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THE RISE AND FALL OF THE EXCLUSIONARY RULE: CAN IT SURVIVE *HUDSON, HERRING, & BRENDLIN?*

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A. Introduction

1. All About the Exclusionary Rule

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures but does not specify how that right is to be enforced. Between 1914 and 1969, the United States Supreme Court formulated the exclusionary rule, requiring the suppression of evidence wrongfully seized by government officials in violation of the Fourth Amendment. The justices who announced the rule viewed it as judicially implied but constitutionally mandated. The exclusionary rule was deemed necessary to enforce and effectuate the prohibition on unreasonable searches and seizures, to assure that the courts are not condoning such unconstitutional activity, and to deter future official misconduct. (*Mapp v. Ohio* (1961) 367 U.S. 643.)

If the conduct of state or federal officials is shown to violate the Fourth Amendment, the exclusionary rule requires that evidence obtained as a result of such conduct must be suppressed; it cannot be used in the criminal trial of the individual who was victimized by the illegal search and seizure. The exclusionary rule applies to both the primary evidence, seized in the course of the unlawful government activity, and to the derivative evidence obtained by exploitation of that activity. Primary evidence is automatically suppressed, whereas derivative evidence is excluded only if it is tainted by the unlawful conduct and that taint has not been purged by the passage of time or intervening circumstances. The exclusionary rule applies to all types of evidence – physical materials, verbal statements and testimony as to matters observed during an unlawful search and seizure. (*Wong Sun v. United States* (1963) 371 U.S. 471.)

However, the exclusionary rule does not apply in every case when officials violate a defendant's Fourth Amendment rights and consequently obtain incriminating evidence. By the 1970's, critics of the rule gained control of the Supreme Court, and they have never relinquished it. In a series of opinions, the Court has limited the application of the exclusionary rule and diminished the vitality of Fourth Amendment rights.

The Court has declined to apply the exclusionary rule to proceedings other than criminal trials.(See, e.g. *United States v. Calandra* (1974) 414 U.S. 338; *United States v. Janis* (1976) 428 U.S. 433; *Pennsylvania Board of Probation and Parole v. Scott* (1998) 524 U.S. 357.) The Court has refused to exclude illegally procured evidence when the officer who conducted the search and seizure reasonably relied in good faith on a warrant subsequently found invalid, a statute later declared unconstitutional, or erroneous computer data. (See, e.g. *United States v. Leon* (1984) 468 U.S. 897; *Illinois v. Krull* (1987) 480 U.S. 340; *Arizona v. Evans* (1995) 514 U.S. 1.)

To justify these restrictions on the exclusionary rule, the Supreme Court re-defined the rule's purposes, rejecting the rationales offered by the justices who formulated the rule. No longer was exclusion of illegally seized evidence a constitutional right, necessary to effectuate the Fourth Amendment's guaranty and preserve judicial integrity. (See *Weeks v. United States* (1914) 232 U.S. 383; *Mapp, supra*., 367 U.S. at 647-659.) The exclusionary rule was recast as a judicially created utilitarian remedy that's sole purpose is to deter future police misconduct. The Court declared that the rule should not apply when its social costs, including the loss of probative and reliable evidence, outweighed the deterrent benefits. (See, e.g. *Leon, supra*., 468 U.S. at 906-908.)

2. Hudson, Herring and Brendlin: Three Recent Cases Limiting Application of the Exclusionary Rule

The final four sections of these materials, E, F, G, and H, discuss the three most recent cases restricting application of the exclusionary rule in criminal trials. In *Hudson v. Michigan* (2006) 547 U.S. 586, the Supreme Court held that the exclusionary rule does not apply to evidence seized following a knock-notice violation. In *Herring v. United States* (2009) 129 S.Ct. 695, the Court declined to apply the exclusionary rule when the officer arrested and searched the defendant in reasonable reliance on false information resulting from a police employee's negligent record-keeping error. In *People v. Brendlin* (2008) 45 Cal. 4th 262, the California Supreme Court held that discovery of an arrest warrant during an unlawful traffic stop dissipates the taint of the illegal detention.

3. Placing These Cases in Historical Context: The Rise and Fall of the Exclusionary Rule

Hudson, *Herring* and *Brendlin* are just the latest moves in an on-going assault on the exclusionary rule. They must be analyzed in the context of the rule's tumultuous history. The next three sections of these materials, B, C, and D, relate that history – the rise and fall of the exclusionary rule. They describe the Supreme Court's rejection of the rule's constitutional basis and original rationale, as well as the majority's growing hostility to the suppression of illegally seized, but reliable, evidence which has facilitated the process that Justice Brennan called the "slow strangulation" of the exclusionary rule.

4. Why is the Exclusionary Rule Important? L

The justices who formulated the exclusionary rule and those who dissented from later cases limiting its application recognized that the rule is absolutely necessary to effectuate Fourth Amendment rights. If illegally seized evidence was not excluded from criminal trials, the Fourth Amendment guarantee would be an empty promise. (*Weeks v.*

United States (1914) 232 U.S. 383, 393; *Mapp, supra*., 367 U.S. at 655, 660.)

Imagine how our system would function without the exclusionary rule. A police officer could detain, arrest or search an individual and his property based on bias, a hunch or a whim, without reasonable cause. If the officer discovered incriminating evidence, it could be freely admitted at the individual's criminal trial. The officer would have no incentive to comply with Fourth Amendment restrictions. The vague possibility of civil lawsuits or departmental discipline would not deter police misconduct. By allowing the illegally seized items into evidence and upholding convictions based on such evidence, the courts would condone unconstitutional activity. The Fourth Amendment would be effectively nullified.

Probative evidence of a defendant's guilt is excluded because it was secured in violation of his constitutional rights. The justices who formulated the exclusionary rule believed that it was better for some guilty persons to go free than for the courts to accept and encourage Fourth Amendment violations:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence".
> (*Mapp, supra*., 367 U.S. at 659.)

Every time the Supreme Court limits the reach of the exclusionary rule, it deals a blow to our Fourth Amendment rights. Justice Brennan recognized this in his dissent from *United States v. Leon*. He stated that in our zealous efforts to combat crime, it is all too easy for government officials to seek expedient solutions. Limiting or abandoning the exclusionary rule, and the consequent "relaxation of Fourth Amendment standards seems a tempting, costless means of meeting the public's demand for better law enforcement". But as a society, we would pay a heavy price for such expediency for it has long been recognized that the Fourth Amendment restricts the exercise of unrestrained power by the police and the government. (See *United States v. Leon* (1984) 468 U.S. 897, 959-960.)

Sixty years ago, Justice Jackson offered this testament to the importance of Fourth Amendment rights which is often quoted by defenders of the exclusionary rule:

> "These, I protest, are not second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.

> Uncontrolled search and seizure is the first and most effective weapon in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."
> (*Brinegar v. United States* (1949) 338 U.S. 160, 180-181.)

Moreover, as has often been noted, enforcement of Fourth Amendment rights and deterrence of unreasonable searches and seizures protects all citizens, not merely those who have committed crimes. In *Elkins v. United States* (1960) 364 U.S. 206, 217-218, the Court recognized this benefit of the exclusionary rule by quoting again from Justice Jackson's dissent in *Brinegar*:

> "Only occasional and more flagrant abuses [of the Fourth Amendment] come to the attention of the courts, and then only those where the search and seizure yield incriminating evidence..... If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress.....I am convinced that there are many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear. Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence against those who frequently are guilty."
> (*Brinegar, supra*., 338 U.S. at 181.)

Finally, the exclusionary rule permits the courts to fulfill their historic function as guardians of the Fourth Amendment. The rule allows for judicial review of police practices. (*United States v. Peltier* (1975) 422 U.S. 531, 555 [dis.opn. of Brennan, J.].) Through the litigation of suppression motions, the courts define the parameters of a reasonable search and seizure.

B. The Rise of the Exclusionary Rule: Origins and Development

1. Boyd v. United States (1886) 116 U.S. 616: A Short-lived Late 19th Century Exclusionary Rule

The genesis of the exclusionary rule is generally traced to *Boyd v. United States*, even though *Boyd* involved no actual search and seizure. In *Boyd*, the defendants were prosecuted for fraudulently importing merchandise into the United States in violation of customs laws. In accordance with statutory provisions, the defendants were ordered to produce incriminating invoices for the merchandise for admission into evidence at trial. Under the statute, if the defendants had not produced the invoices, the fraud allegations would "be taken as confessed at trial." (*Boyd, supra*., 116 U.S. at 617-622.)

The Supreme Court held that the statute authorizing these procedures violated both the Fourth and the Fifth Amendments. Compelling an individual to produce private papers to be used as evidence against him to establish a criminal charge is the equivalent of an unreasonable search and seizure prohibited by the Fourth Amendment. Because the statute compelled the defendant to "be a witness against himself" in a criminal case – by producing the incriminating documents or confessing the government's allegations – it also violated the Fifth Amendment. Thus, exclusion of the evidence was required by both amendments. (*Boyd, supra*., at 617-638.)

The *Boyd* rule did not endure. Just eighteen years later, in *Adams v. New York* (1904) 192 U.S. 585, the Supreme Court held that gambling paraphernalia illegally seized from the defendant's premises could be admitted into evidence at his state trial. The Supreme Court restricted *Boyd* to its facts, noting that this case did not involve the compulsory production of private papers. The Court then reiterated the common law rule that competent evidence was admissible in a criminal trial regardless of how it was obtained, whether lawfully or unlawfully. (*Adams, supra*., at 586 - 599.)

2. Weeks v. United States (1914) 232 U.S. 383: The Birth of the Exclusionary Rule

Ten years later, the Supreme Court decided *Weeks v. United States*, setting forth the exclusionary rule that has persisted to this day. The Court held that in a federal prosecution, the Fourth Amendment barred the use of evidence illegally seized by federal agents. In *Weeks*, officers searched the defendant's home without a warrant. Incriminating papers were seized, and the defendant was prosecuted for unlawful use of the mails. The trial court denied the defendant's motion to return the seized property, and it was admitted at trial over defense objection. (*Weeks, supra*., 232 U.S. at 386-389.)

In a unanimous opinion, the Supreme Court held that the incriminating property should have been restored to the accused and excluded from his criminal trial. According to the Court, the exclusionary rule is mandated by the Fourth Amendment which restrains the power and authority of the courts as well as law enforcement; both are "entrusted under our Federal system with enforcement of the laws." (*Weeks, supra*., at 391-392.)

The Court recognized that exclusion of illegally seized evidence was necessary to give force and effect to the Fourth Amendment's guarantees. Without it, "the protection of the amendment, declaring [a citizen's] right to be secure against such searches and seizures is of no value and....might as well be stricken from the Constitution". (*Weeks, supra*., at 393.) Finally, the Court emphasized that the exclusionary rule was necessary to assure judicial integrity. "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches....should find no sanction in the judgments of the courts." (*Weeks, supra*., at 392.)

3. Is the Exclusionary Rule Based on the Fourth or Fifth Amendment?

Following *Weeks*, several Supreme Court cases held that illegally seized evidence must be excluded from federal criminal prosecutions. (See, e.g. *Silverthorne Lumber Co.v. United States* (1920) 251 U.S. 385.) These cases saw the suppression of tainted evidence as necessary to effectuate Constitutional guarantees. However, the Court vacillated as to whether the source of the exclusionary rule was the Fourth or the Fifth Amendment. In *Weeks*, the Court based the exclusionary rule solely on the Fourth Amendment. Nevertheless, some of the cases following *Weeks*, harkened back to the Court's earlier reasoning in *Boyd*, which had based exclusion of the wrongfully procured evidence on both amendments. "[W]hen properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment". (*Agnello v. United States* (1925) 269 U.S. 20, 33-34; see also *Gouled v. United States* (1921) 255 U.S. 298.)

4. The Federal-State Distinction

What was clear, however, was that the exclusionary rule applied only in federal criminal prosecutions to evidence illegally seized by federal officials. The Fourth Amendment did not restrict the actions of state officials, because its prohibition on illegal searches and seizures did not apply to the states. (See *National State Deposit Co. v. Stead* (1914) 232 U.S. 58, 71.) Thus, state police could search property without a warrant or probable cause and turn that evidence over to the federal government on "a silver platter" for use in a federal prosecution. (See *Lustig v. United States* (1948) 338 U.S. 74, 78-79.)

In a series of cases, the Supreme Court held that the exclusionary rule forbid the admission of illegally procured evidence, in a federal prosecution, if the evidence was seized by state police acting jointly with federal officers. (See *Byars v. United States* (1927) 273 U.S. 28 [federal agent participated with local officers from the start of the search, looking for evidence of a federal crime]; *Lustig v. United States, supra*., 338 U.S. at 74 [federal agent joined with local police officers during the search and directed the collection of evidence]; *Gambino v. United States, supra*., 275 U.S. at 310 [state troopers were working on behalf of the federal government when they searched the defendant's car for evidence that he was violating the National Prohibition Act].)

5. Wolf v. Colorado (1949) 338 U.S. 25: The Fourth Amendment, but not the Exclusionary Rule, Applies to the States

Thirty-five years after *Weeks,* the Supreme Court decided *Wolf v. Colorado*, a case that extolled the importance of Fourth Amendment rights but did not view the exclusionary rule as a necessary component of those rights. The Court held that the freedom from unreasonable searches and seizures is a fundamental right protected from state violations by the Fourteenth Amendment's Due Process Clause. "The security of one's privacy against arbitrary intrusion by the police - which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause." (*Wolf, supra*., 338 U.S. at 27-28.) However, according to *Wolf*, the exclusionary rule is "not derived from the explicit requirements of the Fourth Amendment", but is "a matter of judicial implication." (*Wolf, supra*., at 29.) Thus, the Constitution did not require state courts to suppress the fruits of such violations.

Ultimately, the Court's reasons for holding that the exclusionary rule need not apply in state courts was "bottomed on factual considerations." (See *Mapp v. Ohio* (1961) 367 U.S. 643, 651.) The Court emphasized that the majority of states had not adopted the exclusionary rule as a remedy for Fourth Amendment violations. The Court also noted that jurisdictions without the exclusionary rule had adopted other "equally effective" remedies to protect their citizens' right to privacy, including private actions for damages and internal discipline of police officers. (*Wolf, supra*., at 30-31.)

6. Elkins v. United States (1960) 364 U.S. 206*: *The Exclusionary Rule Applies to Evidence Seized by State Officers as Well as Federal Officers

The next significant exclusionary rule case was *Elkins v. United States*. The Court overturned the so-called "silver platter doctrine" and held that evidence illegally seized by state officials was inadmissible in a federal criminal trial. The Court held that after *Wolf*,

"the foundation upon which the admissibility of state-seized evidence in a federal trial originally rested – that unreasonable state searches did not violate the Federal Constitution – disappeared." Nevertheless, federal courts continued to allow the admission of evidence illegally seized by state officers without discussing *Wolf's* impact. (*Elkins, supra*., 364 U.S. at 213-214.) *Elkins* ended this contradiction by holding that evidence seized by state officers as well as federal officers would be excluded from federal criminal trials. The Court noted that it made no difference to the aggrieved victim whether the evidence was seized by a state police officer, in violation of the Fourteenth Amendment, or by a federal agent, in violation of the Fourth Amendment: "The Constitution is flouted equally in either case." (*Elkins, supra*., at 215.)

The Court stated that one purpose of the exclusionary rule is to deter police misconduct - "to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." (*Elkins, supra*., at 217.) However, the Court emphasized that the exclusionary rule also preserves judicial integrity. If courts admit evidence that has been illegally seized and permit convictions based on such evidence, they become "accomplices in the willful disobedience of a Constitution they are sworn to uphold." (*Elkins, supra*., at 223.)

7. Mapp v. Ohio (1961) 367 U.S. 643: The Exclusionary Rule Applies in State and Federal Proceedings

One year later, in *Mapp v. Ohio*, the Supreme Court overturned *Wolf v. Colorado* and held that the exclusionary rule applied in state as well as federal criminal proceedings. After a dozen years, the Court closed "the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse" of the Fourth Amendment. (*Mapp, supra*., 367 U.S. at 654-655.) In a six-to-three majority opinion written by Justice Clark, the Court made its strongest argument on behalf of the exclusionary rule as "logically and constitutionally necessary... an essential part of the right to privacy" guaranteed by the Fourth Amendment. (*Mapp, supra*., at 656.)

The Court viewed extension of the exclusionary rule to the states as a matter of judicial duty. As independent tribunals of justice, the courts were empowered to guard against encroachments upon constitutional rights and enforce the Fourth Amendment's guarantee against unreasonable searches and seizures. (*Mapp, supra*., at 647.) The Court characterized the exclusionary rule as a "constitutionally required – even if judicially implied – deterrent safeguard" without which the Fourth Amendment would be reduced to "a form of words". (*Mapp, supra*., at 648.) As in *Elkins*, the Court saw the rule as needed to deter police misconduct, but it was also necessary to preserve judicial integrity by assuring that the government did not become a lawbreaker. (*Mapp, supra*., at 659.)

Now that the Fourth Amendment applied to the states and evidence illegally seized by state officials could no longer be admitted into evidence in federal criminal trials, it defied both common sense and the Constitution to preserve the *Wolf* rule allowing the admission of such evidence in state trials. (*Mapp, supra*., at 657.) Finally, the "factual considerations" supporting *Wolf's* refusal to apply the exclusionary rule to state court proceedings were no longer controlling. By 1961, more than half the states, including California, had adopted the exclusionary rule in some form. *Wolf* had speculated that other remedies (e.g. actions for damages) could adequately secure compliance with Fourth Amendment requirements. The experience of California and other states showed that these other remedies have proved "worthless and futile." (*Mapp, supra*., at 651-653.)

8. Wong Sun v. United States (1963) 371 U.S. 471: The Exclusionary Rule Suppresses the Fruits of Unreasonable Searches and Seizures

In *Wong Sun*, the Court clarified that the exclusionary rule applies to evidence seized during an unlawful search and to the "fruits" of the illicit police action. (*Wong Sun, supra*., 371 U.S. at 484-485.) In determining whether the fruits of an unconstitutional search or seizure should be excluded, a court should consider whether, granting the primary illegality, the evidence has subsequently been discovered "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (*Wong Sun, supra*., at 488.)[1]

The Court also held that the exclusionary rule bars all types of illegally procured evidence from a criminal trial: physical tangible materials, verbal statements, and testimony as to matters observed during an unlawful invasion. (*Wong Sun, supra*., at 485.) Exclusion of both physical and verbal evidence advances the policies underlying the exclusionary rule – to deter lawless conduct by police officers and to close the doors of the courts to any use of evidence unconstitutionally obtained. (*Wong Sun, supra*., at 486.)

9. Davis v. Mississippi (1969) 394 U.S. 721: There is no Exception to the Exclusionary Rule for Reliable and Trustworthy Evidence

In an opinion written by Justice Brennan, who would later write several powerful dissents objecting to incursions on the reach of the exclusionary rule, the Supreme Court held that fingerprints obtained from the defendant during an illegal detention should have

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[1] Two earlier Supreme Court cases, *Silverthorne v. United States* (1920) 251 U.S. 385 and *Nardone v. United States* (1939) 308 U.S. 338, had held that fruits of the illegal search, as well as evidence seized during the illicit invasion, should be excluded.

been suppressed from his rape trial. (*Davis, supra*., 394 U.S. at 721-723.) The Court concluded that fingerprints taken from the defendant, although different from verbal statements or seized articles, are evidence subject to suppression if taken during an unlawful arrest or detention. (*Davis, supra*., at 724.)

The Court rejected the Mississippi Supreme Court's suggestion that "fingerprint evidence, because of its trustworthiness, is not subject to the proscriptions of the Fourth and Fourteenth Amendments." (*Davis, supra*., at 723-724.) "Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however, relevant and trustworthy the seized evidence may be as an item of proof." The Court emphasized that "[t]he exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment." To make an exception for illegally seized evidence, merely because it is trustworthy "would fatally undermine these purposes." (*Davis, supra*., at 724.)

Justice Black dissented from the majority opinion, and concluded with a statement that proved a harbinger of things to come:

> "This case is but one more in an ever-expanding list of cases in which this Court has been so widely blowing up the Fourth Amendment's scope that its original authors would be hard put to recognize their creation.... I think it is high time this Court, in the interest of the administration of criminal justice, made a new appraisal of the language and history of the Fourth Amendment and cut it down to its intended size. Such judicial action would, I believe, make our cities a safer place for men, women and children to live." (*Davis, supra*., at 729-730 [dis. opn. of Black, J.].)

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As a consequence of these decisions, by the late 1960's, the exclusionary rule existed in its most robust form. All types of evidence discovered by state or federal officers during or as a result of an illegal search or seizure would be excluded from both state and federal trials. However, this golden age of the rule was to be short-lived. By the mid-1970's, critics of the exclusionary rule included a majority of Supreme Court justices. From then on, Justice Black's wish would come to pass. All subsequent cases would limit the application of the rule under a variety of circumstances.

C. The Justification for the Exclusionary Rule: Changing Rationales Reflect Changing Attitudes

From 1974 on, every Supreme Court case regarding the exclusionary rule included these words from *United States v. Calandra* (1974) 414 U.S. 338, 348: The exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." In other words, the exclusion of evidence seized in violation of the Fourth Amendment is not constitutionally required. Rather, the rule was created by the Court, and the justices are free to modify or eliminate it at any time. Moreover, the rule's primary purpose is remedial – to deter future police misconduct.

But these views of the exclusionary rule have not always prevailed.
The justices who formulated the exclusionary rule between 1914 and 1969, believed that the rule was constitutionally mandated – either implicit in the Fourth Amendment's prohibition on unreasonable searches and seizures or necessary to effectuate the Amendment's guarantee. These justices also believed the rule's main purpose was to maintain judicial integrity and assure that the government was not condoning or benefitting from law enforcement's illegal conduct.

How did this shift in attitude come about, and how did the Supreme Court rely on this changed interpretation of the exclusionary rule's rationale to limit its application?

1. Those who Formulated and Defended the Exclusionary Rule saw it as Required by the Fourth Amendment as a Right and a Remedy

The Supreme Court justices who defined the exclusionary rule recognized the importance of the Fourth Amendment to a free society. That amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." (*Weeks, supra*., 232 U.S. at 391.) It protects the "very essence of constitutional liberty and security" from "all invasions on the part of government and its employees." (*Weeks, supra*., at 389-391.) Moreover, "[t]his protection reaches all alike, whether accused of a crime or not." (*Weeks, supra*., at 392.)

As critics of the exclusionary rule never tire of repeating, the Fourth Amendment makes no express provision for the exclusion of evidence secured in violation of its commands. Nevertheless, in cases from *Weeks* through *Mapp*, the Supreme Court recognized that the rule was constitutionally required even if judicially implied. (*Mapp, supra*., 367 U.S. at 656.)

The justices who viewed the exclusionary rule as constitutionally mandated based this conclusion on two separate but related theories: 1) that exclusion by the courts of illegally seized evidence is part of the right guaranteed by the Fourth Amendment; and 2) that the "rule is constitutionally required, not as a right explicitly incorporated in the Fourth Amendment's prohibitions, but as a remedy necessary to ensure that those prohibitions are observed in fact." (*Pennsylvania Board of Probation and Parole v. Scott* (1998) 524 U.S. 357 [dis. opn. of Stevens, J.].)

The first theory holds that the Fourth Amendment prohibits not only the police officer's initial unlawful seizure of incriminating evidence, but also the subsequent use of such evidence in a criminal trial by the prosecutor and the court. This broad view of the Fourth Amendment was set forth in *Weeks* as the principle rationale for the exclusionary rule. (See *Weeks*, *supra*., 232 U.S. at 391-392, 398.)

In *Weeks*, the Court concluded that the Fourth Amendment restrains all of the federal government, including the courts. All federal officials are charged with supporting the Constitution and protecting the people and their property from unreasonable searches and seizures. (*Weeks, supra*., at 391-392.) Thus, both the police officer's unconstitutional seizure of evidence and the court's use of the evidence constitutes "a denial of the constitutional rights of the accused." (*Weeks, supra*., at 398; *Mapp, supra*., at 648.)

In *Olmstead v. United States* (1928) 277 U.S. 438, the Court explained:

> "The striking outcome of the *Weeks* Case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment." (*Olmstead, supra*., at 462.)

By the mid-1970's, the Supreme Court had abandoned the idea that the exclusionary rule was constitutionally required and had specifically rejected the concept that the use of illegally seized evidence at trial violated the Fourth Amendment. (See *United States v. Calandra* (1974) 414 U.S. 338, 354; *Leon, supra*., 468 U.S. at 906.)

Disagreeing with this rejection of the exclusionary rule's constitutional basis, Justice Brennan, dissenting in *Leon*, clearly explained the theory originally set forth in *Weeks*. The Fourth Amendment "like other provisions of the Bill of Rights, restrains the power of government as a whole", including law enforcement, the executive and the judiciary. (*Leon, supra*., 468 U.S. at 932.) The amendment prohibits not only the initial

unreasonable invasion and unlawful seizure of the evidence by the police, "which is done, after all, for the purpose of securing evidence", but also the subsequent use of such evidence in a criminal trial. (*Leon, supra*., at 933-934.) "Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment." (*Leon, supra*., at 933.) The Fourth Amendment guarantees two rights – the right not to have the police invade your privacy by conducting an unreasonable seizure, and the right not to have the government use that evidence against you in court. "The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures." (*Leon, supra*., at 935.)

Under a separate but compatible theory, the justices who put forth the exclusionary rule reasoned that it was required to effectuate the Fourth Amendment's guarantee. It is the duty of the federal courts to enforce the laws, maintain constitutional rights, and give force and effect to the Fourth Amendment. (*Weeks, supra*.,232 U.S. at 392.) Commensurate with this constitutional duty, unlawfully procured evidence cannot be used in a criminal trial against a citizen accused of an offense. Otherwise, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value and...might as well be stricken from the Constitution". (*Weeks, supra*., at 393.)

This theory was fully explained in *Mapp*. As James Madison had predicted in his address to the First Congress in 1789, in our federal system, it is up to the courts – the "independent tribunals of justice" to be watchful for encroachments upon constitutional rights and to resist such encroachments. (*Mapp, supra*., 367 U.S. at 647.) The Supreme Court fulfilled that duty by formulating the exclusionary rule. If unlawfully seized evidence was admitted in criminal trials, the Fourth Amendment's assurances would be "a form of words, valueless and undeserving of mention in a perpetual charter of inestimable human liberties." (*Mapp, supra*., at 655; see also *Silverthorne, supra*., 251 U.S. at 392.) Without the exclusionary rule, "the right to privacy embodied in the Fourth Amendment" would be "an empty promise." (*Mapp, supra*., at 660.)

In his dissenting opinion *United States v. Leon*, Justice Brennan explained that in formulating the exclusionary rule, the Court fulfilled its constitutional duty to ensure that Fourth Amendment rights were protected. Referring to society's zealous efforts to enforce the criminal laws, Brennan stated that "the sometimes unpopular task of ensuring that the government's enforcement efforts remain within the strict boundaries fixed by the Fourth Amendment was entrusted to the courts." (*Leon, supra*., 468 U.S. at 929-930.)

2. The Original Purpose of the Exclusionary Rule was to Preserve Judicial Integrity

The justices who defined the exclusionary rule reasoned that suppression of unlawfully seized evidence was also necessitated by the "imperative of judicial integrity" (*Elkins, supra*., 364 U.S. at 222.) Exclusion preserves judicial integrity by ensuring that judges do not condone a law enforcement officer's violation of the Fourth Amendment or permit the government to benefit from that illegality. (*Weeks, supra*., 232 U.S. at 392.)

When judges admit unlawfully seized evidence in a criminal trial, they legitimize the unconstitutional conduct that produced the evidence. Moreover, the government profits from the illegality by securing a conviction. By considering evidence seized in violation of the defendant's Fourth Amendment rights, or by allowing convictions to stand based on illegally seized evidence, the courts become accomplices in the willful disobedience of the law. (*Elkins, supra*., at 223.) As Justice Fortas wrote in his dissenting opinion in *Alderman v. United States*: "In recognition of the principle that lawlessness on the part of the Government must be stoutly condemned, this Court has ruled that when such lawless conduct occurs, the Government may not profit from its fruits." (*Alderman v. United States* (1969) 394 U.S. 165, 203.)

A court that admits unlawfully seized evidence encourages "disobedience to the Federal Constitution it is bound to uphold" (*Mapp, supra*., 367 U.S. at 657), imperils public trust in government (*Calandra, supra*., 414 U.S.at 360-361 [dis. opn. of Brennan, J.]), and breeds contempt for the law. (*Elkins, supra*., at 223.)

Finally, the justices who developed and supported the exclusionary rule were well aware that it embodied a judgment that it is better for some guilty persons to go free than for the police to violate the Constitution:

> "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." (*Weeks, supra*., 232 U.S. at 393.)

3. Critics of the Exclusionary Rule Gain Control of the Supreme Court

In *Weeks*, the Supreme Court set forth the exclusionary rule in a unanimous opinion. However, starting soon after *Weeks* was decided, commentators and judges have criticized the rule, attacking its premise and bemoaning its effects. The critics' primary

objection to the rule was distilled in a single sentence written by Judge Cardoza: "The criminal is to go free because the constable has blundered". (*People v. Defore* (1926) 242 N.Y. 13, 21 [declining to apply the exclusionary rule in New York state criminal trials].)

By the 1970's, critics of the exclusionary rule included a majority of Supreme Court justices. Over the last fifty years, opponents of the rule have never relinquished control of the Court. For the most part, these justices have been content to limit the exclusionary rule's application. In a series of decisions, they have declined to apply the rule to proceedings other than criminal trials, and refused to suppress evidence when officers conducting the search and seizure acted in good faith.[2]

To rationalize their attack on the exclusionary rule, these justices insisted that deterrence of future police misconduct is the rule's sole rationale. They denied the rule's constitutional basis and disregarded concern for the imperative of judicial integrity. Ultimately, these justices balanced the social costs of the rule against the benefits of deterrence and determined that "application of the rule should be restricted to those situations where its remedial objectives are most efficaciously served. (*Calandra, supra*., 414 U.S. at 348; *Leon, supra*., 468 U.S. at 908.)

At the same time, the exclusionary rule has had it's defenders, even on the Supreme Court. Almost every majority decision restricting application of the exclusionary rule has generated a vigorous dissent. In these dissents, justices have castigated the majority for disregarding the exclusionary rule's historical objectives, and reminded us that the deterrence of police misconduct, although a worthy goal, is not the rule's only purpose. These dissenting justices have also challenged the premises underlying the balancing test – the primary mechanism used by the Court to limit the exclusionary rule.

4. The Ascendency of the Deterrence Rationale

In *Weeks* and the other early cases, there is no mention of deterrence of police misconduct as the purpose of the exclusionary rule. "In those formative decisions, the Court plainly understood that exclusion of illegally obtained evidence was compelled not by judicially fashioned remedial purposes, but rather by a direct constitutional command." (*Leon, supra*., 468 U.S. at 938-939 [dis. opn. of Brennan, J.].)

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[2] Some justices have wanted to go farther. For example, Chief Justice Burger wanted to abolish the flawed and ineffective rule for all but "a small and limited category of cases." (*Stone, supra*., 428 U.S. at 496-502 [conc. opn. of Burger, C.J.].)

The Supreme Court first suggested that exclusion of illegally seized evidence might deter future misconduct in *Wolf v. Colorado*. In justifying the Court's decision to apply the Fourth Amendment but not the Exclusionary Rule to the states, the Court made a passing reference to deterrence as one purpose of the rule: "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn....a State's reliance upon other methods which ....would be equally effective." (*Wolf, supra*., 338 U.S. at 31.)

Eleven years later, in holding that the exclusionary rule barred the use of evidence illegally seized by both state and federal officials, the Court acknowledged the deterrent purpose of the rule and its effectiveness in discouraging Fourth Amendment violations. (*Elkins, supra*., 364 U.S. at 217-219.) The Court noted that deterrence protects "innocent people" who are the victims of illegal police searches that turn up no incriminating evidence and thus don't come to the attention of the courts. "Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." (*Elkins, supra*., at 217-218, quoting *Brinegar v. United States* (1949) 338 U.S. 160, 181.) Ultimately, the Court emphasized the imperative of judicial integrity, stating that the exclusionary rule was adopted to prevent the courts from becoming "accomplices in willful disobedience of the law." (*Elkins, supra*, at 223.)

One year later, in *Mapp*, the Court again mentioned the rule's deterrent purpose, characterizing the rule as a "constitutionally required - even if judicially implied - deterrent safeguard." (*Mapp, supra*., 367 U.S. at 648) However, the Court again stressed the rule's other goals – to give meaning to the Fourth Amendment's guaranty and maintain judicial integrity. (*Mapp, supra*., at 655-660.)

By the mid-1970's, as the Supreme Court limited application of the exclusionary rule, the deterrence rationale took center stage. The Court characterized deterrence as the primary justification – if not the only justification – for the rule. Moreover, the Court focused exclusively on deterring police violations of Fourth Amendment rights; it was no longer concerned with deterring misconduct by other government officials. (See, e.g. *Calandra, supra*., 414 U.S. at 347-348 ["the rule's prime purpose is to deter future unlawful police misconduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures"]; *United States v. Janis* (1976) 428 U.S. 433, 446 ["the prime purpose of the exclusionary rule, if not the sole one, is to deter future police misconduct]; *Stone v. Powell* (1976) 428 U.S. 465, 486 ["the primary justification for the exclusionary rule..is the deterrence of police conduct that violates Fourth Amendment rights"].)

5. How the Exclusionary Rule Deters Police Misconduct

The exclusionary rule is calculated to prevent future misconduct: "Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." (*Elkins, supra*., 364 U.S. at 217.) Presumably, if law enforcement officers know that any evidence seized during a search without a warrant and/or probable cause will be excluded from a subsequent criminal trial, they will be disinclined to conduct the search. In *Leon*, the Court explained that by refusing to admit evidence gained as a result of willful or negligent violations of the Fourth Amendment, "the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." (*Leon, supra*., 488 U.S. at 919.)

The Court also embraced the idea that the exclusionary rule would discourage all government officials from disrespecting Fourth Amendment values:

> "More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." (*Stone, supra*., 428 U.S. at 492.)

The rule deters police misconduct, in part, by encouraging improved police training -- by making officers aware of the limits imposed by the Fourth Amendment and emphasizing the need to operate within those limits. (*Leon, supra*., at 921.)

Ironically, in *Elkins*, while expanding the reach of the exclusionary rule, Justice Stewart penned the phrase that was later used to limit the rule's application: "The rule is calculated to prevent, not to repair." (*Elkins, supra*., at 217.) Fourteen years later, the Court expanded on this concept. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim", because "the ruptured privacy of the [victim's home] and effects cannot be restored. Reparation comes too late." (*Calandra, supra*., 414 U.S. at 347, quoting *Linkletter v. Walker* (1965) 381 U.S. 618, 637.)

In *Leon*, the Court explained that "the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered". (*Leon, supra*., 486 U.S. at 906.) Because exclusion cannot repair or redress the past Fourth Amendment violation, the suppression of illegally seized evidence is solely prophylactic in nature – deterring future violations.

6. The Court Repudiates the Constitutional Basis of the Exclusionary Rule

As the Supreme Court insisted that deterrence was the primary purpose of the exclusionary rule, the Court also rejected the idea that suppression of illegally seized evidence was constitutionally required or necessary to make the Fourth Amendment guarantee more than an empty promise.

The Court definitively rejected the idea that "the exclusionary rule is a necessary corollary of the Fourth Amendment." (*Leon, supra*.,468 U.S. at 905-906.) *Leon* emphasized that "[t]he Fourth Amendment contains no provisions expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purpose makes clear that use of the fruits of a past unlawful search or seizure 'works no new Fourth Amendment wrong'." (*Leon, supra*., at 906, quoting *Calandra*, 414 U.S. at 354.) Finally, in *Scott*, the Supreme Court concluded that the exclusionary rule "is prudential rather than constitutionally mandated." (*Scott, supra*., 524 U.S. at 363.)

7. The Court Rejects the Idea That Exclusion of Illegally Seized Evidence is Necessary to Preserve Judicial Integrity

In *United States v. Janis*, the Court recognized that preserving judicial integrity had been recognized as "a relevant, albeit subordinate factor" justifying judicial creation of the exclusionary rule. (*Janis*, *supra*., 428 U.S. at 458, n. 35.) The Court believed, however, that considerations of judicial integrity did not necessarily require the exclusion of evidence seized in violation of the Fourth Amendment. Because the constitutional violation was completed long before the "unquestionably accurate" evidence was proffered in the judicial proceeding, the court could not be deemed an accomplice to the past violation. (*Janis*, *supra*., 428 U.S. at 458, n. 35.)

In *Stone v. Powell*, the Court acknowledged that pre-*Mapp* decisions had cited the belief that "exclusion of illegally seized evidence prevents contamination of the judicial process" as one reason supporting application of the exclusionary rule.(*Stone, supra*., 428 U.S. at 484.) The Court noted, however, that this concern for judicial integrity was no longer a primary justification as it would require exclusion of illegally seized but highly probative evidence in every proceeding. (*Stone, supra*., at 485.)

8. How the Shift to the Deterrence Rationale Supported Restrictions on the Application of the Exclusionary Rule: The Development of the Balancing Test

The focus on deterrence as the sole purpose of the exclusionary rule led the Supreme Court to ask four questions: 1) Is the exclusion of illegal seized evidence an

effective means of deterring police violations of the Fourth Amendment? 2) Are there other effective ways to deter police misconduct? 3)What are the social costs of excluding illegally seized evidence from criminal trials? 4) Is the deterrence effect of the rule worth the cost of excluding probative evidence of guilt? The Court's answers to these four questions justified restrictions placed on application of the exclusionary rule.

a. Is the Exclusion of Illegally Seized Evidence an Effective Means of Deterring Police Violations of the Fourth Amendment?

Are there fewer unlawful searches and seizures because of the exclusionary rule? The problem, of course, is that it is next to impossible to measure a negative effect. As the Supreme Court recognized, there is a lack of any convincing empirical evidence on the effects of the exclusionary rule. (*Calandra, supra*., 414 U.S. at 348, n. 5.)

The Court stated, in *Janis*, that "although scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed." (*Janis, supra*., at 449-450.) There are a substantial number of variables that cannot be measured or subjected to effective controls. Record keeping before *Mapp* was "spotty at best", and since *Mapp* extended the exclusionary rule to the states, there is no identifiable control group; one cannot measure the number of illegal searches in states that don't have the exclusionary rule and compare that calculation to the number of illicit searches in states that have adopted the rule. Moreover, a lessening of police misconduct might be due to other factors, such as better police training or improved police-citizen relationships. (*Janis, supra*., at 450-452.)

b. Are There Other Effective Ways to Deter Police Misconduct?

In 1949, the Court had cited the availability of other "equally effective" means of deterring Fourth Amendment violations as one reason for not extending the exclusionary rule to the states. (*Wolf, supra*., 338 U.S. at 30-31.) By 1961, when the Court overturned *Wolf*, these other administrative and civil remedies were disfavored. The experience of California and other states had shown that these other remedies were ineffective "in suppressing lawless searches and seizures." (*Elkins, supra*., 364 U.S. at 220.)

By the mid-seventies, alternative methods of deterring unreasonable searches and seizures were again touted as "less costly to societal interests" than the exclusionary rule. (*Janis, supra*., 428 U.S. at 449.) These alternatives included tort remedies for police violations of individual rights and better police training and discipline. (*Janis, supra*., at 449, n. 21.) As support for the exclusionary rule decreased, faith in these alternative measures consequently increased.

c. What are the Social Costs of Excluding Illegally Seized Evidence from Criminal Trials?

Since the inception of the exclusionary rule, its critics have focused on its costs and on the burden allegedly imposed on effective law enforcement. Most significantly, the exclusionary rule suppresses relevant and reliable evidence, rendering it unavailable to the prosecution in a criminal trial. As a consequence, the guilty party may go free and escape the consequences of his actions. (*Janis, supra*., 428 U.S. at 447; *Stone, supra*., 428 U.S. at 489-491; *Leon, supra*., 468 U.S. at 907-908; *Scott, supra*., 524 U.S. at 364.) Or the guilty defendant may use the threat of suppression to bargain for a favorable plea deal and a reduced sentence. (*Leon, supra*., at 907.)[3] As the Court concluded in *Stone*:

> "[A]lthough the rule is thought to deter unlawful police activity in part through nurturing respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." (*Stone, supra*., at 490-491.)

Application of the exclusionary rule allegedly imposes other costs on the criminal justice system. Because of the need to adjudicate motions to suppress evidence, the attention of the court and the attorneys is deflected from the question of the defendant's guilt or innocence "which should be the central concern in a criminal proceeding." (See *Stone, supra*., 428 U.S. at 489-490; *Scott, supra*., 524 U.S. at 364.) Finally, according to studies cited in *Janis*, "the exclusionary rule tends to lessen the accuracy of the evidence presented in court because it encourages the police to lie in order to avoid suppression of evidence." (*Janis, supra*., 428 U.S. at 447, n. 18.)

d. Is the Deterrent Effect of the Exclusionary Rule Worth the Cost of Excluding Probative Evidence of Guilt?

Beginning in the 1970's, the Court has balanced the social costs of excluding

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[3] In *Leon*, the Court cited a study which purported to quantify "the effects of the exclusionary rule on the disposition of felony arrests." The study found that the prospect that illegally seized evidence will be suppressed results in non-prosecution or non-conviction of between 0.6% and 2.35% of individuals arrested for felonies. Moreover, the estimates may be higher for crimes, such as drug offenses, which depend heavily on physical evidence. (*Leon, supra*., at 907, n. 6.)

illegally seized but relevant evidence from the proceedings against the projected deterrence benefits under the circumstances. The Court concluded the rule should only apply "to those areas [and situations] where its remedial objectives are thought most efficaciously served." (*Calandra, supra*., 414 U.S. at 348.) If application of the exclusionary rule "does not result in appreciable deterrence", its use in a particular situation is unwarranted. (*Janis, supra*., 428 U.S. at 454; *Scott, supra*., 524 U.S. at 363.)

The Supreme Court placed the burden on the proponents of the exclusionary rule to prove that deterrence was worth the cost:

> "Because the exclusionary rule precludes consideration of reliable probative evidence, it imposes significant costs.... Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's costly toil upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." (*Scott, supra*., at 364-365.)

In case after case, the Supreme Court has employed this balancing test to rationalize placing limits on the application of the exclusionary rule.

9. The Dissenting Justices Criticize the Reliance on Deterrence and the Premises Underlying the Balancing Test

From 1970 onward, the Supreme Court justices who believed that the exclusionary rule was constitutionally mandated and necessary to effectuate Fourth Amendment rights and preserve judicial integrity were in the minority. Nevertheless, they filed vigorous dissenting opinions in the succession of cases limiting application of the rule.

Chief among the dissenters was Justice Brennan. In his dissent in *United States v. Leon*, Brennan protested the Court's creation of the good-faith exception to the exclusionary rule and attacked the majority's embrace of the deterrence rationale as the sole purpose of the rule, and its consequent adoption of the balancing test in which "the 'costs' of excluding illegally obtained evidence loom to exaggerated heights", while "the 'benefits' of such exclusion are made to disappear with a mere wave of the hand." (*Leon, supra*., 468 U.S. at 929.)

First, Justice Brennan criticized the majority's insistence that deterring future misconduct is the purpose of the exclusionary rule. "A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles

embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale." (*Leon, supra*., at 930.)

Moreover, reliance on "the deterrence theory is both misguided and unworkable" (*Leon, supra*., at 940.), because it requires the court to attempt to measure whether the exclusion of illegally seized evidence actually discourages police misconduct. "[I]t is extremely difficult to determine with any degree of precision whether the incidence of unlawful conduct by police is now lower than it was prior to *Mapp*." (*Leon, supra*., at 942.) Also, the Court turned "this uncertainty to its advantage by casting the burden of proof upon proponents of the rule." (*Leon, supra*., at 943.) Nevertheless, Justice Brennan contended that the exclusionary rule effectively deters violations of the Fourth Amendment. There may not be conclusive empirical data, but the testimony of those actually involved in law enforcement indicates that the adoption of the rule has encouraged better police training and increased awareness of Fourth Amendment requirements. (*Leon, supra*., at 954, n. 13.)

Justice Brennan also criticized the majority's discussion of the high costs of excluding illegally seized but reliable evidence:

> "[T]he Court has frequently bewailed the 'cost' of excluding reliable evidence. In large part, this criticism rests upon a refusal to acknowledge the function of the Fourth Amendment itself. If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the "price" our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment.....[I]t is not the exclusionary rule but the Amendment itself that has imposed this cost." (*Leon, supra*., at 941.)

Finally, Justice Brennan noted that the claim that many criminals go free because of the exclusionary rule was not supported by empirical evidence. In fact, the statistics showed that very few prosecutions were dropped out of concern that evidence will be suppressed because of a Fourth Amendment violation, and very few suppression motions were actually granted. (*Leon, supra*., at 950.)

D. The Fall of the Exclusionary Rule: Cases Limiting the Application of the Exclusionary Rule

In a series of cases, from 1969 onward, the Supreme Court limited the application of the exclusionary rule. It held that only those victimized by the illegal search or seizure could invoke the rule, that the rule only applied in criminal trials, that evidence seized by officers relying in good faith on a subsequently invalidated warrant, statute or precedent would not be excluded and that the fruits of illicit conduct would not be excluded if the taint of the illegality was sufficiently purged.

1. The Standing Limitation: *Only the Search Victim may Invoke the Exclusionary Rule*

In *Alderman v. United States* (1969) 394 U.S. 165, the Court held that only the individual whose rights were violated by the unlawful search and seizure could invoke the exclusionary rule. The illegally obtained evidence would only be excluded from that individual's criminal trial. The purpose of the exclusionary rule is to deter illegal searches, but that does not mean "that anything which deters illegal searches is thereby commanded by the Fourth Amendment". Only for the actual victim of the unlawful invasion does the benefit of deterrence outweigh the cost of suppressing probative evidence and encroaching upon the public interest in prosecuting those accused of crimes.

2. The Exclusionary Rule Applies Only in Criminal Trials[4]

a. United States v. Calandra (1974) 414 U.S. 338: The Exclusionary Rule Does not Apply in Grand Jury Proceedings

The question presented in *Calandra* was whether grand jury witnesses could refuse to answer questions based on evidence obtained from an unlawful search and seizure. (*Calandra, supra*., 414 U.S. at 347.) The Supreme Court said no, because the exclusionary rule should not apply to grand jury proceedings. (*Calandra, supra*., at 354.)

The Court stated for the first time that "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." However, "[d]espite the broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally

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[4] The Fourth Amendment and the exclusionary rule also apply to juvenile criminal proceedings. (See *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 338; *In re Scott K.* (1979) 24 Cal. 3d 395; *In re Aaron C.* (1997) 59 Cal. App. 4th 1365.)

seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." (*Calandra, supra*., at 347-348.)

In deciding whether to "extend" the exclusionary rule to grand jury proceedings, the court weighed "the potential injury to the historic role and functions of the grand jury" against the potential deterrence benefits of the rule in this context. (*Calandra, supra*., at 349.) The Court concluded that the flexible, non-adversarial nature of such proceedings would be jeopardized by application of the exclusionary rule, and that the proceedings would be delayed while time was spent adjudicating Fourth Amendment issues. (*Calandra, supra*., at 349-50.) Consequently, the Court concluded that the damage to the grand jury "from the unprecedented extension of the exclusionary rule.....outweighs the benefit of any possible incremental deterrent effect." (*Calandra, supra*., at 354.)

Justice Powell wrote the majority opinion, and Justice Brennan filed a dissent, joined by Justices Douglas and Marshall. As he would in numerous other dissents, Justice Brennan criticized the majority for focusing on deterrence as the sole purpose of the exclusionary rule:

> "The downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule.....to give content and meaning to the Fourth Amendment guarantees" and to assure "that the government would not profit from its lawless behavior." (*Calandra, supra*., at 356-357.)

b. United States v. Janis (1976) 428 U.S. 433: The Exclusionary Rule Does not Apply in Federal Civil tax Proceedings

The question presented was whether evidence obtained in violation of the Fourth Amendment was inadmissible in a federal civil tax proceeding. (*Janis, supra*., 428 U.S. at 447.) The Court balanced the costs of applying the rule to bar evidence from a civil tax proceeding against the deterrence benefits of such exclusion. The Court concluded that the costs of excluding relevant and reliable evidence outweighed any marginal deterrence achieved in this context. (*Janis, supra*., at 450-454.) Assuming that "the exclusionary rule is the 'strong medicine' that its proponents claim it to be", the suppression of unlawfully obtained evidence in federal and state criminal trials should sufficiently deter illegal

searches. Further extension of the rule was unwarranted. (*Janis, supra*., at 453-454.)

Justice Blackmun authored the majority opinion and Justices Brennan, Marshall and Stewart dissented. Once again, Justice Brennan protested the "slow strangulation" of the exclusionary rule, and insisted the rule "is a necessary and inherent constitutional ingredient of the protections of the Fourth Amendment." (*Janis, supra*., at 460.)

c. Stone v. Powell (1976) 428 U.S. 465: The Exclusionary Rule Does not Apply in Federal Habeas Proceedings

Stone v. Powell is known for holding that Fourth Amendment claims cannot be raised by state prisoners in federal habeas corpus proceedings. However, that ruling was actually based on weighing the utility of the exclusionary rule as a deterrent against the costs of applying the rule in habeas proceedings, after the Fourth Amendment claim has been fully adjudicated at trial and on direct review. (*Stone, supra*., 428 U.S. at 489, 493.)

The Court emphasized the costs of the exclusionary rule – diversion of attention from the truthfinding process and the suppression of reliable and probative evidence.(*Stone, supra*., at 490-491.) The additional contribution to deterrence that would be gained by applying the rule in habeas proceedings is small in relation to the costs of exclusion.(*Stone, supra*., at 493-494.) For police officers, the risk that illegally seized evidence could be excluded at trial or that convictions could be reversed on direct appeal sufficiently deters Fourth Amendment violations. (*Stone, supra*., at 493.)

Justice Powell wrote the majority opinion in *Stone*. Justices White, Brennan and Marshall dissented. Again, Brennan criticized the majority for its ongoing hostility to "the continued vitality of the exclusionary rule as part and parcel of the Fourth Amendment's prohibition of unreasonable searches and seizures." (*Stone, supra*., at 502-503.)

d. Immigration and Naturalization Service v. Lopez-Mendoza (1984) 468 U.S. 1032: The Exclusionary Rule Does not Apply in Civil Deportation Proceedings

The question presented was whether evidence secured from an undocumented immigrant following his illegal arrest by an INS agent could be admitted into evidence at his deportation hearing. The Court answered yes, declining once again to apply the exclusionary rule in a proceeding other than a criminal trial. The Court weighed the likely deterrence benefits of excluding the unlawfully obtained evidence against the likely cost, and concluded that the balance came out against applying the exclusionary rule in civil deportation proceedings. (*Lopez-Mendoza, supra*., 468 U.S. at 1041.)

For reasons particular to the deportation process, excluding illegally seized evidence from these formal hearings – which occur in less than 3% of deportation cases – would be unlikely to deter INS agents' violations of the Fourth Amendment. (*Lopez-Mendoza, supra*., at 1043-1046.) On the other side of the equation, the social costs of excluding probative evidence from deportation proceedings are high. Application of the exclusionary rule would unduly complicate the administrative nature of these proceedings. Moreover, suppressing relevant evidence could compel the release from custody of persons who would then resume their commission of a crime through their continuing unlawful presence in the country. (*Lopez-Mendoza, supra*., at 1046-1050.)

This was a five-to-four decision. Justice O'Connor wrote the majority opinion and Justices Brennan, White, Marshall and Stevens dissented.

e. Pennsylvania Board of Probation and Parole v. Scott (1998) 524 U.S. 357: The Exclusionary Rule Does not Apply in Parole Revocation Hearings

The Supreme Court held that evidence obtained in violation of a parolee's Fourth Amendment rights is admissible at a parole board hearing to establish the parole violation. The Court stressed the state's "overwhelming interest" in ensuring that a parolee complies with the conditions of his release and returns to prison if he fails to do so. (*Scott, supra*., at 365.) The Court then weighed the significant costs of excluding reliable, probative evidence from parole hearings, which might allow the parolee "to avoid the consequences of his non-compliance", against the marginal deterrence benefits. (*Scott, supra*., at 364-369.) "The rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches." (*Scott, supra*., at 365.)

This was a five-to-four decision. Justice Thomas authored the majority opinion, and Justices Stevens, Souter, Ginsburg and Breyer dissented. Justice Stevens argued that exclusionary rule is "constitutionally required, not as a right explicitly incorporated in the Fourth Amendment's prohibitions, but as a remedy necessary to ensure that those prohibitions are observed in fact." (*Scott, supra*., at 369-370.)

3. The Good Faith Exception to the Exclusionary Rule: The Rule Does not Apply When An Officer Conducts an Illegal Search or Seizure Relying in Good Faith on a Precedent, Statute, Warrant, or Computer Data Subsequently Found Invalid

The government bears the burden of establishing that the good faith exception applies and precludes application of the exclusionary rule. (See *People v. Willis* (2002) 28 Cal. 4th 22, 36-37, citing *Leon, supra*., 468 U.S. at 924.)

a. United States v. Peltier (1975) 422 U.S. 531: The Exclusionary Rule Does not Apply When the Searching Officer Relied in Good Faith on a Statute and Lower Court Precedent Subsequently Overturned by the Supreme Court

This case concerns the retroactive application of a Supreme Court case setting forth a new rule of Fourth Amendment law, but it is also the first case to apply a good faith exception to the exclusionary rule.

The defendant's car was stopped and searched by border patrol agents who found marijuana in the vehicle's trunk. Four months after the search, the United States Supreme Court decided *Almeida-Sanchez v. United States* (1973) 413 U.S. 266, holding that border patrol agents could not search a car within reasonable distance of the border without probable cause. The prosecution conceded that the search of the defendant's car was unconstitutional under *Almeida-Sanchez*. (*Peltier, supra*., 422 U.S. at 532-533.)

The issue presented was whether *Almeida-Sanchez* should be applied retroactively to cases pending on appeal when it was decided. The Supreme Court reformulated the question to ask whether the exclusionary rule should be applied to the fruits of a search that would be illegal under a subsequent high court decision announcing a new Fourth Amendment principle, when the law enforcement officers who conducted the search relied in good faith on current law.

The key consideration was that the agents stopped and searched the defendant's car in good faith reliance on "a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval" – federal court of appeal opinions that authorized random searches. (*Peltier, supra*., at 541.) Consequently, suppressing the "illegally seized" evidence would not serve the purposes of the exclusionary rule – the deterrence of unlawful law enforcement conduct and the preservation of judicial integrity. (*Peltier, supra*., at 536-542)

The deterrent purpose of the exclusionary rule necessarily assumes that the police officer conducting the search and seizure engages in willful or negligent conduct depriving the defendant of his Fourth Amendment rights. On the other hand, if the officer reasonably believes, in good faith, that the search he is about to conduct is lawful, he will not be deterred by the prospect of exclusion. (*Peltier, supra*., at 539.) The Court articulated the premise underlying the good-faith exception to the exclusionary rule:

> "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." (*Peltier, supra*., at 542.)

As for preserving judicial integrity, "the introduction of evidence which has been seized by law enforcement in good-faith compliance with then-prevailing constitutional norms did not make the courts 'accomplices in the willful disobedience of a Constitution they are sworn to uphold'." (*Peltier, supra*., at 536, quoting *Elkins, supra*., 364 at 223.)

Justice Rehnquist wrote the majority opinion, and Justices Douglas, Brennan, Marshall and Stewart dissented. Justice Brennan warned that the good faith exception would complicate the litigation of suppression motions by adding a level of inquiry. The lower courts would now need to determine what the officer knew or reasonably should have known about Fourth Amendment requirements at the time of the search and seizure. If there is a conflict in the lower courts over the interpretation of Supreme Court precedent, how will the lower court evaluate the officer's good faith? (*Peltier, supra*., at 552-553, 560-561.)

b. United States v. Leon (1984) 468 U.S. 897: The Exclusionary Rule Does not Apply When the Officer Relied in Good Faith on a Subsequently Invalidated Search Warrant

In this seminal case, the Court formally announced the good faith exception, holding that the exclusionary rule does not bar the admission of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate that is ultimately found to be unsupported by probable cause. The Court concluded that "the marginal or nonexistent [deterrence] benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." (*Leon, supra*., 468 U.S. at 922.)

In *Leon*, officers were investigating the defendants' alleged drug-trafficking activities. Officer Rombach applied for a warrant to search the defendants' residences for drug-related items. A "facially valid" search warrant was issued by a magistrate. The ensuing searches yielded large quantities of drugs, and the defendants were prosecuted for federal narcotics offenses. The defendants moved to suppress evidence seized pursuant to the warrant. In granting those motions, the district court found that although Officer Rombach had acted in good faith, his affidavit was insufficient to establish probable cause and the warrant was thus invalid. (*Leon, supra*., at 901-905.)

The Court reiterated that the exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." (*Leon, supra*., at 906, quoting *Calandra, supra*., 414 U.S. at 348.) The question of whether evidence obtained during an unlawful search should be suppressed is resolved by weighing the "substantial social costs" of excluding "inherently trustworthy tangible evidence" against the rule's deterrence benefits in the particular situation. (*Leon, supra*., at 906-908.) The Court noted its longstanding concern with the costs of exclusion:

> "An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly, when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." (*Leon, supra*., at 907-908.)

Turning to the situation before it, the Court emphasized that the error in judgment which rendered the search illegal was made by the magistrate who issued the search warrant, and not by the police officer who applied for the warrant or the officers who searched the residences and seized the evidence. The exclusionary rule is solely designed "to deter police misconduct rather than to punish the errors of judges and magistrates". Moreover, no evidence suggested that judges and magistrates were inclined to ignore or subvert the Fourth Amendment. Finally, there was no reason to believe that "exclusion of evidence seized pursuant to a warrant [would] have a significant deterrent effect on the issuing judge or magistrate." (*Leon, supra*., at 916-917.)

Applying the exclusionary rule in a case where the judge or magistrate had erroneously assessed probable cause might discourage police officers from seeking warrants from neutral magistrates, and this would truly jeopardize Fourth Amendment rights and disregard the Court's preference for warrants. (*Leon, supra*., at 913-914.)

The ultimate question was whether exclusion of the illegally seized evidence would deter misconduct by the officers who applied for or executed the warrant in good faith. The Court acknowledged that exclusion might encourage officers applying for warrants to take more care in establishing probable cause. It might deter inadequate presentations or magistrate shopping. It might encourage officers to carefully scrutinize the warrant and point out any judicial errors. However, these benefits were deeemed "speculative." Thus, "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." (*Leon, supra*., at 918.)

The Court concluded that the exclusionary rule should only apply when the police officer willfully or negligently violated the defendant's Fourth Amendment rights. This occurs only when the officer knew "or may properly be charged with knowledge" that the search was unconstitutional under the Fourth Amendment. (*Leon, supra*., at 919, quoting *Peltier, supra*., 422 U.S. at 542.) Simply put, when an officer reasonably relies on a search warrant issued by a neutral magistrate, he does not know and cannot reasonably be expected to know that the search is unconstitutional. Under these circumstances, he will not be deterred. It is the magistrate's responsibility to determine whether the officer's affidavit has established probable cause and, in the usual case, an officer cannot be expected to question the magistrate's determination. (*Leon, supra*., at 919-921.)

The Court, however, did set forth an exception to the good faith exception. "[T]he officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable." (*Leon, supra*., at 922.) If the officer has no reasonable grounds for believing that the warrant was properly issued, the exclusionary rule should apply. "[S]uppression therefore remains an appropriate remedy" under four circumstances: 1)the officer misleads the magistrate by placing information in the affidavit that he knows or should have known was false; 2)the magistrate wholly abandoned his judicial role so that a "reasonably well trained officer" would not rely on the warrant; 3)the affidavit supporting the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and 4)the warrant is so facially deficient (i.e. in failing to particularize the place to be searched or the things to be seized) that the executing officers cannot reasonably presume it to be valid. (*Leon, supra*., at 923.)

On the same day that the Supreme Court issued its opinion in *Leon*, it also filed a decision in the companion case of *Massachusetts v. Sheppard* (1984) 468 U.S. 981. In *Sheppard*, the Court held that the exclusionary rule would not apply when the officers conducting a residential search acted in objectively reasonable reliance on a warrant subsequently found invalid because it did not particularly describe the items to be seized. In these circumstances, the critical error was made by the judge and not by the police officers who applied for and executed the warrant. Because the exclusionary rule was designed to deter unlawful searches by police officers and not to deter or punish magistrates, the evidence seized in reliance on the invalid warrant would not be suppressed. (*Sheppard, supra*., at 990-991.)

Justice White wrote the majority opinions in both *Leon* and *Sheppard*. Justice

Brennan filed a dissenting opinion in both cases, joined by Justice Marshall, and Justice Stevens wrote a separate dissent in *Leon*.

Justice Brennan's dissent in *Leon* and *Sheppard* is an extraordinary document. Brennan criticized "the Court's gradual but determined strangulation of the [exclusionary] rule." (*Leon, supra*., 468 U.S. at 928-929.) He challenged the majority for ignoring the rule's historical purpose and constitutional basis. He critiqued the majority's insistence that deterrence is the sole purpose of the rule and objected to the premises underlying the cost-benefit analysis relied upon to deny suppression of evidence seized in violation of the Fourth Amendment. (*Leon, supra*., at 928-951; see also Section C9, *supra*.)

Finally, Justice Brennan specifically criticized the good-faith exception and the majority's assumption that excluding evidence seized in reliance upon a warrant unsupported by probable cause would not deter future illegal searches. Brennan asserted that suppressing this illegally seized evidence would encourage police departments to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to carefully review the warrant once it has been issued. He argued that the good faith exception would "tend to put a premium on police ignorance of the law." (*Leon, supra*., at 955.)

c. Illinois v. Krull (1987) 480 U.S. 340: The Exclusionary Rule Does not Apply to Evidence Obtained by an Officer who Reasonably Relied on a Statute Authorizing the Search Which was Subsequently Found Unconstitutional

In *Krull*, officers conducted an administrative search of an auto wrecking yard and found several stolen cars. The yard's operators were criminal prosecuted. The search was authorized by statute. On the day after the search, the Seventh Circuit Court of Appeal ruled that the statute violated the Fourth Amendment The Supreme Court considered whether the evidence illegally seized from the yard should be suppressed when the officers had reasonably relied in good faith upon the statute authorizing the search which was subsequently found unconstitutional. (*Krull, supra*., 480 U.S. at 342-344.)

The Court concluded that the good faith doctrine set forth in *Leon* was applicable to the present case. It made no difference that the officer had searched in objectively reasonable reliance on a statute, rather than a warrant, subsequently found invalid:

> "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding

> evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court's comment in *Leon*: Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." (*Krull, supra*., at 349-350.)

The exclusionary rule is aimed at deterring police officers, not legislators. Legislators are not adjuncts of the law enforcement team. They take an oath to uphold the Constitution, and they don't intentionally pass acts authorizing police conduct in violation of the Fourth Amendment. Finally, there is no reason to believe that applying the exclusionary rule in this context would deter legislators from enacting unconstitutional statutes. (*Krull, supra*., at 350-352.)

As in *Leon*, the Court held that the good faith exception to the exclusionary rule would not apply if the law enforcement officer's reliance on the subsequently invalidated statute was not objectively reasonable – i.e. if a reasonable officer should have known that the statute was unconstitutional. (*Krull, supra*., at 355.)

Justice Blackmun wrote the majority opinion. Justice O'Connor wrote a dissenting opinion, joined by Justices Brennan, Marshall and Stevens. O'Connor protested the majority's extension of the *Leon* doctrine to an officer who relied in good faith on an unconstitutional statute rather than an invalid warrant. She believed that "statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment" as well as the justices who set forth the exclusionary rule. (*Krull, supra*., 480 U.S. at 362-364.) In comparison to an invalid warrant which only authorizes a single search, an unconstitutional statute may affect thousands or millions and "poses a greater threat to liberty." (*Krull, supra*., at 365.) Thus, it is important to discourage legislators from passing statutes which violate the Fourth Amendment. (*Krull, supra*, at 366.)

d. Arizona v. Evans (1995) 514 U.S. 1: The Exclusionary Rule Does not Apply When An Officer Reasonably Relies on Computerized Data That is Incorrect due to a Clerical Error Made by a Court Employee

This case began with a routine traffic stop. After learning from the defendant-driver that his license had been suspended, the officer entered the defendant's name into a computer located in his patrol car. The computer indicated an outstanding warrant for the defendant's arrest. After arresting the defendant on this warrant, the officer searched his

vehicle and found marijuana. It was subsequently determined that the defendant's arrest warrant had been quashed 17 days before his arrest. In his drug prosecution, the defendant filed a motion to suppress evidence, arguing that his arrest was invalid. During his suppression hearing, a court clerk testified that someone in her office had failed to comply with "standard procedure" by calling the sheriff's office and informing them that the defendant's arrest warrant had been quashed. That is why the quashed warrant still showed up on the police computer. (*Evans, supra*., 514 U.S. at 4-5.)

Because the police officer who arrested the defendant had reasonably relied in good faith on the erroneous computer record, "[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees." (*Evans, supra*., at 15-16.) Significantly, the Court did not decide whether the good faith exception would still apply if police personnel rather than court employees were responsible for the error relied upon by the arresting officer. Because the State had not made that argument, the issue was not adequately presented for the Court's consideration. (*Evans*, *supra*., at 16, n. 5.)[5]

The Court applied the reasoning of *Leon*: "[T]he exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees." (*Evans, supra*., at 14.) There was no evidence establishing that court employees are inclined to ignore or subvert the Fourth Amendment, or that exclusion would "have a significant effect on court employees responsible for informing the police that a warrant had been quashed." Because court employees are not "adjuncts to law enforcement" engaged in ferreting out crime,"they have no stake in the outcome of particular criminal prosecutions." The threat of exclusion would not deter them from failing to assure that information in the police computers was properly updated. (*Evans, supra*., at 15.)

Most importantly, excluding evidence under these circumstances would not alter the behavior of the arresting officer who relies in good faith on computer data indicating that an individual has an outstanding warrant. If the officer does not arrest the individual under these circumstances, he would be derelict in his duty. (*Evans, supra*., at 15.)

Chief Justice Rehnquist wrote the majority opinion. Justices O'Connor and Souter

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[5] Cases applying *Evans* saw this distinction as determinative; application of the exclusionary rule depended on whether the source of the error, reasonably relied upon by the officer, was a court employee or an adjunct to law enforcement. (See, e.g. *People v. Willis* (2002) 28 Cal. 4th 22, 33-35; *People v Downing* (1995) 33 Cal. App. 4th 1641, 1644-1645; *People v. Ferguson* (2003) 109 Cal. App. 4th 367, 372.)

filed separate concurring opinions and Justices Stevens and Ginsburg each filed dissents. Justice O'Connor insisted that it would not always be reasonable for police officers to rely on a record keeping system, particularly if the system had no mechanism to ensure its accuracy over time. Although police could enjoy the benefits conferred by computer-based record keeping systems, they should not rely blindly on such technology. "With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities." (*Evans, supra*., at 17-18.)

Justice Stevens' dissent invoked the spirit of Justice Brennan. He criticized the majority's view that the exclusionary rule has the limited purpose of deterring police misconduct. "Both the constitutional text and the history of its adoption and interpretation identify a more majestic conception". The Amendment constrains all agents of the sovereign, not merely the police, and "[t]he remedy for its violation imposes costs on that sovereign, motivating it to train all of its personnel to avoid future violations." The government should not be permitted to profit from the negligent misconduct of its employees, whether they work for the court or the police. (*Evans, supra*., at 18-19.)

4. The Fruit of the Poisonous Tree: The Fruits of an Illegal Search or Seizure are not Excluded When Time or Intervening Circumstances Have Purged the Taint

If police officers conduct an unconstitutional search, incriminating evidence discovered during that search – the primary evidence – will automatically be suppressed at the defendant's criminal trial. (See, e.g. *Gouled v. United States* (1921) 255 U.S. 298; *Elkins v. United States* (1960) 364 U.S. 206; *Mapp v. Ohio* (1961) 367 U.S. 643.) However, if officers unlawfully detain the defendant, and he then consents to a search of his car or admits he is carrying contraband in the vehicle, the question of whether to exclude evidence subsequently seized from that vehicle is more complex. This derivative evidence will only be excluded from the defendant's trial if it was tainted by the unlawful conduct and that taint was not dissipated by time or intervening circumstances. (See, e.g. *Nardone v. United States* (1939) 308 U.S. 338, 340-341; *Wong Sun v. United States* (1963) 371 U.S. 471, 488; *Brown v. Illinois* (1975) 422 U.S. 590, 603-604.)[6]

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[6] Two related rules which allow the admission of illegally seized evidence are inevitable discovery and the independent source doctrine. Under the inevitable discovery doctrine, evidence is not excluded if the prosecution can prove that the incriminating items or information would inevitably have been discovered by lawful means. (*Nix v. Williams* (1984) 467 U.S. 431, 443-444.) The independent source doctrine holds that evidence is not suppressed when it was seized pursuant to a valid warrant and the information upon which the warrant was secured comes from a source wholly

a. Early Cases Holding That the Exclusionary Rule Applies to the Fruit of the Unconstitutional Conduct*: *Silverthorne, Nardone and Wong Sun

In *Silverthorne Lumber Co. v. United States* (1920) 251 U.S. 385, 392, the Court held that knowledge of incriminating evidence "gained by the Government's own wrong" (the Fourth Amendment violation) could not be admitted in the criminal proceeding. In *Nardone v. United States*, the Court concluded that once it has been established that the officers acted illegally, the defendant must be given the opportunity to prove "that a substantial portion of the case against him was the fruit of the poisonous tree." The burden then shifts to the government to convince the court that "its proof had an independent origin, or that the connection between the illicit act and the government's proof became "so attenuated as to dissipate the taint." (*Nardone, supra*., 308 U.S. at 341.)

In *Wong Sun v. United States*, the defendants sought to suppress incriminating statements made to federal agents following their illegal arrests. The Court held that one defendant's statement was the "fruit" of the agents' conduct and did not result from an intervening act of free will sufficient to purge the taint; it was inadmissible at the defendant's criminal trial. As for a second defendant's statement, intervening time and events between the unlawful arrest and the defendant's statement purged the taint of the illegal seizure; his statement was given after he returned voluntarily to the station a few days following his arrest. (*Wong Sun, supra*., 371 U.S. at 484-488, 491.)

The Court reiterated that the exclusionary rule extends to the indirect as well as the direct products of the unlawful search or seizure. (*Wong Sun, supra*., at 484-485.) The Court defined the issue as whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint." (*Wong Sun, supra*., at 487, quoting *Nardone, supra*., at 341.) The Court emphasized that but-for causation was not a sufficient basis for exclusion:

> "We need not hold that all evidence is [the] fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question ....is whether granting the establishment of the primary illegality, the evidence to which...objection is

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independent of an earlier illegal entry and previously known to the officers. It does not matter that the evidence was initially observed during the unlawful entry, so long as these observations were not the basis for the warrant. (*Segura v. United States* (1984) 468 U.S. 796; *Murray v. United States* (1988) 487 U.S. 533.)

made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (*Wong Sun, supra*., at 487-488.)

b. Brown v. Illinois (1975) 422 U.S. 590: The Three-Factor Test for Determining if The Taint was Purged

In *Brown v. Illinois*, the Supreme Court rejected a lower court's holding that *Miranda* warnings are always sufficient to attenuate the taint of an unconstitutional arrest so that the defendant's subsequent statement would be admissible at trial. Instead, the Court set forth three factors to consider in determining whether the confession was obtained by exploitation of the illegal arrest. (*Brown, supra*., at 602-603.)

In *Brown*, the defendant was arrested taken to the police station where he was read his *Miranda* rights and interrogated. Less than two hours after his arrest, he confessed. Sometime later, he was re-informed of his *Miranda* rights. He gave a second confession, substantially in accord with his first statement. Prior to trial, the defendant's motion to suppress the two statements as the fruits of his illegal arrest was denied. Both were admitted at trial, and the defendant was convicted. On appeal, the Illinois Supreme Court held that the defendant's arrest was unsupported by probable cause and thus unlawful. However, the two confessions were properly admitted because the giving of *Miranda* warnings broke the causal connection between the illegal arrest and the statements, purging the taint of the unconstitutional seizure. (*Brown, supra*., at 593-597.)

The U.S. Supreme Court rejected the idea that the *Miranda* warnings were sufficient to render the confessions an act of free will unaffected by the unconstitutional arrest. (*Brown, supra*., at 602-603.) The purpose of the exclusionary rule is to protect the Fourth Amendment's guarantees by "deterring lawless conduct by federal officials and by closing the doors of the federal courts to any use of evidence unlawfully obtained". (*Brown, supra*., at 599, citing *Wong Sun, supra*., 371 U.S. at 486.) Allowing a per se exception to the exclusionary rule for statements made following *Miranda* warnings would defeat these purposes. Police officers would be encouraged to arrest without probable cause so they could secure suspects for interrogation, knowing that if they gave *Miranda* warnings prior to questioning, any subsequent statements could be admissible at trial. "Any incentive to avoid Fourth Amendment violations would be eviscerated by making the [*Miranda*] warnings, in effect, a cure-all." (*Brown, supra*., at 602-603.)

The question of whether a confession made subsequent to an illegal arrest should be excluded as the tainted fruit of the seizure must be decided on the facts of each case; no single fact is dispositive. The giving of *Miranda* warnings is an important factor to

consider, but not the only factor. The Court emphasized three other "relevant" factors that courts should consider in determining evidence was obtained by exploitation of the illegal arrest: 1) [t]he temporal proximity of the arrest and the confession; 2) the presence of intervening circumstances; and 3) particularly, the purpose and flagrancy of the official conduct. The prosecution bears the burden of establishing that the evidence is admissible – i.e. that the taint was dissipated. (*Brown, supra*., at 603-604.)

Assessing these three factors in the case before it, the Court held that the defendant's confessions should have been excluded as the fruit of the illicit arrest. Brown's first statement was separated from his arrest by less than two hours, and there were no significant intervening events. The second statement was clearly the fruit of the first. Finally, the illegal seizure "had a quality of purposefulness. The impropriety of the arrest was obvious." The detectives arrested the defendant for investigatory purposes, in the hope that something might turn up. The egregious manner in which the officers made the arrest – breaking into the defendant's house when he was not present and then arresting him at gunpoint when he returned -- gave the appearance of "having been calculated to cause surprise, fright and confusion." (*Brown, supra*., at 592-593; 604-605.)

Justice Powell wrote a concurring opinion in *Brown*, joined by Justice Rehnquist. Contending that a primary purpose of the rule is to deter police misconduct by removing possible incentives for illegal arrests, Justice Powell argued that when the connection between the illicit arrest and the seizure of the incriminating evidence was sufficiently attenuated, exclusion of the evidence would not be worth the cost:

> "[I]n some circumstances, strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its costs. (*Brown, supra*., at 608-609.)

c. Cases Applying the Brown Factors: Dunaway and Taylor

In ***Dunaway v. New York* (1979) 442 U.S. 200**, the Court held that the police violated the defendant's Fourth Amendment rights when, without probable cause, they picked him up and transported him to the station for interrogation. After waiving his *Miranda* rights, the defendant confessed his involvement in a robbery-murder. The Supreme Court concluded that the defendant's confession was the tainted fruit of the

illegal seizure and should have been excluded from his criminal trial.

The Court claimed that "[t]he situation in this case is virtually a replica of the situation in *Brown*." (*Dunaway, supra*., at 218.) The giving of *Miranda* warnings did not dissipate the taint of the officer's illegal conduct. Neither the passage of time nor intervening events broke the connection between the defendant's illegal detention and his confession. As in *Brown*, the officers seized the defendant without probable cause "in the hope that something might turn up." It did not matter that the officers did not threaten or abuse the defendant or coerce his confession. (*Dunaway, supra*., at 218-219.)

In his concurring opinion, Justice Stevens points out problems with two of the *Brown* factors, given that the focus should be on whether the defendant was motivated to confess by the illegal arrest or by other circumstances. "The temporal relationship between the arrest and the confession may be an ambiguous factor". If there are no intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one." (*Dunaway, supra*., at 220.) As for the flagrancy of the police misconduct, "[a]midnight arrest with drawn guns will be equally frightening whether the police acted recklessly or in good faith." (*Dunaway, supra*., at 220.)

In ***Taylor v. Alabama*** **(1982) 457 U.S. 687**, the police arrested the defendant without a warrant or probable cause. The defendant was taken to the police station where he was fingerprinted, read his *Miranda* rights and questioned. He was placed in a line-up, which did not yield an identification. During a break in questioning, he was allowed a short visit with his girlfriend, after which, he confessed. (*Taylor, supra*., at 688-689.)

Applying the rules developed in *Brown* and *Dunaway*, the Supreme Court held that the confession should have been excluded from evidence at the defendant's robbery trial. The state had not met its burden of proving that time or intervening events broke the causal connection between the illegal arrest and the confession so that it would be deemed "an act of free will". It did not matter that six hours elapsed between the defendant's arrest and his confession, as opposed to the two-hour gap in both *Brown* and *Dunaway*. Moreover, the giving of the *Miranda* warnings and defendant's 5-to-10 minute visit with his girlfriend were insufficient to break the connection between the illegal arrest and the defendant's confession. Neither event "could possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will". Finally, the officer's conduct was sufficiently flagrant and purposeful. "As in *Dunaway*, the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarilyy transported [the defendant] to the station in the hope that something would turn up." It did not matter that the police did not physically abuse the defendant during or after the arrest. (*Taylor, supra*., at 690-693.)

d. New York v. Harris (1990) 495 U.S. 14: *The Exclusionary Rule Does not Apply to a Statement Taken Outside the Home Following a Warrantless In-Home Arrest as Long as the Police had Probable Cause*

This case portended the Supreme Court's subsequent opinion in *Hudson v. Michigan* (2006) 547 U.S. 586. In holding that the defendant's post-arrest confession was admissible, the Court focused on whether exclusion would promote the goals of the specific Fourth Amendment rule violated by the warrantless in-home arrest, and whether suppression was necessary to deter future violations of this rule.

In *Harris*, the police had probable cause to believe the defendant had committed a murder. Without obtaining an arrest warrant, they went to his home and demanded entry. Once inside, the police secured a waiver of the defendant's *Miranda* rights, and he confessed to the murder. He was arrested inside his apartment. He was then taken to the police station and again read his *Miranda* rights. He signed a written inculpatory statement. The issue before the Supreme Court was whether this second confession was properly admitted at trial. The Court held that it was; the exclusionary rule did not apply. (*Harris, supra*., 495 U.S. at 15-16.)

It was undisputed that the police violated the rule of *Payton v. New York* (1980) 495 U.S. 573 and the Fourth Amendment by entering the defendant's home and arresting him therein without a warrant or consent. Thus, any evidence obtained by the police while they were inside of the defendant's home, including his first statement, was properly suppressed. But that did not mean that the confession obtained by the officers outside of the home, following his illegal arrest, needed to be excluded, particularly because the police had probable cause to arrest the defendant. They could have arrested him outside of his home without violating the law. (*Harris, supra*., at 16-20.)

The second out-of-home statement was properly admitted at trial, because exclusion of that evidence would not serve the purposes of the *Payton* doctrine or the exclusionary rule. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." (*Harris, supra*., at 17.) The purpose of the *Payton* rule is to protect the integrity of the home and bar the police from crossing the threshold without a warrant or consent, even if they have probable cause to arrest. The purpose of the exclusionary rule is to deter police misconduct, including violations of *Payton*. The purposes of both rules are served by the suppression of evidence gathered by the officers during the illegal in-home arrest. This is sufficient to deter the police from violating *Payton* as they "know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home." (*Harris, supra*., at 20-21.)

The Court found no need to apply the *Brown* attenuation analysis: "Attenuation analysis is only appropriate where, as a threshold matter, courts determine that the challenged evidence is in some sense the product of the illegal government entry." Here, in contrast to *Brown*, *Dunaway* and *Taylor*, the police had probable cause to arrest the defendant prior to illegal entering his home. Thus, his subsequent statement at the station was not come at by exploitation of the unlawful entry. (*Harris, supra*., at 19.)

In this five-to-four opinion, Justice Marshall filed a dissent. He emphasized that the police had illegally arrested the defendant inside of his home. Thus, the question before the Court was whether the defendant's statement at the station house, made an hour after his unconstitutional arrest, was the tainted fruit of the officer's illicit conduct. According to Marshall, the majority answered this question "by adopting a broad and unprecedented principle" – that a suspect's statement made following an unlawful in-home arrest was admissible if the police had probable cause and the statement was taken outside of the home. (*Harris, supra*., at 21-22.)

Justice Marshall accused the majority of ignoring the deterrent purpose of the exclusionary rule and creating an incentive for the police, armed with probable cause, to circumvent the warrant process, enter the suspect's home in violation of *Payton*, make an illegal in-home arrest, and then drag the suspect outside to take his statement. Once outside, the suspect, "shaken by the enormous invasion of privacy he has just undergone", may well say something incriminating. (*Harris, supra*., at 22, 31-32.)

In contrast, the attenuation analysis developed in *Wong Sun*, *Brown*, *Dunaway* and *Taylor*, arose from "an understanding of how extensive exclusion must be to deter violations of the Fourth Amendment" – that it must extend to the derivative evidence obtained by exploitation of the illegal police conduct. The Court should have applied the *Brown* attenuation analysis to the facts of this case, and if it had considered the three relevant factors, the statement taken from the defendant at the police station one hour after his arrest would have been suppressed. (*Harris, supra*., at 23-25.)

E. Hudson v. Michigan (2006) 547 U.S. 586: The Exclusionary Rule Does not Apply to Evidence Seized Following a Knock-Notice Violation

1. Analysis of Hudson v. Michigan

Just a few months after Chief Justice Roberts and Justice Alito joined the Supreme Court, the Court issued its opinion in *Hudson*, further limiting application of the exclusionary rule. The Court adopted a rare per se rule, holding that evidence seized during a search following an unconstitutional knock-notice violation need not be suppressed in a criminal trial.

Hudson is a five-to-four opinion. Justice Scalia wrote the majority opinion, joined by Chief Justice Roberts, Justice Thomas, Justice Alito and Justice Kennedy. Justice Kennedy wrote a separate concurring opinion. Justice Breyer wrote a dissenting opinion, joined by Justices Stevens, Souter and Ginsberg.

a. The Majority Opinion

In *Hudson*, police officers obtained a valid warrant authorizing a search of the defendant's home. Upon arriving at the house to execute the warrant, the officers announced their presence but only waited three to five seconds before entering the residence through the unlocked door. Subsequently, the officers searched the home and seized evidence leading to the defendant's prosecution for drugs and gun possession.

The Court held that although the officers had violated knock-notice rules and made an unconstitutional entry into the defendant's home, the evidence subsequently seized need not be excluded in this or any other criminal case. Evidence obtained following an entry made in violation of knock-notice may be freely admitted at trial. Other remedies are sufficient to remedy and deter knock-notice violations, which go to the manner of entry and not the police officers' right to search.

Preliminarily, the Court confirmed that compliance with long-standing knock-notice rules is still constitutionally mandated. The "common law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door" before entering was not only required by statute but commanded by the Fourth Amendment. (See *Wilson v. Arkansas* (1995) 514 U.S. 927.) (*Hudson, supra*., at 589.) However, that did not mean that probative evidence secured pursuant to a valid warrant following this illegal entry should be suppressed.

The Court redefined exclusion of unlawfully seized evidence as an exception rather than a rule. "Suppression of evidence, however, has always been our last resort, not our first impulse." (*Hudson, supra*., at 591.) Through the years, rather than limiting application of the exclusionary rule, "[w]e have been cautious against expanding it." Admittedly, this was not always the case. "Expansive dicta in *Mapp*, for example, suggested wide scope for the exclusionary rule..... But we have long since rejected that approach." No longer would the Court reflexively apply the rule whenever evidence was seized during or following a Fourth Amendment violation. (*Hudson, supra*., at 591.)

The Court drew a line between the officers' entry into the home and their subsequent search, stressing that with a knock-notice violation, it is only the "manner of entry" that is illegal. The police are armed with a valid search warrant and thus have the right to search the house and seize evidence described in the warrant despite this "preliminary misstep." (*Hudson, supra*., at 592.)

No evidence is discovered during a knock-notice violation. Thus, the Court considered whether the evidence seized from the home should be excluded as the tainted fruit of that violation. The Court concluded that with a knock-notice violation, the illegal manner of entry is not the but-for cause of obtaining the evidence. "Whether that preliminary misstep had occurred or not, the police would have executed the warrant they had obtained and would have discovered the gun and drugs inside the house." (*Hudson, supra*., at 592.) Consequently, the Court did not apply the traditional attenuation analysis of *Wong Sun* and *Brown v. Illinois* to determine whether the evidence was obtained by exploitation of the knock-notice violation. Instead, the Court applied a distinct type of attenuation analysis adopted from *New York v. Harris* (1990) 495 U.S. 14:

> "[A]ttenuation can occur...when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." (*Hudson, supra*., at 593, citing *Harris, supra*., 495 U.S. at 14.)

In *Harris*, the Court had declined to suppress a confession obtained after the police had taken the defendant out of the home following an illegal warrantless entry and arrest made in violation of *Payton v. New York* (1980) 445 U.S. 573. The Court had stressed that the officers had probable cause for the arrest and held that excluding the confession

would not serve the purpose of the *Payton* rule, which was to protect the integrity of the home and bar officers from crossing the threshold without a warrant. That purpose was adequately served by suppressing all evidence gathered by the officers inside the home. Moreover, suppression of the in-home evidence adequately deterred future violations of *Payton*. (*Harris*, supra., 495 at 17-21.)

In *Hudson*, the Court held that evidence found in the home following a knock-notice violation should not be excluded, because suppression would not vindicate the interests protected by the knock-and-announce requirements. Unlike the warrant and probable cause requirements, knock-notice rules do not protect individuals' rights to shield their persons, houses, and effects from government scrutiny. Rather, the interests protected by knock-notice rules are: 1)to protect life and limb from the violence that may be provoked by an unannounced entry; 2)to avoid the destruction of property occasioned by a forcible entry; and 3)to protect elements of privacy and dignity that might be adversely affected by a sudden unexpected police entrance; knock-notice gives residents the opportunity to prepare for the police entry by pulling on clothes and collecting themselves before answering the door. These interests, violated by the unlawful manner of entry, "have nothing to do with the seizure of evidence" and would not be served by excluding that evidence from trial. Once a valid search warrant has issued, the residents have no right to prevent the government from entering and searching the home, or from seeing and taking evidence described in the warrant. (*Hudson, supra*., at 594.)

The Court then engaged in a more typical exclusionary rule analysis, focusing on the deterrent purpose of the rule. The Court asserted that "the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs." (*Hudson, supra*., at 594-595, quoting *Leon, supra*. 468 U.S. at 907.) The Court assessed the "considerable" social costs incurred when the courts exclude evidence following a knock-notice violation. Of course, there is the cost that always results from the suppression of relevant incriminating evidence – allowing dangerous criminals to be released into society. (*Hudson, supra*., at 595.)

But then there are costs particular to this context: 1) Providing the remedy of suppression to criminal defendants encourages "a constant flood" of suppression motions alleging police failure to comply with knock-notice. "The costs of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card." 2) Litigating knock-notice claims is difficult because the rules are purposely vague. 3)To avoid this litigation, police officers will wait too long before entering a residence, "producing preventable violence against officers in some cases, and the destruction of evidence in many others." (*Hudson, supra*., at 595.)

Weighed against these social costs, excluding the fruits of a knock-notice violation has little deterrent effect. Police officers armed with a lawful search warrant have little incentive to violate knock-notice. Presumably, the police don't want to endanger themselves or others by bursting in and provoking a violent response, even though they might prevent the destruction of evidence triggered by an announcement of their intended entry. Thus, "massive deterrence is hardly required." (*Hudson, supra*., at 595-596.)

Moreover, there are other ways to deter knock-notice violations. Victims can file civil law suits for damages or civil rights actions for which attorneys fees are available. The Court claimed that "the lower courts are allowing knock-and-announce suits to go forward unimpeded by assertions of qualified immunity." (*Hudson, supra*., at 596.) Finally, the prospect of internal department discipline and better police training discourage officers from violating knock-notice. (*Hudson, supra*., at 598-599.)

Reading *Hudson*, one senses that Justice Scalia does not think violations of knock-notice rules rank very high on the scale of Fourth Amendment intrusions. After all, these rules affect only the "manner of entry" and not the officer's right to search and seize evidence, which has been validated by a warrant supported by probable cause. Justice Scalia referred to a knock-notice violation as a "preliminary misstep" (*Hudson, supra*., at 592), and he characterized the right protected by knock-notice requirements as "the right not to be intruded upon in one's nightclothes." (*Hudson, supra*., at 597.)

b. Justice Kennedy's Concurring Opinion

In a short concurring opinion, Justice Kennedy emphasizes three points. First, the Court's opinion limiting application of the exclusionary rule, applies only to knock-notice violations. "[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." (*Hudson, supra*., at 603.)

Second, the Court's opinion should not be read as suggesting that violations of long-standing and constitutionally required knock-notice rules are "trivial or beyond the law's concern". (*Hudson, supra*., at 602-603.) The basic rights in question – one's privacy and security in one's own home – are central to the Fourth Amendment's guarantees. If police officers persist in violating the sanctity of the home by ignoring the requisites of lawful entry, then the government should fortify procedures for training police officers and enhance disciplinary procedures with detailed legislation. These efforts, along with the availability of civil remedies, should be sufficient to deter and punish even the most serious knock-notice violations. (*Hudson, supra*., at 603.)

Third, Justice Kennedy viewed the issue in *Hudson* as involving attenuation.

"[T]he causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression." The evidence is discovered not because of a failure to knock and announce, but because of a subsequent search conducted pursuant to a lawful warrant supported by probable cause. (*Hudson, supra*., at 603-604.)

c. Justice Breyer's Dissent

Justice Breyer wrote a strong dissent. He asserted that the majority opinion "destroys the strongest legal incentive to comply with the Constitution's knock-notice requirements." (*Hudson, supra*., at 605.) As long recognized, the "driving purpose underlying the exclusionary rule" is to deter the police from violating citizens' Fourth Amendment rights. (*Hudson, supra*., at 608.) The only effective way to deter knock-notice violations is to suppress evidence seized during the search following the illegal entry. If the police know that they can enter a home illegally, without risking suppression of the evidence found inside, they will have no reason to comply with knock-notice when a surprise entry would be tactically advantageous. (*Hudson, supra*., at 609.) No-knock entries will undoubtedly increase, and residents will have no recourse but to suffer these invasions upon property and privacy.

As recognized in many exclusion cases, other mechanisms for enforcing Fourth Amendment rights have proved worthless and futile. (*Hudson, supra*., at 607-608.) The vague prospect of civil damage or civil rights lawsuits is neither a reasonable disincentive to police misconduct nor a viable remedy for victimized home occupants. Justice Breyer noted that "[t]he cases reporting knock-and-announce violations are legion....sufficiently frequent and serious to indicate a widespread pattern." Yet the majority failed to turn up a single reported case "in which a plaintiff has collected more than nominal damages" by claiming a knock-notice violation. Indeed, as the government conceded, in most cases damages may be virtually non-existent. Civil actions are expensive, time-consuming, not readily available, and rarely successful. (*Hudson, supra*., at 610-611.)

Justice Breyer challenged the majority's claim that an illegal entry, made in violation of knock-notice, is not the but-for cause of the officers' subsequent seizure of incriminating evidence. In the present case, "[a]lthough the police might have entered Hudson's home lawfully, they did not in fact do so. Their unlawful behavior inseparably characterizes their actual entry; that entry was a necessary condition of their presence in Hudson's home, and their presence in Hudson's home was a necessary condition of their finding and seizing the evidence." One cannot separate the "manner of entry" from the related search. (*Hudson, supra*., at 615.)

The dissent criticized the majority's redefinition of "attenuation" as occurring

"when, given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by the suppression of the evidence obtained." (*Hudson, supra*., at 620.) Justice Breyer argued that the majority minimized the interests protected by knock-notice. These rules exist not only to protect homeowners from damaged doors and to protect occupants from surprise and the indignity of being "intruded upon in one's nightclothes." The rules protect core Fourth Amendment values – the sanctity of one's home and the privacies of life. (*Hudson, supra*., at 620-621.)

Justice Breyer stated that the majority opinion represented a significant departure from the Court's precedents in two areas. First, the majority disregarded a long line of precedent affirming the historical importance of knock-notice requirements, and the Court's own opinion holding that failure to comply with these rules renders the subsequent search and seizure constitutionally defective. (*Hudson, supra*., at 605-606.)

Second, and more importantly, the majority ruling ignored precedents recognizing that the exclusionary rule was essential to effectuate Fourth Amendment protections. By suppressing evidence seized following a Fourth Amendment violation, the Court assured that the government could not retain and use the evidence to its benefit in a criminal trial. These cases gave meaning to the Constitutional promise. (*Hudson, supra*., at 607-608.)

But even assuming that deterrence was the purpose of the exclusionary rule, the Court had previously declined to apply the exclusionary rule only when suppression of the evidence would not result in appreciable deterrence – e.g. when the police officer relied on a defective warrant in good faith; or when the prosecution proffered the evidence in proceedings other than criminal trials. Neither of these exceptions apply when an officer knowingly or negligently violates knock-notice requirements, without reasonably relying on another's error or misjudgment, and the government introduces the subsequently seized evidence at the defendant's criminal trial. (*Hudson, supra*., at 612-613.)

Finally, the dissent warned that the majority's analysis will likely lead to denying the exclusionary remedy to defendants who have suffered other Fourth Amendment violations. Scalia found that the considerable social costs of applying the exclusionary rule to knock-notice violations outweighed the deterrence benefits. But the considerable social costs cited by Scalia exist in every criminal case when illegally seized evidence is suppressed. In every case "where the constable blunders, a guilty defendant may be set free." (*Hudson, supra*., at 614.)

2. The Impact of Hudson/ Cases Applying Hudson[7]

The immediate impact of *Hudson* is obvious. A criminal defendant can no longer raise a knock-notice violation claim in a motion to suppress evidence. Moreover, the opinion surely takes the teeth out of knock-notice enforcement. As Justice Breyer states in the dissenting opinion: "Today's opinion..... weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection." If evidence discovered following an illegal entry will be admitted at a criminal trial, police officers will have little reason to knock, announce their presence and wait several seconds before bursting in. The theoretical possibility of civil lawsuits or internal police discipline, sometime in the future, will not assure compliance.

In the three and-one-half years since *Hudson* was decided, the lower courts – for the most part – have heeded the limitations urged by Justice Kennedy in his concurring opinion. Most of the cases applying *Hudson* to deny the suppression of evidence have been knock-notice cases, in which incriminating evidence was discovered following the knock-notice violation.

Two cases from the Ninth Circuit have applied *Hudson* to uphold the admissibility of evidence secured after distinct types of Fourth Amendment violations – an entry to serve a search warrant accomplished by the use of excessive force (*United States v. Ankeny* (9th Cir. 2007) 502 F.3d 829); and an officer's failure to serve the defendant with the actual search warrant during the search. (*United States v. Hector* (9th Cir. 2007) 474 F.3d 1150.) However, in both of these cases, as in *Hudson*, the officers had a valid warrant, supported by probable cause, entitling them to enter and search the residence. Two cases, from the Tenth and Sixth Circuits, have declined to apply *Hudson's* rule and rationale to evidence seized following illegal residential searches when the officers did not violate knock-notice and did not have an independent right to enter and search. (See *United States v. Cos* (10th Cir. 2007) 498 F.3d 1115 [evidence suppressed following illegal entry when third party did not have actual or apparent authority to consent]; *United States v. Hardin* (6th Cir. 2008) 539 404 [evidence excluded when officers enter apartment to serve arrest warrant without reasonable belief that defendant inside].)

The only other case extending *Hudson* was *United States v. Farias-Gonzalez* (11th Cir. 2009) 556 F.3d 1181. In that case, the Eleventh Circuit employed the cost-benefit balancing test used by the Supreme Court in cases from *Calandra* through *Hudson.* The

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[7] In these materials, we focus only on California appellate cases and opinions from the federal Courts of Appeal, rather than out-of-state cases.

court balanced the costs of excluding evidence (fingerprints and photos) for a specific purpose at trial (to prove the undocumented immigrant's identity) against the deterrence benefits in this particular context. This is an unprecedented application of the balancing test which should be confined to its facts.

a. Applying Hudson to Evidence Seized Following California and Federal Knock-Notice Violations

Two months after *Hudson*, the California Court of Appeal (First District, Division Five) published *In re Frank S.* (2006) 142 Cal. App. 4th 145, holding that the incriminating evidence found on the defendant following a knock-notice violation need not be suppressed from his criminal trial. The Court held that the reasoning and rule of *Hudson* applied, even though in this case, the officers entered the residence not to execute a search warrant, but to arrest the defendant, a parolee, for a parole violation.

Following *Hudson*, there have been several federal Court of Appeals cases holding that evidence seized following an unconstitutional entry into a residence, made in violation of knock-notice requirements, need not be suppressed. In *United States v. Pelletier* (1st Cir. 2006) 469 F.3d 194, the Court held that *Hudson* precludes the suppression of evidence seized following a knock-notice violation committed while executing a parole violation arrest warrant. In *United States v. Smith* (6th Cir. 2008) 526 306, the Court held that evidence found during a lawful parole search need not be suppressed even though the officers violated knock-notice rules in entering the residence. Several circuits have held that under *Hudson*, evidence is admissible if it was seized following a residential entry that violated knock-notice rules defined by federal statute. (See *United States v. Bruno* (5th Cir. 2007) 487 F.3d 304; *United States v. Acosta* (2d Cir. 2007) 502 F.3d 54; *United States v. Southerland* (D.C. Cir. 2006) 466 F.3d 1083.)

b. United States v. Hector (9th Cir. 2007) 474 F.3d 1150: No Suppression of Evidence Seized Pursuant to a Valid Search Warrant, When the Police Failed to Serve the Defendant With the Warrant During the Search

In *United States v. Hector* (9th Cir. 2007) 474 F.3d 1150, the Ninth Circuit applied Hudson to another "preliminary misstep" in the execution of a valid warrant. The police had acquired a valid warrant to search the defendant's apartment. During the search, the officers failed to serve the defendant with a copy of the search warrant. They discovered a handgun and cocaine in the defendant's home. (*Hector, supra*., 474 F.3d at 1152-1153.)

The issues before the Ninth Circuit were: 1) whether the officers violated the defendant's Fourth Amendment rights by failing to present him with a copy of the valid

warrant at the time of the search; and 2) whether the claimed Fourth Amendment violation merited the suppression of evidence seized pursuant to the search warrant. (*Hector, supra*., at 1151.) The Ninth Circuit did not resolve the first issue because they found that the evidence seized during the search authorized by the valid warrant need not be excluded from the defendant's trial. (*Hector, supra*., at 1154.)

The Court applied *Hudson*, and found that the failure to serve the search warrant was not the but-for cause of the discovery of the incriminating evidence. "The causal connection between the failure to serve the warrant and the evidence seized is highly attenuated, indeed non-existent in this case." (*Hector, supra*., at 1155.) Regardless of whether the police had shown the defendant the valid warrant, they still would have executed it and discovered the evidence inside the apartment. (*Hector, supra*., at 1155.)

The Court also assessed the considerable costs of excluding relevant evidence obtained pursuant to a valid warrant against the deterrence benefits of suppressing the evidence due to this particular violation. Because officers have little incentive to fail to present valid search warrants to home occupants, "resort to the massive remedy of suppressing evidence of guilt [was] unjustified" in this case. (*Hector, supra*., at 1155.)

c. United States v. Ankeny (9th Cir. 2007) 502 F.3d 829: Evidence Seized Following an Entry to a Residence During Which the Officers Used Excessive Force Need not be Suppressed

In *United States v. Ankeny* (9th Cir. 2007) 502 F.3d 829, in an opinion written by Judge Garber, the Ninth Circuit applied *Hudson* in a manner that sparked a strong dissent and criticism from commentators. The court held that *Hudson* precludes the suppression of evidence seized after officers use excessive and unreasonable force to enter a home in order to execute a search warrant.

In *Ankeny*, the Portland Police received a domestic violence and weapons complaint regarding the defendant who had several outstanding warrants and an extensive criminal history. The officers decided to arrest the defendant at the house where he was living, rather than on the street because of his record of violence and hostility to the police. The police obtained a warrant for an in-home arrest and search, and they decided to execute it in the early morning hours. A total of 44 officers executed the warrant at 5:30 a.m. They yelled, "police, search warrant", while pounding on the door and broke down the door one second later. After entering, they saw the defendant sleeping on a recliner near the front door. Officers ordered him to get down and threw a flash-bang device into the center of the room which exploded, causing first-and-second-degree burns to the defendant's face and upper body. Other officers shot out the windows with rubber

bullets and threw a second flash-bang device into the second floor, causing a fire. Extensive damage done to the house cost more than $14,000 to repair. Officers found guns in proximity to the defendant and he was prosecuted for illegal firearm possession. (*Ankeny, supra*., 502 F.3d at 832-834.)

The defendant filed a motion to suppress the evidence found in the house, alleging that the officers' entry into the home was unconstitutional because: 1)the police violated knock-notice rules; and 2)they used excessive force rendering the subsequent search unreasonable. The Ninth Circuit quickly disposed of the first claim, holding that regardless of whether the officers had violated knock-notice, suppression was foreclosed by the Supreme Court's decision in *Hudson*. (*Ankeny, supra*., at 835.) The Court also applied *Hudson* to hold that even if the manner of the officers' entry was unconstitutional due to excessive force, evidence seized subsequent to this entry would not be excluded from evidence.[8] The unreasonably entry and the discovery of evidence "lack the causal nexus that is required to invoke the exclusionary rule." (*Ankeny, supra*., at 836-838.)

The Ninth Circuit held that the exclusionary rule applies only when the Fourth Amendment violation is the but-for cause of the officers' procuring of the evidence. In the present case, the officers' discovery of the defendant's guns was "not causally related to the manner of executing the warrant." The police had a valid warrant and the guns were not hidden. "Even without the use of a flash-bang device, rubber bullets, or any of the other methods that Defendant challenges, the police would have executed the warrant they had obtained, and would have discovered the [evidence] inside the house." (*Ankeny, supra*., at 838, quoting *Hudson, supra*., 547 U.S. at 592.) Thus, exclusion of the evidence found inside the home was not warranted.

Judge Reinhardt filed a dissent in *Ankeny*, vigorously protesting the majority's extension of *Hudson* to create "a blanket exception to the exclusionary rule" for searches executed with excessive force whenever the officers possess a valid warrant. (*Ankeny*, supra., 502 F.3d at 847.) Reinhardt claimed that suppression was appropriate in *Ankeny* because it was not a "preliminary misstep" during the entry but the manner of the search which led to the discovery of the incriminating evidence. (*Ankeny, supra*., at 842.)

Acknowledging that *Hudson* held that "suppression is no longer a remedy for constitutional violations of the knock-and-announce requirements", Judge Reinhardt noted that the majority was divided on the basis for this holding. Justice Kennedy, whose

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[8] The Court did not resolve the issue of whether the police in this case used excessive force, calling it a close question. (*Ankeny, supra*., at 836.)

concurring opinion provided the majority's fifth vote, gave the ruling a narrow reading. Kennedy did not join in the portion of Justice Scalia's opinion which attempted to link *Hudson's* rejection of suppression as a remedy for violating the Fourth Amendment's knock-notice requirements to a broader trend abandoning the exclusionary rule in other contexts. Instead, Justice Kennedy cautioned that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt", and that the *Hudson* ruling only applied to the discovery of evidence following knock-notice violations. (*Ankeny, supra*., at 842-843, quoting *Hudson, supra*., 547 U.S. at 603.) Moreover, Justice Kennedy concurred with the majority opinion only due to attenuation – because 'the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression" of the subsequently discovered evidence. (*Ankeny, supra*., at 843, *Hudson, supra*., at 603-604.)

Judge Reinhardt addressed attenuation in *Ankeny*. He claimed that the officers used excessive force not only in the manner of entry but during the search itself, and it was that search, "permeated with illegality", that led directly to the discovery of the incriminating evidence. "The principal excessive force was directed against persons, not property, and the force was applied after the officers had entered the dwelling and were in the process of executing the search warrant." (*Ankeny, supra*., at 844, n. 1.) Thus, this case is very different from *Hudson*, where the Fourth Amendment violation occurred before the officers entered the residence and was followed by a lawful search lasting five hours which uncovered the incriminating evidence. In this case, the discovery of the guns was causally related to the unconstitutional search. (*Ankeny, supra*., at 844.)

Next, Judge Reinhardt argued that the cost-benefit analysis applied in *Hudson* favored suppression of evidence secured during a "military-style search conducted with excessive force". The costs of exclusion were minor. Excessive force claims arise only rarely, and it is relatively easy for courts to "discern which extraordinary tactics constitute excessive force". (*Ankeny, supra*., at 845.) Moreover, "in the context of a search executed with excessive force...the benefits of deterrence are tremendous" – avoiding unnecessary destruction of private property and reducing the risk of serious injury and death to all who occupy the home, including innocent children. "Certainly, the right not to be set afire or killed 'in one's night-clothes' is far more grave and worthy or protection that the right not to be intruded upon in that attire." (*Ankeny, supra*., at 846.) Judge Reinhardt cautioned that this ruling could encourage the excessive use of force and lead to dire and unfortunate consequences. (*Ankeny, supra*., at 847.)

d. United States v. Farias-Gonzalez (11th Cir. 2009) 556 F.3d 1181: *Evidence Obtained During an Unlawful Search and Seizure are Admissible Only to Prove the Defendant's Identity*

In this unusual case, the Eleventh Circuit applied *Hudson's* "cost-benefit balancing test" to the fruits of a Fourth Amendment violation that did not involve the manner of executing a valid search warrant. The Court held that evidence obtained during an unlawful search and seizure may be admissible in a criminal trial for one purpose – to prove the defendant's identity – but presumably not for other purposes.

In *Farias-Gonzalez*, two Immigration and Customs Enforcement agents were patrolling an apartment complex in Atlanta for possible gang activity. They approached the defendant because he had possible gang tattoos and identified themselves as police. After the defendant denied gang affiliation, one agent lifted the defendant's shirt to look at the tattoos on his upper arm. The agents, who were visibly armed, then asked the defendant for identification. They accompanied him into his apartment to get his ID. Inside the apartment, the defendant provided drivers licenses in the name of "Norberto Gonzalez" and claimed he had been to prison. The agents told the defendant to take off his shirt and took photographs of his tattoos. A records check revealed no information for Norberto Gonzalez. After the agents took the defendant's fingerprints, they learned that he was Farias-Gonzalez and had previously been deported. He was prosecuted for illegally re-entering the country. However, the court declined to suppress the "identifying information", including the fingerprints and photographs. (*Farias-Gonzalez, supra*., 556 F.3d at 1182-1184.)

The Eleventh Circuit found that the defendant had been illegally detained and searched (when the officers lifted up his shirt) at the time that the officers procured the incriminating evidence. Nevertheless, the "identity-related evidence" (the fingerprints and photographs) should not be excluded from the criminal prosecution if offered solely to prove the defendant's identity. (*Farias-Gonzalez, supra*., at 1187.)

The Court of Appeal reached this conclusion by applying the "cost-benefit balancing test" attributed to *Hudson* (although actually used by the Supreme Court since *Calandra*.) The Court found that the social costs of excluding evidence of the defendant's identity from a criminal prosecution were considerable. If the defendant were permitted to "hide who he is", the government might not consider his criminal history, which could preclude the proper sentencing or allow the defendant to escape punishment for certain crimes or avoid the court's jurisdiction, particularly in a deportation case. (*Farias-Gonzalez, supra*., at 1186-1188.)

On the other hand, the deterrence benefits of suppressing identity-related evidence would be minimal. Law enforcement agents would have little incentive to illegally detain or search an individual to gain evidence of his identity because they can easily find out who he is without violating the Fourth Amendment. For example, police officers can require an individual to identify himself during a valid *Terry* stop or obtain fingerprints and photographs without conducting a search. (*Farias-Gonzalez, supra*., at 1188-1189.)

e. Federal Court of Appeal Cases Declining to Extend Hudson to Other Than Knock-Notice Violations

In ***United States v. Cos* (10th Cir. 2007) 498 F.3d 1115**, the Court of Appeal refused to apply the rule of *Hudson* or the good-faith exception to the exclusionary rule when police officers entered the defendant's apartment pursuant to a guest's consent, and that guest had neither actual nor apparent authority. The officers had mistakenly believed that she did have authority to consent.

Officers learned from the defendant's ex-girlfriend that he had threatened her with a knife. The officers obtained an arrest warrant and went to the defendant's apartment to take him into custody. Ms. Ricker, a guest at the apartment, opened the door to the officers and told them that the defendant was not at home; she was alone there with her three young children. Nevertheless, Ms. Ricker allowed them to enter and look around. Searching the defendant's bedroom, they found a gun. The defendant was prosecuted for illegal firearm possession and the district court suppressed the gun. The trial court found that the officers violated the defendant's Fourth Amendment rights when they entered and searched the apartment. They did not reasonably believe he was present and Ms. Ricker lacked both actual and apparent authority to consent to the officers' search. The court also rejected the government's claim that the good-faith exception to the exclusionary rule should apply because the officers mistakenly believed that Ms. Ricker had authority to consent. (*Cos, supra*., 498 F. 3d at 1117-1119.)

The Tenth Circuit rejected the government's appeal, upholding the district court's legal findings – i.e. that Ms. Ricker did not have actual or apparent authority to consent. On the exclusionary rule issue, the Court held that the "good faith exception" should not apply to these facts, because the mistake in this case – believing that Ms. Ricker had authority to consent – was made by the officers who entered and searched the home. "In this circuit, we have concluded that "*Leon's* good faith exception applies only when an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer." (*Cos, supra*., at 1132, quoting *United States v. Herrera* (10th Cir. 2006) 444 F.3d 1238, 1249.)

The Court held that *Hudson* did not affect the result as it was "based on considerations pertaining to the knock-and-announce requirement in particular rather than to other Fourth Amendment violations" – a limitation made clear in Justice Kennedy's concurring opinion. (*Cos, supra*., at 1132, n. 3.)

In ***United States v. Hardin*** **(6th Cir. 2008) 539 F.3d 404**, the court declined to apply *Hudson* to allow the admission of evidence discovered after officers illegally entered an apartment where the defendant was staying to serve him with an arrest warrant.

Police officers had a warrant to arrest the defendant for violating parole. An informant claimed that the defendant was staying with his girlfriend at an apartment complex, but did not indicate which apartment he was staying in. The officers spotted a vehicle matching the description of the defendant's car near apartment #48. They talked to the manager of the complex who informed them that the defendant had not leased any of the apartments or been seen on the property. The manager said that a woman had leased apartment #48. The officers convinced the manager to go to apartment #48 and pretend to be checking a water leak as a ruse to enter and see if the defendant was inside. The manager did what he was told, found the defendant inside apartment #48, and told the police. The officers forced their way into the apartment, arrested the defendant, searched and seized firearms and cocaine. (*Hardin, supra*., at 406-408.)

The Sixth Circuit found that the officers illegally entered the apartment. The apartment manager was acting as an agent of the government when he improperly used a ruse to enter the apartment, and before his improper entry, the officers lacked a reasonable belief that the defendant was inside apartment #48. Because the entry was illegal, the evidence discovered should have been suppressed. (*Hardin, supra*., at 426.)

Disagreeing with their dissenting colleague, the Court held that the rule of *Hudson* did not affect this conclusion. *Hudson* only precludes exclusion of evidence obtained after a knock-notice violation. Moreover, even if *Hudson* had any application beyond that context, there were glaring factual differences between *Hudson* and the present case. First, the officers in *Hudson* had a search warrant, supported by probable cause, and thus the right to enter the house and search for specific evidence; in the present case, the officers merely had an arrest warrant and did not know that the defendant was in the apartment. The illegal entry was not merely a "preliminary misstep" in executing a valid warrant. Second, the illegal entry in the present case was the but-for cause of discovering the evidence. The officers would not have found the evidence if they had not illegally entered the residence to serve the warrant. (*Hardin, supra*., at 426, n. 13.)

F. Herring v. United States (2009) 129 S.Ct. 695: The Exclusionary Rule Does not Apply When the Officer Conducting the Search and Seizure Reasonably Relied on False Information Resulting from A Police Employee's Negligent Record-keeping Error

1. Analysis of Herring v. United States

In *Herring*, the Court expanded the good faith exception to the exclusionary rule. In *Herring*, as in *Arizona v. Evans*, a law enforcement officer illegally arrested the defendant because he reasonably relied on false information indicating that the defendant had an active arrest warrant when, in fact, the warrant had been recalled. In *Evans*, the false information was due to an error made by a court employee, whereas in *Herring*, the negligent error was made by a police employee. In *Herring*, the Court answered the question left unresolved in *Evans*, and held that the exclusionary rule would not apply even though the record-keeping error was made by law enforcement personnel.

Herring was a five-to four opinion. Chief Justice Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas and Alito. Justice Ginsburg wrote a dissenting opinion, joined by Justices Stevens, Souter and Breyer. Breyer wrote a separate dissent, joined by Justice Souter.

a. The Majority Opinion

Investigator Anderson learned that the defendant, who was "no stranger to law enforcement" had driven to the Coffee County Sherriff's Department to retrieve items from his impounded truck. Anderson asked the Coffee County warrants clerk to ascertain whether the defendant had an outstanding arrest warrant in that county; he did not. Anderson then asked the Coffee County clerk to call the Dale County warrants clerk to see if the defendant had an active warrant in that neighboring county. The Dale County warrants clerk checked their computer database and discovered an outstanding arrest warrant for failure to appear. This information was relayed to Investigator Anderson, who asked the Dale County clerk to fax over a copy of the warrant but did not wait to receive it. Instead, he arrested the defendant, searched him and found drugs and a gun. Within ten minutes after the arrest, the Dale County clerk ascertained that the defendant's warrant had been recalled five months earlier. A sheriffs department employee had negligently failed to update the Dale County records, so the recalled warrant still showed as "active" on the computer system. (*Herring, supra*., 129 S.Ct. at 698-699, 705-706.)

Because Investigator Anderson lacked probable cause and there was no active

warant, the arrest and subsequent search was unconstitutional. The Court stressed, however, that Investigator Anderson did nothing wrong. He reasonably believed the defendant was subject to an arrest warrant. The negligent error which invalidated the arrest was made by someone in the Dale County's Sheriffs Department. The extreme sanction of exclusion should not have applied because "the error was the result of isolated negligence attenuated from the arrest." The incriminating evidence was admissible at the defendant's criminal trial. (*Herring, supra*., at 698, 699-700.)

The exclusionary rule applies only when it will result in "appreciable deterrence" of future Fourth Amendment violations. In addition, the benefits of deterrence must outweigh the costs, including "letting guilty and possibly dangerous defendants go free." (*Herring, supra*., at 700-701.) This principle explains the good faith exception to the exclusionary rule, set forth in *Leon* and applied in *Evans*. A police officer who reasonably relies on a warrant subsequently found invalid, or on computer information later determined to be incorrect, will not be deterred from arresting or searching the defendant. In these circumstances, the reasonably well-trained officer does not know beforehand that the search is unconstitutional; nor may he be charged with that knowledge. (*Herring, supra*., at 700-701, 703.) In the present case, Investigator Anderson reasonably relied on false information that the defendant had an active warrant. The error that caused the constitutional violation was "attenuated" from the actual arrest. (*Herring, supra*., at 698.)

In previous good faith cases, the party that made the error which invalidated the arrest or search was not a law enforcement official but a judge (*Leon)*, and a court employee (*Evans)*. These prior cases recognized that the "exclusionary rule was crafted to curb police rather than judicial misconduct." (*Herring, supra*., at 701.) In *Herring*, the record-keeping error was made by a sheriffs' department employee. Thus, the Court confronted the issue left unanswered in *Evans* – "whether the evidence should be suppressed if police personnel were responsible for the error." (*Herring, supra*., at 701.)[9]

In addressing this question, the Court considered the culpability of the particular law enforcement official – the employee who did not change the Dale County computer data base to indicate that the defendant's arrest warrant had been recalled. The Court insisted that "[t]he extent to which the exclusionary rule is justified by [deterrence] varies with the culpability of the law enforcement conduct." (*Herring, supra*., at 701.) Based on

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[9] The majority rejected the dissent's suggestion that the ruling in *Evans* was premised on the distinction between judicial errors and police errors, noting that the Court expressly left unresolved the issue of whether evidence should be suppressed if police personnel were responsible for the error. (*Herring, supra*., at 703, n. 3.)

the evidence, the Court concluded that error of the sheriffs department employee who did not delete the defendant's warrant resulted from mere negligence. There was no indication that the record-keeping error was deliberate or reckless, or that errors in Dale County's system were routine and widespread. (*Herring, supra*., at 703-704.) The Court noted that the abuses that gave rise to the exclusionary rule, in *Weeks* and *Mapp*, were intentional and patently unconstitutional conduct committed by the officers who searched and seized the incriminating evidence.[10] The error in the present case arose "from nonrecurring and attenuated negligence [and] is thus far removed from the core concerns that led us to adopt the rule in the first place." (*Herring, supra*., at 702.)

Referring to the culpability of the Dale County sheriffs department employee who failed to record the recalled warrant, the Court stated:

> "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence. *The error in this case* does not rise to that level." (*Herring, supra*., at 702 [emphasis added].)

Subsequently, the Court concluded that "when police mistakes are the result of negligence *such as that described here*, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way." (*Herring*, supra., at 704 [emphasis added].) Excluding the evidence discovered in these circumstances might encourage police employees to take greater care in maintaining their computerized record systems, but that is not worth the cost of excluding reliable evidence. The "core concerns" underlying the exclusionary rule are not raised by "an isolated, negligent record-keeping error attenuated from the arrest." (*Herring, supra*., at 702, 706.)

The Court acknowledged that some record-keeping errors by the police might be subject to the exclusionary rule. For example, suppression to deter repeated errors might be justified "if the police have been shown to be reckless in maintaining a warrant system

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[10] In *Weeks*, the officers broke into the defendant's home, searched it and confiscated papers without a warrant or probable cause. (*Weeks, supra*., 232 U.S. at 386, 393-394.) In *Mapp*, officers brandished a false warrant when they entered and searched the defendant's home. (*Mapp, supra*., 367 U.S. at 644-645.)

or to have knowingly made false entries to lay the groundwork for future false arrests." Similarly, where systemic errors were demonstrated, it might be unreasonable for officers in the field to rely on such unreliable computer systems. None of these conditions, however, were demonstrated in the present case. (*Herring, supra*., at 703-704.)

The Court in *Herring*, did not hold that the exclusion is precluded when the conduct of the officer who actually made the unconstitutional arrest or conducted the illegal search was negligent, as opposed to deliberate, reckless, or grossly negligent. The Court's comments requiring more than mere negligence to trigger the exclusionary rule apply to the police employee who made the record-keeping error rendering the search and seizure unconstitutional. (See *Herring, supra*., at 702-704.)

b. Justice Ginsburg's Dissent

In a dissent joined by three other justices, Justice Ginsburg made four points. First, she criticized the majority's narrow view of the exclusionary rule. Although the "main objective" of the rule is to deter police misconduct, that is not its only purpose. The rule also "enables the judiciary to avoid the taint of partnership in official lawlessness" and "assures the people – all potential victims of unlawful government conduct – that the government would not profit from its lawless behavior." (*Herring, supra*., at 707, quoting *Calandra, supra*., 414 U.S. at 357 [dis. opn. of Brennan, J.].)

Second, other remedies to redress Fourth Amendment violations – including illegal arrests resulting from negligent record-keeping - are not effective. Civil suits and Section 1983 actions are not viable alternatives. 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, supra*., at 707-708, 709.)

Third, excluding evidence seized as a result of negligent record-keeping by police employees would deter future misconduct. The risk of exclusion would encourage policy-makers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems. It would discourage the type of inefficiency that occurred in this case. (*Herring, supra*., at 708.) Moreover, deterrence would be worth the cost as computerized record-keeping is pervasive. "Electronic databases form the nervous system of contemporary criminal justice operations", and "inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty." (*Herring, supra*., at 708-709.)

Fourth, serious problems are likely to flow from the majority's decision "restricting suppression to book-keeping errors that are deliberate or reckless." The

victims of negligent errors would be left without a remedy for violations of their constitutional rights. Moreover, even when deliberate or reckless error occurs, it will be difficult for the "impecunious defendant" to make the required showing. Finally, to determine if the error was deliberate, reckless, or merely negligent, the courts will have to probe the subjective mental state of the police – usually an irrelevant inquiry. (*Herring, supra*., at 709-710, citing *Whren v. United States* (1996) 517 U.S. 806, 812-813.)

c. Justice Breyer's Dissent

In a short dissent joined by Justice Souter, Justice Breyer criticized the majority for repudiating the distinction between judicial errors and police errors, which had been critical to the Court's decision in *Arizona v. Evans* and its application of the good faith exception. Moreover, as opposed to the judicial v. police error distinction, a multi-factored inquiry in the degree of culpability of the police employee who made the error will be difficult to administer. (*Herring, supra*., at 710-711.)

d. Professor Lafave's Analysis of Herring[11]

Professor Lafave asserts that *Herring* concluded that the exclusionary rule does not apply to evidence procured during an unreasonable search or seizure when the error which rendered the police conduct unconstitutional "was the result of isolated negligence attenuated from the arrest." (Lafave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule* (2009) 99 J.Crim. L. & Criminology 757, 759; quoting *Herring, supra*., at 698.) Lafave states: "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, but is totally unconvincing and in many respects irrelevant and disingenuous." (Lafave*, supra*., at 759.)

Ultimately, Lafave concludes that *Herring* did not hold that all evidence seized during a Fourth Amendment violation resulting from negligence is admissible at the defendant's criminal trial, or that only evidence secured by a flagrant or deliberate violation would be suppressed. Lafave emphasizes that the law enforcement official's negligent act which invalidated the search or seizure must be "isolated, nonrecurring negligence." More importantly, the negligence must be "attenuated from the arrest."

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[11] This section summarizes the analysis of renowned Fourth Amendment expert, Professor Wayne R. Lafave, as set forth in his recent article, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule,* published in the Summer 2009 Journal of Criminal Law and Criminology.

(Lafave, *supra*., at 759, 770-785; quoting *Herring, supra*., at 698, 702-703.)

Lafave's first criticism of *Herring* is that the majority falsely claimed that the cost-deterrent benefit balancing test is a routine part of assessing whether the exclusionary rule should apply in every case. According to Lafave, all prior Court decisions that applied this test to determine if evidence should be excluded involved two situations: 1)when the Court rejected attempts to apply the exclusionary rule at proceedings other than criminal trials, concluding that "application of the rule at the criminal trial itself suffices to provide the necessary deterrence"; or 2)when the arresting or searching officer reasonably relied in good faith upon a non-police source (a judge, court clerk, or legislators) and those individuals outside of law enforcement were neither in need of deterrence nor likely to be deterred by suppressing the fruits of the police officer's good-faith violation. Lafave emphasizes that *Herring* did not involve either situation. (Lafave, *supra*., at 758-763.)

Second, Lafave criticizes *Herring* for falsely claiming that the Court's precedents support the proposition that the exclusionary rule may be selectively applied depending on the culpability attending the Fourth Amendment violation – i.e. whether it was negligent or intentional. To support the statement that the deterrence benefit derived from exclusion "varies with the culpability of the law enforcement conduct" (*Herring, supra*., at 701), the majority took quotes from *Leon* and *Krull* out of context. Those "good faith" cases did not hold that evidence obtained during a subsequently invalidated search could be admitted at trial because the party who made the error was merely negligent, so that deterring that party was not worth the cost of exclusion. Rather those cases declined to apply the exclusionary rule because the searching or arresting officer had reasonably relied on an error made by an authoritative non-police source and "exclusion merely to deter the non-police source was deemed unnecessary." As for the police officer who acted in good faith, it made no "sense to exclude the evidence in the interest of deterrence where he neither knew or should have known that the directive received from the authoritative non-police source would later turn out not to square with the protections of the Fourth Amendment." (Lafave, *supra*., at 763-765.)

Third, Lafave contends that the *Herring* majority never adequately explained why applying the exclusionary rule to negligent police errors has a reduced deterrent effect. Indeed, as the Justice Ginsburg notes in her dissent, this "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." (*Herring, supra*., at 708.) Moreover, even if the *Herring* exception to the exclusionary rule only applies to negligent record-keeping mistakes by law enforcement employees, society has a strong interest in deterring such errors due to the increased reliance on computerized records and the facilitation of information sharing between different jurisdictions. Finally, it is not clear that "deterrence

by way of the exclusionary rule" is not needed because police departments have developed other ways to discourage Fourth Amendment violations or assure the accuracy of their computerized databases. (Lafave, *supra*., at 769-770.778-779.)

Lafave emphasizes that to qualify for the newly-minted *Herring* exception to the exclusionary rule, the actor's conduct needs to be both negligent and "attenuated" from the subsequent search and seizure. However, his fourth criticism is that Chief Justice Roberts, the author of the majority opinion, failed to adequately define attenuation in this context. This may cause lower courts to ignore the attenuation requirement or to apply *Herring* more broadly than the majority intended. (Lafave, *supra*., at 771-785.)[12]

Lafave considers six possible definitions of conduct "attenuated from the arrest" Ultimately, interpreting this phrase in context and noting that the majority relied on prior good-faith cases to justify limiting exclusion in this case, Lafave contends that attenuated negligence likely means "second-hand Fourth Amendment negligence". When the negligent error invalidating the search or seizure is "committed by someone other than the arresting or searching officer and not known by that officer", the obtained evidence "would no longer be subject to the exclusionary rule." (Lafave, *supra*., at 772.)

This interpretation is consistent with *Herring's* reliance on *Leon.* The Court stated that cost-benefit balancing did not justify suppressing evidence obtained by an officer "in objectively reasonable reliance on a subsequently invalidated search warrant", and "[t]he same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant." (*Herring*, *supra*., at 703.)The Court stressed that in *Leon* and *Herring*, the error causing the Fourth Amendment violation was committed by someone other than the searching or arresting officer. If that officer reasonably relied on that negligent error, the evidence may be admitted at trial. (Lafave*, supra*., at 772-773.)

Nevertheless, Lafave acknowledges that there is language in *Herring* which suggests either that attenuation does not matter or that it means more than merely second-hand error. Both the majority and dissenting opinions suggest that only a negligent record-keeping error, committed by a police department clerk, rather than a patrol officer, permits application of the *Herring* exception to the exclusionary rule. In other words,

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[12] Lafave speculates that "attenuation" is not clearly defined in *Herring* because the qualification was added at the last minute. The Chief Justice's opinion may have been originally drafted "to free all forms of negligence from the exclusionary rule, and....the 'attenuated' qualification became a necessary add-on to garner the needed fifth vote" from Justice Kennedy. (Lafave*, supra*., at 771.)

Herring extended the *Evans* rule to record-keeping errors committed by law enforcement clerks as well as court clerks. (Lafave, *supra*., at 777-783.)

Of course, the second-hand error that causes the Fourth Amendment violation need not only be negligent and attenuated to qualify for the *Herring* exception. The error must also be isolated. The police employees conduct must be merely negligent and not grossly negligent or the result of systemic negligence. (Lafave*, supra*., at 783-784.)

Lafave anticpates that it will be up to the lower courts to figure out the meaning of these terms and the full extent of *Herring's* holding. Lafave warns these courts against an overly broad interpretation of *Herring*: "[I]t would be a serious mistake for a lower court to pretend the 'attenuated' element of *Herring* did not exist or to interpret that element so broadly as to render the exclusionary rule largely inoperable." (*Lafave, supra*., at 785.)

In addition, the lower courts will have to determine who bears the burden of establishing that the error which caused the Fourth Amendment violation was negligent, attenuated, and isolated. Lafave states, "Though nothing was said about this in Herring, it would seem the burden of proof must be on the prosecution." This is consistent with prior cases holding that "the government has the burden to prove facts warranting application of the good faith exception" (Lafave, *supra*., at 786, quoting *People v. Willis, supra*., 28 Cal. 4th at 36-37.) It also "squares with the general policy of placing the burden on the party who has greatest access to the relevant facts" and who is "seeking an exception to a general rule." (Lafave, *supra*., at 786-787.)

2. The Impact of Herring

The initial impact of *Herring* is obvious. If you have a case where an officer arrested or searched an individual in reasonable reliance on erroneous data in computerized or paper records, you will have a hard time suppressing the seized evidence. It no longer matters whether the error was made by a court employee, a police employee or another adjunct of law enforcement. The many cases that relied on that distinction as presumably set forth in *Evans* have effectively been overruled.

If the record-keeping error that led to the illegal arrest or search was made by law enforcement personnel, your only arguments are that the prosecution failed to prove: 1)that the error was merely negligent as opposed to deliberate, reckless or grossly negligent; 2)that the error was not the result of recurring or systemic negligence; or 3)that the officer's reliance on the error was not objectively reasonable. This is assuming that you convince the court that the prosecution still bears that burden. (See *Willis, supra*., 28 Cal. 4th at 36-37; *People v. Pearl* (2009) 172 Cal. App. 4th 1280.)

3. Herring Does not Prohibit the Exclusion of Illegally Seized Evidence When the Arresting or Searching Officer's Conduct was Merely Negligent

Does the *Herring* exception to the exclusionary rule apply to other than negligent record-keeping errors? Although it may apply to other mistakes made by law enforcement employees who negligently provide false information, it should not apply to legal errors made by the officer who arrests or searches the defendant. It is clear from the majority and dissenting opinions in *Herring*, that the Court was concerned with negligent errors by police personnel that were "attenuated" from the arrest. (*Herring, supra*., at 698, 702.)

Some commentators and prosecutors have taken language from *Herring* out of context. They assert that the Court held that evidence should not be suppressed if the arresting or searching officer made an unintentional mistake of law that was merely negligent, as opposed to reckless or grossly negligent – i.e., an honest mistake about the existence of probable cause.[13] The Sixth District appears to favor this interpretation. (See *People v. Leal* (2009) 178 Cal. App. 4th 1051, 1065; *In re Lopez*, an unpublished decision discussed below.) However, the First District, Division One has held that police misconduct must be attenuated from the arrest, in order for the illegally seized evidence to be admitted. (See, *In re D.G*., an unpublished opinion discussed below.)

The broad interpretation is a misreading of *Herring*, but unfortunately, other appellate courts may be convinced to apply this reading, given the Supreme Court's evident frustration with the exclusionary rule and its broad language on culpability.

In *Herring*, the Court did not overrule the central premise of *Leon* and other good faith cases, which is that the exclusionary rule should apply when the conduct of the officer who conducted the search or seizure was willful or negligent – when the officer knew or should have known that the search or seizure violated the Fourth Amendment:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater

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[13] They rely on the following language in *Herring*: "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." (*Herring, supra*., at 702.)

> degree of care towards the rights of an accused..... 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." (*Leon, supra*., 468 U.S. at 919, quoting *Peltier, supra*., 422 U.S. at 539, 542; see also *Krull, supra*., 480 U.S. at 348-349, 355.)

In *Herring*, the Court reiterated that in assessing the culpability of the searching or arresting officer, "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." (*Herring, supra*., at 702-703, quoting *Krull, supra*., at 348-349.)

Thus, after *Herring*, two separate culpability determinations are required when officers conduct a search or seizure in reliance on erroneous information supplied by another law enforcement employee. (See *Herring, supra*., at 699-700.) First, as to the employee who supplied the information, was his conduct merely negligent or was it deliberate, reckless or grossly negligent? Second, as to the arresting or searching officer, was his reliance on the supplied information objectively reasonable? Conversely, did he know or should he have known that the information was false and the arrest or search was thus unconstitutional? If the officer's conduct in disregarding this actual or imputed knowledge was intentional or negligent, it would not be objectively reasonable, and the exclusionary rule would apply. (See *Leon, supra*., at 919.)

In summary, to qualify for the *Herring* good faith exception to the exclusionary rule, the police mistake or misconduct which invalidates the search and seizure must be <u>both negligent and attenuated</u> from the search and seizure.

4. Cases Interpreting or Applying Herring[14]

a. United States v. Groves (7th Cir. 2009) 559 F.3d 637: The Court Applies Herring to Hold That a Dispatcher's Negligent Mistake did not Invalidate the Lawful Detention nor Require Suppression of the Evidence

In this case, the Seventh Circuit applied *Herring* to an analogous situation: A police dispatcher mistakenly told an officer that there was a warrant out for the defendant's arrest. In fact, the defendant was the subject of a "wanted bulletin" which was supported by reasonable suspicion. The court held that the officer's detention of the defendant was legal, despite the misinformation. Moreover, even if the stop was illegal, the seized evidence was admissible under *Herring*. The court interpreted *Herring* as holding that "a negligent mistake by police personnel about the existence of a warrant does not require application of the exclusionary rule." (*Groves, supra*., 559 U.S. at 642.)

Eyewitnesses told the police that the defendant had fired shots into an occupied home. After investigating and consulting the prosecutor, who said he would seek an arrest warrant but did not follow through, the police investigator issued a "crime information bulletin" summarizing the defendant's alleged involvement in the shooting, provided his identifying information, and asked officers to pick him up if found. The bulletin was disseminated to all police personnel. One month later, an anonymous tipster called 911 and reported that she had just seen the defendant probably carrying a gun. A dispatcher transmitted this information to patrol officers, along with the tipster's description of the defendant's vehicle and location. The dispatcher also falsely reported that there was an active warrant for the defendant's arrest. In fact, there was no warrant, but only the crime information bulletin. Relying on the dispatch, a patrol officer stopped a car matching the tipster's description, detained the defendant and searched the car for weapons, finding a handgun under the driver's seat. The defendant was prosecuted for firearm possession.

The Seventh Circuit held that the defendant's motion to suppress had been properly denied. Although the uncorroborated anonymous tip did not justify the defendant's detention, the stop was justified by the "crime information bulletin" which was amply supported by reasonable suspicion so that the officer who made the stop could justifiably rely on it and search the car. (See *Groves, supra*., at 640-641, citing *United States v. Hensley* (1985) 469 U.S. 221 and *Michigan v. Long* (1983) 463 U.S. 1032.)

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[14] In these materials, we focus only on California and Federal Court of Appeal cases, and not on out-of-state cases

The Court acknowledged that "a problem" arose because the patrol officer was mistakenly told by the dispatcher that the defendant was the subject of an arrest warrant, not just a wanted bulletin. Also, the officer did not recall having seen the bulletin; he relied on the dispatcher's claim of an actual warrant. The Court held that the dispatcher's mistake did not invalidate the stop. It did not "undermine the preexisting reasonable suspicion that supported issuance of the bulletin." (*Groves, supra*., at 641-642.)

Moreover, pursuant to *Herring*, "even assuming that the dispatcher's error affected the validity of the stop, the gun need not have been suppressed", because "a negligent mistake by police personnel about the existence of a warrant does not require application of the exclusionary rule." Deeming the dispatcher's error at issue here "substantially similar to the one at issue in *Herring*", the court found nothing in the record to suggest that the dispatcher recklessly disregarded constitutional requirements or knowingly falsified the warrant record. (*Groves, supra*., at 642.)

b. People v. Pearl (2009) 172 Cal. App. 4th 1280: Even After Herring the Prosecution Bears the Burden of Proving That the Good-Faith Exception to the Exclusionary Rule Applies

In *Pearl*, the Court of Appeal for the Fourth District, Division Three held that the trial court erred in denying the defendant's motion to suppress evidence seized from his home during three alleged parole searches because: 1) the prosecution did not produce sufficient evidence establishing that the defendant was actually on parole at the time of the searches; and 2) the prosecution did not rely on the good-faith exception to the exclusionary rule or prove that it should apply to the defendant's case.

Most importantly, the court stated that even after *Herring*, the prosecution bears the burden of proving the good-faith exception:

> "In *People v. Willis* (2002) 28 Cal. 4th 22, the California Supreme Court squarely placed the burden on the prosecution of proving the good faith exception, including the burden of proving an error in recordkeeping that led to the unlawful search was not the fault of any part of the law enforcement team. Recently, in *Herring v. United States* (2002) 129 S.Ct. 695, the United States Supreme Court further defined the good faith exception, but did not alter the prosecution's burden of proof in the trial court." (*Pearl, supra*., at 1292-1293.)

In *Pearl*, the prosecution had failed to meet that burden. In the trial court and on appeal, the prosecution had not argued that the good faith exception to the exclusionary rule applied to this case – that the officers who illegally searched the defendant's home had reasonably relied on false information incorrectly stating that he was still on parole, When the Court of Appeal invited supplemental letter briefs addressing the effect of *Herring*, the Attorney General merely asserted that the defendant showed "no culpability on the part of law enforcement to justify exclusion." (*Pearl, supra*., at 1293.)

c. Applying Herring and Other Good Faith Decisions to Determine the Retroactive Application of Arizona v. Gant

Three published cases discussing *Herring* concern the application of another recent United States Supreme Court case, *Arizona v. Gant* (2009) 129 S.Ct. 1710, which was decided three months after *Herring* on April 21, 2009.

In *Gant,* the Supreme Court redefined the circumstances that justify the search of a vehicle's passenger compartment incident to the arrest of a recent occupant. In *Chimel v. California* (1969) 395 U.S. 752, the Court had held that when an officer makes a custodial arrest, he may search the person arrested and the area within the arrestee's immediate control in order to retrieve weapons or destructible evidence. In *New York v. Belton* (1981) 453 U.S. 454, the Court had considered the parameters of the "area within the arrestee's immediate control" when he has recently occupied a vehicle. The Court deemed the vehicle's entire passenger compartment to be an area into which the arrested occupant might reach to access a weapon or evidence. Consequently, upon arresting a recent occupant, officers may search the passenger compartment and any containers found therein. *Belton* left open the question of whether the arrestee must be within reaching distance of the vehicle to justify the post-arrest search of the car. Could officers still search the vehicle if the arrestee had been secured in the back of the patrol car or removed from the scene? Lower courts divided on this question with most holding that a vehicle search is permitted every time the police arrest a recent occupant regardless of the arrestee's actual location at the time of the search.

In *Gant*, the Court settled this question. Commensurate with the purposes of a search incident to arrest – to protect the officers and safeguard evidence – the Court held: "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." The police may search the passenger compartment only: 1)when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or 2)when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the

vehicle. (*Gant, supra*., 129 S.Ct. at 1714.)[15]

Since *Gant* was decided in April 2009, the appellate courts have considered several cases in which officers searched vehicles incident to an occupant's arrest prior to *Gant*. In each of the three cases discussed below, the officers arrested the defendant during a traffic stop, secured the defendant in the police car, and then searched the defendant's vehicle. These pre-*Gant* searches would be unconstitutional if the *Gant* standard was applied. To determine whether the evidence seized in these cases should be suppressed, courts have formulated the question in two different ways: 1)Should the *Gant* standard be applied retroactively to cases pending on review; or 2)Should the evidence be suppressed when the officer relied in good faith on pre-*Gant* precedents which authorized the search now deemed unconstitutional?

In ***United States v. Gonzalez*** **(9th Cir. 2009) 578 F.3d 1130**, the Ninth Circuit held that the *Gant* rule should apply retroactively to assess the validity of pre-*Gant* vehicle searches pending on review as of the date *Gant* was decided. If the search was illegal under *Gant*, the evidence should be suppressed.

In *Gonzalez*, the government conceded that the search of the defendant's car incident to arrest was illegal, but only if the *Gant* rule applied. The government asserted that the June 2006 search of the vehicle's glove box was conducted in good faith under the then prevailing interpretation of *Belton*. Consequently, the exclusionary rule should not apply. The government relied on *Herring* which purportedly held that "whether the exclusionary rule should be applied to a search in violation of the Fourth Amendment 'turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.'" (*Gonzalez, supra*., at 1132, quoting *Herring, supra*., 129 S.Ct. at 698.)

The Ninth Circuit declined to apply the good faith exception to this situation. The court noted that *Herring* and other good faith cases applied the exception to searches conducted in reliance on a warrant subsequently found invalid or a statute subsequently found unconstitutional.

> "Neither the Supreme Court nor our court, however, has applied the good faith exception to the scenario we face: a search conducted under a then-prevailing interpretation of a Supreme Court ruling, but rendered unconstitutional by a

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[15] For further analysis of *Gant*, see *"The Evolution of the Search Incident to Arrest Doctrine: Arizona v. Gant (2009) 129 S.Ct. 1710*", posted on the FDAP website.

> subsequent Supreme Court ruling announced while the defendant's conviction was on direct review." (*Gonzalez, supra*., 578 F.3d at 1132.)[16]

The Ninth Circuit concluded that this case presented a retroactivity issue controlled by long-standing precedent holding that "a decision of [the Supreme Court] construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." (*Gonzalez, supra*., at 1132, citing *United States v. Johnson* (1982) 457 U.S. 537, 562; *Griffith v. Kentucky* (1987) 479 U.S. 314, 328.) Thus, the *Gant* rule applies to all searches conducted in cases in which the defendant's conviction was not final by April 21, 2009, and evidence discovered during those searches must be excluded.

In ***United States v. McCane*** **(10th Cir. 2009) 573 F.3d 1037**, the court declined to suppress evidence recovered in a search illegal under *Gant*, when the officers searched the car two years before *Gant* in good-faith reliance on pre-*Gant* precedents. The parties agreed that under *Gant*, the April 2007 search of the defendant's car would be illegal; he was arrested for a traffic violation and then handcuffed and secured in the patrol car at the time of the search. (*McCane, supra*., at 1039-1040.)

Agreeing with the prosecution, the Tenth Circuit did not view the issue as whether the Supreme Court's ruling in *Gant* applied retroactively to the defendant's case. Rather, the issue was whether the evidence found in the car should be suppressed. Should the good-faith exception to the exclusionary rule apply because, at the time of the search, the officer had reasonably relied on settled precedents which permitted the vehicle search incident to the defendant's arrest? (*McCane, supra*., at 1040, 1044, n. 5.) As *Gant* acknowledged, *Belton* had been "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." Tenth Circuit cases had adopted this interpretation of *Belton*, approving vehicle searches even when the arrestee was secured in the officer's patrol car by the time of the search. (*McCane, supra*., at 1041.)

The Court of Appeal analyzed Supreme Court cases defining the good-faith exception to the exclusionary rule when officers conducted searches in good faith reliance

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[16] Actually, in *United States v. Peltier* (1975) 422 U.S. 531, the Court held that the exclusionary rule does not apply when the searching officer relied in good faith on a valid statute supported by federal appellate court precedent subsequently overturned by a recent Supreme Court case. (See Section D(3)(a), *supra*.)

on a warrant subsequently declared invalid *(Leon, supra.,* 468 U.S. 897); a statute later declared unconstitutional (*Krull, supra.,* 480 U.S. 340); or incorrect information in a court's data base mistakenly entered by court employees. (*Evans*, supra., 514 U.S. 1). The Tenth Circuit viewed *Herring* as extending "the good-faith exception to police reliance upon the negligent [record-keeping] mistake of a fellow law enforcement employee, as opposed to a neutral third party." (*McCane, supra*., at 1043-1044.)

In good-faith cases, the Court had declined to apply the exclusionary rule, because suppression of the evidence would not serve the rule's purpose – to deter police misconduct. The rule was not designed to punish or deter the misconduct of judges, magistrates, legislators, court employees or even "fellow law enforcement officers" who acted negligently. Consequently, the exclusionary rule should only be applied to deter objectively unreasonable police misconduct – a search or seizure that the officer knows or should know violates the Fourth Amendment. (*McCane, supra*., at 1044.)

Applying these principles to the defendant's case, the Tenth Circuit considered whether a reasonably well-trained officer would have known that the search of the defendant's car was illegal. After all, the officer who searched the defendant's car, following his arrest, reasonably relied on settled Tenth Circuit law later rendered unconstitutional by *Gant*. In April 2007, the officer did not know – nor should he have known – that he could not search the car while the arrestee was secured in the patrol car. Although the search of the defendant's car was unconstitutional under *Gant*, the evidence seized from the car need not be suppressed. (*McCane, supra*., at 1044.)[17]

The California Court of Appeal's Third District weighed in on this controversy in its published opinion, ***People v. Banner* (2009 WL 4858105)**[18] The Court held that the new rule of constitutional law announced in *Gant* applied retroactively, so that "the [December 2004] search of the defendant's vehicle incident to his arrest while he was secured in the back seat of a patrol car violated the Fourth Amendment". Nevertheless, the evidence illegally seized from that car need not be suppressed because the officers relied in good faith on *Belton*'s bright line rule which had allowed a search of the passenger compartment even if the person arrested was no longer in the car.

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[17] It is interesting that the Tenth Circuit did not rely on the most relevant Supreme Court case, *United States v. Peltier*. (See footnote 16, *supra*.)

[18] *Banner* does not yet have an official California Reporter citation because the opinion was modified, without changing the result or reasoning, on January 11, 2010.

The court explained that at the time of the search, *Belton* was understood as allowing a search of the vehicle's passenger compartment, incident to an occupant's arrest, regardless of where the arrestee was located at the time of the search. This broad understanding of *Belton* was commonly accepted by federal and state appellate courts and widely taught in police academies. The officers in the present case reasonably relied on *Belton* rule when they searched the passenger compartment of the defendant's vehicle. According to the Third District, the Supreme Court, in *Gant*, "changed its mind", rendering illegal a search that it had previously approved.

As the Tenth Circuit had done in *McCane*, the Third District traced the history and rationale of the good-faith exception to the exclusionary rule. "In *Herring*, the Supreme Court extended the reasoning of *Leon*, *Krull* and *Evans* to an officer's good faith reliance on an 'isolated, negligent bookeeping error by another police employee' stating the existence of an outstanding arrest warrant." But the Third District also hinted that *Herring* added an additional requirement to the analysis – i.e. that the exclusionary rule would only apply if the conduct violating the Fourth Amendment was deliberate, reckless or grossly negligent. Only then would the deterrent effect be worth the price of exclusion.

The court concluded that just as the officers who conducted the searches in *Leon*, *Krull* and *Evans* could not be faulted for relying on a statute, a judge's decision or information provided by a court clerk, the officer who searched the defendant's car should not be faulted for acting in conformity with the Supreme Court's decision in *Belton*. Surely, the officer could not have been expected to question the judgment of the Supreme Court. Moreover, the conduct in this case did not rise to the level of "deliberate, reckless or grossly negligent conduct required by *Herring*."

Emphasizing that the exclusionary rule's effect is to suppress relevant evidence because officers have violated the Fourth Amendment, *Banner* concluded: [T]he guilty should not go free when the constable did precisely what the United States Supreme Court told him he could do, but the court later decides it is the one who blundered." [19]

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[19] There was a dissent filed in *Banner*. The dissenting justice agreed with the Ninth Circuit's opinion in *Gonzalez*, that the good-faith exception to the exclusionary rule should not apply to this case, and that since *Gant* applied retroactively to render the search illegal, the seized evidence should be suppressed.

d. The Sixth District Broadly Interprets Herring as Applying to all Negligent Police Misconduct

In two decisions by Justice Duffy (one published and one unpublished) the Sixth District has read *Herring* as requiring suppression of illegally seized evidence only when "the police have engaged in 'deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence." The court has applied this standard to assess the culpability of the officers who illegally searched the defendants' homes.

***People v. Leal* (2009) 178 Cal. App. 4th 1051**, is a search-incident-to-arrest case involving a residential search rather than a vehicle search. Following the defendant's in-home arrest, the police searched an area of the residence that had been within the defendant's reaching distance at the time of his arrest and found a gun. However, by the time of the search, the defendant had been taken outside and secured in the officers' patrol car, parked 30 to 38 feet away from the site of arrest. (*Leal, supra*., at 1056-1058.)

The Sixth District held that the search was not justified by *Chimel* as incident to arrest, because the weapon was found in an area that was not within the defendant's immediate control at the time of the search when he was confined in a patrol car, far away from the premises. He could not longer grab a weapon or evidence. Thus, the search did not serve the rationales for a post-arrest search set forth in *Chimel* – protecting officer safety and preventing the destruction of evidence. (*Leal, supra*., at 1059-1061.)

The parties were ordered to submit briefing discussing the effect of *Gant* on the situation presented in *Leal*. In their post-*Gant* supplemental briefing, the prosecution acknowledged that the search in the defendant's case would have been unconstitutional if it had taken place after *Gant.* However, because the search preceded *Gant*, it was valid under the "broad authority" that the law previously conferred on police actions under these circumstances. (*Leal, supra*., at 1064.) The Sixth District disagreed, finding that the residential search in *Leal* was illegal under *Chimel* even before the Supreme Court decided *Gant*. *Gant*, which dealt with the proper scope of a vehicle search incident to arrest, did not affect its ruling, except that the high court had reaffirmed the Sixth District's interpretation of *Chimel*. (*Leal, supra*., at 864.)

Next, the prosecution argued that even if the search was illegal, the defendant was not entitled to exclusion of the evidence, under *Herring*, because the officers conduct in searching a portion of the defendant's home was not "grossly negligent or worse when the state of the law prior to *Gant* was...muddled." Thus, the officers acted in good faith under then prevailing law when they returned to search the arrest site after the defendant was secured in the patrol car. (*Leal, supra*., at 1065-1066.)

After noting that the exclusionary rule's sole purpose is to deter wrongful police conduct, and that it should not be applied when the cost of allowing a criminal to go free exceeds its deterrent effect, the Sixth District stated the rule only applies when police conduct is sufficiently deliberate and culpable:

> "Under *Herring* [citation], evidence seized in violation of the Fourth Amendment is to be suppressed when, under an objective standard of deterrence and culpability involving a reasonably well-trained officer, a court finds that the police have engaged in 'deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence'." (*Leal, supra*., at 1065.)

The Sixth District applied this culpability standard to hold that the officers conduct in searching the defendant's home after confining him in the patrol car was "sufficiently unsupportable under the Fourth Amendment" to warrant suppression of the evidence. First, the court disagreed with the prosecution's assertion that the law was muddled, reiterating that *Chimel* and "bedrock Fourth Amendment law" clearly prohibited such a residential search. Second, "the violation was serious enough to warrant giving substance to the Fourth Amendment's promise of protection from state intrusion by suppressing the firearm evidence against [the] defendant." (*Leal, supra*., at 1065-1066.)

From a defense standpoint, *Leal* offered a mixed result. The Sixth District interpreted *Herring* to hold that only deliberate, reckless or grossly negligent misconduct by the searching officers warrants suppression of illegally seized evidence. But the court held that when officers misinterpret Supreme Court law, even if there are conflicting lower court decisions, their conduct may be deemed deliberate, reckless or grossly negligent if the violation of Fourth Amendment rights is sufficiently serious.

In its unpublished opinion in ***In re Lopez*** **(2009 WL 1639517)**, also written by Justice Duffy, the Sixth District applied the same broad interpretation of *Herring*. Again, the court held that evidence seized during an illegal residential search should only be suppressed if the searching officers' conduct was deliberate, reckless or grossly negligent.

The underlying facts are complex. In September 2006, the police received two tips indicating that "Jose Lopez" was engaged in "drug activity" at 1401 Elm Avenue. The police then checked their files and the Superior Court database and ascertained that a Jose Lopez residing at 1401 Elm Avenue had been placed on probation with a search condition. Two officers went to that address. The man who opened the door matched the informants' description and said he was Jose Lopez. When the officers stated that they

planned to conduct a probation search of the house, Lopez said "okay". The officers searched the house and found drugs and a firearm. Lopez was arrested. While booking Lopez, the officers noticed that his birthdate did not match that of the probationer named "Jose Lopez". Upon comparing fingerprints, the officers ascertained that the man they'd just arrested was Jose Cruz Lopez who was not on probation or parole. The probationer was Jose Hernandez Lopez, who had previously lived at the Elm Avenue house. However, the officers subsequently learned that Jose Hernandez Lopez was no longer on probation as of the date of the search (September 11th). One month earlier, his probation had been terminated, and on the day of the search, he was in jail. Thus, the officers had no right to conduct a probation search of 1401 Elm Avenue on September 11th.

A habeas petition filed on behalf of Jose Cruz Lopez asserted that his trial counsel was ineffective in not presenting the trial court with documents showing that by the day of the search, the database had been updated to indicate that Jose Hernandez Lopez's probation had been terminated and that he was in jail. Because the officers had access to that information, they should have known they had no right to conduct a probation search.

The Court of Appeal agreed that the defendant's trial counsel was deficient in not bringing these documents to the trial court's attention. However, the Sixth District held that the determination of prejudice involved assessing whether a trial court presented with this missing information would have suppressed the evidence seized during the illegal search under the *Herring* standard.

As noted, the Sixth District read *Herring* as holding that evidence seized in violation of the Fourth Amendment should only be suppressed if the court found that the police had engaged in "deliberate, reckless or grossly negligent misconduct." The question was whether the actions of the police officers who checked the database and then searched the Elm Avenue residence were "grossly negligent or worse." The matter was remanded to the trial court to determine whether the officers had engaged in deliberate, reckless, or grossly negligent conduct warranting suppression of the evidence. Assuming that the database had been updated to show the termination of Jose Hernandez Lopez's probation and his incarceration when the police consulted it in early September, should the officers have done a more thorough search of the database and should they have realized that they were investigating a different Jose Lopez?

e. The First District, Division One Holds that the Herring Exception to the Exclusionary Rule Only Applies When the Negligent Police Misconduct was Attenuated From the Arrest and not When the Arresting Officer Made an Honest Mistake of law

On January 14, 2010, Division One filed an unpublished opinion in *In re D.G.* (2010 WL 161424). The court held that evidence obtained following an illegal arrest, unsupported by probable cause, should have been suppressed. The court rejected the prosecution's argument that the illegally seized evidence should be admitted pursuant to *Herring* because only police conduct which intentionally violates the Fourth Amendment or is grossly negligent must be excluded, and in the present case, the officer's " honest mistake about the existence of probable cause" was neither intentional nor grossly negligent. The Attorney General raised this argument for the first time on appeal.

The facts of *D.G.* are as follows: Two officers were conducting surveillance at a shopping center where several robberies had recently been committed. They noticed the minor and his companion in front of a Safeway, walking and looking around. Believing this conduct suspicious, the officers approached the two boys to question them and request consent to search. As the officers approached, the minor stayed put, but his companion yelled out that he was not on probation and walked away. One officer detained and pat-searched the companion, finding a gun in his waistband. The companion was arrested. In the meantime, the other officer asked the minor if he was on probation. He admitted he was on probation but did not state that he was subject to a search condition. Nor did he do or say anything suspicious. As the other officer apprehended the defendant's companion, a "hostile" crowd gathered, vocally accusing the officers of "police brutality". The officers decided to transport both the minor and his arrested companion to the police station to protect themselves and the two juveniles. The minor was then handcuffed, placed on his stomach, put in the patrol car and taken to the station. At the station, the officer learned from the minor that he had a probation search clause. Subsequently, the officer seized the minor's cell phone and examined photos on the phone which showed the minor holding the gun previously found on his companion. The minor also admitted possession of that gun.

Division One found that when the minor was handcuffed, placed on his stomach, confined in the patrol car and involuntarily transported to the police station, the detention became a de facto arrest. Moreover, this arrest was not supported by probable cause, as the officers "had no reason to believe that any crime had been or was about to be committed by the [minor]." Consequently, the arrest was illegal and it was not retroactively justified by the officer's subsequent discovery of the minor's probation search condition. The minor had told the officer, prior to his arrest, that he was on

probation but not every juvenile probationer is subject to a search condition.

Finally, the court held that the cell phone photos of the minor holding the gun and his confession that he possessed the gun must be suppressed as the tainted fruits of the illegal arrest. First, the minor's station-house admission that he was subject to a probation search clause did not attenuate the taint of the illicit seizure. Applying the *Brown v. Illinois* factors, the court held that the minor's own admission regarding the search condition was not "an intervening independent act by the defendant or a third party" sufficient to break the causal chain between the unconstitutional arrest and the incriminating evidence – the discovery of the photos and the minor's ultimate confession, which was not preceded by *Miranda* warnings.

Second, as noted above, Division One rejected the Attorney General's claim that even if the minor was illegally arrested, the seized cell phone photos and the minor's confession were admissible under *Herring's* reformulation of the good-faith exception to the exclusionary rule. The Attorney General asserted that any unconstitutional arrest in this case resulted from an "honest mistake about the existence of probable cause" which was neither intentional nor negligent.

In discussing the exclusionary rule and the good-faith exception, Division One emphasized three points: First, the purpose of the exclusionary rule is to deter police violations of the Fourth Amendment. Second, evidence is excluded when the conduct of the arresting officer was not objectively reasonable, so that law enforcement professionals will be encouraged to conduct themselves in accordance with the Fourth Amendment. Third, the prosecution bears the burden of proving that the good faith exception applies – i.e. that the conduct of the arresting officer was objectively reasonable. The court noted that in *Herring*, "the culpability of the police was the result of isolated negligence attenuated from the arrest." (*Herring, supra*., 129 S.Ct. at 698.) Consequently, the Court held that suppressing the evidence would not result in appreciable deterrence.

In *D.G*., the prosecution failed to satisfy its burden of establishing the good faith exception to the exclusionary rule. First, because the prosecution did not invoke or present any evidence to support the exception in the trial court, the appellate court was "not entirely aware of the nature and culpability of the police misconduct." Nothing showed that the officers actually believed, erroneously or otherwise, that they possessed probable cause to arrest when they put the minor in the police car.

Second, "in contrast to *Herring*, the police misconduct in the present case is intimately associated with the arrest, not attenuated from it." In other words, the *Herring* exception should not apply when the officer who actually arrests the defendant is

responsible for the mistake or misjudgment causing the Fourth Amendment violation.

Third, allowing the evidence to be admitted when an officer makes an "honest mistake" of law or negligently believes he has probable cause, would encourage and reward police ignorance of the law, contradicting the principle purpose of the exclusionary rule. The exclusionary rule is consistently applied in cases involving warrantless arrests made without probable cause to deter officers from ignoring Fourth Amendment requirements. (See *People v. Jenkins* (2004) 122 Cal. App. 4th 1160, 1177.)

There is no good faith exception for police who don't know the law or who don't act in accordance with the law. To apply the exception under those circumstances would defeat the purpose of the exclusionary rule by removing incentives for police to make certain they learn and understand the law they are entrusted to enforce and obey. (See *People v. Cox* (2008) 168 Cal. App. 4th 702, 711 [holding that there is no exception to the exclusionary rule for officers who detain a defendant based on a good faith mistake of law]; *People v. White* (2003) 107 Cal. App. 4th 636, 644; United States v. Lopez-Soto (9th Cir. 2000) 205 F.3d 1101, 1106.) Division One concluded: "The arrest of [the minor] was manifestly unreasonable, and refusal to apply the exclusionary rule in this case would reward police misconduct, not deter it."

G. People v. Brendlin (2008) 45 Cal. 4th 262: The Discovery of an Outstanding Arrest Warrant During an Unlawful Traffic Stop but Before the Search Attenuates the Taint of the Illegal Detention

1. Analysis of People v. Brendlin

The California Supreme Court considered whether evidence seized in a search incident to a lawful arrest based on a valid warrant must be suppressed because the police discovered the warrant during an unlawful traffic stop. In a unanimous opinion, the Court determined that the answer is no. The discovery of the warrant attenuates the taint of the antecedent illegal detention, assuming that the police violation of Fourth Amendment rights is neither purposeful nor flagrant. (*Brendlin, supra*., at 265.)[20]

The defendant was the lone passenger in a vehicle pulled over by the police after the officer had seen both expired registration tags on the vehicle's license plate and an unexpired temporary operating permit taped to the rear window. He had also phoned dispatch and confirmed that a registration renewal application was in progress. During the ensuing detention, the officer asked the defendant for identification as he recognized him as "one of the Brendlin brothers" and recalled that one brother had absconded from probation supervision. The defendant identified himself, and the officer ran a warrant check from his patrol vehicle. The officer verified that the defendant was a parolee at large with an outstanding warrant for his arrest. The officer then arrested the defendant for the parole violation. He searched the defendant and the vehicle incident to this arrest, finding two hypodermic needles on the defendant's person and materials for manufacturing methamphetamine in the back seat of the car. At issue was whether this evidence should be excluded from the defendant's criminal trial. (*Brendlin, supra*., at

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[20] This is the second *Brendlin* opinion issued by the California Supreme Court. The defendant was a passenger in a car stopped for an alleged registration violation. In the first *Brendlin* decision, filed in 2006, the California Supreme Court held that even if the traffic stop was illegal, the defendant could not challenge it because, in the absence of additional circumstances, passengers are not detained during a routine traffic stop. (See *People v. Brendlin* (2006) 38 Cal. 4th 1107.) The United States Supreme Court granted certiorari and reversed the California court, holding that a traffic stop subjects a passenger, as well as a driver, to a detention within the meaning of the Fourth Amendment. (*Brendlin v. California* (2007) 127 S.Ct. 2400.) However, the high court remanded the matter back to the state court to determine if evidence seized following the unlawful detention should be suppressed. (*Brendlin, supra*., 45 Cal. 4th at 267.)

The prosecution conceded that this traffic stop was not supported by reasonable suspicion of criminal activity, and that following the United States Supreme Court's holding, the defendant was unlawfully seized. Moreover, the California Supreme Court agreed that "but for the unlawful traffic stop, [the officer] would not have discovered the outstanding warrant for [the] defendant's arrest and would not then have conducted the search incident to arrest that revealed the contraband." (*Brendlin, supra*., at 268.)

However, but-for causation was not sufficient to mandate suppression of the evidence. The relevant question was whether the incriminating items were discovered by exploitation of the unconstitutional detention. Was "the chain of causation proceeding from the unlawful conduct....interrupted by some intervening circumstance so as to remove the taint imposed upon that evidence by the original illegality"? To answer this question, the Court analyzed the three factors set forth in *Brown*: "the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of official misconduct." (*Brendlin, supra*., at 268-269.)

Applying these factors to the facts of *Brendlin*, the Court concluded that "the outstanding warrant, which was discovered prior to any search of the defendant's person or of the vehicle, sufficiently attenuated the taint of the unlawful traffic stop." (*Brendlin, supra*., at 269.) Although this was an issue of first impression in California, the Court noted that case law from other state and federal jurisdictions have held that the discovery of an outstanding arrest warrant, prior to a search, constitutes an intervening circumstance sufficient to break the chain of causation from the illegal stop to the discovery of evidence. (*Brendlin, supra*., at 265.)

As to the first *Brown* factor -- the temporal proximity of the unlawful conduct to the procurement of evidence -- the Court noted that "only a few minutes elapsed between the unlawful traffic stop and the search incident to arrest which uncovered the evidence." The Court acknowledged that such close temporal proximity worked against a finding of attenuation in *Brown* and other cases. However, in those cases, the intervening event was an act of the defendant which made it likely, given the brief passage of time, that the defendant's response was influenced by the illegality. Conversely, when – as in this case – the intervening circumstance is the officer's independent discovery of a warrant, the defendant's reactive conduct is irrelevant. In these circumstances, the temporal proximity is either irrelevant or outweighed by other factors. (*Brendlin, supra*., at 270.)

As to the second *Brown* factor -- the presence of intervening circumstances – the officer's intervening discovery of an outstanding arrest warrant is a circumstance that tends to dissipate the taint. The warrant supplied legal authorization to arrest the

defendant that was completely independent of the factors that caused the officer to initiate the traffic stop. The arrest and subsequent searches were based on the warrant and not on the illegal traffic stop. (*Brendlin, supra*., at 271.)

The third *Brown* factor – the flagrancy and purposefulness of the police misconduct – was deemed the most important "because 'it is directly tied to the purpose of the exclusionary rule – deterring police misconduct'". (*Brendlin, supra*., at 271, quoting *United States v. Simpson* (8th Cir. 2006) 439 F.3d 490, 496.) The officer in this case testified that he had pulled the car over to investigate the expired registration; he had not seen the temporary operating permit prior to the stop and, in his experience, these permits were sometimes falsified. The Court stated:

> "Although the People have conceded that this was insufficient to justify a temporary detention to permit further investigation, the insufficiency was not so obvious as to make one question [the officer's] good faith in pursuing an investigation of what he believed to be suspicious registration, nor does the record show that he had a design and purpose to effect the stop "in the hope that something might turn up.". (*Brendlin, supra*., at 271, citing *Brown, supra*., 422 U.S. at 605.)

Essentially, the Court viewed this illegal traffic stop as a relatively minor Fourth Amendment violation, not "particularly egregious" or even "questionable." The officer did not knowingly misuse his authority. The seizure was not "flagrantly or knowingly unconstitutional or otherwise undertaken as a fishing expedition." There is no evidence that the officers invented a justification for the traffic stop to have an excuse to run a warrant check or find a way to search the car. In contrast, if the officer's conduct was flagrant, purposeful or egregious, the intervening discovery of the warrant might not be sufficient to attenuate the taint of the misconduct. (*Brendlin, supra*., at 265, 271-272.)

The Court distinguished *People v. Sanders* (2003) 31 Cal. 4th 318, and *In re Jaime P.* (2006) 40 Cal. 4th 128, which both held that a search could not be justified, after-the-fact, by the subsequent discovery of the defendant's parole or probation search condition. The Court emphasized that to establish attenuation, the officer must discover the outstanding warrant, justifying the arrest and search, beforehand. The officer here "never relied on any search condition, and no search in fact occurred until the deputy discovered an outstanding warrant for the defendant's arrest." (*Brendlin, supra*., at 272-273.)

2. The Impact of Brendlin/ Cases Applying Brendlin

Because of *Brendlin*, it will be more difficult to suppress derivative evidence seized after the police acquire authority to arrest or search during an illicit traffic stop or on-the-street detention. Keep in mind, however, that the prosecution bears the burden of establishing that the taint of the illegal detention was dissipated by time or intervening events, and that the prosecution's conduct was not flagrant and purposeful. (See *Brown, supra*., 422 U.S. at 603-604.) Nevertheless, it will ultimately be up to the defense to make a strong argument in favor of suppression.

If you have a case on "all fours" with *Brendlin* – i.e. the police run a warrants check and discover an outstanding arrest warrant during an illegal detention – it will be very difficult to get subsequently seized evidence excluded. You will need to argue that the prosecution failed to establish that the officer's conduct was not flagrant and purposeful – that the officer was on a fishing expedition for criminal evidence, or that he knew or should have known that he lacked reasonable suspicion for the detention. You will also have an uphill argument if the police run a computer or records check and discover another basis to arrest or search the defendant – that he's on parole, on probation with a search condition, or has a suspended driver's license.

What if during a traffic stop, in response to the officer's questions, the defendant admits he is on probation or parole or possesses contraband? What if he acquiesces when the officer asks for consent to search? Would the defendant's admission or consent, which gives the officer the right to arrest or search, constitute an intervening circumstance sufficient to purge the taint of the of the illegal detention? There is a strong argument that the defendant's own response would be insufficient.

The intervening circumstance must break the causal connection so that the defendant may carefully and objectively consider his options and his admission or consent may be deemed an independent act of free will. (See *Taylor, supra*., 457 U.S. at 691; *Wong Sun, supra*., 371 U.S. at 486 ; *Brown, supra*., 422 U.S. at 602.) In *Brendlin*, the Court distinguished cases where the intervening factor between the illegal police conduct and the challenged evidence was a responsive act by the defendant rather than an independent warrant check conducted by the officer. (*Brendlin, supra*., at 270.) In their unpublished opinion in *In re D.G*., discussed above (Section F(4)(e)), the First District, Division One, rejected the Attorney General's argument, based on *Brendlin*, that the minor's admission that he was on probation with a search condition – made at the police station following his illegal arrest – attenuated the taint of the illegal seizure. The court held that this was not "an intervening independent act by the defendant or a third party."

In the published decision, *People v. Hernandez* (2009) 178 Cal. App. 4th 1510, the Sixth District relied on *Brendlin* to hold that the defendant's probation search condition attenuated the connection between an allegedly illegal arrest and the discovery of a gun and ammunition concealed in the defendant's shoes. Thus, that evidence was properly admitted at the defendant's attempted murder trial. An officer was transporting the defendant, one of several suspects, to the sheriffs' station. A second officer called, having interviewed a witness, and told the first officer that the defendant had been seen placing a gun and ammunition in his shoes. The first officer searched the defendant's shoes and found the incriminating evidence. At issue was whether the defendant was under arrest, without probable cause, when the officer searched his shoes. The Sixth District held that even if probable cause was lacking, the valid probation condition broke the causal connection between the unlawful arrest and the discovery of the gun and ammunition. (*Hernandez, supra*., at 1542-1543.)

Unfortunately, the Sixth District did not explain how or when the officer learned of the defendant's probation search condition. Did he learn it from a records check or did the defendant admit his probation search condition to the officer before or after he was taken into custody? This was one of many issues on appeal and was minimally discussed.

The only other cases applying *Brendlin* are six unpublished Court of Appeal cases: *People v. Prodigalidad* (2009 WL 226015 [4th Dist., Div. 1]); *People v. Rose* (2009 WL 445137 [4th Dist., Div. 1]); *People v. Aispuro* (2009 WL502312 [4th Dist., Div.1]); *People v. McGhee* (2009 WL 850148 [4th Dist., Div. 2]); *People v. David* (2009 WL 2518867 [2nd Dist., Div. 1]; and *People v. Pulford* (2009 WL 3246424 [3rd Dist.]). In each of these cases, during an allegedly illegal detention, the officer ran a records check and was informed that the defendant was subject to an outstanding arrest warrant. The officer then arrested the defendant on the warrant, searched his person and/or vehicle and discovered incriminating evidence. In each case, relying on *Brendlin*, the court held even if the detention was unreasonable, the discovery of the active arrest warrant attenuated the taint of any illegality so that the evidence was properly admitted at trial.

In each of these cases the courts held – with little or no analysis – that the officer's conduct was not flagrant or purposeful. Thus, exclusion of the evidence was not warranted. Two of the cases, *Rose* and *David* equated "flagrant misconduct" with a detention that is "pretextual" or conducted in "bad faith" – e.g. when an officer invents a justification for the detention so that he may run a warrant check or find some way to search the defendant. In *Rose*, the court stated that the officer's "mistaken belief that he or she has cause to detain the defendant would not establish bad faith." In *David*, the court observed that "a mere mistake as to the quantum of suspicion necessary" to justify stopping an individual does not establish bad faith.

H. Conclusion

1. Can the Exclusionary Rule Survive Hudson, Herring and Brendlin?

The answer is yes....for now.

However, as defense advocates, we must challenge prosecution attempts to interpret *Herring* as permitting the admission of illegally seized evidence whenever the conduct of the arresting or searching officer was merely negligent, as opposed to deliberate, reckless or grossly negligent. We must argue that even if the officer made a "honest mistake" as to the existence of reasonable suspicion or probable cause, the subsequently obtained evidence must still be excluded in order to encourage officers to be fully informed regarding Fourth Amendment requirements. The government should not benefit from an officer's abuse of authority or from his/her ignorance of the law.

We must also challenge a broad interpretation of *Brendlin* that would consider a defendant's consent, or his admission of a parole or probation search condition, to constitute an intervening event sufficient to attenuate the taint of the preceding illegality and allow the admission of most derivative evidence. We must also advocate for a broader definition of flagrant and purposeful misconduct.

The United States Supreme Court has not yet abolished the exclusionary rule or limited its application to evidence seized as a result of intentional or reckless police misconduct. Nor has the Supreme Court ruled that evidence shall only be excluded following egregious Fourth Amendment violations. However, the majority of the Supreme Court is undoubtedly critical of the exclusionary rule which is now viewed as a judicially created remedy of last resort. They have continued to limit its application for thirty-five years, and assuming that the composition of the Court does not change, there is no doubt that further restrictions are coming.

2. Practice Tips

If you are handling an appeal from the denial of a motion to suppress evidence, you need to prevail on two arguments: 1)The search and/or seizure violated the Fourth Amendment, and 2)The evidence procured during or as a result of the illegality must be excluded from evidence at the defendant's criminal trial.

If you are assigned a case where the facts are on "all fours" with *Hudson*, *Herring* or *Brendlin* – the evidence was discovered following a knock-notice violation, the officer

arrested or searched the defendant in reliance on information that was later determined to be erroneous, or the officer ran a records check and discovered an outstanding arrest warrant in the course of the defendant's detention – consider whether you have a viable Fourth Amendment/suppression claim.

If the factual situation is close, but not identical to these cases, consider whether you can distinguish your facts or make an argument that the prosecution, in the trial court, did not meet its burden or proof.[21] For example, if you have a case where the officer had a valid search warrant but his manner of entering into the home violated the defendant's Fourth Amendment rights, try and distinguish *Hudson,* as well as *United States v. Hector* (9th Cir. 2007) 474 F.3d 1150 [failure to serve resident with warrant] and *United States v. Ankeny* (9th Cir. 2007) 502 F.3d 829 [the police use excessive force in entering the residence]. If you have an appeal where the officer relied on erroneous computer data, try arguing that the prosecution failed to prove that the error did not result from gross or systemic negligence.

In any case where you are arguing for the suppression of derivative evidence, you will need to make an "attenuation" analysis based on the *Brown v. Illinois* factors, and challenge the prosecution's likely reliance on *Brendlin*. And in absolutely every case, you must be prepared to challenge a possible argument from the Attorney General based on *Herring* that the exclusionary rule should not apply because the officer's misconduct was merely negligent or an honest mistake regarding the existence of reasonable suspicion or probable cause.

To assist you with formulating these arguments, review the relevant portions of these materials. If you are challenging a broad application of *Herring*, don't forget to review the summary of Professor La Fave's article analyzing that case.

As to how much to argue in the opening brief as opposed to your reply brief, that depends on the fact of the case, so be sure to consult your FDAP buddy.

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[21] Remember: the prosecution bears the burden of establishing that the good-faith exception to the exclusionary rule applies (see *People v. Willis* (2002) 28 Cal. 4th 22, 36-37; *People v. Pearl* (2009) 172 Cal. App. 4th 1280), and that the taint of an illegal search or seizure was purged by the time that evidence was discovered. (See *Brown v. Illinois* (1975) 422 U.S. 590, 603-604.)