HERRING v. UNITED STATES: ARE ERRORS IN GOVERNMENT DATABASES PREVENTING DEFENDANTS FROM RECEIVING FAIR TRIALS?

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I. Introduction

In 1791, the framers of our Bill of Rights could not have foreseen the technological advancements that came about during the modern age.[1] As Justice Brandeis put it "this [C]ourt has repeatedly sustained the exercise of power by Congress, under various clauses of [the Constitution], over objects of which the fathers could not have dreamed."[2] Marvel and invention have redefined law enforcement in both the field and in the courtroom.[3] In response, the judiciary has been forced to balance the rights of the accused with those of law enforcement.[4] The ever-changing technology used by police and prosecutors has made it difficult to establish bright line rules regarding evidence

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1. *See* MILTON MELTZER, *THE BILL OF RIGHTS: HOW WE GOT IT AND WHAT IT MEANS 48-54 (*Thomas Crowell Publishers, 1990) (summarizing the history of the framing of the Bill of Rights). The Bill of Rights was introduced by James Madison to the First United States Congress in 1789 and came into effect December, 1791 when it was ratified by three-fourths of the States. *Id.*

2. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

3. *See id.* at 474 (noting that technological advances have provided the government with an expanding array of information gathering techniques).

4. *See* Robert L. Farb, *The Fourth Amendment, Privacy, and Law Enforcement*, POPULAR GOV'T, Spring 2002, at 13, 13, *archived at* http://www.webcitation.org/5sk83fzy4 (describing the Supreme Court's role in interpreting the Fourth Amendment).

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obtained through the use oftechnology.[5] Thus the legal landscape surrounding technology and the Fourth Amendment is also ever-changing.[6]

In the modern age, where law enforcement is dependent on computers, the accuracy of government databases may determine whether a defendant gets a fair trial. Technology has played a major role in the area of Fourth Amendment search and seizure law through its use in law enforcement and the determination of probable cause.[7] In 1961, *Mapp v. Ohio* applied the exclusionary rule to all federal and state criminal proceedings; suppressing evidence at trial that was obtained through a Fourth Amendment violation.[8] However, since *Mapp*, the Supreme Court has limited the application of the exclusionary rule.[9] When probable cause for an arrest is founded on errors in government databases, the Supreme Court has allowed evidence obtained from that search into trial.[10] As a result, individuals are

5. *See Olmstead*, 277 U.S. at 469 (1928) (finding that using wire taps to gather evidence did not violate the Fourth Amendment and such evidence was admissible); Berger v. State of New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring) (overruling the *Olmstead* decision with regard to the Fourth Amendment implications of wire taps); Katz v. United States, 389 U.S. 347, 359 (1967) (reversing a conviction based on evidence obtained through wire taps on public telephones because the evidence was obtained in violation of the Fourth Amendment).

6. *See Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting) (illustrating the impact of technology-based information gathering methods on Fourth Amendment rights); s*ee also* U.S. CONST. amend. IV. The Fourth Amendment States:

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

7. *See, e.g.,* People v. Robinson, 224 P.3d 55, 60 (Cal. 2010). Robinson was arrested when his DNA profile in the state's database was linked to sexual assault crimes. *Id.*

8. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence seized by Cleveland police officers in violation of the Fourth Amendment could not be used by the prosecution in a state criminal court).

9. *See* Arizona v. Evans, 214 U.S. 1, 13-14 (1995) (allowing evidence seized in violation of the Fourth Amendment as a result of a clerical error); Leon 468 U.S. at 909 (creating the good faith exception to the exclusionary rule).

10. *See Evans*, 214 U.S. at 14.

having evidence seized in violation of the Fourth Amendment used against them at trial.

The recent decision of *Herring v. United States* even further restricts the application of the exclusionary rule where errors in government databases form the basis for a search.[11] Under *Herring*, errors in government databases have the potential to infringe on an individual's right against unreasonable search and seizures.[12] The result is unfair: the accused is faced with illegally seized evidence and the government receives no penalty for keeping incorrect records. As policing becomes more reliant on computerized systems, the number of illegal arrests and searches based on errors in government record-keeping is poised to multiply.

II. History

A. The Exclusionary Rule and Early Technology

In 1914, the Supreme Court unanimously ruled that evidence seized in violation of the Fourth Amendment must be excluded from evidence in federal criminal prosecutions.[13] This remedy, known as the exclusionary rule, provides a disincentive to police officers and prosecutors who illegally gather evidence in violation of the Fourth Amendment.[14] The *Weeks* Court recognized that unless a remedy was available to those who have had their rights violated, the Fourth Amendment protections would mean nothing:

> The Fourth Amendment was intended to secure the citizen in

11. *See* 129 S. Ct. 695, 699 (affirming the Eleventh Circuit's decision to allow evidence seized in a search incident to an arrest based on a warrant that had been recalled five months earlier).

12. *See id.*

13. *See* Weeks v. United States, 232 U.S. 383, 393 (1914). A unanimous Court determined that in order for the Fourth Amendment to have bite and redress for violations, evidence obtained by way of illegal searches and seizures must be excluded from use in federal criminal prosecutions. *Id.*

14. *See Evans,* 514 U.S. at 10 (stating that the purpose of the exclusionary rule is to prevent future violations of Fourth Amendment rights).

> person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the Government and officers of the law acting under it. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[15]

While the *Weeks* decision significantly changed criminal procedure and increased the protections under the Fourth Amendment, its holding did not extend to state criminal proceedings.[16] This limitation lasted four decades, until a change in court membership brought with it a change in judicial philosophy.[17] The Warren Court dramatically reformed criminal procedure through incorporating the Bill of Rights and its protections to apply to state criminal proceedings.[18]

In 1960, after receiving a tip that Dollree Mapp was harboring a fugitive at her home, the Cleveland police broke into her home flashing a fake warrant in her face, when in fact they did not have a search warrant.[19] After an exhaustive search of the house, the police discovered obscene material that violated

15. *Weeks*, 232 U.S. at 394 (citation omitted).

16. *See id.* at 398. "The Fourth Amendment is not directed to individual misconduct of such [state] officials. Its limitations reach the Federal Government and its agencies." *Id.*

17. *See* Bernard Schwartz, Commentary, *Chief Justice Warren and 1984,* 35 HASTINGS L.J. 975, 979-80 (1984) (reviewing the history of the exclusionary rule).

18. *See Mapp*, 367 U.S. at 655 (incorporating the exclusionary rule to apply to state criminal prosecutions through the Fourteenth Amendment); s*ee also Katz*, 389 U.S. at 359 (1967) (overturning a state conviction for illegal gambling based on a Fourth Amendment violation).

19. *See Mapp*, 367 U.S. at 644 (stating the facts of the case).

Ohio anti-obscenity statutes.[20] The *Mapp* Court was troubled by this deliberate violation of the Fourth Amendment and held that the evidence seized must be excluded from the state criminal proceeding.[21] While *Mapp* drastically expanded the reach of the exclusionary rule, twenty years later the membership of the Supreme Court had changed, and once again, so had the philosophy of the majority.

In 1984, the Supreme Court curtailed application of the exclusionary rule by creating a "good faith" exception.[22] In California, police officers executed a search warrant that was later invalidated due to a lack of probable cause.[23] In holding that the evidence obtained through the search is admissible at trial, the *Leon* Court reasoned that the purpose of the exclusionary rule is to deter police misconduct and that excluding the evidence here would not deter the judiciary from issuing unsound warrants.[24] In limiting the reach of the exclusionary rule, the *Leon* Court stated that the rule requires the "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule."[25]

A decade later, the Supreme Court once again narrowed the exclusionary rule when it had to determine whether

20. *See id.* at 645.

21. *See id.* at 657. Justice Clark stated "our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense." *Id.*

22. United States v. Leon, 468 U.S. 897, 909 (1984) (holding that evidence obtained in good faith by police relying upon a search warrant that is subsequently invalidated may be used in criminal trial).

23. *See id.* at 901-03 (summarizing the facts of the case which involved criminal charges based on drugs found and allegedly trafficked within a residence).

24. *See id.* at 908 (construing the purpose of the exclusionary rule).

25. *Leon*, 468 U.S. at 918.

If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence
obtained from a search 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. *Id.* at 919.

suppression of evidence is appropriate when police conduct a search based on an error in a government database.[26] When police officers stopped Isaac Evans for a traffic violation, a computer check revealed an outstanding arrest warrant.[27] When officers arrested Evans, a search of his vehicle following the arrest revealed a bag of marijuana under the driver seat.[28] As it turned out, the arrest warrant had been revoked seventeen days before the arrest, but the court that quashed the warrant never informed the police and their database was never updated.[29] Isaac Evans appealed his conviction on the grounds that the drug evidence was the "fruit of an unlawful arrest" and that the marijuana should be suppressed because "the purposes of the exclusionary rule would be served here by making the clerks... more careful about making sure that warrants are removed from the records."[30] The Arizona Supreme Court reversed Evans's conviction, and held that suppressing the marijuana would "serve to improve the efficiency of those who keep records in our criminal justice system."[31]

Ultimately, however, the Supreme Court disagreed and *Arizona v. Evans* extended the good-faith exception to the exclusionary rule to apply to government database errors.[32] In

26. *See* Benjamin J. Robinson, Case Comment, *Constitutional Law: Suppressing The Exclusionary Rule*, 59 FLA. L. REV. 475, 480-81 (2007) (discussing *Arizona*); *see also Arizona*, 514 U.S. at 6 (holding that suppression of evidence is not required when seized based on inaccurate computer record).

27. *See* Robinson, *supra* note 26, at 480.

28. *See* Robinson, *supra* note 26, at 480.

29. *See Evans*, 514 U.S. at 4.

At the suppression hearing, the Chief Clerk of the Justice Court testified that a Justice
of the Peace had issued the arrest warrant on December 13, 1990, because respondent
had failed to appear to answer for several traffic violations. On December 19, 1990,
respondent appeared before a *pro tem* Justice of the Peace who entered a notation in
respondent's file to "quash warrant." *Id.* at 4-5.

30. *Evans*, 514 U.S. at 4-5.

31. *Id.* at 6.

32. *See id.* (upholding the trial court's decision to allow the illegally seized evidence in *Arizona* to be introduced).

reaching this conclusion, the *Evans* Court stated that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees."[33] More importantly, the *Evans* Court relied on the fact that there is no basis for believing that applying the exclusionary rule to court clerk errors would increase the accuracy of police databases.[34]

B. Government Databases and Errors

In 1967, FBI director J. Edgar Hoover created the National Crime Information Center ("NCIC") to facilitate information flow between the numerous federal and state branches of law enforcement.[35] The NCIC is a computerized database that provides access to information about criminals, their records, and missing persons to law enforcement agencies.[36] Data on criminal records, wanted persons and crimes are exchanged throughout federal and state law enforcement agencies and ultimately compiled into the FBI's NCIC database.[37] The NCIC is the nation's largest criminal database, and provides over 80,000 law enforcement agencies, including police departments, with access to data on wanted persons, missing persons, gang members as well as information on stolen items.[38]

By 1974, the NCIC's importance and influence over law enforcement caused Congress to act and regulate the database.[39] The Privacy Act of 1974 ("Privacy Act") requires government

33. *Id.* at 14.
34. *See Evans*, 514 U.S. at 15 (adopting the logic that the exclusionary rule is intended to deter police misconduct).
35. *See* Shawn B. Spencer, *Security vs. Privacy: Reframing the Debate*, 79 DENV. U. L. REV. 519, 521 (2002) (describing uses and abuses of the NCIC); *NCIC: The National Crime Information Center*, , *archived at* http://www.webcitation.org/5snAK25Hd (outlining history and purpose of the NCIC) [hereinafter *NCIC*].
36. *See NCIC*, *supra* note 35 (detailing the organization of the NCIC).
37. *See NCIC*, *supra* note 35 (explaining how the NCIC operates).
38. *See FBI: Facts and Figures 2003*, www.FBI.gov, *archived at* http://www.webcitation.org/5snCodP2N (providing statistics on the NCIC).
39. *See* 28 U.S.C. § 534(a), (c) (2009) (authorizing Attorney General to delegate to the Director of the FBI the duty of acquiring, preserving and exchanging criminal and identification records and information) (*amended* 1988, Uniform Federal Crime Reporting Act of 1988).

agencies to keep accurate records.[40] This applied both to the NCIC database and to local databases held by federal and state agencies.[41] Upon inception of the NCIC, the accuracy of these records was at issue and certain courts made their position on the matter known.[42] Most notably was the U.S. Circuit Court of Appeals for the District of Columbia:

> The FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely, acting in effect as a step-up transformer that puts into the system a capacity for both good and harm.[43]

From 1971-1984, during his time as national staff counsel and executive director of the ACLU's Washington office, John Shattuck was at the forefront of major civil rights and liberties issues during the Nixon, Ford, Carter and Reagan administrations, often involving the accuracy of government databases.[44] "In New Orleans, a mother on welfare was arrested and jailed for eighteen hours on the basis of an inaccurate crime report resulting from programming errors in police

40. *See* Privacy Act of 1974, 5 U.S.C. §552a(e)(5) (2010). The statute defines agencies covered under the Act as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. §552(f)(1) (2009).

41. *See* 5 U.S.C. §552a(e)(5) (2010); 5 U.S.C. §552(f)(1) (2009) (combining to describe the agencies covered by the Act).

42. *See* Menard v. Saxbe, 498 F.2d 1017, 1030 (1974) (requiring the FBI to expunge NCIC record where individual was only detained and not formally arrested).

43. *Id.* at 1026.

44. *See Biography of John Shattuck*, THE GLOBALIST, *archived at* http://www.webcitation.org/5suoe4LEW (highlighting the career of Shattuck); s*ee also* John Shattuck, *In the Shadow of 1984: National Identification Systems, Computer-Matching, and Privacy in the United States*, 35 HASTINGS L.J. 991, 994 (1984) (citing the ACLU's involvement in cases involving errors in government databases during Mr. Shattuck's tenure there) [hereinafter Shattuck].

computers."[45] In New York, a middle-aged man was denied a license to drive a taxi because a computerized credit report showed that when he was thirteen years old in Massachusetts he temporarily had been placed in a mental institution, but the file failed to show that he was an orphan and the institution was the only home the state authorities could find for him for a period of four years.[46] In Massachusetts, an elderly woman lost her Medicaid benefits when a computer determined that she had a bank account above the Medicaid assets limit, even though the account was an exempt resource under federal regulations.[47] These instances are a few examples of how errors in government databases have disrupted the lives of individuals, and how serious criminal consequences may result.

According to the Electronic Privacy Information Center ("EPIC"), numerous reports indicate that government databases are filled with errors.[48] In both a 1997 report and a 2002 follow-up report, the Inspector General of the Department of Justice found that data from the Immigration and Naturalization Service was unreliable and "seriously flawed in content and accuracy."[49]

45. *See* Shattuck, *supra* note 44, at 994 (listing several examples of errors in government databases).

46. *See* Shattuck, *supra* note 44, at 994.

47. *See* Shattuck, *supra* note 44, at 994.

48. *See Errors in Government Databases*, EPIC, *archived at* http://www.webcitation.org/5surLYBXM (summarizing reports by the Inspector General of the Department of Justice); OFF. OF THE INSPECTOR GEN., SOC. SEC. ADMIN., REP. NO. A-08-06-26100, CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE ii (2006), archived *at* http://www.webcitation.org/5susOqe91. The report found numerous accuracy problems in citizenship, immigration statistics and Social Security Administration databases. *Id.* The Inspector General estimated and confirmed that about 18 million records in the Social Security Administration files have discrepancies with name, date of birth or death, and citizenship status. *Id.*

49. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REP. NO. I-2003-004, THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS n. 30 (2003); *see also* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REP. NO. I-97-08, IMMIGRATION AND NATURALIZATION SERVICE MONITORING OF NONIMMIGRANT OVERSTAYS (1997) (recognizing unreliability of data in the Nonimmigrant Information System (NIIS) database maintained by the INS); OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REP. NO. I-2002-006, FOLLOW-UP REPORT ON INS EFFORTS TO IMPROVE THE CONTROL OF NONIMMIGRANT OVERSTAYS, EVALUATION AND INSPECTIONS 5 (2002) (concluding that the data in the NIIS continue to be unreliable).

However, due to recent actions taken by the Department of Justice ("DOJ"), little can be done to remedy these errors.[50]

The bite of the Privacy Act has been severely lessened over the years by the numerous exemptions granted to certain agencies by the DOJ.[51] One notable exemption is the Department of Homeland Security, which, in 2003, sought and received an exemption from the requirement that the agency assure the reliability of their databases.[52] In 2003, the DOJ exempted the FBI of its statutory duty to ensure accuracy and completeness of over 39 million criminal records maintained by the National Crime Information Center ("NCIC").[53] In response to this exemption, EPIC launched a campaign to reestablish the accuracy requirements for the FBI and their NCIC database.[54] EPIC warned that the exemption from keeping accurate records would result in significant risks to privacy, law enforcement and constitutional violations.[55] This campaign did not go unnoticed, and in 2004 numerous Congressmen and Senators introduced The Civil Liberties Restoration Act.[56] Title III of the bill required data entered into the NCIC database to meet the accuracy requirement

50. *See* 6 C.F.R. pt. 5 App. C (2010) (granting the Department of Homeland Security an exemption from the accuracy requirements of the Privacy Act of 1974).

51. *See* 28 C.F.R. §§ 16.70-16.133 (2010) (exempting the record systems of numerous agencies, including those of the FBI, INS, and DEA, from the Privacy Act).

52. *See* 6 C.F.R. pt. 5 App. C (2010) (codifying an exemption from the Privacy Act).

53. *See* 28 C.F.R. 16.96 (2010). This regulation also exempted the Central Records System and National Center for the Analysis of Violent Crime systems from accuracy requirements of the Privacy Act. *Id.*

54. *See Errors in Government Databases*, EPIC, *archived at* http://www.webcitation.org/5surLYBXM (stating that EPIC and 85 other organizations campaigned against exemptions from the accuracy requirements of the Privacy Act)..

55. *See id.* (explaining EPIC's interest in the Herring case).

56. *See* Civil Liberties Restoration Act of 2004, H.R.4591, 108th Cong. (2004). Among the many prominent Congressmen are Representative Howard Berman (CA) and Representative William Delahunt (MA). *Id.* Additionally, Senators Edward Kennedy (MA), Senator Richard Durbin (IL), Senator Russ Feingold (WI), and Senator Jon Corzine (NJ) introduced the Senate counterpart of the Civil Liberties Restoration Act. S 2528, 108th Cong. (2004).

of the Privacy Act.[57] Even with EPIC's campaign and Congressional support, the bill died in the House Subcommittee on Crime, Terrorism and Homeland Security, and never became law.[58] As if the quashing of this bill wasn't enough, in December 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004, which directed the president to "create an information sharing environment for the sharing of terrorism information in a manner consistent with national security and with applicable legal standards relating to privacy and civil liberties."[59]

An investigation conducted by the Government Accountability Office in 2005 found a myriad of errors in Department of Homeland Security databases.[60] The inaccuracies in government databases coupled with the lack of upkeep of their own advanced technology has caused the judiciary to react.[61] In 2007, the federal district court in Northern California granted a

57. *See* David Carney, *Legislators Introduce Bills Pertaining to NCIC Database*, TECH L. J. (June 16-20, 2004), *archived at* http://www.webcitation.org/5sxrABZfi. In proposing the bill to the Senate, Senator Edward Kennedy of Massachusetts stated that
"[o]ur bill protects the integrity of the National Crime Information Center database. For decades, in maintaining the database, the Department of Justice was required to obey the Privacy Act, which requires each agency to maintain its records 'with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individuals determination.'" *Id.*

58. *See H.R. 4591: Civil Liberties Restoration Act of 2004*, GOVTRACK.US, *archived at* http://www.webcitation.org/5sxsWMa4b(summarizing the history of the bill).

59. Brief of Amici Curiae Electronic Privacy Information Center (EPIC), Privacy and Civil Rights Organizations, and Legal Scholars and Technical Experts in Support of Petitioner at 8, Herring v. United States, 129 S. Ct. 695 (2009) (No. 07-513), 2008 WL 2095709 (setting forth the historical rise of information sharing for government agencies); *see also* Pub. L. No. 108-458, 118 Stat. 3638 (2004) (delineating the president's responsibilities with regard to information sharing between government agencies).

60. *See* U. S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 6 (2005), *archived at* http://www.webcitation.org/5t5QLjXMv (finding weaknesses in the DHS Basic Pilot Program database due to inability of the program to detect identity fraud, DHS delays in entering data into its databases, and employer non-compliance with program requirements).

61. *See, e.g., Menard*, 498 F.2d at 1017(ordering the FBI to remove an erroneous record from its database).

temporary restraining order enjoining the Department of Homeland Security from implementing a verification program for employment eligibility.[62] The main reason the Court enjoined this program is because the numerous errors in Social Security Administration databases would result in unverified and inaccurate employment application reviews and decisions.[63] However, while here a job applicant may have to wait months to obtain a job, the stakes are even higher during a criminal proceeding. Where government database accuracy plays a key role in law enforcement, it may mean the difference between liberty or a jail cell for the accused.

C. Herring v. United States

"What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee?"[64] On July 7, 2004, Bennie Herring went to the Coffee County Sheriff's Department to retrieve something from his impounded truck.[65] Mark Anderson, an investigator for the Coffee County Sheriff's Department asked the county warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring's arrest.[66] When the warrant search came back negative, Anderson asked the warrant clerk to investigate further check with the neighboring Dale County.[67] After checking their computer database, the Dale County warrant clerk, Sharon

62. *See* Am. Fed'n of Labor v. Chertoff, 552 F. Supp. 2d 999, 1001-02 (N.D.Cal. 2007) (granting motion for preliminary injunction against DHS).

63. *See id.* at 1005. Under the proposed program for employment application verification, any disputed social security numbers would be sent to the Social Security Administration ("SSA") for verification. *Id.* at 1004. It would usually take 90 days for a response, and any letter that indicated there was no match in the SSA database would restart the entire process. *Id.* The flaw in this program is that the numerous inaccuracies in the SSA databases would result in No-Match letters would prevent eligible applicants from obtaining employment. *Id.* Through no fault of their own, qualified applicants would be denied work, and the SSA was making little effort to upgrade their technology or improve the accuracy of their databases. *Id.* at 1006.

64. *Herring*, 129 S. Ct. at 698 (explaining the questions facing officers when an arrest made on an invalid warrant results in the discovery of contraband).

65. *See id.* (providing case background).

66. *See id.*

67. *See id.*

Morgan, informed Anderson that there was an active arrest warrant for Herring's failure to appear on a felony charge.[68] The warrant clerk from Dale County attempted to locate the hard-copy of the warrant to be faxed as confirmation.[69]

Anderson stopped Herring as he was leaving the impound lot, and a search incident to the arrest revealed methamphetamine in Herring's pocket and a gun in his vehicle.[70] However, there had been a mistake about the warrant:

> The Dale County sheriff's computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk's office or a judge's chambers calls Morgan, who enters the information in the sheriff's computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mixup, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with

68. *See id.*
69. *See id.* at 698.
70. *See Herring*, 129 S. Ct.at 698; s*ee also* 18 U.S.C. §922(g)(1) (2010) (prohibiting a felon to be in possession of a firearm).

> the gun and drugs, just a few hundred yards from the sheriff's office.[71]

Bennie Herring was indicted in the District Court for the Middle District Court of Alabama for illegally possessing the gun and drugs in violation of 18 U.S.C. § 922(g)(1)[72] and 21 U.S.C. § 844(a).[73] He moved to suppress the seized evidence on the

71. *Herring*, 129 S. Ct. at 698.

72. 18 U.S.C. §922(g)(1) states:
It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year … to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

73. *Herring*, 129 S. Ct. at 699; 21 U.S.C. § 844(a) states:
(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or sub chapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $ 1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter,, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $ 2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $ 5,000. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this

ground that the initial search conducted incident to the arrest had been illegal because the warrant had been rescinded five weeks prior.[74] The Magistrate Judge recommended to deny the motion because the arresting officers had acted in a good-faith belief that the warrant was still outstanding and valid.[75] The Magistrate Judge reasoned that even if there were a Fourth Amendment violation, there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes."[76] The District Court adopted the Magistrate Judge's recommendation, and Herring was convicted for illegally possessing the gun and drugs.[77]

In affirming the District Court's decision, the Eleventh Circuit Court of Appeals found that the arresting officers in Coffee County "were entirely innocent of any wrongdoing or carelessness."[78] The Supreme Court further affirmed Herring's conviction, following the reasoning set forth in *Evans*, reasoning that the mistake was made by a court clerk, and not by a police officer.[79] However, the *Herring* Court further narrowed the

subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, [United States Code,] except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

74. *See Herring*, 129 S. Ct. at 699.

75. *See id.* (summarizing rationale of District Court). *See also* United States v. Herring, 451 F. Supp. 2d 1290, 1292-93 (M.D. Ala. 2005) (adopting the Magistrate Judge's recommendation and discussing the reasoning by the Magistrate Judge).

76. *Herring*, 129 S. Ct. at699 (explaining Magistrate Judge's reasoning). *See also* 451 F. Supp. 2d at 1292 (reasoning that the mistake was discovered and corrected within ten to 15 minutes and there was no evidence of routine problems).

77. *See Herring*, 129 S. Ct. at 699; s*ee also* 451 F. Supp. 2d at 1291 (adopting the Magistrate Judge's recommendation to deny Herring's motion to suppress).

78. United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007) (holding that even though the defendant's Fourth Amendment rights were violated, suppression was not required because while the county's failure to update its records may have been negligent, applying the exclusionary rule would not deter bad record keeping in the future).

79. *See* 129 S. Ct. at 701, 704 (stating that, in absence of evidence that police database errors are systematic or widespread, the exclusionary rule is ineffective to deter errors). *See also Arizona*, 514 U.S. 1, 14-15 (1995) (stating

exclusionary rule by setting an even higher burden for defendants to invoke the exclusionary rule on the basis of an error in a government database, specifically an outdated, invalid warrant:

> 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.[80]

Finally, the true effects of the *Herring* decision may lay in future cases with similar but a few distinguishing facts. According to the *Herring* Court, "we do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion."[81] However it seems that the Court is concerned with habitual problems, not just one-time occurrences. The numerous government database errors pointed out by Herring during oral arguments were dismissed by the Court because there was no evidence presented that "errors in Dale County's warrant system [were] routine or widespread."[82] However, with all the errors in the NCIC and other government databases, it is only a matter of time before the issue in *Herring* resurfaces and the Supreme Court, or a lower court, will again have to confront this issue. Until the Court changes its current position, individuals will continue to be convicted on evidence seized in violation of the Fourth

that the exclusionary rule is intended to deter misconduct and only applies in situations where deterrence of future misconduct is likely).

80. *Herring*, 129 S. Ct. at 702 (emphasis added).
81. *Id.* at 703.
82. *Herring*, 129 S. Ct. 695, 704 (2009).

Amendment. Another shift in Fourth Amendment jurisprudence is needed to bring fairness back to the courtroom.

III. Analysis

A. Effect of the *Herring* Decision

"There was a time that the exclusionary rule could be simply stated: In *Weeks v. United States*,[83] this Court [the Supreme Court] held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure."[84] But, the Supreme Court's holding in *Herring v. United States* represents a continuing shift in the narrowing application of the exclusionary rule.[85]

> "[T]he United States Supreme Court made what appears to be a fundamental shift in exclusionary rule analysis, by holding that a Fourth Amendment violation does not necessarily trigger the rule if the underlying police error was merely negligent and not sufficiently deliberate that exclusion of evidence could meaningfully deter it."[86]

According to Steve Posner, "Herring represents a policy decision by the Court that convicting criminals is more important than

83. *Weeks*, 232 U.S. at 398 (holding that evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures must be excluded from use in federal criminal prosecutions).

84. Steve C. Posner, *Herring v. United States, the Exclusionary Rule, and the USA PATRIOT Act "Fall of the Wall*," EMERGING ISSUES (Lexis Nexis), Feb. 6, 2009 at 1 . Steve Posner is the author of the annually updated legal treatise *Privacy Law and the USA PATRIOT Act* (LexisNexis/Matthew Bender 2006), and frequently speaks on privacy and national security law to professional and community groups, as well as undergraduate and graduate level university classes. *Id.* at 4. Mr. Posner was an editor of the Technology Law and Policy Review column for *The Colorado Lawyer* magazine, and was co-chair of the Colorado Bar Association's Law and Technology Committee. *Id.*

85. *See* Lieutenant Colonel Stephen R. Stewart, "Damn the Torpedoes! Full Speed Ahead!" – Fourth Amendment Search and Seizure Law in the 2008 Military Appellate Term of Court, 2009 ARMY LAW. 19, 34 (2009) (outlining recent developments in the application of the exclusionary rule). Lt. Cl. Steward is a Professor in the Criminal Law Department at The Judge Advocate General's Legal Center and School, U.S. Army, in Charlottesville, Virginia. *Id.* at 19.

86. Posner, *supra* note 84, at 1.

preventing citizen victimization due to police negligence in record keeping, unless such errors are shown to be so widespread or systematic that police would be reckless in relying on the particular database at issue."[87] While it is true that the holding of *Herring* can be read broadly or narrowly, the true effect will be seen in future suppression disputes in trial courts that try to interpret and apply the decision.[88] "A broad reading of this decision by lower courts could mean 'the death of the exclusionary rule as a practical matter.'"[89] "Accordingly, the recent decision in *Herring* has already sparked controversy amongst commentators, journalists, and courts with some declaring the decision a landmark case and others dismissing the case as a blip on the constitutional radar."[90] In fact,

> "[o]n the day *Herring* was decided, Tom Goldstein, a Washington lawyer who has argued [numerous] cases before the Supreme Court, blogged, '[M]y preliminary reaction is that we will at some point soon regard today's Herring decision as one of the most important [Fourth Amendment] rulings... in the last quarter century.'"[91]

However, what scholars are missing in debating whether the *Herring* holding is broad or narrow is that the facts of *Herring* are likely to happen again. The situation is significantly more likely to happen than most people think based on the numerous errors in government databases.[92] "As technology evolves, law

87. Posner, *supra* note 84, at 1-2.

88. *See* Stewart, *supra* note 85, at 34 (examining the impact of the *Herring* decision).

89. Stewart, *supra* note 85, at 34.

90. Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 176-77 (2009).

91. Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 472 (2009) (quoting Tom Goldstein, *The Surpassing Significance of Herring*, SCOTUSBLOG (Jan. 14, 2009), *archived at* http://www.webcitation.org/5t8XzzFsX.

92. *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REP. NO. I-2002-006, FOLLOW-UP REPORT ON INS EFFORTS TO IMPROVE THE CONTROL OF NONIMMIGRANT OVERSTAYS, EVALUATION AND INSPECTIONS 4-7 (2002) (finding that because the INS has not corrected database errors, they have remained ineffective at removing aliens that are not in custody).

enforcement officials are increasingly using a vast, cross-referenced system of public and private databases, which contains numerous errors."[93] In these inter-linked databases, one error can spread like a disease, infecting every system it touches, plaguing the individual with false records and undue suspicion.[94]

The EPIC amicus curiae brief in the *Herring* case highlights the numerous errors present in government databases, and how the factual situation in *Herring* will likely repeat itself.[95] According to the Bureau of Justice Statistics ("BJS"), "[i]n the view of most experts, inadequacies in the accuracy and completeness of criminal history records is *the single most serious deficiency* affecting the Nation's criminal history record information systems."[96] Years later, the problem persists. In a 2005 report, the BJS detailed ongoing concerns about errors in the NCIC database and targets the problem to state criminal history records which are then fed into the NCIC.[97] According to the 2005 report, "surveys have suggested that criminal history repositories are encountering several problems including significant backlogs, older records that have no dispositions, and infrequent audits to ensure accuracy of records."[98] For example, a man faced a similar predicament as Bennie Herring when a computer report listed him as committing "numerous crimes he never committed."[99] "Specifically the computer report listed him

93. Brief of Amici Curiae Electronic Privacy Information Center (EPIC), Privacy and Civil Rights Organizations, and Legal Scholars and Technical Experts in Support of Petitioner at 7, Herring v. United States, 129 S. Ct. 695 (2009) (No. 07-513), 2008 WL 2095709

94. *See id.* (arguing that one error can seriously hinder fairness in the criminal justice system).

95. *See id.* at 6 (summarizing EPIC's argument).

96. *Id.* at 14 (*quoting* BUREAU OF JUSTICE STATISTICS, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE, NCJ 187670 38 (Dec. 2001)).

97. *See* PETER M. BRIEN, BUREAU OF JUSTICE STATISTICS, IMPROVING ACCESS TO AND INTEGRITY OF CRIMINAL HISTORY RECORDS, NCJ 200581 24 (Jul. 2005) (pointing to the NCIC database's dependency on the accuracy and completeness of state criminal databases).).

98. *Id.* at 11 (discussing that state repositories must make significant changes in order to improve the NCIS background check process).

99. George M. Dery, III, *Good Enough for Government Work: The Court's*

as a female prostitute in Florida, an inmate currently incarcerated in Texas for manslaughter, a stolen goods dealer in New Mexico, a witness tamperer in Oregon, and a registered sex offender in Nevada".[100] Record accuracy was an issue long before Bennie Herring was searched pursuant to an invalid warrant, and it will continue to be a problem the lower courts must deal with while applying *Herring*.

Arguably, with *Herring* comes a shift from requiring suppression of physical evidence due to police misconduct to "other ways to deter police wrongdoing directly, including professional discipline, civil lawsuits and criminal prosecution."[101] The Court generally established that an officer's negligent error does not trigger the exclusionary rule, stating that "[a]s 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."[102] Yet, it is hard to ignore the fact that in refusing to exclude the evidence gained from Herring's illegal arrest and search, the Court diminished everyone's right against unreasonable searches and seizures.[103] *Herring* actually undermines the Supreme Court decisions that came before emphasizing the importance of the exclusionary rule.[104] The *Mapp* Court regarded the exclusionary

Dangerous Decision, In Herring v. United States, to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior, 20 GEO. MASON U. CIV. RTS. L.J. 1, 1 (2009) (quoting Brief of Amici Curiae Electronic Privacy Information Center (EPIC), Privacy and Civil Rights Organizations, and Legal Scholars and Technical Experts in Support of Petitioner at 18-19, Herring v. United States, 129 S. Ct. 695 (2009) (No. 07-513), 2008 WL 2095709).

100. *Id.*; *see* Brief of Amici Curiae Electronic Privacy Information Center (EPIC), Privacy and Civil Rights Organizations, and Legal Scholars and Technical Experts in Support of Petitioner at 18-19, Herring v. United States, 129 S. Ct. 695 (2009) (No. 07-513), 2008 WL 2095709 (providing examples of government database errors).

101. Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1, *archived at* http://www.webcitation.org/5tGEUQizA (explaining how the United States takes a distinctive approach to the exclusionary rule and how other nations handle police misconduct).

102. *Herring*, 129 S. Ct. at 702.

103. *See* Dery, *supra* note 99, at 2-3 (noting that the Court's decision in *Herring* "increased the likelihood that anyone, guilty or innocent, can be improperly seized based on a government computer snafu." *Id.*).

104. *See Weeks*, 232 U.S. at 383 (establishing the exclusionary rule); *Mapp*,

rule as so critical that it surmised that failure to use it would reduce the right against unreasonable search and seizure to "'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties."[105] By forbidding use of the Fourth Amendment's most effective remedy—the exclusionary rule—to deter law enforcement's careless computer errors, the *Herring* Court signaled to police that negligent maintenance of records will have no practical consequences in the courtroom.[106] A Fourth Amendment violation, an illegal search and seizure based on false or mistaken computer records, now passes constitutional muster and the evidence will not be suppressed.

Justice Sandra Day O'Connor warned of this type of incident in the *Evans* case: "The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base strikes me as equally outrageous."[107] Additionally, Justice Ginsburg predicted how the errors and mistakes in government databases would cause more problems in the future:

> Widespread reliance on computers to store and convey information generates, along with manifold benefits, new possibilities of error, due to both computer malfunctions and operator mistakes. Most germane to this case, computerization greatly amplifies an error's effect, and correspondingly intensifies the need for prompt correction; for inaccurate data can infect not only one agency, but the

367 U.S. at 643 (expanding the exclusionary rule to the state courts).
105. *Mapp*, 367 U.S. at 655.
106. *See* Posner, *supra* note 84, at 2-3 (analyzing the practical impact of the *Herring* decision).
107. *Arizona*, 514 U.S. at 23 (1995) (O'Connor, J. concurring).

> many agencies that share access to the database.[108]

Similar to *Herring*, the *Evans* decision provides no protection to those who fall victim to police and computer database error. *Evans*, as discussed above, involved a police search of defendant's car pursuant to an outstanding warrant.[109] However, despite the warrant being in the Sheriff's Office's database, the warrant had been quashed seventeen days prior to the arrest.[110] In refusing to apply the exclusionary rule, the *Evans* Court concluded that "exclusion of evidence at trial would not sufficiently deter future errors [by court employees] so as to warrant such a severe sanction."[111] While the Supreme Court in both *Evans* and *Herring* pointed out that no evidence existed to support the proposition "that court employees [were] inclined to ignore or subvert the Fourth Amendment,"[112] they ignored the proposition that without the exclusionary rule or any further penalties, clerks and employees have no reason or incentive to keep accurate, updated records.

The standard set in *Herring* makes it almost impossible for defendants to get a fair trial and obtain an appropriate remedy for violations of their Fourth Amendment rights. "Only, for example, where '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' will exclusion be applied."[113] As an attorney with criminal defense experience, I am troubled by this standard since these new barriers for invoking the exclusionary rule in cases involving database errors seem insurmountable. How are defendants supposed to gain insight and knowledge into warrant and other government database management? And as a practical matter,

108. *Id.* at 26 (Ginsburg, J., dissenting).
109. *See id.* at 4 (outlining history of the case).
110. *See id.*
111. Sean D. Doherty, *The End Of An Era: Closing The Exclusionary Debate Under Herring v. United States*, 37 HOFSTRA L. REV. 839, 858 (2009) (quoting *Evans)*.
112. *Arizona*, 514 U.S. at14-15.
113. Doherty, *supra* note 111, at 860 (quoting *Herring*).

how is a defendant going to prove at an evidentiary hearing, with evidence and testimony, that the clerks or employees recklessly maintained or made false entries in the system? Steve Posner attempted to answer these questions and practical concerns facing criminal defendants:

> After *Herring*, the practitioner who seeks to suppress evidence based on a police record-keeping error, or any issue involving a law enforcement database, should consider whether to subpoena or otherwise discover the entire police file and review it for evidence of record-keeping errors, in order to prove that police who rely on that database are reckless. As a practical matter, and as recognized by the *Herring* dissent, this is an expensive proposition that impoverished defendants may not be able to afford, and when a defendant *can* afford it, production and audit or police databases will be burdensome on police and the courts, and will be opposed on that basis.[114]

Without answers to these questions, criminal defendants will face a drastic reduction in their Fourth Amendment rights, resulting in an unfair trial with what has historically been deemed inadmissible evidence.

B. *Herring* in Practice

The *Johnson* case out of Louisiana state court is a prime example of how *Herring* affected one defendant negatively and actually shifted the tides mid-litigation.[115] Shortly before *Herring*

114. Posner, *supra* note 84, at 2.
115. *See* State v. Johnson, 6 So. 3d 195, 196 (La. Ct. App. 2009) (reversing the court's earlier ruling to suppress evidence in light of the *Herring* decision).

was decided, Robert Johnson was involved in a similar situation as Bennie Herring:

> Robert Johnson was initially stopped by an NOPD [New Orleans Police Department] officer after the officer observed Johnson driving without a seat belt. Upon running Johnson's name through NOPD's CAD [Computer Aided Dispatch] system and finding an outstanding warrant on Johnson, the officer arrested him, and searched him incidental to the arrest. The search revealed a small amount of marijuana in Johnson's pocket. Before leaving the scene, the officer attempted to run Johnson's name through the NCIC system to verify the validity of the warrant; the NCIC system was down. The officer proceeded to central lockup. Once there, the officer requested deputies to check the warrant again. The warrant was no longer valid. However, Johnson was booked and charged with one count of first offense possession of marijuana...[116]

The defendant moved to suppress the marijuana arguing that the officer should have attempted to run Johnson's name through NCIC to verify the validity of the warrant before conducting a search incident to arrest.[117] The trial court agreed with the defense and, in suppressing the evidence, held that the officer "could have waited on scene for some undetermined amount of time before Johnson was arrested on the warrant and

116. *Id.*
117. *See id.* (discussing case history).

searched."[118] As of this point, prior to the *Herring* decision, the defendant experienced significantly lesser consequences due to an error in a state warrant database because the evidence was suppressed.[119] However, immediately after the *Herring* decision, the State appealed the trial court in light of the *Herring* Court's new views on defective warrants in governmental databases and how the exclusionary rule should be applied.[120]

As the Court of Appeal of Louisiana for the Fourth Circuit stated, "the United States Supreme Court cleared up this previously murky area of law."[121] The Appeals Court reversed the trial court's ruling, and held that "[t]he officer in this case acted in good faith when he arrested Johnson based on the information available to him at the time."[122] The defendant had won his motion in trial court; the case seemingly was over for the prosecution.[123] Yet, within weeks of the *Herring* decision, this appeal was granted, the trial court's ruling was reversed, and the prosecution was now allowed to use evidence that was obtained through a search predicated on an invalid warrant in an un-updated warrant management system.[124] There are also other cases where the prosecution has attempted to turn the tide on defendants with the *Herring* decision.

On March 12, 2007, agents of Immigration and Customs Enforcement ("ICE") submitted an application and affidavit in support of a warrant to search John Perry Ryan's house.[125] The

118. *Id.*
119. *See Johnson*, 6 So. 3d at 196 (discussing the trial court suppression of the evidence due to the error in the warrant database).
120. *See id.* (citing *Herring* as providing grounds to appeal suppression of evidence). *See also* Herring v. United States, 129 S. Ct. 695 (2009) (setting precedent that errors in warrant databases do not trigger the exclusionary rule).
121. *Johnson*, 6 So. 3d at 196 (referring to the *Herring* decision being dispositive on issue in this case).
122. *Id* (justifying the court's decision on *Herring* and rationalizing that the trial court had erroneously granted the motion to suppress).
123. *See id.* (recognizing that the trial court suppressed the evidence).
124. *See id* (noting the vast differences in opinion in the lower circuit courts).
125. *See* United States v. Ryan, 2008 U.S. Dist. LEXIS 29690, 2 (March 31, 2008) (providing facts of the case).

warrant was granted; however, "[a]lthough the items to be seized were described in the application and affidavit, the warrant contained no such description."[126] Upon executing the search warrant, federal agents seized computers, a wireless media card, documents and photographs.[127] These items did appear in a list attached to the application for a search warrant, but were not attached to the actual search warrant.[128] A grand jury indicted Ryan for transporting and possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(1) and § 2252A(a)(5)(B), based on what was recovered and contained on the seized electronics.[129]

The defense moved to suppress the evidence seized based on the defective search warrant, and the court granted the motion to suppress on March 31, 2008.[130] However, in light of *Herring*, the government moved the Court in February 2009 to reconsider its March 31, 2008 ruling under Federal Rule of Civil Procedure 60(b).[131] According to the Vermont District Court, "*Herring* addresses the issue of whether the good faith exception to the exclusionary rule applies when the police make a negligent error in the execution of a warrant."[132] The government in this case likened the clerk and officer's failures to attach the list of

126. *Id.*
127. *See id.* at 3 (describing the agents' search).
128. *See id* (explaining why the warrant was invalid).
129. *See Ryan*, 2008 U.S. Dist. LEXIS 29690 at 3 (summarizing the charges).
130. *See* United States v. Ryan, 2009 U.S. Dist. LEXIS 53644, 4 (May 26, 2009) (discussing the court's actions prior to *Herring*).
131. *See id.* at 2-4; *see also* Fed. R. Civ. P. 60(b), which states:
Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.
132. *Ryan*, 2009 U.S. Dist. LEXIS 53644 at 4.

items to be seized to the search warrant to the negligent warrant database maintenance in *Herring*.[133] However, in reconsidering its prior decision, the District Court affirmed the suppression of the illegally seized evidence, distinguishing this case from *Herring*:

> This is a critical distinction from *Herring.* The law enforcement officers in *Herring* relied upon apparently reliable information that existed. In this case, the agents relied upon a facially invalid warrant that failed to particularly describe the items to be seized. Exclusion is appropriate where a 'warrant was so lacking in the indicia of probable cause that an objectively reasonable officer should not have relied on it.'[134]

There is also little doubt that technology played a commanding role in the *Herring* decision as evidenced by the concerns and comments made by the Justices during oral arguments. As Chief Justice Roberts commented 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."[135] However, as the *Robinson* case out of the Supreme Court of California shows, even police officers with the most advanced technology make mistakes that lead to unreasonable searches, seizures and invasions upon an individual's privacy.[136] In this case, Paul Eugene Robinson

133. *See id.* at 7 (recounting the government's argument that the *Herring* decision exempts from exclusion any evidence seized due to a merely negligent violation of the defendant's Fourth Amendment rights).

134. *Id.* at 10-11; s*ee also* United States v. Lindsey, 596 F. Supp. 2d 55, 63 (D.D.C. 2009) (finding, post-*Herring,* that the good faith exception in *Leon* did not apply where "an objectively reasonable officer could not have relied on the warrant in this case" and suppressing evidence found in search of home where search warrant was based on stale evidence) (citation omitted). *Id.* at 61; United States v. Lester, 2009 U.S. Dist. LEXIS 29631, at *16-*17 (W.D. Va. 2009) (distinguishing *Herring* and finding that officers could not reasonably rely on search warrant because it was not based on probable cause).

135. Transcript of Oral Argument at 20, Herring v. United States, 129 S. Ct. 695 (2008) (No. 07-513), *archived at* http://www.webcitation.org/5tQlHvQvq.

136. *See* People v. Robinson, 224 P.3d 55, 80 (Cal. 2010) (holding that the

was accused of committing five felony sexual offenses upon a Deborah L. in August of 1994.[137] In August of 2000, four days before the statute of limitations to bring criminal prosecution would have expired (6 years in California), "the Sacramento County District Attorney filed a felony complaint against 'John Doe, unknown male' describing him by his unique 13-loci deoxyribonucleic acid (DNA) profile."[138] The next day, a John Doe arrest warrant was issued, incorporating by reference the same DNA profile, and Robinson was arrested in September of 2000.[139] However, the "defendant's DNA profile in the state's DNA database, which linked Robinson to the crimes committed against Deborah L., had been generated from blood mistakenly collected from the defendant by local and state agencies in administering the DNA and Forensic Identification Database and Data Bank Act of 1998 (the Act)."[140] The Act was enacted while the defendant was incarcerated, serving a sentence for two misdemeanor convictions.[141] However, an unknown prison employee completed a DNA testing form in which the defendant was mistakenly identified as a prisoner with a qualifying offense; as a result, a sample of the defendant's blood was drawn in violation of the Act.[142] In fact, the parties both agreed that the defendant's earlier blood sample was collected in violation of the Act.[143] The defense moved to suppress the DNA evidence at trial on the basis

exclusionary rule was not triggered where the police were negligent in implementing a new Act requiring a new DNA database that resulted in an unwarranted blood sample to be taken from the defendant).

137. *See id.* at 59 (stating the charges against the defendant).

138. *Id.* at 60; *see also* CAL. PENAL CODE §§ 959(4), 815 (West 2008) (permitting the use of fictitious names in charging documents and in warrants, respectively); People v. Montoya, 255 Cal. App. 2d 137, 142 (1967) (holding that if a fictitious name is used the warrant should also contain sufficient descriptive material to indicate with reasonable particularity the identification of the person whose arrest is ordered).

139. *See Robinson*, 224 P.3d at 60 (recounting the facts of the case).

140. *Id; see also* CAL. PENAL CODE § 295 (creating a state-wide DNA database and requiring DNA samples from "all persons, including juveniles, for the felony and misdemeanor offenses described…").

141. *See Robinson*, 224 P.3d at 63.

142. *See* People v. Robinson, 224 P.3d, 55, 64 (Cal. 2010) (explaining why the defendant's DNA should not have been in the database to begin with).

143. *See id*. at 62 (confirming the error).

that the federal exclusionary rule was the appropriate "remedy to apply to the police personnel errors that occurred in this case."[144]

Ultimately the California Supreme Court held that there was no violation of Robinson's Fourth Amendment rights because as an incarcerated, convicted criminal, he did not have a valid privacy interest.[145] However, the *Robinson* Court then conducted an in-depth analysis of *Herring* and how it would apply if the court had found a Fourth Amendment violation.[146] The defense contended that the mistaken collection of his blood sample was the result of "a cascading series of errors" that "were indicative of a system breakdown."[147] The *Robinson* Court rejected this argument, and upheld the trial court's finding of fact that "the mistakes that lead to the unlawful collection of defendant's blood were made because correctional staff was under pressure to immediately implement a newly enacted law that was complex and confusing," and the motivation for collecting the blood sample "was a good faith belief, possibly based on a negligent analysis by someone, that the defendant was a qualified offender."[148] Based on *Herring* and *Robinson*, it follows that local police departments in California will be given significant lee-way in conducting mistakes, and the result will be illegally seized evidence being admissible against defendants at trial.

IV. Conclusion

Herring and technology have both contributed to sweeping changes in Fourth Amendment jurisprudence, specifically the exclusionary rule. In the modern age, where law enforcement is dependent on computers, the accuracy of government databases may determine whether a defendant gets

144. *Id*.
145. *See id.* at 64-65 (determining that the collection of DNA samples is a form of identification against which convicted criminals have no right to be protected).
146. *See Robinson*, 224 P.3d at at 68-69 (determining that *Herring* was inapplicable because there was no Fourth Amendment violation).
147. *Id*. at 68.
148. *People*, 224 P.3d at 69.

a fair trial. Technology has played a major role in the area of Fourth Amendment search and seizure law through its use in law enforcement and the determination of probable cause. When probable cause for an arrest is founded on errors in government databases, the Supreme Court has allowed evidence obtained from that search into trial. As a result, individuals are having their Fourth Amendment rights violated during the illegal seizure, and when that evidence is introduced at trial.

Maintaining accurate record systems is one of the central requirements of information management. Moreover, the technology of government databases has changed dramatically since 1995, when the Court upheld the use of evidence obtained from an erroneous arrest record that was the product of a clerical mistake. Today, the police have within their electronic reach access to an extraordinary range of databases. Mixed and mingled together are government and commercial databases filled with errors. Modern policing is a coordinated enterprise and it is critical that a commitment to accuracy is maintained throughout the criminal justice system. Not only does erroneous data affect the rights of citizens, it also undermines effective investigations by creating confusion and mistakes.

What *Herring* has done is shed light on the sheer volume of errors that exist in government databases. However, what *Herring* has also done is leave criminal defendants vulnerable to these errors. *Herring* not only provides no protection to victims of government database errors or negligent police bookkeeping, it actually strips away a fundamental judicial remedy historically used to protect these victims. Short of a massive fishing expedition into an entire governmental database, which is impractical, defendants will have much more difficulty in suppressing evidence obtained through illegal searches and seizures. The result is unfair: the accused is faced with illegally seized evidence and local police departments receive no penalty for keeping incorrect records. As policing becomes more reliant on computerized systems, the number of illegal arrests and searches based on errors in government record-keeping is poised

to multiply. And under *Herring*, the exclusionary rule is no longer a weapon in the defense's arsenal to combat these errors.