search he has requested."\textsuperscript{61} Thus, the \textit{Sheppard} decision reaffirmed the principle that a judicial error leading to an illegal search will not trigger the exclusionary rule.


In \textit{Illinois v. Krull},\textsuperscript{62} the United States Supreme Court applied the good-faith exception to an officer's reliance on a statute that later proved unconstitutional.\textsuperscript{63} In \textit{Krull}, an Illinois statute required motor vehicle sellers to allow state officials to scrutinize certain records and vehicles.\textsuperscript{64} Pursuant to the statute, a police detective entered defendant's automotive wrecking yard and asked to see records of certain vehicle purchases.\textsuperscript{65} After receiving permission to inspect the cars, the detective discovered that three cars were stolen and that a fourth had its identification number removed.\textsuperscript{66} The cars were then seized and the wrecking yard's operators were arrested and charged with various crimes.\textsuperscript{67} The state trial court granted defendant's motion to suppress the evidence seized from the yard on the ground that the

\textsuperscript{55} Id. at 986.
\textsuperscript{56} Id. at 985.
\textsuperscript{57} Id. at 986.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 990-91.
\textsuperscript{60} Id. at 990.
\textsuperscript{61} Id. at 989-90.
\textsuperscript{64} \textit{Krull}, 480 U.S. at 342-43.
\textsuperscript{65} Id. at 343.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 343-44.
state statute violated the Fourth Amendment by giving officers unrestrained discretion in their warrantless searches. The Illinois Supreme Court affirmed, rejecting the State's argument that the seized evidence was admissible because the detective relied on the statute in good-faith when making the search.

The Court reversed and determined that the Fourth Amendment exclusionary rule does not require the exclusion of evidence that results from a search conducted pursuant to an unconstitutional statute. Drawing from United States v. Leon, the Court again focused on the deterrence objective of the exclusionary rule:

The approach used in Leon is equally applicable to the present case. The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law.

The Court essentially extended the good-faith exception to an officer's reasonable reliance on a legislative determination that a search was constitutionally permissible.

4. Arizona v. Evans

In Arizona v. Evans, much like United States v. Leon and Massachusetts v. Sheppard, the United States Supreme Court confronted a situation in which police acted in reasonable reliance on a judicial-branch representation that a warrant provided authorization for an arrest. In Evans, police stopped the defendant for a routine traffic violation and during the stop checked the computer database for any outstanding warrants. Because a judicial clerk failed to notify the Sheriff that the defendant's warrant had been quashed, the officers' computer check came back positive, the defendant was ar-

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68. Id. at 344.
69. Id. at 345-46.
70. Id. at 359-60.
77. Evans, 514 U.S. at 4.
rested, and the officers found marijuana pursuant to a search incident to the arrest.\textsuperscript{78}

Drawing from \textit{Leon}, the Court concluded that because the arrest and search were the product of judicial error, suppression was not required.\textsuperscript{79} The Court explained that, like the state-court judge whose error authorized the search in \textit{Leon}, "court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime" and consequently "they have no stake in the outcome of particular criminal prosecutions."\textsuperscript{80} Thus, "[a]pplication of the \textit{Leon} framework supports a categorical exception to the exclusionary rule for clerical errors of court employees."\textsuperscript{81}

\section*{III. THE NEW FOURTH AMENDMENT EXCLUSIONARY RULE: \textit{HERRING V. UNITED STATES}}

\subsection*{A. FACTUAL AND PROCEDURAL BACKGROUND}

On an Alabama summer afternoon, Bennie Dean Herring drove to the Coffee County Sheriff's Department to reclaim an item from his impounded truck.\textsuperscript{82} An officer at the Sheriff's Department saw Herring, who was "no stranger to law enforcement," and asked the county's warrant clerk to run a search for any outstanding arrest warrants.\textsuperscript{83} When this effort came up empty, the officer asked the clerk to check with the clerk in neighboring Dale County.\textsuperscript{84} The neighboring county clerk's search revealed "an active arrest warrant for Herring's failure to appear on a felony charge."\textsuperscript{85} After the Coffee County clerk relayed this information back to the officer, the officer asked that clerk make sure the neighboring clerk faxed over a copy of the warrant to confirm the warrant's validity.\textsuperscript{86} Meanwhile, the officer and a fellow deputy trailed "Herring as he left the impound lot, pulled him over, and arrested him."\textsuperscript{87} After conducting a search incident to the arrest, the officer discovered a pistol in Herring's vehicle, which as a con-

\begin{itemize}
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} See \textit{id.} at 14-15.
\item \textsuperscript{80} \textit{id.} at 15 (citations omitted).
\item \textsuperscript{81} \textit{id.} at 16.
\item \textsuperscript{82} Herring \textit{v.} United States, 129 S. Ct. 695, 698 (2009).
\item \textsuperscript{83} \textit{Herring}, 129 S. Ct. at 698. It is not altogether clear why the particular investigator was suspicious of Herring. According to Herring's account, "Herring told the district attorney, among others, of his suspicion that" the particular investigator "had been involved in the killing of a local teenager," and the investigator "had pursued Herring to get him to drop the accusations." \textit{Id.} at 705 (Ginsburg, J., dissenting) (citation omitted).
\item \textsuperscript{84} \textit{id.} at 698 (majority opinion).
\item \textsuperscript{85} \textit{id.}
\item \textsuperscript{86} \textit{id.}
\item \textsuperscript{87} \textit{id.} (stating that the officer and deputy trailed and arrested the suspect).
\end{itemize}
victhed felon he could not possess, and methamphetamine in his pocket. 88

Unbeknownst to the arresting officers, the neighboring county clerk erroneously reported Herring's outstanding warrant. 89 The Dale County Sheriff's computer records did not accurately represent actual arrest warrants. 90 After the neighboring county clerk realized that the warrant had been recalled five months earlier, she immediately informed her counterpart in Coffee County to alert her to the mix-up, and the Coffee County clerk relayed the mix-up via radio to the arresting officers. 91 At this point, however, the arresting officers had already pulled methamphetamine out of Herring's pocket and plucked a pistol from his vehicle. 92

Herring was indicted in the United States District Court for the Middle District of Alabama for illegally possessing the drugs and gun, in violation of 18 U.S.C. section 922(g) (1) (2005) and 21 U.S.C. section 844(a) (2005). 93 He moved to suppress the gun and the drugs because his arrest had been illegal and the warrant had been recalled. 94 "[T]he Magistrate Judge recommended denying the motion because the arresting officers had acted in a good-faith belief that the warrant was still outstanding." 95 Thus, even if the arresting officers' actions violated the Fourth Amendment, "there was 'no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes.'" 96 "The District Court adopted the Magistrate Judge's recommendation." 97

The United States Court of Appeals for the Eleventh Circuit affirmed, finding that the arresting officers "were entirely innocent of any wrongdoing or carelessness." 98 The Eleventh Circuit assumed that the clerk responsible for the error was a law enforcement official, but found the exclusionary rule too harsh a remedy for a relatively minor mistake. 99 As the Eleventh Circuit put it, "the conduct in question [w]as a negligent failure to act, not a deliberate or tactical choice

88. Id.
89. Id. ("After checking Dale County's computer database, [the neighboring county clerk] replied that there was an active arrest warrant for Herring's failure to appear on a felony charge.").
90. Id.
91. Id.
92. Id.
93. Id. at 699.
94. Id.
95. Id.
96. Id. (citation omitted).
97. Id.
98. Id. at 699 (quoting United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007)).
99. Id.
to act," and thus the benefit of suppression “would be marginal or non-existent.”100 In essence, the Eleventh Circuit found the evidence admissible under the United States v. Leon101 good-faith exception to the exclusionary rule.

B. MAJORITY OPINION

In Herring v. United States,102 Chief Justice Roberts began the majority opinion by stating, for purposes of the decision, that the majority “accept[s] the parties’ assumption that there was a Fourth Amendment violation.”103 Properly framed, “[t]he issue is whether the exclusionary rule should be applied.”104

The majority began from the premise that a Fourth Amendment violation, in and of itself, was not sufficient to trigger the exclusionary rule.105 Rather, the majority explained, exclusion “has always been our last resort, not our first impulse.”106 The majority justified this limited application of the exclusionary rule by focusing on the deterrence objectives the rule serves: The exclusionary rule “is not an individual right and applies only where it result[s] in appreciable deterrence.”107 The majority noted that it has “repeatedly rejected” the notion that exclusion flows automatically from a Fourth Amendment violation and instead has “focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.”108

The majority then extrapolated from this deterrence-centered conception of the exclusionary rule. The Court stated that because the exclusionary rule is a utilitarian tool that balances the benefits of deterring future police misconduct with the costs of letting potentially guilty defendants go free, the exclusionary rule’s applicability depends on whether the benefits outweigh the costs.109 The exclusionary rule’s principal cost, the majority noted, is “letting guilty and possibly dangerous defendants go free – something that ‘offends basic concepts of

100. Id.
103. Herring, 129 S. Ct. at 699. The Court did so, however, with notable hesitance, suggesting that the police conduct at issue may not have even violated the Fourth Amendment at all. See Herring v. United States, 129 S. Ct. 695, 699 (2009). (“The very phrase “probable cause” confirms that the Fourth Amendment does not demand all possible precision. And whether the error can be traced to a mistake by a state actor or some other source may bear on the analysis.”).
105. Id. at 700 (citations omitted).
106. Id. at 700 (citing Hudson v. Michigan, 547 U.S. 586, 591 (2006)).
107. Id. (internal citation marks and citation omitted).
108. Id. (citation omitted).
109. Id. at 700.
the criminal justice system."

Consequently, the exclusionary "rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." The majority then cited United States v. Leon, Massachusetts v. Shepard, Illinois v. Krull, and Arizona v. Evans for the general proposition that negligent police errors are not culpable enough to trigger the exclusionary rule. Most notably, the majority interpreted Evans rather broadly, and explained that Evans, which declared mistakes by judicial employees could not give rise to evidentiary exclusion, had three primary justifications. First, "[t]he exclusionary rule was crafted to curb police rather than judicial misconduct." Second, "court employees were unlikely to try to subvert the Fourth Amendment." Third, and most importantly, "there was no basis for believing that application of the exclusionary rule in those circumstances would have any significant effect in deterring the errors." Thus, the majority interpreted Evans as having "left unresolved 'whether the evidence should be suppressed if police personnel were responsible for the error'" and consequently rejected the argument, which Justice Breyer raised in dissent, "that Evans was entirely premised on a distinction between judicial errors and police errors.”

The majority then outlined prior cases where the exclusionary rule was triggered and held that "conduct that was patently unconstitutional" was the common thread tying those cases together. In particular, the majority discussed Weeks v. United States, the foundational exclusionary rule case. In Weeks, officers broke into the defendant’s home without a warrant, seized incriminating papers, and returned later to seize even more. In addition to not having a warrant, the officers "were so lacking in sworn and particularized information that 'not even an order of court would have justified such

110. Id. at 701 (citing Leon, 468 U.S. at 908).
117. Herring, 129 S. Ct. at 701.
118. Id.
119. Id. (citing Evans, 514 U.S. at 15).
120. Id. at 700 & n.3 (majority opinion) (referring to Breyer, J., dissesenting).
121. Id. at 702 (citations omitted).
122. 232 U.S. 383 (1914).
procedure."\textsuperscript{124} The majority interpreted \textit{Mapp v. Ohio}\textsuperscript{125} in similar fashion and found that "equally flagrant conduct was at issue."\textsuperscript{126} In \textit{Mapp}, officers pushed the door open, flashed a false warrant, kept the defendant's lawyer from entering, handcuffed the defendant, and searched extensively for evidence of obscenity.\textsuperscript{127} In contrast to the flagrant violations of the Fourth Amendment present in \textit{Weeks} and \textit{Mapp}, the majority determined that the error at issue in \textit{Herring} arose from "nonrecurring and attenuated negligence" and is thus "far removed from the core concerns that led us to adopt the [exclusionary] rule in the first place."\textsuperscript{128}

The majority then established what is now the new Fourth Amendment exclusionary rule:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.\textsuperscript{129}

The majority did, however, cabin its holding to some extent, giving some life to the future of the exclusionary rule. The majority recognized that not "all recordkeeping errors by the police are immune from the exclusionary rule."\textsuperscript{130} The majority cautioned that "if the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation."\textsuperscript{131} Thus, police departments cannot deliberately keep their officers in the dark or recklessly maintain information in order to procure evidence for prosecutions. The warrant system at issue in \textit{Herring}, however, did not suffer from any systemic or routine defects and thus posed no Fourth Amendment problem.

\textsuperscript{124} \textit{Herring}, 129 S. Ct. at 702. (citing \textit{Weeks}, 232 U.S. at 393-94).
\textsuperscript{125} 367 U.S. 643 (1961).
\textsuperscript{126} \textit{Herring}, 129 S. Ct. at 702 (citing \textit{Mapp v. Ohio}, 367 U.S. 643, 644-45 (1961)).
\textsuperscript{127} \textit{Id.} (citing \textit{Mapp}, 367 U.S. at 644-45).
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} at 702.
\textsuperscript{130} \textit{Id.} at 703.
\textsuperscript{131} \textit{Id.} at 703.
C. DISSENTING OPINIONS

In *Herring v. United States*, Justice Ginsburg authored a dissenting opinion and offered what she referred to as "a more majestic conception’ of the exclusionary rule." The dissent first took issue with the majority’s theoretical determination that the sole purpose of the exclusionary rule is the deterrence of future police misconduct. The dissent agreed that deterrence is a “main objective” of the rule, but disagreed that deterrence alone served as the sole justification for the rule’s existence. In addition to deterrence, the rule “enables the judiciary to avoid the taint of partnership in official lawlessness,” and “minimize[es] the risk of seriously undermining popular trust in government” by making sure “the government would not profit from its lawless behavior.”

The dissent then focused directly on the exclusionary rule’s application under the circumstances at issue and found that the exclusionary rule’s deterrent effect would be substantial and outweigh the relative costs of excluding valuable evidence. Drawing on tort principles, the dissent recognized “that liability for negligence, i.e., lack of due care, creates an incentive to act with greater care.” Applying the exclusionary rule to a police clerk’s computer error, the dissent reasoned, is analogous to traditional respondeat superior liability in the tort setting. “Just as the risk of respondeat superior liability encourages employers to supervise . . . their employees’ conduct [more carefully], so the risk of exclusion of evidence encourages policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems.”

Moreover, the dissent opined that the particular warrant system at issue was not, as the majority contended, a system free of systemic error. The system that eventually led to Herring’s arrest had “no electronic connection between the warrant database of the . . . sheriff’s [d]epartment and . . . [the warrant database] of the county Circuit Clerk’s office, which is located in the basement of the same

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133. Justice Ginsburg’s dissent was joined by Justice Stevens, Justice Souter, and Justice Breyer.
134. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting Evans, 514 U.S. at 18 (Stevens, J., dissenting)).
135. See *id.* at 707-08.
136. *Id.*
137. *Id.* (citation omitted).
138. See *id.* at 708.
139. *Id.* at 708.
140. *Id.*
141. *Id.* (quoting Evans, 514 U.S. at 29 n.5 (Ginsburg, J., dissenting)).
142. See *id.* at 708 (describing deficiencies of the warrant system).
In order for the database to be accurate, someone had to find a hard copy of the warrant, return it to the Clerk, and manually update the sheriff department's database. The dissent argued that the county did not routinely check the warrant system at issue for accuracy and pointed out that the neighboring county clerk did not discover the error that led to Herring's arrest until five months after the warrant had been recalled. Thus, the Sheriff's Department "is in a position to remedy the situation and might well do so if the exclusionary rule is there to remove the incentive to do otherwise."

As for the costs of the exclusionary rule, the dissent emphasized "the paramount importance of accurate recordkeeping in law enforcement" and found that the benefits of deterring careless recordkeeping outweighed the potential costs of excluding valuable evidence. Information sharing is not only vitally important and central to law enforcement endeavors but is also in need of reform. "Electronic databases form the nervous system of contemporary criminal justice operations," and "their breadth and influence have dramatically expanded" in recent years. The dissent noted that law enforcement databases are often "insufficiently monitored and often out of date."

The dissent also found little solace in the majority's concession "that 'exclusion would certainly be justified' if 'the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests.'" The dissent laid out three reasons why suppressing only deliberate or reckless clerical errors is inadequate. First, this approach leaves many individuals, like Herring, with no remedy when the government violates their Fourth Amendment rights. No civil remedy, in all probability, will exist under 42 U.S.C. section 1983 (1996) because qualified immunity would protect the arresting officer, and the police department is not vicariously liable for the negligence of its employees. Even if these hurdles are jumped, identifying the

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143. Id.
144. Id.
145. Id.
146. Id. (quoting 1 Wayne R, LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.8(e)(4th ed. 2004)).
147. Id. at 708.
148. Id. (noting that "police today can access ... National Crime Information Center (NCIC) ... terrorist watchlists, the Federal Government's employee eligibility system, and various commercial databases.").
149. Id.
150. Id. at 709.
151. Id.
152. Id.
individual who committed the error will be practically impossible.\textsuperscript{153} Second, police forces do not have sufficient incentives to keep accurate records.\textsuperscript{154} Although police will have no inclination to send police officers out to make unnecessary arrests, police also use data to legitimize their predisposed feelings that certain individuals should be arrested.\textsuperscript{155} Third, a defendant will not be able to prove systemic negligence or routine errors without discovery mechanisms, which in turn will impose “a considerable administrative burden on courts and law enforcement.”\textsuperscript{156}

Justice Breyer, who joined Justice Ginsburg’s dissent, also dissented “separately to note one additional supporting factor that” justifies the application of the exclusionary rule.\textsuperscript{157} In particular, he focused on the “distinction between judicial errors and police errors,” and why suppression is warranted for police errors and not for judicial errors.\textsuperscript{158} Justice Breyer laid down three reasons why the distinction, recognized in \textit{Arizona v. Evans},\textsuperscript{159} is important.\textsuperscript{160} First, the exclusionary rule was historically intended to deter police misconduct, not judicial mistakes.\textsuperscript{161} Second, court employees, as a class, are not inclined to violate the commands of the Fourth Amendment.\textsuperscript{162} Third, the application of the exclusionary rule would have little practical effect in light of the nature of a court clerk’s role.\textsuperscript{163} “Court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime” and thus “have no stake in the outcome of particular criminal prosecutions.”\textsuperscript{164} These three reasons, Justice Breyer argued, explain why the distinction is important and why the Court’s cases in \textit{United States v. Leon},\textsuperscript{165} \textit{Massachusetts v. Sheppard},\textsuperscript{166} \textit{Illinois v. Krull},\textsuperscript{167} and \textit{Evans} came out in favor of admitting the evidence despite the Fourth Amendment violation.\textsuperscript{168} In contrast to those cases, the \textit{Herring} decision concerned a police clerk error, which cuts in favor of applying the exclusionary rule.

\textsuperscript{153} Id. (indicating that identifying the person who committed the error is practically impossible).
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 710.
\textsuperscript{157} Id. (Breyer, J., dissenting).
\textsuperscript{158} Id.
\textsuperscript{159} 514 U.S. 1 (1995).
\textsuperscript{160} \textit{Herring}, 710 (Breyer, J., dissenting).
\textsuperscript{161} Id. (quoting \textit{Evans}, 514 U.S. at 14).
\textsuperscript{162} Id. (quoting \textit{Evans}, 514 U.S. at 14-15).
\textsuperscript{163} Id. (quoting \textit{Evans}, 514 U.S. at 15).
\textsuperscript{164} Id. (quoting \textit{Evans} 514 U.S. at 15).
\textsuperscript{165} 468 U.S. 897 (1984).
\textsuperscript{166} 468 U.S. 981 (1984).
\textsuperscript{167} 480 U.S. 340 (1987).
\textsuperscript{168} \textit{Herring}, 129 S. Ct. at 710-11.
The distinction between police errors and judicial errors, Justice Breyer added, is also "easier for courts to administer than the [majority's] case-by-case, multifactored inquiry" into police culpability. Consequently, Justice Breyer "would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation."169

IV. THE "GOOD-FAITH" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE POST-HERRING

A. HERRING'S LIMITATIONS

1. Negligence Attenuated from the Arrest

Perhaps the most important limitation in the Herring v. United States170 opinion is the United States Supreme Court's statement that the negligence-is-not-enough formulation of the exclusionary rule applies to police conduct "attenuated from the arrest."171 The Court did not explain this limitation, but the attenuation reference appears to refer to the fact that the clerk who made the error did not make the arrest, and the clerk made the error five months before the arrest.172 Consequently, the Court may have left open the question whether the good-faith exception applies when the officer who made the error is also the officer who conducted the warrantless illegal search or seizure, or whether the temporal distance between the error and the arrest changes the application of the exclusionary rule.

From a deterrence standpoint, the Herring case was rather weak for applying the exclusionary rule. First, the arresting officers had no knowledge of the error that led to the illegal arrest and had no authority to correct the particular mistake at issue.173 The arresting officers worked in a wholly different department in a different county and never communicated with the person having knowledge of the mistake.174 Second, the agency responsible for the arrest had no authority to correct such mistakes even if the agency knew about those

169. Id. at 711.
173. See Herring, 129 S. Ct. at 698 (noting that error was not known to officer and was made by police clerk in neighboring county).
174. Id.
mistakes.\textsuperscript{175} The \textit{Herring} case record did not indicate that the Coffee County Sheriff's Department, whose officers made the arrest, had any control over recordkeeping in the Dale County Sheriff's Department, whose officials were responsible for the error.\textsuperscript{176} The arresting agency, in other words, had no direct authority to correct the error at issue by disciplining or training the employee responsible for the mistake. Consequently, the exclusionary rule's deterrent effect would be minimal in light of the relationship between the agency causing the error and the agency effecting arrest.\textsuperscript{177} Both the arresting officer's lack of knowledge of the error and the arresting agency's lack of authority to correct the error could distinguish \textit{Herring} from arrests based on a probable cause determination made directly by the arresting officer.

The Appellate Court of Illinois's recent decision in \textit{People v. Morgan}\textsuperscript{178} illustrates how some courts may read \textit{Herring} narrowly.\textsuperscript{179} In Morgan, the officers arrested the defendant for various drug offenses after the officers searched the defendant's house in reliance on a three-day-old arrest warrant that later turned out to be invalid.\textsuperscript{180} The officers knew the warrant was not current and did not verify the warrant's validity, contrary to the department's standard practice.\textsuperscript{181}

\begin{itemize}
\item 175. \textit{Id.}
\item 176. \textit{See id.}

Hoping to gain a beneficial deterrent effect on Dale County personnel by excluding evidence in a case brought by Coffee County officers would be like telling a student that if he skips school one of his classmates will be punished. The student may not exactly relish the prospect of causing another to suffer, but human nature being what it is, he is unlikely to fear that prospect as much as he would his own suffering.

Herring, 492 F.3d at 1218. For another United State Supreme Court case arguing for the proposition that the Fourth Amendment exclusionary rule is most effective when the agency responsible for the error is also the agency making the arrest, see INS v. Lopez-Mendoza, 468 U.S. 1032, 1043 (1984) (noting that, when an agency responsible for unlawful arrest is also agency who subsequently brings the deportation action, the exclusionary rule is more effective).
\item 178. 901 N.E.2d 1049 (2009).
\item 179. People v. Morgan, 901 N.E.2d 1049 (Ill. App. Ct. 2009). This Illinois appellate decision provides a good illustration of \textit{Herring}'s potential limitations because, in Illinois, the Fourth Amendment of the United States Constitution has the same meaning and effect as the equivalent provision in the Illinois Constitution. See Morgan, 901 N.E.2d at 1057 (stating that Article I, section 6 of Illinois Constitution is in "limited lockstep" with the Fourth Amendment which means Illinois courts will "look first to the federal constitution, and only if federal law provides no relief [will they] turn to the state constitution to determine whether a specific criterion . . . justifies departure from federal precedent.") (citations omitted).
\item 180. \textit{Id.} at 1051-54.
\item 181. \textit{Id.} at 1060-61.
\end{itemize}
The officers provided no explanation for their acceptance of the outdated warrant list and their failure to request a newer list.\textsuperscript{182} The Appellate Court of Illinois determined that the exclusionary rule, as explained in \textit{Herring}, required the suppression of the evidence.\textsuperscript{183} The court reached this determination by distinguishing \textit{Herring} in two important respects.\textsuperscript{184} First, the court emphasized that, unlike \textit{Herring}, the arresting officers knew before the arrest that the warrant was no longer current.\textsuperscript{185} This level of knowledge differed markedly from the \textit{Herring} arresting officer's level of knowledge, who had no knowledge the warrant had been recalled. Second, the court noted that, unlike \textit{Herring}, "it was not the officers' reliance on the warrant sheet from another county that led them to mistakenly arrest defendant. It was their own conduct in relying on an up-to-three-day-old warrant list without making any effort to check the continued validity of the warrant."\textsuperscript{186} Thus, the Appellate Court of Illinois concluded that the conduct at issue evidenced the type of "reckless disregard" the United States Supreme Court noted would justify exclusion of the evidence in \textit{Herring}.\textsuperscript{187}

2. Fact-Specific Nature of the Holding

The \texttt{Herring} v. \textit{United States}\textsuperscript{188} opinion is also limited by the United States Supreme Court's emphasis on the fact-specific nature of its holding.\textsuperscript{189} The Court concluded that the exclusionary rule does not apply "when police mistakes are the result of negligence such as that described here."\textsuperscript{190} Thus, the \texttt{Herring} opinion largely leaves open the issue of how the exclusionary rule applies when the Fourth Amendment violation results directly from police negligence by the arresting officer.

In light of the Court's emphasis on the facts of the case, it may prove significant that the \texttt{Herring} opinion directly concerned an error made by a police clerk and not an error by an officer in the field. While police departments pay police clerks' salaries, clerical employees responsible for maintaining records are not "engaged in the often competitive enterprise of ferreting out crime"\textsuperscript{191} in the same way as officers in the field. Police clerks perform many of the same functions

\begin{itemize}
\item \textsuperscript{182} Id. at 1061.
\item \textsuperscript{183} Id. at 1051.
\item \textsuperscript{184} See id. at 1060-62.
\item \textsuperscript{185} Id. at 1060-61.
\item \textsuperscript{186} Id. at 1062.
\item \textsuperscript{187} Id. at 1062.
\item \textsuperscript{188} 129 S. Ct. 695 (2009).
\item \textsuperscript{189} Herring v. United States, 129 S. Ct. 695 (2009).
\item \textsuperscript{190} Herring, 129 S. Ct. at 704 (emphasis added).
\item \textsuperscript{191} United States v. Leon, 468 U.S. 897, 914 (1984) (citations omitted).
\end{itemize}
as the Arizona v. Evans192 judicial clerk. Thus, while the Herring opinion extended the good-faith exception to reliance on police errors, the clerical function of the particular police employee who made the error still limits the Herring holding.193

Similarly, it is important to note that the Herring opinion still concerned the purported presence of a warrant. While the requirement that police obtain a warrant before conducting a search or seizure is riddled with multiple exceptions,194 the Court has nonetheless expressed a strong judicial preference for warrants.195 If the Herring opinion stands for the proposition that all illegally seized evidence will be admissible so long as the police did not act culpably, then the warrant requirement will be significantly weakened, if not nullified. Police, armed with the knowledge that good-faith saves all blunders, would be encouraged to ignore the warrant requirement altogether. This result would not only prevent a neutral and detached judicial officer from reviewing the propriety of the police conduct but would also make good-faith difficult to prove (or rebut). Without tangible evidence of the basis for the police conduct, which a warrant provides, the good-faith analysis would depend almost entirely on the officer's own assertions.196 In essence, a general reasonableness standard would govern the Fourth Amendment, and the warrant requirement would not be much of a requirement at all. While at least one Justice has rejected the categorical warrant requirement and embraced a general reasonableness approach to the Fourth Amendment,197 that view has not traditionally garnered the majority of justices' support.

193. In fact, the United States, in its brief on the merits, relied on the clerical function of the error-producing employee as support for the limited nature of the Herring holding. See Brief of Respondents at 22-23, Herring 129 S. Ct. 695 (No. 07-513) (arguing that clerical function of employee is merely minor extension of Evans).
194. See California v. Acevedo, 500 U.S. 565, 582 (1991) ("The [warrant clause's] victory was illusory .... The "warrant requirement" [has] become so riddled with exceptions that is [is] basically unrecognizable.") (Scalia, J., concurring).
195. See George M. Dery, The Unwarranted Extension of the Good-faith Exception to Computers: An Examination of Arizona v. Evans and its Impact on the Exclusionary Rule and the Structure of Fourth Amendment Litigation, 23 Am. J. CRIM. L. 61, 67 n.17 (collecting multiple United States Supreme Court cases and scholarly citations standing for proposition that there is strong judicial preference for warrants).
196. See David R. Childress, Maryland v. Garrison: Extending the Good-faith Exception to Warrantless Searches, 40 BAYLOR L. REV. 151 (1988) (noting that applying good-faith exception to warrantless searches poses proof problems because no objective evidence of good-faith exists).
197. See California v. Acevedo, 500 U.S. 565, 583-84 (Scalia, J., concurring) (stating that best approach to Fourth Amendment analysis is "to return to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded.").
3. States May Provide More Protection Against Unreasonable Searches and Seizures than the Federal Constitution

Any analysis of the *Herring v. United States* opinion's impact on the exclusionary rule would be incomplete without mentioning the role of the States in providing protection from illegal searches and seizures. The federal interpretation of the Fourth Amendment will not change the protections afforded individuals by state interpretations of state statutes and state constitutional provisions that provide more protection than the United States Constitution provides against illegal searches and seizures. Although the United States Supreme Court made the exclusionary rule enforceable against the states through the operation of the Fourth and Fourteenth Amendments of the United States Constitution, the States are free, as a matter of state law, to impose greater restrictions on police conduct that those the Court holds to be necessary as a matter of federal constitutional law. Thus, "the State[s] have power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." Accordingly, many states have accepted the Court's invitation and provided higher standards on searches and seizures than required by the United States Constitution by rejecting the *United States v. Leon* good-faith exception. In states that have rejected the *Leon* good-faith exception to the exclusionary rule, the *Herring* opinion will have little impact. If a State has rejected the *Leon* good-faith exception, then the Court's explication of that exception in *Herring* will likewise be rejected. Some states, however, have held that their state constitutional provisions must mirror the United States Constitution's Fourth Amendment. In these states, the *Herring* opinion could be influential, either directly or indirectly.

B. HERRING’S POTENTIAL BREADTH

Despite the potential limitations, the *Herring v. United States* decision’s rationale could arguably support a more general exception to the exclusionary rule that applies to all police conduct, including warrantless searches. While the attenuation reference provides a textual hook that future courts can use to limit the opinion in future cases, the *Herring* opinion’s reasoning is not altogether consistent with the distinction between immediate police errors leading to illegal searches and seizures (which presumably would lead to evidentiary exclusion) and attenuated police errors leading to illegal searches and seizures (which presumably would not lead to evidentiary exclusion). Two reasons in particular undercut the importance of the distinction. First, the United States Supreme Court recognized that the exclusionary rule’s applicability requires an analysis of all officers involved. Thus, the Court did not consider significant that the error was made by police personnel not directly responsible for the arrest. Second, the Court primarily focused on the exclusionary rule’s utilitarian nature, predicking the exclusionary rule’s application on whether the deterrence benefits outweigh the costs of exclusion. That cost-benefit analysis is presumably the same whether the officer directly makes a negligent and isolated error or relies on the negligent and isolated error of another officer. If these two reasons prove persuasive, then the attenuation reference does not mean much and, consequently, exclusion will apply in only a very narrow class of cases.

C. HERRING’S COMPLICATIONS

1. **Is the Exclusionary Rule “Result-Oriented?”**

The *Herring v. United States* opinion presents the significant doctrinal challenge of what factors are appropriate to consider when

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206. See *Herring*, 129 S. Ct. at 699-700 (“In analyzing the applicability of the rule, Leon admonished that we must consider the actions of all the police officers involved.”) (citation omitted). See also *Leon*, 468 U.S. at 923 n.24 (“It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.”).
207. See Posting of Richard McAdams to University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2009/01/herring-and-the-exclusionary-rule.html (Jan. 17, 2009, 12:06 EST) (“If we don’t exclude evidence when officer A relies on a negligent but isolated error by officer B, because the evidentiary costs outweigh the deterrence benefits, then I don’t see why we would exclude evidence when Detective B relies on her own negligent but isolated error. Presumably the cost-benefit analysis is the same.”).
conducting the cost-benefit test for exclusion.\textsuperscript{209} The United States Supreme Court does not elaborate on the requirement that “[t]he deterrent effect of suppression must be substantial and outweigh any harm to the justice system.”\textsuperscript{210} As the Court noted, “[t]he principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free.”\textsuperscript{211} This statement begs the question, which at least one court already has raised: “[I]s the Supreme Court directing lower courts to become result-oriented in their application of the exclusionary rule?”\textsuperscript{212} The Court did not elaborate on exactly what “harm to the justice system” can be considered when weighing the balance.\textsuperscript{213} Thus, the cost-benefit test for exclusion will be difficult to apply “in a rational and predictable manner.”\textsuperscript{214}

While difficult, the Court does provide some guidance. The Court stated:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.\textsuperscript{215}

Application of Professor Yale Kamisar’s distinction between the “proportionality approach” and the “comparative reprehensibility approach” to the exclusionary rule is helpful in understanding what this formulation of the exclusionary rule means.\textsuperscript{216} Under the “proportionality approach” to the exclusionary rule, the focus is on “the disparity or disproportion between the police error and the ‘drastic’ remedy of exclusion.”\textsuperscript{217} Adherents to this “proportionality approach” are largely concerned with situations “when an ‘honest’ or ‘inadvertent’ police blunder affords a guilty defendant – any guilty defendant – an unacceptable windfall.”\textsuperscript{218} Under the “comparative reprehensibility” approach to the exclusionary rule, the focus is on “the disparity or dis-

\begin{footnotesize}
\begin{enumerate}
\item[209.] Herring v. United States, 129 S. Ct. 695 (2009).
\item[210.] \textit{Herring}, 129 S. Ct. at 704 (emphasis added).
\item[211.] Id. at 701.
\item[212.] United States v. Thomas, Crim. No. 08-cr-87-bbc-02, 2009 WL 151180, at *8 (W.D.Wis. Jan. 20, 2009).
\item[213.] \textit{Thomas}, 2009 WL 151180, at *8 (quoting \textit{Herring}, 129 S. Ct. 695, 704 (2009)).
\item[214.] Id. at *8.
\item[215.] \textit{Herring}, 129 S. Ct. at 702 (emphasis added).
\item[217.] Id. at 7.
\item[218.] Id.
\end{enumerate}
\end{footnotesize}
proportion between the officer's misconduct and the defendant's."^{219} Adherents to this "comparative reprehensibility" approach are largely concerned with situations "where the murderer or armed robber 'goes free' despite the fact that his misconduct is more dangerous or reprehensible than the officer's – and this is so even when the officer has committed a 'deliberate' or 'gross' constitutional violation."^{220}

At first blush, the *Herring* rule appears to combine both approaches. The Court stated that for the exclusionary rule to apply, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it."^{221} This language is in line with the "proportionality approach," where the exclusion of evidence depends on the disparity between police error and the severe remedy of exclusion. The focus is on the deliberateness of police action regardless of the severity of the defendant's crime. Yet, the Court also stated that police conduct must be "sufficiently culpable that such deterrence is worth the price paid by the justice system."^{222} This language is in line with the "comparative reprehensibility" approach, where the exclusion of evidence depends on the disparity between the officer's misconduct and the defendant's crime. The nature of the defendant's crime, be it murder or candy stealing, would be crucial to whether "the price paid by the justice system"^{223} is too high to warrant the exclusion of the evidence.

While interpreting the *Herring* opinion as combining both the proportionality and comparative reprehensibility approaches is arguably consistent with the Court's language, the *Herring* decision, when taken as a whole, is best read as embracing the "proportionality approach" and not the "comparative reprehensibility" approach. Put simply, the exclusionary rule should only apply if the officer's conduct is sufficiently deliberate and sufficiently culpable, regardless of what crime is committed. The fact that the *Herring* court never considered significant the nature of the crime at issue, the possession of methamphetamine and possession of a gun by a convicted felon, supports this interpretation. Rather, the Court focused primarily on the police conduct rather than the defendant's crime: "As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent *conduct*, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level."^{224}

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219. *Id.* at 8.
220. *Id.* at 7-8.
221. *Herring*, 129 S. Ct. at 702.
222. *Id.*
223. *Id.*
Thus, the exclusionary rule does not rest on the magnitude of the defendant's crime.

2. The Blurring of Rights and Remedies: Will Every Novel Fourth Amendment Question Preclude the Application of the Exclusionary Rule?

Stating that the proper focus of the exclusionary rule analysis should be on the police conduct rather than the defendant's crime, does not fully resolve the problem of determining what police conduct will count as “sufficiently deliberate” or “sufficiently culpable.” In particular, it is difficult to see how police conduct can be “sufficiently deliberate” or “sufficiently culpable” so as to trigger the exclusionary rule when the Fourth Amendment is applied to novel factual scenarios. For example, in *Logan v. Virginia*, the Virginia Court of Appeals addressed a situation where the arresting officer entered a common area of the defendant's rooming house without a warrant, and the arresting officer subsequently saw the defendant possess cocaine. The court held that the Fourth Amendment exclusionary rule, as interpreted in *Herring*, did not require suppression of the evidence. The court focused on the fact that a “principled disagreement” among courts as to whether individuals have a reasonable expectation of privacy in the common area of a dwelling house indicated that the arresting officer acted in good-faith. As the court stated, “in cases where experienced jurists disagree among themselves as to the legality of the police conduct, we can hardly expect law enforcement officers to predict which contesting juristic view will ultimately prevail and become binding precedent.”

Under this approach, every novel substantive Fourth Amendment question would preclude application of the exclusionary rule. That approach, however, is inconsistent with many of the Court's decisions defining the substantive scope of the Fourth Amendment. For example, before the Court decided *Kyllo v. United States*, an officer deciding that he could lawfully use a thermal imager to develop probable cause that an occupant of a home was growing marijuana was hardly unreasonable. Yet, the Court never suggested that the officer's reasonableness had anything to do with whether the evidence should be excluded.

227. *Logan*, 673 S.E.2d at 527.
228. *Id.* at 526.
229. *Id.*
One answer to this problem is simply to interpret *Herring* narrowly as a simple extension of *Arizona v. Evans* and not applying across the board to all police conduct. If so, the problem of undefined Fourth Amendment rights will not present itself. If the *Herring* opinion does apply to all police conduct, then the *Logan v. Virginia* court's approach is viable and almost every novel Fourth Amendment issue could preclude application of the exclusionary rule.

V. CONCLUSION

The Fourth Amendment exclusionary rule has changed. To trigger the exclusionary rule, police conduct must be "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Negligence alone is not enough to suppress any evidence.

The *Herring v. United States* decision may be a relatively minor extension of existing precedent. On its facts, *Herring* simply extended the *Arizona v. Evans* holding that errors made by judicial clerks do not trigger the exclusionary rule to errors made by police clerks. Also, the Court has never seriously required a showing of police culpability outside the contexts of *United States v. Leon*, *Massachusetts v. Sheppard*, *Illinois v. Krull*, and *Arizona v. Evans* – cases that all concerned a legislative or judicial authorization for the police conduct. Finally, the Court's emphasis on the fact the negligent conduct in *Herring* was "attenuated from the arrest" as well as the Court's emphasis on the fact specific nature of the holding suggest that the Court is not endorsing a wholesale reform of the exclusionary rule.

The reasoning of the *Herring* opinion, however, is much broader and appears to authorize lower courts to apply the good-faith exception to all police conduct until the United States Supreme Court states otherwise. This expansion will pose new doctrinal problems, namely how courts will square the fact that negligent police conduct is insuffi-
cient for suppression with a substantive Fourth Amendment right that the courts have never clearly defined. While the contours of the exclusionary rule are not exactly clear post-*Herring*, one thing is clear: *Herring*, a narrow 5-4 decision, is hardly the last word on the Fourth Amendment exclusionary rule.