



# *Herring v. United States*: Extension of the Good-Faith Exception to the Exclusionary Rule in Fourth Amendment Cases

-name redacted-  
Legislative Attorney

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## Summary

The Fourth Amendment to the U.S. Constitution provides a right against “unreasonable searches and seizures.” To deter the federal and state governments from violating this right, courts have developed an “exclusionary rule,” which requires that evidence obtained as a result of an invalid search or seizure be excluded from use at trial.

The Supreme Court has narrowed the scope of the exclusionary rule in several cases since the late 1970s. In *United States v. Leon*, the Court created the “good-faith” exception to the exclusionary rule. The good-faith exception applies when officers conduct a search or seizure with “objectively reasonable reliance” on, for example, a warrant that is not obviously invalid but that a judicial magistrate should not have signed.

Until a 2006 case, *Hudson v. Michigan*, the Supreme Court had applied the good-faith exception only in cases in which the error creating the constitutional violation was caused by judicial or legislative actors, rather than by the police themselves. In *Hudson*, the Court applied the exception to a case in which police officers had violated the “knock and announce” rule by entering a home without waiting a sufficient period of time.

In *Herring v. United States*, a 2009 decision, the Supreme Court for the first time applied the good-faith exception to bar application of the exclusionary rule in a case involving police error regarding a warrant. A police officer in the case mistakenly identified an arrest warrant for the defendant. The Court held that evidence discovered after the subsequent arrest was admissible at trial because the officer’s error was not “deliberate” and the officers involved were not “culpable.”

In future cases, courts will apply the *Herring* “deliberate and culpable” test to determine whether to admit evidence obtained as a result of a search or seizure which is unconstitutional as a consequence of police error. A second impact of the *Herring* decision is a weaker constitutional footing for the exclusionary rule. Whereas judicially-created remedies have gained “constitutional status” in the context of some other constitutional rights, it appears that the exclusionary rule lacks such a grounding under the Court’s current Fourth Amendment jurisprudence.

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## Introduction

The U.S. Supreme Court recognized in 1803 that in order to maintain a society governed by laws, a legal remedy should accompany each legal right.<sup>1</sup> Toward this end, courts apply various remedies to ensure effective enforcement of constitutional rights. For example, courts sometimes order retrials to remedy violations of defendants' trial-by-jury or assistance-of-counsel rights.

A remedy that excludes impermissibly obtained evidence from use at a criminal trial—the “exclusionary rule”—similarly protects constitutional rights. The exclusionary rule typically applies in cases involving violations by law enforcement of rights guaranteed by the Fourth or Fifth Amendments to the U.S. Constitution.<sup>2</sup> It differs from remedies such as retrial, because in addition to retrospectively redressing injustice, its major aim is prospective deterrence of government misconduct. In theory, although it only actually redresses violations when probative evidence is found, the exclusionary rule also protects innocent people by deterring unwarranted privacy intrusions.

The rule operates to prohibit the introduction at trial of probative evidence that would be admissible if collected in a constitutionally permissible manner. Because the excluded evidence is frequently incriminating, many believe that its application aids criminals in escaping punishment. For this reason, the rule has long been controversial. In past cases, the Supreme Court has defended the rule as a necessary corollary to the constitutional rights it protects.<sup>3</sup> More recently, a division has emerged. Some justices adhere to the view of the rule as constitutionally required. Other justices express concerns about the cost to society of freeing criminals who would likely be convicted if the excluded evidence was admitted.

Over the past several decades, the Supreme Court has narrowed the scope of the exclusionary rule in Fourth Amendment cases—that is, in cases involving illegal searches or seizures. The Court's 2009 decision in *Herring v. United States* furthers this trend.<sup>4</sup> Because *Herring* is the first Supreme Court decision that rejects the exclusionary rule in the context of police error regarding a warrant, the decision has made news headlines and prompted debate about whether the *Herring* decision appropriately limits the exclusionary rule's reach.<sup>5</sup>

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<sup>1</sup> See *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

<sup>2</sup> The exclusionary rule is sometimes designated as the “Fifth Amendment exclusionary rule” or the “Fourth Amendment exclusionary rule.” This report addresses only the Fourth Amendment context. As applied to the Fifth Amendment, the rule typically bars the prosecution's use of evidence obtained as a result of coercive interrogation techniques proscribed by the Fifth Amendment's self-incrimination or due-process clauses.

<sup>3</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 649 (1961).

<sup>4</sup> 555 U.S. \_\_\_ (2009).

<sup>5</sup> See, e.g., David Stout, *Justices Say Evidence is Valid Despite Police Error*, NY Times A4 (Jan. 15, 2009); Adam Liptak, *Justices Ease Limits on Evidence*, NY Times A17 (Jan. 15, 2009) (Late Ed. (East Coast)).

## Overview of the Fourth Amendment and the Exclusionary Rule

The Fourth Amendment to the U.S. Constitution provides a right “of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>6</sup> As a general rule, “reasonableness” requires law enforcement officers to demonstrate “probable cause” and obtain a warrant (unless a recognized warrant exception applies) before conducting searches or seizures.<sup>7</sup> For example, under the general rule, a police officer may not arrest a person unless a judicial magistrate has issued a warrant, based on evidence establishing sufficient probable cause, for that person’s arrest. Likewise, a police officer typically may not search a person’s belongings without first obtaining a warrant that describes, with sufficient particularity, the property for which sufficient evidence justifies a search.

The Constitution does not explicitly provide a remedy that applies when governmental actors violate a citizen’s Fourth Amendment right.<sup>8</sup> To deter Fourth Amendment violations, courts apply the exclusionary rule, which “is often the only remedy effective to redress a Fourth Amendment violation.”<sup>9</sup> In the Fourth Amendment context, the exclusionary rule requires a trial court to forbid the prosecution’s use of evidence obtained as a result of an unconstitutional search or seizure.<sup>10</sup> For example, if a police officer arrests a person in violation of constitutionally mandated procedures (i.e., without a warrant or a warrant exception), then the exclusionary rule requires a trial court to suppress any contraband the officer discovered during the search incident to that arrest.

Although the exclusionary rule protects constitutional rights, a question remains regarding its status—that is, is it constitutionally required in the Fourth Amendment context? In past Fourth Amendment cases, the Supreme Court has stated that the exclusionary rule is “of constitutional origin.”<sup>11</sup> In other cases, the Court has characterized the rule as a “judicially created remedy ...

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<sup>6</sup> U.S. Const. Amend. IV.

<sup>7</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (recognizing a warrant exception for arrest of an individual who commits a crime in an officer’s presence, as long as the arrest is supported by probable cause). Probable cause is “a fluid concept—turning on the assessment of probabilities in particular factual contexts.” *Illinois v. Gates*, 462 U.S. 213, 232 (1983). For example, for issuance of a search warrant, probable cause requires an issuing magistrate to determine, based on specific evidence, whether there exists a “fair probability” that, for example, an area contains contraband. *Id.* at 238. Exceptions to the warrant requirement include, for example, “exigent circumstances” where people’s lives are at risk or illegal items in “plain view” during a search authorized for other items.

<sup>8</sup> In a 1961 case, *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court held that the due process clause of the Fourteenth Amendment to the U.S. Constitution incorporated the Fourth Amendment to the states. Thus, the Fourth Amendment prohibits unreasonable searches and seizures by state and local, in addition to federal, governments.

<sup>9</sup> *Herring*, 555 U.S. \_\_\_, Slip. op. at 6. (Ginsburg, J., dissenting) (citing *Mapp*, 367 U.S. at 652).

<sup>10</sup> Although it was not termed the “exclusionary rule” until later, the Supreme Court first clearly articulated a remedy of excluding evidence as a result of Fourth Amendment violations in *Weeks v. United States*. 232 U.S. 383, 393 (1914) (“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment ... is of no value”). In *Weeks*, the Court implied that the exclusionary rule is grounded in long-standing judicial precedent. *Id.* at 398 (“That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts.”) It also suggested that the rule is constitutionally required. *Id.* (stating that the lower court had violated the defendant’s constitutional rights by declining to apply the rule). Although the *Weeks* holding applied only to evidence obtained by federal officers, the Court later applied the rule to the states in *Mapp v. Ohio*. 367 U.S. at 655.

<sup>11</sup> *Mapp*, 367 U.S. at 649. In *Mapp*, the Court relied on the exclusionary rule’s constitutional status to hold that the (continued...)

rather than a personal constitutional right.”<sup>12</sup> This distinction affects Congress’s authority to alter the exclusionary rule statutorily. Congress may not reduce a constitutionally guaranteed remedy but could potentially alter a rule that lacks constitutional status.

Regardless, the Court has narrowed the exclusionary rule’s reach in Fourth Amendment cases throughout the past several decades. For example, it has barred courts’ use of the rule in civil cases, grand jury proceedings, and parole revocation hearings. Arguably, the most important narrowing trend has been the Court’s development of the good-faith exception.

## The Good-Faith Exception

The Supreme Court introduced what has come to be known as the good-faith exception in *United States v. Leon*.<sup>13</sup> In *Leon*, the Court held that the exclusionary rule does not apply when police officers act with “objectively reasonable reliance” on a search warrant later found to be invalid.<sup>14</sup> Language in the opinion embraced a cautionary “balancing” approach to the exclusionary rule in which the benefits of exclusion (namely any deterrence effect on unconstitutional police action) must outweigh the costs (namely the risk that a guilty person will escape justice because evidence is excluded at trial) before the Court will apply the rule to new factual circumstances.<sup>15</sup>

Police officers in *Leon*, acting on a tip about drug activity in a particular home, investigated the license plate number and connections of a man who exited the home holding a small paper sack.<sup>16</sup> The officers then observed people coming and going from the residences of several people connected to that man, including the home of Leon, the respondent in the case, whom the man had listed as his employer and who had a criminal record.<sup>17</sup> Based on these observations, the officers obtained a warrant from a magistrate to search three homes and several automobiles.<sup>18</sup> The subsequent search uncovered illegal drugs and other evidence.<sup>19</sup>

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(...continued)

Fourteenth Amendment had incorporated the rule to the states. *Id.* at 655. Although in theory, this application to the states loses its legal foundation if the rule lacks constitutional status, states have generally continued to apply the rule to the extent that the federal courts have required it, despite the Court’s recent suggestions that the remedy is not constitutionally required.

<sup>12</sup> See, e.g., *United States v. Calandra*, 414 U.S. 338, 348 (1974) (emphasis added). The Court’s reliance on the rule’s “judicially-created” status in concluding that the Fourth Amendment exclusionary rule lacks constitutional status contrasts with the Court’s approach in other areas of constitutional interpretation. For example, in the Fifth Amendment context, the Court has recognized that the so-called “*Miranda* warnings,” and their exclusionary-rule corollary, are a judicially-created rule aimed to deter police conduct. Nonetheless, in *Dickerson v. United States*, the Court held that the *Miranda* warnings have the status of constitutional interpretation; thus, Congress cannot eliminate the *Miranda* warnings requirement by statute. 530 U.S. 428, 434-435 (2000).

<sup>13</sup> 468 U.S. 897 (1984).

<sup>14</sup> *Id.* at 922.

<sup>15</sup> *Id.* at 909-13.

<sup>16</sup> *Id.* at 901-02.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 902.

At trial, a federal district court held that the warrant was not supported by probable cause; thus, the search violated the Fourth Amendment.<sup>20</sup> Applying the exclusionary rule remedy, the district court suppressed the evidence of drugs found in the homes and cars.<sup>21</sup> On appeal, the Supreme Court held that suppression is inappropriate in cases, such as *Leon*, where the violation occurred despite a police officer's "objectively reasonable reliance"—for example, on a warrant that is actually invalid.<sup>22</sup>

By creating an exception to the exclusionary rule, the *Leon* court arguably opened the door to permitting evidence in cases involving multiple types of Fourth Amendment violations. However, the *Leon* decision itself addressed only the particular circumstance in which a warrant exists but was invalidly issued based on insufficient probable cause. The *Leon* opinion, including several exceptions to the good-faith exception articulated in the case, evidences a holding that only addresses that particular context.<sup>23</sup>

To justify its holding, the *Leon* court noted the logical inconsistency between exclusion in cases involving non-police errors and the rule's traditional deterrence rationale, stating: "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."<sup>24</sup> Based on the Court's reliance on this rationale, one might argue that the Court did not originally anticipate an extension of the good-faith exception to cases involving police error.

The Supreme Court has extended the *Leon* good-faith exception in relatively minor ways over the past several decades. In a 1995 case, *Illinois v. Krull*, the Court applied the exception where police officers had searched an auto dealer's list of licenses pursuant to a statute that courts later struck down as unconstitutional.<sup>25</sup> Several years later, in *Arizona v. Evans*, the Court applied *Leon* to evidence obtained after an arrest based on a facially valid warrant that the clerk of the court had neglected to show had been quashed seventeen days earlier.<sup>26</sup>

Until recently, these extensions had involved police reliance on errors made by actors—for example, the clerk of the court in *Evans* and the legislative branch in *Krull*—not the police themselves. Furthermore, in a 2004 case, *Groh v. Ramirez*, the Court seemed to draw an explicit line between police errors and errors made by other actors.<sup>27</sup> Police officers in *Groh* searched a home where they suspected that the owners had stored illegal weaponry.<sup>28</sup> The court of appeals held that the search warrant, which a magistrate had signed but the officers had themselves

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<sup>20</sup> *Id.* at 903.

<sup>21</sup> *Id.* at 903-04.

<sup>22</sup> *Id.* at 923. Despite its emphasis on the police officer's "good faith," the operative language in *Leon* focuses not on the officer's subjective integrity, but rather on whether the officer's reliance on the defective warrant was "objectively reasonable." *Id.* at 903-04, 923.

<sup>23</sup> The *Leon* court articulated four exceptions to its holding, in which this good-faith exception would not apply: (1) no reasonable officer would have relied on the affidavit underlying the warrant; (2) the warrant is defective on its face for failing to state the place to be searched or things to be seized; (3) the warrant was obtained by fraud on the part of a government official; or (4) the magistrate issuing the warrant had "wholly abandoned his judicial role." *Id.* at 923.

<sup>24</sup> *Id.* at 921.

<sup>25</sup> 480 U.S. 340, 349-50 (1987).

<sup>26</sup> 514 U.S. 1 (1995).

<sup>27</sup> 540 U.S. 551 (2004).

<sup>28</sup> *Id.* at 554-55.

prepared, violated the constitutional requirement that property to be searched be described with particularity; thus, the officers' search violated the homeowners' Fourth Amendment rights.<sup>29</sup> On appeal, the Supreme Court declined to apply the good-faith exception to the exclusionary rule, because it found that the officers' search pursuant to a warrant that failed to list property to be searched was not a "reasonable" mistake.<sup>30</sup> In so holding, the Court stressed that the officer in *Groh* was himself responsible for the Fourth Amendment violation.<sup>31</sup>

However, only two years after *Groh*, the Court declined to find any distinction between police error and third-party errors. In *Michigan v. Hudson*, it held that police officers' violation of the "knock and announce" rule did not trigger the exclusionary rule.<sup>32</sup> Knock and announce, an "ancient" procedure derived from common-law, constitutional, and statutory sources, protects occupants' privacy by requiring police officers to wait a short while after knocking and announcing their presence before entering a residence for which they have a warrant.<sup>33</sup> The rule is viewed as a less stringent requirement than the warrant or probable cause requirements under the Fourth Amendment, and the *Hudson* court noted that it is "unnecessary" in various circumstances.<sup>34</sup> Because the Court limited its opinion in *Hudson* to knock and announce violations, it was unclear after that case whether the Court would extend the good-faith exception to more serious police errors, such as those involving warrants or warrant exceptions.

## *Herring v. United States*

In *Herring v. United States*, a 2009 case, the Supreme Court for the first time applied the good-faith exception in a case involving police error regarding a warrant.<sup>35</sup> Officers arrested the defendant, Bennie Dean Herring, outside of an impound lot where Herring had come to retrieve an item from his truck.<sup>36</sup> An officer at the lot, recognizing Herring, called the county warrant clerk to determine whether an outstanding arrest warrant applied to him.<sup>37</sup> The warrant clerk found no such warrant but agreed to inquire about warrants in a neighboring county.<sup>38</sup> The clerk then identified as active an arrest warrant in the neighboring county, although it was in fact no longer active.<sup>39</sup> After learning about the warrant, two officers followed Herring from the impound

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<sup>29</sup> *Id.* at 556.

<sup>30</sup> *Id.* at 563 ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid.")

<sup>31</sup> *See, e.g., Id.* at 564 ("... because petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.")

<sup>32</sup> 547 U.S. 586 (2006). For a more detailed analysis of the *Hudson v. Michigan* decision, see CRS Report RS22475, *Hudson v. Michigan: The Exclusionary Rule's Applicability to "Knock-and-Announce" Violations*, by (name redacted).

<sup>33</sup> *Hudson*, 547 at 589-90.

<sup>34</sup> *Id.* at 590. Despite this argument, the decision was not without impact. Dissenting justices in *Hudson* argued that the decision "weakens" and possibly even "destroys" the knock-and-announce rule. *Id.* at 605 (Breyer, J., dissenting).

<sup>35</sup> 555 U.S. \_\_\_.

<sup>36</sup> *Id.*, Slip op. at 2.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



lot, arrested him, and performed a search incident to arrest.<sup>40</sup> The officers discovered methamphetamine in Herring's pocket and an illegal pistol in his vehicle.<sup>41</sup>

Because the arrest warrant was actually invalid, both parties in *Herring* admitted that a Fourth Amendment violation had occurred.<sup>42</sup> The disagreement in the case centered on whether the exclusionary rule should apply to suppress the evidence obtained as a result of the violation.<sup>43</sup> Extending the good-faith exception, the Court held that the exclusionary rule should not apply.<sup>44</sup>

The Court also announced a new test for the exception: "To trigger the exclusionary rule," police conduct must be "sufficiently deliberate" and the police must be "sufficiently culpable."<sup>45</sup> The Court emphasized that this "analysis of deliberateness and culpability" is objective: a court should ascertain not whether the police officer in question acted with good intentions, but rather "whether a reasonably well trained officer would have known that the search was illegal" in light of "all the circumstances."<sup>46</sup>

In rejecting the exclusionary rule in *Herring*, the Court appeared to embrace the view that it is not constitutionally required in the Fourth Amendment context. Quoting *Hudson v. Michigan*, the Court emphasized that the exclusionary rule is a "last resort" rather than a "necessary consequence of a Fourth Amendment violation."<sup>47</sup> It then applied a cost-benefit analysis similar to the approach in *Leon*, stating that in order for the exclusionary rule to apply, "the benefits of deterrence must outweigh the costs."<sup>48</sup>

In contrast, dissenting justices in *Herring* cited cases in which the Court has viewed the exclusionary rule as "inseparable" from the Fourth Amendment, suggesting that the remedy of exclusion has constitutional status.<sup>49</sup> Starting from this different philosophical foundation, the dissenters rejected the cost-benefit approach as inappropriate and would instead have applied the exclusionary rule in all cases where it has "any power to discourage" law enforcement misconduct.<sup>50</sup> Dissenters also highlighted the substantive distinction between errors made by judicial branch personnel and errors made by police, noting three specific distinctions: (1) the exclusionary rule historically aims to deter police, rather than judicial, misconduct; (2) no evidence suggests that court employees are "inclined to subvert the Fourth Amendment"; and (3) because judicial officers have no stake in the outcome of particular criminal investigations, "there [is] 'no basis for believing that application of the exclusionary rule ... [would] have a significant

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Herring*, slip op. at 4.

<sup>43</sup> *Id.*

<sup>44</sup> Slip op. at 9.

<sup>45</sup> *Id.*

<sup>46</sup> Slip op. at 10 (quoting *Leon*, 468 U.S. at 922 n.23).

<sup>47</sup> Slip op. at 5 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

<sup>48</sup> Slip op. at 6.

<sup>49</sup> Slip op. at 5 (Ginsburg, J., dissenting) (citing, among others, *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568-69 (1971)).

<sup>50</sup> See Slip op. at 1 (Ginsburg, J., dissenting).

effect on court employees.”<sup>51</sup> For those reasons, the four dissenting justices would not have extended the good-faith exception to situations involving police conduct regarding a warrant.

## Legal Implications

Although the *Herring* decision broadens the good-faith exception to the exclusionary rule and has shifted the analysis to one of “deliberateness and culpability,” the scope of its impact remains to be seen. For example, although it is perhaps difficult to imagine recordkeeping errors that would meet the Court’s “deliberate and culpable” test, the *Herring* court suggested that “reckless[ness] in maintaining a warrant system,” such as a recordkeeping system that routinely led to false arrests, could justify application of the exclusionary rule.<sup>52</sup> Thus, although most recordkeeping and clerical errors made by police will no doubt fit within the relatively broad parameters of the good-faith exception as interpreted in *Herring*, lower courts will likely decline to apply *Herring* in situations where defendants demonstrate knowledge or ongoing patterns of wrongdoing by law enforcement officers.

In addition to broadening the good-faith exception, the *Herring* decision appears to further the trend toward interpreting the exclusionary rule as lacking constitutional status. One important outcome of this might be greater congressional authority to legislate changes to the Fourth Amendment exclusionary rule. Congress has occasionally considered legislation that would expand or contract the exclusionary rule’s reach.<sup>53</sup> Because Congress may always guarantee a greater right than the Constitution demands as a minimum, Congress clearly may expand the remedy of exclusion. In contrast, whether Congress has the authority to restrict the remedy of exclusion depends upon the status of the remedy vis-à-vis the Constitution. If, as *Herring* appears to indicate, the exclusionary rule lacks constitutional status, then legislation restricting the right—for example, legislation expanding the *Herring* holding—is likely constitutionally permissible. If, on the other hand, the exclusionary rule is a constitutionally required remedy in Fourth Amendment cases, as the *Herring* dissenters suggested, then Congress would lack the authority to narrow the scope of the remedy.

## Author Contact Information

(name redacted)  
Legislative Attorney  
[redacted]@crs.loc.gov, 7-....

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<sup>51</sup> Slip op. at 1 (Breyer, J., dissenting) (quoting *Evans*, 514 U.S. at 15).

<sup>52</sup> Slip op. at 11.

<sup>53</sup> For example, legislation introduced in 1995 attempted to codify the good-faith exception by removing the remedy of exclusion in federal courts in cases in which police officers had acted in good faith. Exclusionary Rule Reform Act of 1995, H.R. 666, 104<sup>th</sup> Cong. (1995).

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