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RECENT DEVELOPMENTS

THE SMELL OF *HERRING*: A CRITIQUE OF THE SUPREME COURT'S LATEST ASSAULT ON THE EXCLUSIONARY RULE

WAYNE R. LAFAVE*

*"The herring, the smell of herring again The smell of the
herring had penetrated [one's] thoughts"*

~ MARTHA BLUM, *THE WALNUT TREE* 227 (1999).

I. INTRODUCTION

In 1961, about the time I began my labors in academe, the Supreme Court in *Mapp v. Ohio*¹ gave full effect to the Fourth Amendment by extending the suppression remedy of *Weeks v. United States*² to cases in the state courts as well. It was thus perhaps inevitable that the Fourth Amendment (in actuality "second to none in the Bill of Rights"³) should become my *cheval de bataille*. In the intervening years—almost a half century now—my main preoccupation (or, some would doubtless say, my obsession) has been with that Amendment, and thus, I have had occasion during that time to study and reflect upon what must be hundreds of Supreme Court decisions having to do with search and seizure.⁴ Many of those decisions were, in my judgment, right on the mark, while others seemed to me only slightly off target. There is a third group of cases that, suffice it to say, I could not bring myself to describe so generously, and

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¹ 367 U.S. 643 (1961).

² 232 U.S. 383 (1914).

³ *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

⁴ The main evidence of those efforts is to be found in a multi-volume treatise on the subject, now in its six-volume fourth edition. 1-6 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* (4th ed. 2004).

then, of course, yet another group that I would characterize as flat-out wrong.

And then came a case styled *Herring v. United States*,⁵ a 5-4 decision handed down just this past January, which, I am chagrined to say, appears to deserve a category of its own, and not on the positive side of the scale. *Herring*, holding the Fourth Amendment exclusionary rule inapplicable whenever “the error was the result of isolated negligence attenuated from the arrest,”⁶ is not simply wrong; it is wrong over and over again! The opinion of the Chief Justice for the majority (1) falsely claims that cost-benefit balancing is an established basis for selectively applying the exclusionary rule at a criminal trial because of a police violation of the Fourth Amendment; (2) falsely represents that the Court’s precedents support the proposition that the exclusionary rule may be selectively applied depending upon the degree of “culpability” attending the Fourth Amendment violation; (3) asserts as a foregone conclusion, without an iota of supporting analysis or evidence, the proposition that application of the exclusionary rule in the instance of a negligent violation of the Fourth Amendment has a reduced “deterrent effect”; (4) purports to cabin the holding by the apparent afterthought that the negligence must also be “attenuated,” but without any explanation of what attenuation means in the instant or any other case, or why attenuation is relevant to the critical conclusion of reduced “deterrent effect”; and (5) inflicts upon trial and appellate courts new and uniquely difficult tasks to be performed in adjudicating Fourth Amendment claims. It is thus apparent that this *Herring* is no mere herring; it is *surströmming*, which (as any Swede can tell you) is touted as a “delicacy” but is actually attended by both a loathsome smell that “grows progressively stronger” and a dangerous capacity to “explode” beyond its existing boundaries.⁷

In *Herring*, an investigator, apparently suspicious because the defendant “was no stranger to law enforcement” and was seeking “to retrieve something from his impounded truck,” requested that a warrant check be run on him and was advised that the computer database in the sheriff’s department of a neighboring county showed “an active arrest

⁵ 129 S. Ct. 695 (2009).

⁶ *Id.* at 698.

⁷ Bob Brooke, *One of the World’s Strangest Dishes*, ALL SCANDINAVIA, <http://www.allscandinavia.com/surstromming.htm> (last visited May 1, 2009). This site should be consulted about this sour Baltic herring, still to be found in Sweden, by any non-Swedes who believe I am making this up. For those who, unlike me, are favorably disposed toward the *Herring* decision, you may wish to take advantage of <http://www.buy-surstromming.com>, where *surströmming* can be ordered on-line.

warrant for [his] failure to appear on a felony charge.”⁸ On the basis of that information, the investigator arrested the defendant and, in a search incident to the arrest, found drugs and a pistol on his person, ultimately leading to federal prosecution. It was subsequently determined that the computer record was in error and that, actually, the warrant had been recalled five months earlier. The court of appeals assumed that whoever failed to update the sheriff’s records “was also a law enforcement official,”⁹ but nonetheless affirmed the district court’s denial of defendant’s motion to suppress because “the conduct in question [wa]s a negligent failure to act, not a deliberate or tactical choice to act.”¹⁰ The Supreme Court, in a 5-4 decision, while “accept[ing] the parties’ assumption that there was a Fourth Amendment violation”¹¹ in arresting the defendant on a nonexistent warrant, concluded that the exclusionary rule was not applicable in a case such as this, namely, where “the error was the result of isolated negligence attenuated from the arrest.”¹² The *Herring* majority reached this conclusion by application of the seemingly broader proposition that “[t]o 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.”¹³

The holding in *Herring* finds little support in the Chief Justice’s opinion for the majority, which perhaps accurately reflects his apparent longstanding opposition to the exclusionary rule,¹⁴ but is totally unconvincing and in many respects irrelevant and disingenuous. The *Herring* majority gets off to a bad start by hanging its collective hat on Justice Scalia’s bald assertion in *Hudson v. Michigan* that suppression “has always been our last resort, not our first impulse,”¹⁵ a declaration which, as two thoughtful scholars have recently documented, “defies historical truth.”¹⁶ Next, the *Herring* majority describes the Fourth Amendment exclusionary rule solely in terms of its deterrence function, rather than as encompassing the other two purposes recognized in earlier decisions of the

⁸ *Herring*, 129 S. Ct. at 698.

⁹ *Id.* at 699.

¹⁰ *Id.* (quoting *United States v. Herring*, 492 F.3d 1212, 1218 (11th Cir. 2007)).

¹¹ *Id.*

¹² *Id.* at 698.

¹³ *Id.* at 702.

¹⁴ See Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1 (noting that back in 1983, as a lawyer in the Reagan White House, Roberts “was hard at work on what he called in a memorandum ‘the campaign to amend or abolish the exclusionary rule’”).

¹⁵ 547 U.S. 586, 591 (2006).

¹⁶ Sharon L. Davies & Anna B. Scanlon, Katz in the Age of *Hudson v. Michigan*: Some Thoughts on “Suppression as a Last Resort,” 41 U.C. DAVIS L. REV. 1035, 1043 (2008).

Supreme Court,¹⁷ which at least can be said to be unremarkable¹⁸ in light of the Court's tendency for some years now to view the suppression sanction with an equally narrow focus.

II. COST-BENEFIT BALANCING

Following this comes the announcement of the general principle, without any stated restriction or limitation, that "the benefits of deterrence must outweigh the costs."¹⁹ Put in such bold terms, it is made to appear that this cost-benefit balancing process is a routine part of the assessment as to when the Fourth Amendment exclusionary rule should be applied, but nothing could be further from the truth. This is manifested in the cases that the *Herring* Court primarily relies upon in its further discussion of this balancing concept: *United States v. Leon*,²⁰ *Illinois v. Krull*,²¹ *Arizona v. Evans*,²² *United States v. Calandra*,²³ *Stone v. Powell*,²⁴ and *Pennsylvania Board of Probation and Parole v. Scott*.²⁵ The latter three decisions, as well as several other Supreme Court cases of like kind,²⁶ all represent instances in which the Court had concluded that application of the exclusionary rule at the criminal trial itself suffices to provide the necessary deterrence, so

¹⁷ One of these purposes is "the imperative of judicial integrity," *Elkins v. United States*, 364 U.S. 206, 222 (1960), also recognized in *Mapp* and later cases; the other is "assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior," *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting), recognized as early as *Weeks* and implicit in the analysis in *Mapp*.

¹⁸ At least as compared to the embrace of those other functions by all four dissenters. As noted by one scholar:

The four dissenters say something equally interesting for the future direction of the exclusionary rule, given some possibility that the new administration might replace one of the Justices in the *Herring* majority. For some time, the Court has appeared to agree that there is no rationale for the exclusionary rule other than the deterrence of future Fourth Amendment violations. But the four dissenters appear to revive the other rationale for the rule, stated in *Mapp* but fallen from favor: that exclusion preserves the integrity of the judiciary by avoiding complicity in the constitutional violation. One more vote for this proposition would not only reverse *Herring*, but might actually re-invigorate the exclusionary rule to a degree not seen since before the Rehnquist Court.

Richard McAdams, *Herring and the Exclusionary Rule*, UNIV. OF CHI. FACULTY BLOG, <http://uchicagolaw.typepad.com/faculty/2009/01/herring-and-the-exclusionary-rule.html> (Jan. 17, 2009, 00:06 CST).

¹⁹ *Herring v. United States*, 129 S. Ct. 695, 700 (2009).

²⁰ 468 U.S. 897 (1984).

²¹ 480 U.S. 340 (1987).

²² 514 U.S. 1 (1995).

²³ 414 U.S. 338 (1974).

²⁴ 428 U.S. 465 (1976).

²⁵ 524 U.S. 357 (1998).

²⁶ See 1 LAFAVE, *supra* note 4, § 1.6.

that additional suppression at certain other proceedings (for example, before the grand jury, on habeas corpus, and at a parole revocation hearing, as in *Calandra*, *Stone*, and *Scott*, respectively), in the interest of still more deterrence, is not worth the candle. Thus, those cases are clearly distinguishable from the action taken in *Herring*.

The same is true of the first three cases in the above listing. The two “good faith” cases, *Leon* and *Krull*, represent instances where cost-benefit balancing was deemed appropriate because of another kind of special circumstance: the person primarily responsible for the Fourth Amendment violation was not a law enforcement official but rather a judge (in *Leon*) and legislators (in *Krull*), a very significant fact deemed to change the dynamics of the deterrence analysis. The same is true of *Evans*, which deserves special attention here because the nature of the Fourth Amendment violation was identical to that in *Herring* except for the fact that the offending clerk was in the employ of the judiciary. As acknowledged by the *Herring* majority, *Evans* decided that exclusion in the interest of deterrence was not called for in such circumstances “for three reasons”²⁷: (i) the exclusionary rule was crafted to curb police rather than judicial misconduct; (ii) court employees were unlikely to try to subvert the Fourth Amendment; and (iii) there was no reason to believe that application of the exclusionary rule in such a case would have a significant effect in deterring errors by court employees.

Obviously, none of these reasons is present in *Herring*, where the misconduct was by a law enforcement official. Yet the Court would have us believe that *Herring* matches up with these decisions, especially *Leon*, by offering the *non sequitur* that if under *Leon* it is not necessary to suppress “evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant,” then the “same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant.”²⁸ Not so, as these are apples and oranges.

Thus, on the preliminary question of whether *Herring* is the kind of case in which some sort of cost-benefit balancing process might be appropriately pursued, the many precedents cited by the Court do not support any such undertaking. Rather, of the Court’s prior decisions, the precedent for pursuing such an inquiry even as to exclusion at a criminal trial for a Fourth Amendment violation by police is reduced to a list of one: *Hudson v. Michigan*,²⁹ where the Court’s cost-benefit balancing was not even essential to the decision given the Court’s added reliance upon the

²⁷ *Herring v. United States*, 129 S. Ct. 695, 701 (2009).

²⁸ *Id.* at 703 (emphasis added).

²⁹ 547 U.S. 586 (2006).

fruit-of-the-poisonous tree doctrine. But even if we pass by all of this and simply concentrate upon how the balancing act was performed in *Herring*, the Court's decision still does not pass muster.

On the cost side of the equation, the *Herring* majority makes no claim that the cost of exclusion in this particular case would be especially high, and rightly so, as any claim otherwise would invoke the discredited "comparative reprehensibility"³⁰ approach to the exclusionary rule. The "principal cost of applying the rule" in this case, just as in all others where exclusion occurs, says the Court, is "letting guilty and possibly dangerous defendants go free."³¹ But this matter of cost ought to be kept in perspective. The essential point is that the cost is not imposed by the exclusionary rule, but by the Fourth Amendment itself.³² If the exclusionary rule *had* been applied to Mr. Herring's benefit, he would then not have been convicted in the federal court for illegally possessing the gun and drugs found on his person. But by like token, if the law enforcement officials had not violated the Fourth Amendment in such a way as to cause Mr. Herring's arrest on a nonexistent warrant, then once again he would have escaped conviction for those crimes on that occasion.

Whatever weight is assigned to the cost factor must be outdone by the potential for deterrence in that particular situation, for, as *Herring* instructs, "the benefits of deterrence must outweigh the costs."³³ (Defendants, apparently, lose all ties.) Assaying the magnitude of those benefits has proved to be a daunting task in the kinds of cases the Court has most often dealt with in the past, where it is at least possible to think about the need for or the possibility of deterrence via exclusion regarding various kinds of non-police actors or with respect to settings other than the criminal trial itself. But how does one go about this task when, as *Herring* contemplates, the question is whether the exclusionary rule is to be applied at a trial in light of a Fourth Amendment violation by a law enforcement official? The answer of the *Herring* majority is that the deterrence benefit derived from

³⁰ See Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987) (criticizing various proposals for limiting the exclusionary rule to instances in which the police violation is more reprehensible than the defendant's crime).

³¹ *Herring*, 129 S. Ct. at 701.

³² Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392-93 (1983). "Much of the criticism leveled at the exclusionary rule is misdirected," as the "critics fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the [F]ourth [A]mendment in the first place." *Id.*

³³ *Herring*, 129 S. Ct. at 700.

exclusion “varies with the culpability of the law enforcement conduct.”³⁴ Hence one important—probably the most important—characteristic of the class of Fourth Amendment violations now declared to be outside the reach of the exclusionary rule is said to be that the error constitutes only “isolated negligence,” as distinguished from “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”³⁵

III. THE “CULPABILITY” DISTINCTION

But where does the *Herring* Court find this “culpability” test for determining the scope of the exclusionary rule? It is set out as if a foregone conclusion, and is immediately followed with quotations from *Leon* and *Krull*, suggesting that the notion is well-grounded in existing jurisprudence on the exclusionary rule. The quote from *Leon*, which seems rather compelling, is that “an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus” of applying the exclusionary rule.³⁶ But that brief excerpt has been taken completely out of context by the *Herring* majority, as the “calculus” the Court was talking about at that point in *Leon* regards the “dissipation of the taint” aspect of the fruit of the poisonous tree doctrine, the notion that the connection between the Fourth Amendment violation and the evidence sought to be suppressed can sometimes be so tenuous that the exclusionary rule need not be applied to that evidence. The *Leon* case cites *Dunaway v. New York*³⁷ in support of the proposition quoted in *Herring*, and then, significantly, offers this quote from *Dunaway*: “When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.”³⁸ This makes it even more apparent that the quote extracted from *Leon* has absolutely nothing to do with the issue in *Herring*. In *Herring*, the connection between the negligent omission causing the records of the sheriff’s office to render a false report on the date defendant was arrested and the arrest itself is indeed “close,” and thus there is no occasion in a *Herring* kind of case to engage in the sort of “assessment of the flagrancy” the Court talked about in *Leon*.

³⁴ *Id.* at 701.

³⁵ *Id.* at 702.

³⁶ *United States v. Leon*, 468 U.S. 897, 911 (1984).

³⁷ 442 U.S. 200 (1979).

³⁸ *Id.* at 218.

As for the other quote put forward by the *Herring* majority, from *Krull*, it says that “evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’”³⁹ But here, again, the context of the quotation indicates that its meaning is other than as represented in *Herring*. *Krull* presented the question of whether the exclusionary rule should apply when an officer acted pursuant to authority set forth in a statute that itself is subsequently found to violate the Fourth Amendment. The discussion at the point in the case where the above quotation appears is directed toward making the point that such a situation should be dealt with in essentially the same fashion as in *Leon*. Both cases involved situations having two common ingredients: (i) the officer in each instance had acted in reliance upon an authoritative non-police source (a judge who issued the warrant at issue in *Leon*, the legislators who enacted the statute at issue in *Krull*); and (ii) exclusion merely to deter the non-police source was deemed unnecessary. By using the above-quoted language, the *Krull* Court was making the point that because in both instances we would ordinarily expect the police officer to act according to the directive received from the judge and legislature, respectively, it also makes no sense to exclude the evidence in the interest of police deterrence where he neither knew nor should have known that the directive received from an authoritative non-police source would later turn out not to square with the protections of the Fourth Amendment. That notion has no counterpart in a case like *Herring*, where the arresting/searching officer was prompted to act as he did by an error of Fourth Amendment magnitude made within the law enforcement system itself.

Since neither *Leon* nor *Krull* supports the *Herring* majority’s magnitude-of-culpability approach, it is not surprising that the Court went on to seek other underpinnings for it. One was an assertion by Judge Friendly in an article nearly forty-five years ago that “[t]he beneficent aim of the exclusionary rule to deter police conduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights.”⁴⁰ The Friendly piece seems an odd choice, at best, if one is seeking to determine the proper limits of the Fourth Amendment exclusionary rule. As the *Herring* dissenters point out,⁴¹ the Friendly article argues that the rule should not apply just because the police

³⁹ *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987) (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)).

⁴⁰ Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953 (1965) (citations omitted).

⁴¹ *Herring v. United States*, 129 S. Ct. 695, 706 (2009) (Ginsburg, J., dissenting).

have “blundered,” thus aligning Friendly with the oft-quoted position of Justice (then Judge) Cardozo, who “distilled in a single . . . sentence”⁴² the case against the exclusionary rule: “The criminal is to go free because the constable has blundered.”⁴³ But this “misleading epigram”⁴⁴ has *never* been an ingredient in the pre-*Herring* exclusionary rule; it was quoted but then rejected by the Supreme Court in Fourth Amendment cases on more than one occasion.⁴⁵

The *Herring* majority attempts to rehabilitate Friendly because of his prescience, characterizing his above-quoted words as “[a]nticipating the good-faith exception to the exclusionary rule.”⁴⁶ Not so! As discussed above, the main thrust of cases such as *Leon* and *Krull* is that the Fourth Amendment violation was brought about by an authoritative agency or individual outside law enforcement who is neither in need of deterrence nor likely to be deterred by suppression of the fruits of that violation. There is in these cases, to be sure, recognition that there must also be some inquiry to ensure that the police should not have appreciated the subsequently declared defect in the directive they received from the judiciary or legislature, thus assuring that there is no police deterrence function to be served. But that is a far cry from an across-the-board limitation of the exclusionary rule to instances of “flagrant or deliberate” violations of the Fourth Amendment. And in any event, *Leon* and *Krull* do not represent instances in which—even in the special circumstances obtaining in those cases—police conduct that is merely “negligent” is an occasion for non-suppression. As the Court explained in *Krull*, regarding the rule applicable in both of those cases, for the police to be acting “in objective good faith,” so that the fruits of the Fourth Amendment violation need not be suppressed, it is essential to show that the officer acted “in objective reasonable reliance” upon the judge’s warrant or the legislature’s statute.⁴⁷

The *Herring* majority also contends that the Friendly position is on target because the conduct he would remove from the exclusionary sanction, and, indeed, the conduct that *Herring* does remove from that sanction, is “far removed from the core concerns that led us to adopt the

⁴² *Elkins v. United States*, 364 U.S. 206, 216 (1960).

⁴³ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

⁴⁴ *United States v. Leon*, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting).

⁴⁵ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *Elkins*, 364 U.S. at 217. On the other hand, Cardozo’s language was most frequently embraced in the concurring and dissenting opinions of Chief Justice Burger. See *United States v. Payner*, 447 U.S. 727, 746 (1980); *Brewer v. Williams*, 430 U.S. 387, 416 n.1 (1977); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 412 (1971).

⁴⁶ *Herring*, 129 S. Ct. at 702.

⁴⁷ *Illinois v. Krull*, 480 U.S. 340, 342 (1987).

rule in the first place.”⁴⁸ The reference, of course, is to *Weeks v. United States*⁴⁹ and *Mapp v. Ohio*,⁵⁰ where, it is emphasized in *Herring*, “flagrant conduct”⁵¹ was involved—search of a home without a warrant and without probable cause in *Weeks*, and search of a home on a false warrant in *Mapp*. But since in neither of these cases was the Supreme Court’s adoption of an exclusionary rule, in the federal system and in the states, respectively, a we-hold-on-these-facts type of ruling, the claim that it was the flagrancy of the acts in *Weeks* and *Mapp* that led to adoption of the exclusionary rule is, at best, pure speculation. The opinion in *Weeks* described the flagrant conduct in some detail, but there is no suggestion of a degree-of-culpability limitation in the Court’s ruling, which instead declares the absolute that “unlawful seizures . . . should find no sanction in the judgments of the courts.”⁵² *Mapp* is, if anything, even more certain on this point, as while again the flagrant acts are described in the case, the Court’s ultimate holding could not be clearer: “[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”⁵³

The *Herring* majority’s next line of attack, which has a bit more substance to it, is an argument by analogy to the Court’s decision in *Franks v. Delaware*.⁵⁴ At issue in *Franks* was whether a defendant in a criminal case ever has a right, subsequent to the ex parte issuance of a search warrant, to challenge the affidavit upon which the warrant was issued, notwithstanding its facial sufficiency. The Court answered that question in the affirmative, but somewhat limited the circumstances in which a hearing upon such a challenge must be held: the allegedly false statements had to be critical to the prior probable-cause finding, and there had to be “allegations of deliberate falsehood or of reckless disregard for the truth,” as “[a]llegations of negligence or innocent mistake are insufficient.”⁵⁵ Hence the *Herring* majority concluded:

Both this case and *Franks* concern false information provided by police. Under *Franks*, negligent police miscommunications in the course of acquiring a warrant do not provide a basis to rescind a warrant and render a search or arrest invalid. Here, the miscommunications occurred in a different context—after the warrant had been

⁴⁸ *Herring*, 129 S. Ct. at 702.

⁴⁹ 232 U.S. 383 (1914).

⁵⁰ 367 U.S. 643.

⁵¹ *Herring*, 129 S. Ct. at 702.

⁵² *Weeks*, 232 U.S. at 393.

⁵³ *Mapp*, 367 U.S. at 654.

⁵⁴ 438 U.S. 154 (1978).

⁵⁵ *Id.* at 171.

issued and recalled—but that fact should not require excluding the evidence obtained.⁵⁶

But just as there can be “false information,” there can also be false analogies. Thus, before this reasoning is accepted on the useful-analogy point it would seem that two questions deserve to be answered: (1) What is the reason underlying the Court’s drawing of the negligent versus intentional/reckless distinction in *Franks*? and (2) Does that reason carry over to the different issue presented in *Herring*?

Unfortunately, the answer to the first of these questions is not to be found in *Franks*, for, notwithstanding the pre-*Franks* existence in some jurisdictions of an affidavit-impeaching process that extended even to negligent misrepresentations,⁵⁷ *Franks* says nothing as to precisely why the line was drawn as it was, except for the general observation that this balance was struck in light of the competing interests involved. But in asserting that “a flat ban on impeachment of veracity”⁵⁸ was unjustified, it appears that the *Franks* Court wished to open the door, but not too far, thus leaving what is now referred to as a *Franks* hearing as somewhat of a disfavored procedure. This is understandable, as under the pre-*Franks* “four-corners” approach, followed in many jurisdictions, a challenge to the probable cause finding in a search warrant case was confined to the four corners of the affidavit itself, meaning that no evidentiary hearing was required. On the other hand, if impeachment of the affidavit is permitted, this can result in a lengthy, time-consuming evidentiary hearing.⁵⁹ Holding, as *Franks* did, that no hearing need be held unless the defendant makes a preliminary showing of subjective fault in the affiant significantly limits the number of cases in which such a hearing must be held. Moreover, drawing the line as the Court did in *Franks* avoids the difficult question⁶⁰ of whether a factual assertion in an affidavit subsequently shown to be false (or, especially, a true fact not included in the affidavit) was included (or omitted) innocently or negligently. Beyond this, the *Franks* Court may have been influenced by the teaching of *United States v. Ventresca* that a “grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a

⁵⁶ *Herring*, 129 S. Ct. at 703.

⁵⁷ See, e.g., *Theodor v. Superior Court*, 501 P.2d 234 (Cal. 1972).

⁵⁸ *Franks*, 438 U.S. at 168.

⁵⁹ See, e.g., *United States v. Averell*, 296 F. Supp. 1004 (E.D.N.Y. 1969) (noting that the hearing in which challenge of the truth of the affidavit was made took twelve days).

⁶⁰ See *United States v. Carmichael*, 489 F.2d 983, 989 (7th Cir. 1973) (“[N]o workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further.”).

judicial office before acting.”⁶¹ In any event, it is clear that *none* of these considerations are at play in *Herring*. Indeed, the *Herring* rule cuts in exactly the opposite direction by intruding a new and often difficult issue into many suppression hearings, as the *Herring* dissenters properly noted.⁶²

IV. THE “NEGLIGENCE” EXCEPTION

There are good reasons to be highly critical of the majority opinion in the *Herring* case. One reason is that, as explained above, much of what the majority has to say in support of its result has a bogus quality to it. But another reason, perhaps even more compelling, concerns what is missing from that opinion. Since the Court’s holding rests upon the conclusion that Fourth Amendment violations of the negligence variety (or, as discussed below, at least some of them) are different from more culpable violations because the “benefits of deterrence” are significantly lower in such circumstances, one would think that somewhere in the *Herring* opinion there would appear a direct statement as to precisely why this is so. But no such statement by the *Herring* majority is to be found. This is a shocking omission, but is in a sense understandable, as it is far from apparent that any halfway plausible case for that proposition can be made.

The first argument that comes to mind in that regard is that the “benefits of deterrence” are low in negligence cases because negligent acts are not subject to meaningful deterrence. While this point is certainly implied in the opinion of the Chief Justice, nothing is offered by way of establishing that this is so. It would seem that it is not so, for, as pointed out by the four *Herring* dissenters, such a

suggestion runs counter to a foundational premise of tort law—that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care. The Government so acknowledges.

That the mistake here involved the failure to make a computer entry hardly means that application of the exclusionary rule would have minimal value. “Just as the risk of *respondeat superior* liability encourages employers to supervise . . . their employees’ conduct [more carefully], so the risk of exclusion encourages policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems.”⁶³

⁶¹ 380 U.S. 102, 108 (1965).

⁶² *Herring v. United States*, 129 S. Ct. 695, 710 (2009) (Ginsburg, J., dissenting) (“[The majority] has imposed a considerable administrative burden on courts and law enforcement.”).

⁶³ *Id.* at 708 (Ginsburg, J., dissenting) (citations omitted) (quoting *Arizona v. Evans*, 514 U.S. 1, 29 n.5 (1995) (Ginsburg, J., dissenting)).

Remarkably, the majority's only response to this point is a footnote objection that they "do not suggest" exclusion in such cases "could have *no* deterrent effect"⁶⁴—apparently a backhanded way of saying that in negligence cases there is significantly less deterrent effect, although once again nothing at all is offered to support that conclusion. Nor is it apparent what might have been offered. If the "benefits of deterrence" would have been sufficiently weighty if the bad recordkeeping had been attributable to intentional or reckless conduct of an employee of the sheriff's office—presumably because the suppression would have prompted the sheriff to take appropriate corrective measures—why is it less likely the sheriff would so act in response to the suppression where an employee's negligence brought about equally serious consequences?

In addition, because the consequences are equally serious whatever the degree of culpability of the sheriff's employee, it is apparent that no distinction can be drawn in terms of just what *results* need to be deterred. For five months Herring was at risk of being arrested on a withdrawn warrant, a risk that ended only after he was in fact arrested (apparently the only event likely to have corrected the records error and thus to have ended the risk for the future),⁶⁵ but this was so whether the records error was attributable to intentional, reckless, or negligent conduct. Nor can it plausibly be argued that negligent violations of the Fourth Amendment, as a class, are not sufficiently harmful to be an appropriate subject of the exclusionary doctrine. As any habitual reader of Fourth Amendment appellate opinions can attest, many more violations of the Fourth Amendment are the result of carelessness than are attributable to deliberate misconduct. Application of the exclusionary rule, the Supreme Court instructs, demonstrates "that our society attaches serious consequences to violations of constitutional rights,"⁶⁶ and provides "an incentive to err on the side of constitutional behavior."⁶⁷ There is nothing about the volume or nature of negligent violations of the Fourth Amendment that makes such demonstration unnecessary, and providing an incentive to do things right is no less important when the wrongdoing was simply failing to pay attention.

Perhaps the unstated assumption is that deterrence by way of the exclusionary rule is not needed with respect to negligent violations of the Fourth Amendment (or some species of them) because a sufficient level of deterrence is provided by some other force. As the *Herring* dissenters note, at oral argument it was asserted "that police departments have become

⁶⁴ *Id.* at 702 n.4.

⁶⁵ As the *Herring* dissenters note, the "record reflects no routine practice of checking the database for accuracy." *Id.* at 708.

⁶⁶ *Stone v. Powell*, 428 U.S. 465, 492 (1976).

⁶⁷ *United States v. Johnson*, 457 U.S. 537, 561 (1982).

sufficiently 'professional' that they do not need external deterrence to avoid Fourth Amendment violations."⁶⁸ But it is less than apparent how it is that this presumed professionalism would have such a profound effect uniquely upon negligent conduct. Indeed, the above assertion is not so limited; nor is its obvious source, a like statement made in the opinion of the Court in *Hudson v. Michigan*.⁶⁹ But *Hudson* cites no body of professional opinion supporting that particular "take" on deterrence via professionalism versus the exclusionary rule. A citation to the work of one respected criminologist is cited, but he has publicly repudiated such reliance on his work, noting that its import was "misrepresented" by the Court and that his view was that "[b]etter police work . . . was a consequence of the exclusionary rule rather than a reason to do away with it."⁷⁰ That very point is made by the *Herring* dissenters' pithy rebuke that "professionalism is a sign of the exclusionary rule's efficacy—not of its superfluity."⁷¹

V. THE ATTENUATION REQUIREMENT

While the negligent character of the actor's conduct appears to be the principal feature of the category excluded by *Herring*, the line the Court draws is actually narrower than this, as the Court's holding only covers such negligence as is "attenuated"⁷² from the subsequent search or seizure—in *Herring* itself the defendant's arrest on the nonexistent warrant. This means that the analysis up to this point is in a sense incomplete, as any critique of *Herring* must take into account this "attenuated" qualifier. It is well to note, however, that *Herring* is a "scary" decision in the same sense that *Hudson v. Michigan*⁷³ is, in that both cases involve "analysis" that far outruns the holding. In *Hudson*, the holding has to do only with a particular kind of Fourth Amendment violation, unjustified no-knock entries, but language in the opinion suggests that the Fourth Amendment's exclusionary rule has more generally become obsolete. In *Herring*, the holding is limited only to that negligence that is "attenuated," but the reasoning seems directed at an across-the-board embrace of Judge Friendly's thesis, under which only "flagrant or deliberate" violations of the Fourth Amendment count when it comes to the exclusionary rule. That is, both *Hudson* and *Herring* seem to set the table for a more ominous holding on some future occasion. In a sense, *Herring* is scarier than *Hudson* because it is easier to

⁶⁸ *Herring*, 129 S. Ct. at 709 n.6.

⁶⁹ 547 U.S. 586, 597-98 (2006).

⁷⁰ Liptak, *supra* note 14.

⁷¹ *Herring*, 129 S. Ct. at 709 n.6.

⁷² *Id.* at 698.

⁷³ 547 U.S. 586.

anticipate the Court taking a bigger bite out of the exclusionary rule than abandoning it entirely. It is thus understandable that some have responded to the *Herring* decision with alarm, predicting that the “attenuated” qualifier in that case will soon evaporate.⁷⁴ As the preceding discussion demonstrates, there does not exist a legitimate basis for excising all negligence cases from the exclusionary rule.

With that out of the way, it is possible to return to the *Herring* holding itself and ask (i) just how broad the *holding* in the case actually is, considering the “attenuated” qualifier; and (ii) whether there is something about this status of attenuation that actually lessens the “deterrent effect” of evidence exclusion, so that it would be legitimate to remove all such cases from the reach of the exclusionary rule. Such inquiry, it would seem, must begin by asking exactly what the word “attenuated” means as used in *Herring*. The word pops up only one other time in the *Herring* majority opinion, but neither there nor earlier is any effort made to describe the sense in which the word is being employed. (That this is so would seem to reinforce the speculation that the Chief Justice’s opinion was originally drafted to free *all* forms of negligence from the exclusionary rule, and that the “attenuated” qualification became a necessary add-on to garner the needed fifth vote.⁷⁵)

While something is attenuated when it becomes diluted, lessened, or weakened, it is far from clear in what sense that is true as applied to the facts of *Herring*, especially since the negligent bookkeeping carried as much force on the date the defendant was arrested as it did when it was performed. The word “attenuated” in *Herring* conceivably refers to any number of things: (i) that the negligence was by someone other than the

⁷⁴ See, e.g., McAdams, *supra* note 18 (“But if ‘attenuated from the arrest’ turns out not to mean much and not to limit the exception, then courts will refuse exclusion whenever the defendant fails to prove the police violation was recurring or more than negligent. The effect here would be to create a strong presumption *against* exclusion.”); Tom Goldstein, *The Surpassing Significance of Herring*, SCOTUS BLOG, <http://www.scotusblog.com/wp/the-surpassing-significance-of-herring> (Jan. 14, 2009, 11:32 A.M.) (“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. But the logic of the decision spans far more broadly, and the next logical step—which I predict is 2 years away—is abandoning the ‘attenuation’ reference altogether.”).

⁷⁵ “The reason for this . . . is, I strongly suspect, due to the refusal of Justice Anthony Kennedy to go along with the broad reworking of the exclusionary rule desired by the other four justices in the majority of this 5-4 decision.” Craig Bradley, *Red Herring or the Death of the Exclusionary Rule?*, 45 TRIAL 52, 53 (Apr. 2009).

officer who made the arrest;⁷⁶ (ii) that the negligence was an omission rather than an act;⁷⁷ (iii) that the negligence occurred five months prior to the arrest;⁷⁸ (iv) that the negligence was by a person in a different jurisdiction than the locale of arrest or prosecution, who for that reason is not as amenable to deterrence;⁷⁹ (v) that the negligence had to do with the maintenance of police records, a subset of police activity not prone to error or in need of deterrence;⁸⁰ or (vi) that while the negligence was by a law enforcement employee, that employee, by virtue of his or her assignment, is less in need of deterrence than the typical policeman.⁸¹ As to each of these alternatives, it must be asked (a) how likely it is that this interpretation is the *Herring* majority's perception of the qualifier "attenuated," and (b) whether it can be said that such a perception of "attenuated" actually describes a class of conduct as to which the critical consequence of reduced "benefits of deterrence" actually exists.

Under an option (i) interpretation of *Herring*, all "second-hand" Fourth Amendment negligence, that is, negligence committed by someone other than the arresting or searching officer and not known by that officer, would no longer be subject to the exclusionary rule. There is some suggestion in *Herring* that this is what the majority is thinking, especially in their attempt to match the instant case up with *Leon*. It is claimed that since that case does not require suppression of "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant," then the "same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant."⁸² By thus equating reliance on a

⁷⁶ As pointed out by the *Herring* majority, this proposition was emphasized by the court of appeals, which noted that the arresting officers "were entirely innocent of any wrongdoing or carelessness." *Herring*, 129 S. Ct. at 699 (quoting *United States v. Herring*, 492 F.3d 1212, 1218 (11th Cir. 2007)).

⁷⁷ The *Herring* majority observed that the lower court characterized the clerk's conduct as "a negligent failure to act." *Id.* (quoting *Herring*, 492 F.3d at 1218).

⁷⁸ It has been suggested that the "attenuated" language in *Herring* "appears to refer to the fact that the clerical error was made five months before the arrest." McAdams, *supra* note 18.

⁷⁹ It has been said of *Herring* that "it is unclear whether the fact that these were police from a different county is significant or not." Bradley, *supra* note 75, at 53.

⁸⁰ Richard McAdams speculates that the Court might later "distinguish errors that do not involve record-keeping." McAdams, *supra* note 18.

⁸¹ Such an interpretation would be consistent with Orin Kerr's conclusion that *Herring* "is a minor case," Orin Kerr, *Responding to Tom Goldstein on Herring*, THE VOLOKH CONSPIRACY, <http://volokh.com/posts/1231961926.shtml> (Jan. 14, 2009, 2:38 P.M.), one that is "almost a replay" of *Arizona v. Evans*, 514 U.S. 1 (1995). Posting of Orin Kerr, *Supreme Court Hands Down Herring v. United States*, LEX_REX, http://groups.yahoo.com/group/Lex_Rex/message/1885 (Jan. 14, 2009, 7:02 P.M.).

⁸² *Herring*, 129 S. Ct. at 703.

warrant later invalidated with reliance on a warrant that does not even exist, the *Herring* Court seems to be saying that the matter must be viewed solely from the perspective of the arresting or searching officer, so that if the officer, as an individual, is not at fault then the exclusionary rule is inapplicable. Yet there also exists in the *Herring* majority opinion other language reflecting that those Justices fully appreciate that such a broad view of the “attenuated” concept cannot be squared with the Court’s prior holdings on the scope of the exclusionary rule. Quoting important language from the very same *Leon* case,⁸³ the Court quite correctly asserts that in “analyzing the applicability of the rule . . . we must consider the action of all the police officers involved.”⁸⁴ The word *all* obviously includes those members of law enforcement who communicate information to others who then are prompted to act by making a seizure or search.

But one is not totally reassured by the inclusion of this latter language in *Herring*, given comments by some of the same Justices in *Arizona v. Evans*⁸⁵ regarding *Whiteley v. Warden*.⁸⁶ *Whiteley* held that where an officer makes an arrest on reasonable reliance upon a radio bulletin, the Fourth Amendment still requires suppression of the evidence obtained thereby if that bulletin was not in fact grounded in probable cause. But *Whiteley* was summarily dismissed in *Evans* on the basis that it was grounded in the now-rejected approach under which “the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation.”⁸⁷ *Whiteley* is an exceedingly important Fourth Amendment decision, for without it an officer lacking grounds to search or seize could avoid any risk of suppression by merely passing the job on to another officer. Especially in light of the frequency with which police are prompted to make seizures and searches based upon communications with other police,⁸⁸ it would be unconscionable if *Whiteley* were, in effect, largely nullified by construing all *Whiteley* situations as fitting within *Herring*’s attenuation principle. If that is what *Herring* contemplates, then the day has

⁸³ “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.” *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984).

⁸⁴ *Herring*, 129 S. Ct. at 699.

⁸⁵ 514 U.S. at 13.

⁸⁶ 401 U.S. 560 (1971).

⁸⁷ *Evans*, 514 U.S. at 13.

⁸⁸ See 2 LAFAVE, *supra* note 4, § 3.5.

arrived when the Fourth Amendment is truly nothing more than “a form of words.”⁸⁹

Precisely because the interpretation of “attenuated” in option (i) would cut such a wide swath through the exclusionary rule, any of the other five possibilities may seem relatively benign by comparison. However, each of the other interpretations has its own difficulties. Option (ii) seems the least likely, for no plausible reason is apparent as to why the “deterrent effect” of the exclusionary rule could be said to be different depending upon whether the Fourth Amendment violation was of the omission rather than commission variety. That is, if the bookkeeping error had been the result of a mistaken and negligent entry of defendant’s name instead of the person for whom a warrant had issued, it is difficult to see why that situation should be treated any differently than the actual facts of *Herring*.

As for option (iii), as noted earlier, it is of course true that in another branch of exclusionary rule jurisprudence, that having to do with the “fruit of the poisonous tree,” a temporal span between the “tree,” that is the occasion of the underlying Fourth Amendment violation, and the “fruit,” the evidence the defendant now seeks to suppress, is of some relevance. But the fact that time is a relevant consideration in working out the matter of causation hardly suggests that it is likewise relevant to the issue presented by *Herring*. If one were to assume a case like *Herring* except that the failure to strike the withdrawn warrant had occurred five days earlier instead of five months earlier, this would hardly seem to make any difference, since in both instances the erroneous record was in place at the time it was consulted, and thus in a quite direct way caused an arrest of the defendant despite the absence of any actual basis for it. In short, whatever one’s view of the concept of “deterrent effect,” it is difficult to see how that effect would somehow diminish with the passage of time.⁹⁰

Consider then option (iv), the notion that attenuation existed in *Herring* because the mistake occurred in a different county than the resulting arrest or prosecution. The *Herring* majority did not specifically embrace such a reading of its “attenuated” qualifier, but it is noteworthy that the Court at one point did emphasize that “somebody in Dale County” was responsible for the error in the records there and that the “Coffee County officers did nothing improper.”⁹¹ Moreover, in affirming the decision of the court of appeals, the majority noted that the lower court’s

⁸⁹ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

⁹⁰ Indeed, there is a sense in which the passage of time makes the circumstances more egregious and thus more in need of deterrence. As noted in another case with facts similar to those in *Herring*, the defendant “was a ‘marked man’ for the five months prior to his arrest.” *United States v. Mackey*, 387 F. Supp. 1121, 1124 (D. Nev. 1975).

⁹¹ *Herring v. United States*, 129 S. Ct. 695, 700 (2009).

decision was grounded in a finding that the negligence in the instant case was in fact “attenuated.”⁹² Thus, it is worth noting here an important aspect of the court of appeals’ analysis. That court stated:

There is also the unique circumstance here that the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of the negligent record keeping, but instead it would scuttle a case brought by officers of a different department in another county, one whose officers and personnel were entirely innocent of any wrongdoing or carelessness. We do not mean to suggest that Dale County law enforcement agencies are not interested in the successful prosecution of crime throughout the state, but their primary responsibility and interest lies in their own cases. 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. For all of these reasons, we are convinced that this is one of those situations where “[a]ny incremental deterrent effect which might be achieved by extending the rule . . . is uncertain at best,” where the benefits of suppression would be “marginal or nonexistent,” and where the exclusionary rule would not “pay its way by deterring official lawlessness.”⁹³

This notion that the Fourth Amendment exclusionary rule stops at the county line is an odd one indeed, especially when it is recognized that the argument set out in the above quotation does not simply have to do with the fact that the *arrest* was made by an officer in another county, but that also the case was “brought” in the neighboring county,⁹⁴ so that application of the exclusionary rule would “scuttle a case” brought other than in the county where the record error occurred. But the notion that the deterrence effect of the exclusionary rule is significantly diminished when the much-trumpeted “cost” (loss of a conviction that doubtless would not have been obtained anyway had the Fourth Amendment been complied with) occurs in another jurisdiction, so that consequently the rule should not apply in such circumstances, runs contrary to longstanding and well-accepted Fourth Amendment doctrine. The fact that the exclusionary rule *is* applicable even when the jurisdiction of the offending individual and the jurisdiction that would lose the fruits via suppression are different was settled even before *Mapp v. Ohio*,⁹⁵ when the Supreme Court in *Elkins v. United States* abolished the “silver platter” doctrine.⁹⁶

⁹² *Herring*, 129 S. Ct. at 699.

⁹³ *United States v. Herring*, 492 F.3d 1212, 1218 (11th Cir. 2007) (citations omitted).

⁹⁴ *Id.* The court of appeals was not strictly correct in this respect, of course, as the case was “brought,” in the sense of being prosecuted, in federal court for violations of federal law.

⁹⁵ 367 U.S. 643 (1961).

⁹⁶ 364 U.S. 206 (1960).

Ever since *Elkins*, it has been clear that evidence obtained in violation of the Fourth Amendment must be suppressed (1) when the error was by state officers and the evidence is offered in a federal prosecution,⁹⁷ (2) when the error was by federal officers and the evidence is offered in a state prosecution,⁹⁸ (3) when the error was by officers in one state and the evidence is offered in a prosecution in another state,⁹⁹ and, most certainly, (4) when the error was by officers in one county and the evidence is offered in a prosecution in another county of that state.¹⁰⁰ Although *Elkins* pre-dates *Mapp*, it is directly relevant to the matter at issue here, for the Court in that case grounded its decision in the proposition that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."¹⁰¹ Such purpose was served in the instant case, the Court reasoned, in light of the extent of "federal-state cooperation in criminal investigation."¹⁰² Considering that the most common form of cooperation between jurisdictions is that involving the exchange of information, such as about outstanding warrants, the firmly established *Elkins* doctrine stands as a most effective rebuttal of the argument made by the court of appeals in *Herring*.

Of course, in the typical *Elkins* situation the search was conducted by an officer in one jurisdiction and the fruits are being offered in another jurisdiction, while *Herring* is a bit more complex in that the police error producing the constitutional violation occurred in one county, the illegal-arrest consequence was then innocently brought about by an officer of another county, and then finally the fruits were tendered in a federal prosecution. But, if under *Elkins* the jurisdiction-of-prosecution difference is of no significance, it is hard to see how it is that the jurisdiction-of-arrest difference should matter. The contrary has sometimes been asserted; for example, in *Hoay v. State*, a case quite similar to *Herring*, the dissenting justices argued that the exclusionary rule should not apply where "the arresting officer from one county relied in good faith upon the information from another county."¹⁰³ But their explanation for this conclusion was that

⁹⁷ See, e.g., *United States v. Self*, 410 F.2d 984 (10th Cir. 1969); *Sablowski v. United States*, 403 F.2d 347 (10th Cir. 1968).

⁹⁸ See, e.g., *United States ex rel. Coffey v. Fay*, 344 F.2d 625 (2d Cir. 1965); *State v. Harms*, 449 N.W.2d 1 (Neb. 1989).

⁹⁹ See, e.g., *United States ex rel. Krogness v. Gladden*, 242 F. Supp. 499 (D. Or. 1965); *State v. Krogness*, 388 P.2d 120 (Or. 1963).

¹⁰⁰ See, e.g., *Hoay v. State*, 71 S.W.3d 573 (Ark. 2002).

¹⁰¹ *Elkins*, 364 U.S. at 217.

¹⁰² *Id.* at 222.

¹⁰³ *Hoay*, 71 S.W.3d at 578.

“there was nothing more the arresting officer could have done except ignore the outstanding warrant, and that would have been a clear dereliction of his duty.”¹⁰⁴ Quite obviously, that reasoning gives no support to a county-line limitation on the exclusionary rule, for had the officer making the arrest in *Herring* been an officer in the department where the error was made, he would have been in precisely the same predicament. And because the arresting officer himself was in no sense at fault, so that neither the officer personally nor his employing jurisdiction could be held liable to pay damages,¹⁰⁵ there is no reason to believe that if the arrest in *Herring* had been by a same-county officer, then that officer’s actions would have had a more profound impact upon that sheriff’s department in a deterrence sense.

In short, since it was the negligent maintenance of the records rather than the conduct of the arresting and searching officer that produced the Fourth Amendment violation in *Herring*, the location of the arresting officer should make no difference. As the *Hoay* majority explained, if the “fault” was solely in the police records of another county, it would still “fly in the face of the *Leon* principle” not to suppress, for *Leon* “makes clear” that “the touchstone of the exclusionary rule is deterrence of police misconduct.”¹⁰⁶ Indeed, in one sense arrests based on bogus records in another jurisdiction are more serious; in *Herring*, for example, it meant that the defendant was at risk of being illegally arrested on the false Dale County records even when he was outside that county.¹⁰⁷

What then of option (v), under which the requisite attenuation is deemed to occur only through a process of a mistaken entry into a law enforcement recordkeeping system and the subsequent extraction and reliance upon that misinformation to justify an arrest or search? That this is what the *Herring* majority meant by the “attenuated” limitation on its holding is not apparent, but there is, at least, a suggestion that this is so because of the majority’s reliance upon *Arizona v. Evans*,¹⁰⁸ another erroneous-records case (albeit involving judicial records), leading to the declaration that the error in the instant case was of a lesser magnitude than

¹⁰⁴ *Id.* at 578.

¹⁰⁵ In such a case the “arresting officer would be sheltered by qualified immunity, and the police department itself is not liable for the negligent acts of its employees.” *Herring v. United States*, 129 S. Ct. 695, 709 (2009) (Ginsburg, J., dissenting) (citations omitted).

¹⁰⁶ *Hoay*, 71 S.W.3d at 577 (discussing *United States v. Leon*, 468 U.S. 897 (1984)).

¹⁰⁷ Although this was apparently not the case in *Herring* itself, in a great many instances the erroneous police record will haunt the defendant wherever he goes. See, e.g., *United States v. Mackey*, 387 F. Supp. 1121, 1124 (D. Nev. 1975) (noting that once misinformation was introduced into the NCIC computer, defendant could have been falsely arrested “anywhere in the United States where law enforcement officers had access to NCIC information”).

¹⁰⁸ 514 U.S. 1 (1995).

in *Evans* because such errors in the *Evans* warrant records were slightly less rare.¹⁰⁹ But even if it thus might be concluded that *Herring* involves “only a slight change from *Arizona v. Evans*,”¹¹⁰ this hardly means that the *Herring* case, so construed, can simply be dismissed because of its benign character, for (as discussed further below) in the broad view of things, the problem of Fourth Amendment violations resulting from bad recordkeeping can hardly be dismissed as insignificant.

Assuming that the “attenuated” limitation in *Herring* is directed specifically at bookkeeping errors in police records, it is once again necessary to ask the question raised earlier as to other aspects and other possible readings of that case: exactly what is there about this particular variety of Fourth Amendment violations that produces the necessary reduced “benefits of deterrence”? While not even a clue is to be found in the *Herring* majority opinion, it might be thought that the answer lies in making a calculation similar to that in *Hudson v. Michigan*,¹¹¹ purportedly showing that the particular kind of violation there at issue (noncompliance with the knock-and-announce requirement) was not in need of more deterrence via the exclusionary rule. The contention in *Hudson* was that “the incentive to such violations is minimal to begin with”¹¹² because the only thing to be gained by unannounced entry is “prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises,”¹¹³ the very risks that make the knock-and-announce procedures inapplicable in particular cases.

Actually, the Government in *Herring* did make a no-more-deterrence-needed type of argument; as noted by the dissenters, the Government contended “that police forces already possess sufficient incentives to maintain up-to-date records,” as “the police have no desire to send officers out on arrests unnecessarily, because arrests consume resources and place officers in danger.”¹¹⁴ But the facts of *Herring* belie that assertion. As the four dissenters aptly note: “The facts of this case do not fit that description of police motivation. Here the officer wanted to arrest Herring and consulted the Department’s records to legitimate his predisposition.”¹¹⁵ Nor

¹⁰⁹ The *Herring* Court noted that, in the instant case, the record clerks’ testimony that they could “remember no similar miscommunication ever happening on their watch” was touted as “even less error” than in *Evans*, where the testimony was as to a similar error “every three or four years.” *Herring*, 129 S. Ct. at 704 (quoting *Evans*, 514 U.S. at 15).

¹¹⁰ Bradley, *supra* note 75, at 53.

¹¹¹ 547 U.S. 586 (2006).

¹¹² *Id.* at 595.

¹¹³ *Id.* at 599.

¹¹⁴ *Herring*, 129 S. Ct. at 709 (Ginsburg, J., dissenting).

¹¹⁵ *Id.*

is there any reason to believe that this aspect of *Herring* is out of the ordinary. During the course of *Terry* stops on reasonable suspicion of criminal activity, it is very common for the officer to obtain the suspect's identity and then run a warrant check.¹¹⁶ And during a traffic stop, even for the most petty of infractions, it has become part of the "routine" to run a warrant check not only on the driver, but also on all the passengers.¹¹⁷ Given the pervasiveness and utility of the warrant check in current practice, certainly a higher level of illegal arrests because of clerical errors is likely to appear advantageous rather than disadvantageous if there is no risk that windfall evidence acquired by arrest on a nonexistent warrant will be suppressed. This is especially the case since the nature of the illegality is such that the arresting officers in these instances cannot be faulted for having made the arrests. Indeed, after *Herring*, police are unlikely to be troubled by the fact that these windfalls are being gained only at the cost of violating the constitutional rights of citizens; as *Terry v. Ohio* teaches, "admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence."¹¹⁸

A somewhat different claim of the requisite reduced "benefits of deterrence" might be grounded in the supposed infrequency of errors in police records. That the *Herring* Court may have been thinking along these lines is suggested by the fact that the majority emphasized that witnesses in the sheriff's department involved in that case "testified that they could remember no similar miscommunication ever happening on their watch."¹¹⁹ Thus, the thinking might be that since such a mistake had never been made before, it was unlikely ever to occur again, meaning suppression in the interest of prompting closer supervision of that records system would hardly be necessary. But viewing the problem nationwide and not merely as to the record system at issue in *Herring*, there is every reason to believe that illegal arrests attributable to record error pose no small problem. For one thing, through a process of data aggregation and data mining, greatly facilitated by modern technology, law enforcement agencies now have available a volume of information in their records far exceeding that maintained in the past.¹²⁰ This data is not limited simply to such matters as outstanding warrants, but includes a broad range of information that could

¹¹⁶ See, e.g., *People v. H.J.*, 931 P.2d 1177 (Colo. 1997); *Wilson v. State*, 874 P.2d 215 (Wyo. 1994).

¹¹⁷ See, e.g., *People v. Harris*, 886 N.E.2d 947 (Ill. 2008); *State v. Sloane*, 939 A.2d 796 (N.J. 2008).

¹¹⁸ 392 U.S. 1, 13 (1968).

¹¹⁹ *Herring*, 129 S. Ct. at 704.

¹²⁰ See Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1403-08 (2001).

be accepted as factually accurate and then used as total or partial justification of a seizure or search. Also, computers have facilitated information sharing, so that much of this data is now available to other law enforcement agencies.¹²¹ In short, as the four *Herring* dissenters put it: "Electronic databases form the nervous system of contemporary criminal justice operations."¹²²

There is no basis for concluding that the amount of error in this vast array of data is at some tolerable or irreducible minimum. Government reports indicate "that law enforcement databases are insufficiently monitored and often out of date."¹²³ And the appellate cases¹²⁴ make it apparent that illegal arrests and searches attributable to error in police records is no small problem. (Those cases, of course, reflect only a part of the problem, considering "that there are many unlawful searches . . . of innocent people which turn up nothing incriminating . . . about which courts do nothing, and about which we never hear."¹²⁵) Moreover, as mentioned earlier, bad recordkeeping such as that in *Herring*, representing that there is an outstanding arrest warrant on a person when there is not, has a ticking time bomb character to it, and in that sense is a more serious matter than many other sorts of Fourth Amendment violations. When at a particular time and place a particular police officer unreasonably interprets the observed circumstances and makes an arrest that ought not have been made, this is bad enough, but at least it is a single event with rather narrow time-place-occasion dimensions. But a mistake of the kind at issue in *Herring* is quite a different matter; "computerization greatly amplifies an error's effect," as "inaccurate data can infect not only one agency, but the many agencies that share access to the database."¹²⁶ Such errors can result in the object of the erroneous information being arrested repeatedly,¹²⁷ and make

¹²¹ *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting) ("States are actively expanding information sharing between jurisdictions. As a result, law enforcement has an increasing supply of information within its easy electronic reach.").

¹²² *Id.*

¹²³ *Id.* (citing several government reports).

¹²⁴ See 2 LAFAVE, *supra* note 4, § 3.5(d).

¹²⁵ *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

¹²⁶ As stated in Justice Ginsburg's dissent in *Arizona v. Evans*, 514 U.S. 1, 26-27 (1995) (noting, for example, that NCIC records are available to about 71,000 federal, state, and local agencies, so that "any mistake entered into the NCIC spreads nationwide in an instant").

¹²⁷ See, e.g., *Finch v. Chapman*, 785 F. Supp. 1277 (N.D. Ill. 1992) (referring to misinformation long retained in NCIC records that resulted in plaintiff being arrested and detained twice); *Rogan v. Los Angeles*, 668 F. Supp. 1384 (C.D. Cal. 1987) (explaining that as a result of misinformation in computer records, plaintiff was arrested four times, three of which were at gunpoint).

that individual a “marked man” subject to illegal arrest “anywhere,” “at any time,” and “into the indefinite future.”¹²⁸

Finally, there is option (vi) regarding the possible interpretation of the word “attenuated” as used in *Herring*, one that finds the requisite reduced “benefits of deterrence” in the nature of the job held by the individual whose negligent act led to the illegal arrest. Under this view of *Herring*, it could be said that the Court has merely taken the reasoning in *Arizona v. Evans*¹²⁹ and extended it to what was believed to be a very closely analogous situation, where again the error is not attributable to a “front line” or “on the street” police officer, but rather someone performing clerical tasks. *Evans* is a case much like *Herring*, except that the mistake was attributable to a clerk who worked in the judicial branch. In holding the exclusionary rule inapplicable in those circumstances, the Court relied largely upon the proposition that there was no basis for concluding that “court employees are inclined to ignore or subvert the Fourth Amendment.”¹³⁰ The implication is that these court employees (who, the *Evans* Court reminds us, are not “engaged in the often competitive enterprise of ferreting out crime”¹³¹) are hardly motivated to undertake calculated intrusions upon Fourth Amendment interests, and consequently are unworthy objects of the exclusionary rule and its deterrence function. Thus, it might be concluded that the “attenuated” test is met in *Herring* precisely because that is an apt description of clerks generally, without regard to whether they are located in the courthouse or the police station.

Whether this is the unstated view of attenuation in *Herring* is not clear, although the possibility that this is the case is suggested by the majority’s disclaimer that *Evans* “was entirely ‘premised on a distinction between judicial errors and police errors,’”¹³² as well as the majority’s game of “gotcha” with the dissenters—dismissing Justice Breyer’s reliance on a judicial errors versus police errors distinction by noting that in *Evans* Justice Ginsburg had characterized such a distinction as “artificial.”¹³³ Perhaps the reason the *Herring* majority said no more along these lines was because it was not possible on the record in that case to determine the precise status of the person whose negligence left the warrant notice outstanding in the sheriff’s department’s records. But, while the court below merely “assume[d] . . . that the negligent actor, who is unidentified in

¹²⁸ *United States v. Mackey*, 387 F. Supp. 1121, 1124 (D. Nev. 1975).

¹²⁹ *Evans*, 514 U.S. 1.

¹³⁰ *Id.* at 14-15.

¹³¹ *Id.* at 16.

¹³² *Herring v. United States*, 129 S. Ct. 695, 701 n.3 (2009).

¹³³ *Id.* at 701 n.3 (quoting *Evans*, 514 U.S. at 29 (Ginsburg, J., dissenting)).

the record, is an adjunct to law enforcement,"¹³⁴ it appears likely that the offender was either a person holding the position of "warrant clerk" or someone under her supervision.¹³⁵ In support of *Herring*, therefore, it might be asserted that a warrant clerk in the sheriff's department needs no more deterrence than the warrant clerk over in the courthouse.

With *Evans* on the books, this interpretation of the *Herring* "attenuated" requirement certainly has more appeal than any of the others previously considered. For one thing, such an interpretation would ensure that *Herring* is limited in the same fashion as *Evans*, so that if there is a mistake in a police record, computer or otherwise, but the mistake was not that of the record keepers, but of detectives and other police officials who supplied information for the records, the defendant would prevail.¹³⁶ There is still reason to be concerned about *Herring*, however, even if it is ameliorated by such a limited reading. Given that the *Herring* exception to the exclusionary rule covers only instances of "isolated negligence attenuated from the arrest,"¹³⁷ there is something odd about the conclusion that only some negligence is being exempted, namely that by clerical personnel, and that the reason is because such persons are not motivated to engage in *deliberate* violations of the Fourth Amendment. As noted earlier, the central concern is with negligently maintained records, which is a current problem of considerable magnitude, and consequently the criticisms stated earlier with respect to the option (v) interpretation of "attenuated" would appear to be largely applicable to option (vi) as well.

Moreover, in terms of minimizing the risk of erroneous records leading to arrests and searches in violation of the Fourth Amendment, it does not necessarily follow from the fact that *Evans* exempts the errors of judicial clerks that the same result should obtain as to police clerks. When the clerk is also a member of the police department, whether civilian employee or uniformed officer, the police agency is in a better position to remedy the situation and might well do so if the exclusionary rule were there to remove the incentive to do otherwise. Finally, this option (vi) reading of *Herring* has less going for it than the view of the dissenters in that case for yet another reason: the *Evans* distinction between police errors and non-police

¹³⁴ *United States v. Herring*, 492 F.3d 1212, 1217 (11th Cir. 2007).

¹³⁵ The Court in *Herring* says that this is the person who "[n]ormally . . . enters the information in the sheriff's computer database" when a warrant is recalled. 129 S. Ct. at 698.

¹³⁶ *People v. Willis*, 46 P.3d 898, 906 (Cal. 2002) (noting that the state can prevail only if error in parole list was by "a data entry clerk," "the person who prepared it, rather than by a parole officer who failed to update defendant's file or forward the information to the appropriate person").

¹³⁷ *Herring*, 129 S. Ct. at 698.

errors presents a clear line; but once it is concluded that police employees must be sorted out on the basis of their assignment, the temptation will be to extend the exemption to others, such as dispatchers, whose conduct has traditionally and rightly been viewed as within the exclusionary rule's purview.¹³⁸

VI. THE TASK FOR THE LOWER COURTS

While the foregoing discussion of *Herring* would indicate that the decision is more to be regretted than praised, it is now a part of our Fourth Amendment jurisprudence, and hence it is necessary to consider how trial and appellate courts should go about interpreting and applying the case whenever presented with a fact situation not on all fours with *Herring*. That will sometimes be a daunting task, given the fact that *Herring* requires what two of the dissenters aptly referred to as a "multifaceted inquiry"¹³⁹—yet another reason to have doubts about the wisdom of *Herring*. For one thing, courts will need to determine what variety of Fourth Amendment violation, in the culpability sense, will bring the case within the *Herring* exception, and then will have to determine whether that is the degree of culpability existing in the instant case. Quite clearly, intentional and reckless wrongdoing will not qualify,¹⁴⁰ but negligence will, at least sometimes. It is important to note that the first branch of the "circumstances" incorporated into *Herring*'s "We hold" sentence is stated not merely as any negligence, but rather as "isolated negligence,"¹⁴¹ referred to elsewhere in the opinion as "nonrecurring"¹⁴² negligence and later distinguished from "routine or widespread"¹⁴³ negligence. This strongly suggests that in a case somewhat like *Herring*, in which the record failed to show¹⁴⁴ that such mistakes were occurring in the use of this

¹³⁸ See *United States v. Shareef*, 100 F.3d 1491, 1503 (10th Cir. 1996) (explaining that the "exclusionary rule applies when an error by a dispatcher or an officer leads to a Fourth Amendment violation"); *State v. Trenidad*, 595 P.2d 957 (Wash. Ct. App. 1979) (applying the exclusionary rule where dispatcher falsely asserted that there was an outstanding arrest warrant for defendant, notwithstanding good faith of arresting officer).

¹³⁹ *Herring*, 129 S. Ct. at 711.

¹⁴⁰ The Court in *Herring* stated: "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." *Id.* at 703.

¹⁴¹ *Id.* at 698.

¹⁴² *Id.* at 702.

¹⁴³ *Id.* at 704.

¹⁴⁴ The proposition is put this way because, as discussed later herein, the burden of proof of proving facts justifying application of the *Herring* exception properly is placed upon the prosecution. See *infra* notes 157-63 and accompanying text.

particular records system only rarely, then the *Herring* exception to the exclusionary rule would not apply.

Later on, the Court seems to identify two other varieties of negligence that are probably not encompassed within the *Herring* exception, for the majority declares that the “exclusionary rule serves to deter . . . grossly negligent conduct, or in some circumstances . . . systemic negligence.”¹⁴⁵ The Court offers no definition or illustration of either of these two categories. As for the term “gross negligence,” it is, as the Supreme Court has itself observed, one of those “elusive terms” that has “left the finest scholars puzzled,”¹⁴⁶ and hence it can fairly be said that the term’s use in *Herring* is itself somewhat puzzling. On yet another occasion the Court observed that “the term is a ‘nebulous’ one, in practice typically meaning little different from recklessness.”¹⁴⁷ But since the “grossly negligent conduct” term is used in *Herring* to fill out a list into which the term “reckless” had already been placed, presumably the term is not being used merely as a synonym for recklessness. This suggests that perhaps the reference is to that version of gross negligence involving only objective fault, but with a greater departure from the reasonable man standard,¹⁴⁸ in which case an otherwise “isolated” instance of negligence would not qualify for the *Herring* treatment if it involved such a greater deviation.

As for “systemic negligence,” a term never before used by the Supreme Court,¹⁴⁹ it presumably refers to a variety of negligence that has an effect upon an entire recordkeeping system. Such is the case, it has been noted, in “an environment in which negligent management and oversight created conditions” permitting the specific error to occur.¹⁵⁰ Thus, it would seem that if a false entry in law enforcement records or failure to discover the same is fairly attributable to a lack of sufficient management or oversight, then the case would not fall within the *Herring* exception. The same would appear to be true if either the making of the error or the failure to detect it is related to some other “systemic” problem, such as the manner in which the recordkeeping system at issue has been structured. But just what is necessary to show what the Court referred to as “systemic error”¹⁵¹

¹⁴⁵ *Herring*, 129 S. Ct. at 702.

¹⁴⁶ *Daniels v. Williams*, 474 U.S. 327, 334 (1985).

¹⁴⁷ *Farmer v. Brennan*, 511 U.S. 825, 836 n.4 (1970).

¹⁴⁸ See 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.4(b) (2d ed. 2003).

¹⁴⁹ But the term “systemic deterrent” is sometimes used in discussion of the exclusionary rule, e.g., *United States v. Leon*, 468 U.S. 897, 917 (1984), and it may be what is lost if there is no suppression in the case of “systemic negligence.”

¹⁵⁰ DUNCAN FAIRGRIEVE & SARAH GREEN, *CHILD ABUSE TORT CLAIMS AGAINST PUBLIC BODIES: A COMPARATIVE LAW VIEW* 165 (2004).

¹⁵¹ *Herring v. United States*, 129 S. Ct. 695, 704 (2009).

at another point in *Herring* is far from clear. Certainly, the reoccurrence of the same kind of error for some time without any effective response would seem highly relevant, and perhaps the length of time that a specific error remained uncorrected is also significant¹⁵²—although *Herring* indicates that this length of time must exceed five months!

But while the first task of a lower court in applying the *Herring* case is to distinguish so-called “isolated” negligence from all other forms of culpability (intent, recklessness, and negligence of a gross or systemic nature), that is the beginning but by no means the end of that court’s responsibility. While it is true that a fair amount of the *discussion* in *Herring* has to do only with that distinction, the *holding* in the case requires that *in addition* the requisite form of negligence can also be said to be “attenuated,” in the sense of manifesting a situation where the “benefits of deterrence” are less than would otherwise be the case. Especially since, as noted earlier, the “attenuated” qualification in the Court’s holding appears to have been added in order to garner the requisite five votes, it would be a serious mistake for a lower court to pretend that the “attenuated” element of *Herring* did not exist or to interpret that element so broadly as to render the exclusionary rule largely inoperable.

While surely *Herring* does not apply when the error regarding police records occurred at the other end (that is, at the time when those records were negligently consulted by the arresting or searching officer),¹⁵³ the mere fact that this officer was not personally at fault in relying upon the information supplied to him by other police sources is not alone a basis for finding that the “attenuated” requirement of *Herring* has been satisfied. As noted earlier, such a ham-handed application of *Herring* is totally without justification, and would have the unfortunate result of withdrawing the protections of the Fourth Amendment from all cases governed by the principle of *Whiteley v. Warden*,¹⁵⁴ namely, that a good faith arrest by an

¹⁵² As stated by the three concurring Justices in *Arizona v. Evans*, 514 U.S. 1, 17 (1995):

Surely it would not be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency’s, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).

(emphasis omitted).

¹⁵³ Cf. *Phelan v. Village of Lyons*, 531 F.3d 484, 488 (7th Cir. 2008) (holding that “there was no probable cause” where officer ran routine license plate check on Cadillac with plate number 1020 and computer reported back that vehicle with that plate was stolen, but officer failed to read the next line on the screen indicating that vehicle was a motorcycle, which was significant because the same numbers were used for car and cycle licenses, but plates for the latter were smaller).

¹⁵⁴ 401 U.S. 560 (1971).

officer relying upon a police source is still a constitutional violation if the requisite grounds for that arrest did not exist at the source.

This is not to suggest that lower courts should deem the “attenuated” requisite to be unmet except upon a case factually on all fours with *Herring*. As explained earlier, it does not seem that the attenuation in *Herring* itself is attributable to either the fact that the negligence was of the omission variety, the fact that it occurred five months prior to the defendant’s arrest, or the fact that it occurred in a different county. On the other hand, what was characterized earlier as options (v) and (vi) to interpreting *Herring*, finding attenuation, respectively, in the fact that a mistake in police records was involved and that the mistake was made by clerical personnel, would seem—especially if viewed collectively—to capture what the attenuation element of *Herring* is all about. Lower courts are thus well-advised to apply *Herring* accordingly.

Yet another factor that lower courts, especially trial courts, will have to take into account in any future cases in which a *Herring* claim is made concerns matters of proof. One important question concerns which party has the burden of proof on the issue of whether or not there exists culpability beyond “isolated negligence” and whether such negligence is “attenuated,” which can well depend upon a careful assessment of the facts in the particular case. As the dissenters in *Herring* note, the majority’s “focus on deliberate conduct” makes the problems of proof uniquely difficult, for, as a general proposition, “application of the exclusionary rule does not require inquiry into the mental state of the police.”¹⁵⁵ Though nothing is said about this in *Herring*, it would seem that the burden of proof must be on the prosecution. As for the generality that the burden of proof is on the defendant in warrant cases,¹⁵⁶ surely it has no application in a case like *Herring*, where it turns out that, in fact, there was no warrant.

Moreover, since *Herring*, like *Evans*, purports to be simply an extension of the “good faith” doctrine, the controlling consideration is that in the past courts have consistently ruled “that the government has the burden to prove facts warranting application of the good faith exception.”¹⁵⁷ That conclusion is especially appropriate in *Herring*-type cases, for in such instances placing the burden on the prosecution squares with the general policy of placing the burden on the party who has the greatest access to the relevant facts.¹⁵⁸ It also squares with the policy of placing the burden on the

¹⁵⁵ *Herring*, 129 S. Ct. at 710 n.7.

¹⁵⁶ See, e.g., *United States v. Vigo*, 413 F.2d 691 (5th Cir. 1969); *State v. Vrtiska*, 406 N.W.2d 114 (Neb. 1987).

¹⁵⁷ *People v. Willis*, 46 P.3d 898, 907 (Cal. 2002).

¹⁵⁸ See CHARLES McCORMICK, EVIDENCE § 337 (4th ed. 1992).

party seeking an exception to a general rule,¹⁵⁹ which is certainly what a *Herring* claim amounts to. Of course, from *Herring*'s quotation of the *Hudson* assertion that exclusion "has always been our last resort, not our first impulse,"¹⁶⁰ it might seem that another general policy, that of handicapping disfavored contentions,¹⁶¹ would support placing the burden on the defendant.¹⁶² But even apart from the fact that the *Hudson* contention "defies historical truth,"¹⁶³ surely, this proposition does not trump the several others referenced above pointing in the opposite direction.

VII. CONCLUSION

Herring is a troubling decision on many counts, and certainly its most worrisome aspect is that it may be a mere harbinger of things to come—that the stage has been set for a more broad-ranging assault on the exclusionary rule whenever five votes can be mustered to drop the other shoe. One can only wonder whether *Weeks* and *Mapp* can survive in any meaningful form up to their forthcoming centenary and golden anniversary, respectively. But my principal concern herein has been with *Herring* on its own terms. Even if it were the last bite the Court was to take out of the exclusionary rule, I still could not bring myself to believe that the *Herring* decision is other than a complete disaster. The Court's efforts to find underpinnings for its holding in its prior decisions, by pretending that they support cost-benefit balancing and a "culpability" distinction in the instant case, are no less than disingenuous. It is not shown that unconstitutional searches and seizures brought about by negligence are either less in need of or less capable of deterrence. And the attenuation qualifier seems only gossamer, unlikely to survive long, and is totally lacking in meaningful content for whatever life it may have. Moreover, the case creates new burdens both for judges conducting suppression hearings and the lower courts charged with reviewing their decisions. This *Herring* is, indeed, really *surströmming*.¹⁶⁴ We should be served up with something better than this by the Supreme Court!

¹⁵⁹ *Id.*

¹⁶⁰ *Herring*, 129 S. Ct. at 700.

¹⁶¹ *MCCORMICK*, *supra* note 158, § 337.

¹⁶² Certainly, if the defendant *does* have the burden of proof, then, as the *Herring* dissenters noted, it would seem, as acknowledged at oral argument, "that a defendant is entitled to discovery (and if necessary, an audit of police databases)," meaning "the Court has imposed a considerable administrative burden on courts and law enforcement." *Herring*, 129 S. Ct. at 710. Of course, discovery can be most important to a defendant in connection with a suppression hearing even when he does not have the burden of proof. See *United States v. Saledo*, 477 F. Supp. 1235 (E.D. Cal. 1979).

¹⁶³ *Davies & Scanlon*, *supra* note 16, at 1043.

¹⁶⁴ See *supra* note 7.

