No. ___

IN THE
Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bennie Dean Herring respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in *United States v. Herring*, No. 06-10795.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App. 1a-12a) is published at 492 F.3d 1212. The district court's opinion explaining the denial of petitioner's motion to suppress (App. 13a-18a) is published at 451 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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

STATEMENT

In *Arizona v. Evans*, 514 U.S. 1 (1995), this Court held that evidence seized incident to an arrest that violates the Fourth Amendment because of a negligent error by a court clerk need not be suppressed in a criminal prosecution. At the same time, this Court expressly reserved the question whether the exclusionary rule would apply to evidence seized incident to an arrest that violates the Fourth Amendment because of a negligent error by *law enforcement* personnel. *Id.* at 16 n.5. This case presents that issue. The Eleventh Circuit held that the exclusionary rule does not apply in such a situation, deepening a substantial conflict over this important question of Fourth Amendment law.

1. On July 7, 2004, Petitioner Bennie Dean Herring traveled to the Coffee County (Alabama) Sheriff's Department to retrieve personal possessions from an impounded vehicle. As petitioner was about to leave, Coffee County Investigator Mark Anderson arrived for work, and another investigator informed him that petitioner was at the station.

Anderson knew petitioner, because petitioner had repeatedly complained to the district attorney and local sheriff that Anderson was responsible for the unsolved murder of a local teenager. Anderson and a sheriff's deputy had visited petitioner's house and pressed petitioner at length to abandon his accusations. The grand jury that was empanelled with respect to the homicide declined to indict Anderson.

Anderson thought that there might be an outstanding warrant for petitioner's arrest. So he

asked Sandy Pope, the Department's employee in charge of tracking warrants, to check the Coffee County warrant database to see if any such warrant existed. Pope did so, and informed Anderson that there were no outstanding warrants for petitioner in Coffee County.

Anderson then asked Pope to call the sheriff's department in neighboring Dale County to see if Dale County had any outstanding warrants for petitioner. Pope telephoned an employee in the Dale County Sheriff's Department, Sharon Morgan, who checked the Dale County computer database and told Pope that there was an outstanding warrant for petitioner in Dale County for failure to appear on a felony charge. Pope asked Morgan to immediately retrieve and to fax a hard copy of the warrant to Coffee County. She then informed Anderson that Dale County reported a warrant for petitioner's arrest. Anderson promptly left the sheriff's office with Deputy Sheriff Neil Bradley to pursue petitioner.

Meanwhile, Dale County warrant clerk Morgan was searching for the purported warrant so she could fax a copy to Coffee County. But Morgan could find no warrant concerning petitioner in the Dale County Sheriff's Department's paper files. Morgan then called the Dale County Clerk's Office, which advised her that there was not, in fact, any outstanding warrant for petitioner's arrest; the court had recalled the warrant referenced in Morgan's computer database five months earlier, on Feb. 2, 2004. Apparently, when the Clerk's Office had notified the Dale County Sheriff's Department of the recall, the Sheriff's Department had returned its copy of the warrant but had neglected to

update its computer database to reflect that the warrant had been recalled. App. 3a, 15a.[1]

About ten to fifteen minutes had now passed since Morgan's original conversation with Pope, and Morgan called her back to inform her that Dale County did not actually have any warrant for petitioner's arrest. Pope then radioed Morgan's retraction to Anderson and Deputy Bradley.

It was too late. Anderson and Bradley already had stopped petitioner's vehicle. They had told him that they intended to arrest him on the basis of a warrant from Dale County. Petitioner had informed the officers that he did not have an outstanding warrant from Dale County and had demanded to see a copy of the alleged warrant before any arrest took place. But without waiting the few minutes necessary to receive further information concerning the validity of the warrant, the officers had gone ahead and conducted a full-scale arrest of petitioner. After they had handcuffed petitioner, the officers had searched him and his truck and found methamphetamine in his pockets and an unloaded gun under the front seat of his vehicle. App. 3a. When Anderson and Bradley received Pope's call, both petitioner and the evidence of criminal activity the officers had discovered in the

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[1] Morgan testified that "[e]veryone has access to our in-office database, and whoever, and I do not know who it was, returned the warrant to the Clerk's Office did not enter into my database that the warrant had been recalled." Supplemental Hearing on Motion to Suppress Proceeding 13:6-10. Morgan believed that the error was committed by someone within the Dale County Sheriff's Department. *Id.*

search incident to arrest were under the officers' custody and control.

2. The federal government indicted petitioner in the U.S. District Court for the Middle District of Alabama on charges of possessing methamphetamine and being a felon in possession of a firearm, in violation of 21 U.S.C. § 844(a) and 18 U.S.C. § 922(g)(1). Shortly thereafter, petitioner moved to suppress all evidence of the methamphetamine and firearm as improper fruits of his unlawful arrest. The district court accepted that the arrest violated the Fourth Amendment; there was no warrant or any other kind of probable cause to arrest petitioner. *See, e.g., Whiteley v. Warden,* 401 U.S. 560, 568 (1971). Because the Dale County Sheriff's Department's negligent recordkeeping had set in motion the events leading to petitioner's illegal arrest and accompanying illegal search, the court framed the sole question as whether "the good-faith exception to the exclusionary rule, as articulated in [*Arizona v.*] *Evans*, should be extended to mistakes by police personnel." App. 16a.

The district court denied the motion, agreeing with the magistrate judge that there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes." App. 4a. A jury subsequently found petitioner guilty of both counts. The district court sentenced petitioner to twenty-seven months imprisonment.

3. The Eleventh Circuit affirmed the district court's denial of petitioner's suppression motion, as well as petitioner's conviction and sentence. The Eleventh Circuit began its analysis of petitioner's

Fourth Amendment claim – the sole issue on appeal – by noting that "[t]he parties agree on the central facts," including the fact that petitioner's arrest resulted from an error by law enforcement personnel. App. 4a; *see also* Gvt. CA11 Br. at 5-6; Supplemental Hearing on Motion to Suppress Proceeding 13:6-14. Accordingly, the Court of Appeals acknowledged, echoing the district court, that this case presents the question that this Court expressly reserved in *Evans*. App. 7a, 16a.

For guidance on this issue, the Eleventh Circuit turned to this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), which it interpreted to require that three conditions be satisfied in order to apply the exclusionary rule to the fruits of an unlawful search and seizure. App. 9a. First, "there must be misconduct by the police or by adjuncts to the law enforcement team." *Id.* Second, application of the exclusionary rule must cause "appreciable deterrence" of such misconduct. *Id.* And third, "the benefits of the rule's application must not [sic] outweigh its costs." *Id.*

Although the Eleventh Circuit acknowledged that the first condition of its test was satisfied here, it held that the second condition was not satisfied because applying the exclusionary rule "will not deter bad record keeping to any appreciable extent, if at all." App. 9a-10a. The court advanced three rationales – two of which it devised *sua sponte* – in support of this hypothesis. First, the court asserted that excluding evidence in a case like this would not deter negligent recordkeeping because "the conduct in question is a negligent failure to act" and "[d]eterrents work best

where the targeted conduct results from conscious decision making." App. 10a. Second, the Eleventh Circuit asserted that the police "already [have] abundant incentives for keeping records current." *Id.* Third, the Court of Appeals asserted that when a law enforcement agency other than the arresting agency acts negligently in providing information leading to an arrest, it is unlikely that the exclusionary rule would deter sloppy recordkeeping because the cost would not fall on the responsible party. App. 11a. Based on these rationales, the Eleventh Circuit concluded that any "minimal deterrence" the exclusionary rule might achieve against the type of law enforcement error in this case would not outweigh the cost of exclusion. App. 11a-12a.

REASONS FOR GRANTING THE WRIT

This Court held in *Arizona v. Evans*, 514 U.S. 1 (1995), that evidence obtained in an illegal search incident to arrest need not be suppressed when the arresting officer conducted the search in good faith reliance upon a clerical error by a court employee. Since that decision was announced, federal courts of appeals and state courts of last resort have divided five-to-four over the question that *Evans* expressly reserved (*id.* at 16 n.5): whether the exclusionary rule applies when similar errors by *law enforcement agents* cause illegal arrests and searches.

This Court should resolve this conflict of authority. The question of how to apply the Fourth Amendment's exclusionary rule in cases involving law enforcement's clerical negligence is a recurring and important one in the criminal justice system. It is

outcome-determinative in this case. And the Eleventh Circuit's refusal to apply the exclusionary rule here contravenes this Court's precedent. For over ninety years, this Court has enforced the exclusionary rule every time the government in a federal prosecution has sought to rely on evidence that it obtained as a direct result of illegal law enforcement conduct. Nothing in *Evans* undercuts this unbroken line of authority. To the contrary, *Evans* emphasized at every turn that court employees, unlike "adjuncts of the law enforcement team engaged in the often competitive enterprise of ferreting out crime, . . . have no stake in the outcome of particular criminal prosecutions." *Id.* at 15 (internal citation omitted). It thus remains appropriate and necessary to enforce the exclusionary remedy when employees of any law enforcement agency working in collaboration with arresting officers negligently make clerical errors that trigger groundless arrests and searches that arresting officers would not otherwise have undertaken – especially when, as here, there is no other remedy or deterrent measure that is available.

I. State And Federal Courts Are Deeply Divided Over Whether The Exception To The Exclusionary Rule Adopted In *Arizona v. Evans* Applies When Law Enforcement Personnel, Instead Of Court Clerks, Negligently Trigger An Illegal Search And Seizure.

Twelve years ago, in *Arizona v. Evans*, 514 U.S. 1 (1995), this Court confronted a situation in which a police officer arrested a motorist based on a computer records check that showed there was a warrant for his arrest. In a search the officer conducted incident to

that arrest, he discovered illegal drugs. But when the police later notified the local court of the arrest, the court advised the police that the warrant for the motorist had been quashed seventeen days earlier. A court employee had failed to notify the police department when this happened.

Although Evans' arrest and the officer's subsequent search were illegal, this Court held that when an illegal search and seizure occurs as a result of a clerical error by a "court employee[]," the Fourth Amendment does not require evidence obtained in the search to be suppressed in a subsequent criminal prosecution. *Id.* at 16. In so holding, this Court emphasized that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees." *Id.* at 14. And in *Evans*, no law enforcement employee had done anything wrong. "[M]ost important," this Court continued:

> [T]here is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.

Id. at 15 (internal citations omitted).

Lest there be any misunderstanding of this Court's focus on the duties and incentives of court employees, as opposed to those of law enforcement agents, this Court expressly reserved the question whether the exclusionary rule applies to recordkeeping errors by law enforcement personnel. *Id.* at 16 n.5. Concurring opinions likewise emphasized that "the Court limit[ed] itself to the question whether a *court employee's* departure from established procedures is the kind of error to which the exclusionary rule should apply." *Id.* at 17 (O'Connor, J., concurring) (emphasis added); *id.* at 18 (Souter, J., concurring) ("In joining the Court's opinion, I share Justice O'Connor's understanding of the narrow scope of what we hold today.").

Over the twelve years since *Evans* reserved the question whether its exception to the exclusionary rule would also apply to negligent errors by law enforcement personnel, the federal courts of appeals and state supreme courts have become deeply divided over the issue.

1. In this case, the Eleventh Circuit held that *Evans* extends to errors committed by law enforcement. After quickly acknowledging that the exclusionary rule is traditionally aimed at law enforcement illegalities, the Eleventh Circuit focused on the nature of the illegality at issue, reasoning that the exclusionary rule is unlikely to deter negligent clerical errors because "the conduct in question is a negligent failure to act, not a deliberate or tactical choice to act." App. 10a. The Eleventh Circuit also asserted that it is

unnecessary to apply the exclusionary rule here because law enforcement departments already have "abundant incentives" to keep accurate records – namely, "the inherent value of accurate record-keeping to effective police investigation"; the possibility of internal reprimand or civil liability; and "the risk that the department where the records are not kept up to date will have relevant evidence excluded from one of its own cases as a result." App. 10a-11a. So long as arresting officers are unaware at the time of arrest that the information that other law enforcement agents have negligently provided is incorrect, the exclusionary rule, in the Eleventh Circuit's view, does not apply.

Two other federal courts of appeals (both of which the district court referenced below, *see* App. 16a), and one state supreme court likewise refuse to suppress evidence police obtain as a result of fellow law enforcement agents' clerical negligence. The two federal courts of appeals, like the Eleventh Circuit, interpret *Evans* as exempting all clerical errors from the exclusionary rule. So long as an arresting officer acts in good faith, the source of the clerical error that allowed the arrest is irrelevant. *United States v. Castaneda*, 2001 WL 1085086, at *1 (5th Cir. 2001) (Police arrested defendant on invalid warrant: "While the Supreme Court has remained silent on this issue, we have held that the good-faith exception to the exclusionary rule applies regardless of whether the error was by court clerks or police personnel") (following as binding precedent *United States v. De Leon-Reyna*, 930 F.2d 396, 400-01 (5th Cir. 1991) (en banc)); *United States v. Williams*, 1998 WL 276460, at *2-3 (4th Cir. 1998) (Sheriff's office failed to inform law

enforcement in another county that warrant had been served and thus should have been removed from the county's computer database: Although *Evans* reserved the question whether it extended to law enforcement errors, "we are satisfied that the error in this case is of the type that is clearly contemplated by the good faith exception as explained by both *Leon* and *Evans*.").[2]

The Georgia Supreme Court has reached the same result on different grounds, going so far as to hold that an arresting officer's reasonable belief that a valid warrant exists for a suspect's arrest provides probable cause for an arrest, and thus that the Fourth Amendment is not even violated when the ostensible warrant has in fact been recalled. *Harvey v. State*, 469 S.E.2d 176, 178-79 (Ga. 1996). Accordingly, evidence obtained under such circumstances cannot be suppressed in Georgia courts. *Id.* at 179.

2. In direct contrast to the Eleventh Circuit's holding and the others like it, five state supreme courts have concluded that the *Evans* exception to the exclusionary rule turns not on the type of error at

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[2] Two other federal courts of appeals have stated that the exclusionary rule does not apply to law enforcement agents' clerical errors without explicitly so holding. *See United States v. Southerland*, 486 F.3d 1355, 1361 (D.C. Cir.) (finding that DMV employee's error in informing police department that driver's license was suspended did not trigger exclusionary rule because even if DMV employees in that jurisdiction were considered fellow police officers, the reasonableness of the arresting officers' actions "precludes, under *Leon* and *Evans*, application of the exclusionary rule."), *cert. denied*, 128 S. Ct. ____ (Oct. 9, 2007); *United States v. Sparks*, 37 Fed. Appx. 826, 829 (8th Cir. 2002) (stating that the good faith exception to exclusionary rule would apply if an officer stopped a motorist in reliance on a police dispatcher's mistake).

issue but rather on the source of the error. Specifically, these courts hold that evidence that police officers seize in reliance on clerical errors must be suppressed when those errors are committed not by court employees but by officers in other police departments or other "adjuncts to the law enforcement team." *Evans*, 514 U.S. at 15.

In *Shadler v. State*, 761 So. 2d 279 (Fla.), *cert. denied*, 531 U.S. 924 (2000), a computer database maintained by the Department of Highway Safety erroneously indicated that the defendant's license had been suspended. Relying on that incorrect computer record, a police officer arrested the defendant for driving with a suspended license, and subsequently found narcotics in a search incident to that arrest. The Florida Supreme Court – in a decision that the government implicitly acknowledged below could not be distinguished from the result it was seeking in the Eleventh Circuit, *see* Gvt. CA11 Br. at 15, n.2[3] – held that the Fourth Amendment required the narcotics to be suppressed. The Florida Supreme Court reasoned that "unlike the court personnel in *Evans,*" employees of the Department of Highway Safety are at least "adjuncts to the law enforcement team." 761 So. 2d at 285 (quoting *Evans,* 514 U.S. at 15). "Accordingly," the court continued, "the operation of the exclusionary rule in this context does not, as the State would suggest, serve to 'punish' police for their 'reasonable

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[3] Petitioner argued in his brief to the Eleventh Circuit that *Shadler* was on point and supported reversal. The government's sole response to this argument was an assertion that *Shadler* was "plainly inconsistent with *Evan* [sic]," and that the Eleventh Circuit should follow the dissent instead of the majority in *Shadler*. Gvt. CA11 Br. at 15, n.2.

reliance' upon the mistake of some wholly separate and independent agency completely unconnected to law enforcement." *Id.* To the contrary, enforcing the exclusionary rule "is perhaps the only means by which the judiciary can help to ensure the accuracy of records and information compiled by the Department of Highway Safety and its divisions that routinely provide records to Florida's police and sheriffs' departments." *Id.*; *see also State v. White*, 660 So. 2d 664 (Fla. 1995) (excluding evidence where police database indicated that warrant that had already been served was still outstanding).

In a case with factual details even more closely parallel to those here, the Arkansas Supreme Court also has ruled that the *Evans* exception does not extend to clerical errors committed by law enforcement agents. In *Hoay v. State*, 71 S.W.3d 573 (Ark. 2002), a police officer from one sheriff's department arrested the defendant upon learning that a computer database in a different county's sheriff's department indicated (erroneously, it turned out) that there was an outstanding warrant for the defendant's arrest. *Id.* at 574. Interpreting *Evans* as being applicable only to "errors committed by court personnel," the Arkansas Supreme Court held that "[i]f the touchstone of the exclusionary rule is deterrence of police misconduct, as *Leon* makes clear, that rule should apply equally to defective recordkeeping by law enforcement." *Id.* at 576-77. "[R]efus[ing] to suppress [evidence] based on objective good faith" of the arresting police department would "fly in the face" of the need to deter "defective recordkeeping" by law enforcement as a whole. *Id.* at 577.

Other state supreme courts have reached the same conclusion in cases involving detentions and searches pursuant to similar types of clerical errors by law enforcement agents. In *People v. Willis*, 46 P.3d 898 (Cal. 2002), the California Supreme Court explained that *Evans* requires courts to "distinguish between errors of law enforcement and those of judges, court employees, and legislators" and held that the Fourth Amendment required the evidence at issue to be suppressed, even though arresting officers acted in good faith, because the recordkeeping error that triggered the detention and search was committed by "adjuncts to the law enforcement team" in a different agency. *Id.* at 912-17. In *State v. Allen*, 690 N.W.2d 582 (Neb. 2005), a case concerning a mistaken communication between a dispatcher and an arresting officer, who acted in good faith, the Nebraska Supreme Court held that the Fourth Amendment required suppression of evidence obtained pursuant to the arrest because "the threat of exclusion is likely to cause police officers and dispatchers to exercise greater care than was exercised in this case when obtaining and transmitting vehicle registration information . . . ." *Id.* at 593; *see also State v. Hisey*, 723 N.W.2d 99 (Neb. Ct. App. 2006) (excluding evidence where an adjunct to the law enforcement team erroneously informed police that a motorist's driver's license was suspended). Finally, in a pre-*Evans* case in which a parole officer had inaccurately entered into a computer database that a warrant had been issued for a parolee (in fact, the warrant had been requested but never actually issued), the Colorado Supreme Court held that the exclusionary rule operated to suppress evidence resulting from the

invalid arrest. *People v. Fields*, 785 P.2d 611 (Colo. 1990). The Colorado Supreme Court reaffirmed this holding after *Evans*, explaining that "[t]he categorical exclusion for clerical errors of court employees announced in *Evans* does not include the type of unexplained police error present in *Fields*. Thus, *Evans* has no effect upon our decision in *Fields*." *People v. Blehm*, 983 P.2d 779, 796 (Colo. 1999).[4]

Finally, three more state courts of last resort have held that the exclusionary rule applies when law enforcement personnel commit clerical errors leading to illegal arrests, although, unlike the Colorado Supreme Court, none of these courts has revisited the issue in a post-*Evans* case. *See People v. Turnage*, 642 N.E.2d 1235, 1241 (Ill. 1994) (affirming exclusion of evidence after arrest on duplicative warrant);[5] *Ott v. State*, 600 A.2d 111, 117, 119 (Md. 1992) (upholding exclusion of evidence where sheriff's department failed

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[4] Two federal courts of appeals likewise have indicated, in cases involving different kinds of errors than this one, that the Fourth Amendment requires excluding evidence resulting from law enforcement agents' clerical errors. *United States v. Santa*, 180 F.3d 20, 29 (2d Cir. 1999) ("*Evans*'s categorical exception to the exclusionary rule applies *only* when police rely on erroneous computer records resulting from clerical errors of court employees.") (internal quotation marks omitted) (emphasis added); *United States v. Shareef*, 100 F.3d 1491, 1503 (10th Cir. 1996) ("We agree with the district court that the exclusionary rule applies when an error by a dispatcher or an officer leads to a Fourth Amendment violation.").

[5] The Illinois Court of Appeals has held in a post-*Evans* case that the exclusionary rule continues to apply to errors by law enforcement personnel. *People v. Anderson*, 711 N.E.2d 24, 31-32 (Ill. App. Ct.) (excluding evidence where arrest was based on outdated warrant list), *appeal denied*, 720 N.E.2d 1095 (Ill. 1999).

to remove from a database a warrant that had already been served); *People v. Jennings*, 430 N.E.2d 1282, 1285 (N.Y. 1981) (holding that evidence should be suppressed because the police arrested the defendant based on vacated warrant that remained in another law enforcement agency's database).

3. Because this conflict over the admissibility of illegally seized evidence is deeply entrenched and turns on how to interpret the Fourth Amendment and this Court's precedent, this Court is the only institution that can resolve the dispute. The need to do so is particularly pressing here because a state court of last resort within the Eleventh Circuit, the Florida Supreme Court, has reached a decision directly opposed to the Eleventh Circuit's. Accordingly, the decision below creates the "troubling" possibility, in the context of arrests based on invalid warrants, of a "state-initiated prosecution [being] brought in a federal court because it could not lawfully be brought in a state court." *United States v. Santa*, 180 F.3d 20, 30 (2d Cir. 1999) (Newman, J., concurring); *see also Mapp v. Ohio,* 367 U.S. 643, 657-58 (1961) (expressing similar concern over such "double standard[s]"); *Elkins v. United States,* 364 U.S. 206, 221-23 (1960) (same). Such an incentive for evading state efforts to deter Fourth Amendment violations will remain until this Court intervenes.

II. The Question Presented Arises Frequently And Is Extremely Important.

In *Evans*, Justice O'Connor (joined by Justices Souter and Breyer) emphasized the need for this Court to delineate the scope of the exclusionary rule in the

context of clerical negligence leading to illegal arrests and searches:

> In recent years, we have witnessed the advent of powerful, computer-based record-keeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.

514 U.S. at 17-18 (O'Connor, J., concurring). These constitutional responsibilities are only as meaningful as they are clearly elucidated and consistently enforced. Yet although courts regularly encounter cases arising from law enforcement agents' clerical errors, they are sending conflicting signals respecting the repercussions (if any) of such negligence.

Indeed, as policing becomes ever more reliant on computerized systems, the number of illegal arrests and searches based on negligent recordkeeping is poised to multiply. In addition to the now well-established police practice of asking other law enforcement agents to search computerized databases for outstanding warrants, police departments across the country are now deploying automatic license plate recognition systems. These systems automatically alert officers whenever a police cruiser passes a car that is registered to someone who, according to a computerized database, has an outstanding warrant, a

suspended license, or the like. Jaques Billeaud, *Infrared Cameras Help Police Scan for Trouble*, L.A. TIMES, Sept. 9, 2007, at B7. As police officers arrest more motorists based solely upon computerized databases' indications of outstanding arrest warrants and other improprieties, officers are bound to conduct more unlawful searches based on erroneous information in such databases. Prosecutors, defense lawyers, and courts need to know whether this illegally obtained evidence can be used to initiate criminal prosecutions.

III. This Case Is An Ideal Vehicle For This Court To Resolve The Question Presented.

This case presents a perfect opportunity for this Court to decide whether the exclusionary rule applies to evidence seized in a groundless and unconstitutional search caused by a law enforcement agent's clerical negligence. The arrest and search here derived from precisely the same sort of error addressed in *Evans* – an arrest and concomitant search based on an erroneous computer record of a warrant that was no longer valid – with the crucial distinction that here a law enforcement agent erred, not court personnel.

This case does not involve any complications that could prevent this Court from reaching the central issue. The government has never asserted any reason but reliance on the no-longer-valid warrant for the arrest or search. Nor are there any disputed issues of fact regarding the arrest or search that could impede this Court in resolving whether the exclusionary rule applies under these circumstances. As the Eleventh Circuit observed, "The parties agree on the central

facts. . . . The erroneous information about the warrant resulted from the negligence of someone in the Dale County Sheriff's Department . . . . The only dispute is whether, under these facts, the exclusionary rule requires the suppression of the firearm and drugs." App. 4a.

IV. The Eleventh Circuit's Decision Contravenes This Court's Precedent.

The sweep of this Court's Fourth Amendment jurisprudence, reinforced by the reasoning in *Evans*, dictates that evidence illegally seized as a result of law enforcement's negligent recordkeeping may not be introduced in criminal prosecutions.

1. Exclusion of illegally seized evidence is the traditional remedy when the federal government seeks to introduce evidence that law enforcement obtained as a result of its violating a defendant's Fourth Amendment rights. Nearly a century ago, this Court unanimously adopted the exclusionary rule for federal prosecutions. *Weeks v. United States*, 232 U.S. 383, 398 (1914). This Court explained that if something that police seize without any legitimate justification can be introduced against a citizen in a criminal prosecution, then:

> the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from 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.

Id. at 393. Several years later, this Court again confronted a case in which the government, "while in form repudiating and condemning the illegal seizure, [sought] to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Silverthorne Lumber Co., Inc., v. United States*, 251 U.S. 385, 391 (1920). Writing for the Court, Justice Holmes reaffirmed that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that [] evidence so acquired . . . shall not be used at all" in a criminal prosecution. *Id.* at 392; *see also Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (exclusionary rule is necessary to prevent Fourth Amendment from being "an empty promise").

This Court has never wavered from the judgment that imposing the exclusionary rule in criminal trials is necessary when law enforcement's mistakes or malfeasance allow it illegally to obtain evidence that it otherwise would not have acquired. *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003) (per curiam); *Minnesota v. Olson,* 495 U.S. 91, 95 (1990); *Franks v. Delaware*, 438 U.S. 154, 156 (1978); *Michigan v. Tyler,* 436 U.S. 499, 511 (1978). To be sure, this Court has created a "good faith" exception to the exclusionary rule for instances in which illegal searches are solely attributable to reasonable reliance on judicial or legislative officers. *See Arizona v. Evans,* 514 U.S. 1 (1995) (court clerk's error); *Illinois v. Krull*, 480 U.S.

340 (1987) (legislative error); *United States v. Leon*, 468 U.S. 897 (1984) (magistrate error); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (legislative error). In such cases, "there is no *police* illegality" or reason for the *police* to suspect illegality "and thus nothing to deter." *Leon*, 468 U.S. at 920 (emphasis added); *accord Krull,* 480 U.S. at 349-50. But when arresting officers themselves or law enforcement agents with whom they work in concert engage in improper conduct that allows them to find evidence they could not constitutionally have obtained, the exclusionary rule is necessary to deter such errors in the future. *Leon*, 468 U.S. at 923 n.24; *see also Hudson v. Michigan,* 126 S. Ct. 2159, 2165 (2006) (reaffirming that exclusionary rule is appropriate when police conduct search without a "valid warrant"); *Illinois v. Gates,* 462 U.S. 213, 261 n.15 (1983) (White, J., concurring in the judgment) ("[T]he exclusionary rule [provides] an incentive for the law enforcement profession *as a whole* to conduct themselves in accord with the Fourth Amendment.") (emphasis added).

Such is the case here. In contrast to *Evans*, in which a court clerk's recordkeeping error led to an illegal search, the error here was committed by an "adjunct[] to the law enforcement team engaged in the often competitive enterprise of ferreting out crime" who, therefore, had a "stake in the outcome of particular criminal prosecutions" such as petitioner's. *Evans,* 514 U.S. at 15. This kind of Fourth Amendment violation, which allows police officers illegally to obtain evidence they would not otherwise have acquired, is exactly the kind of misconduct that *Evans* made clear "the exclusionary rule was historically designed as a means of deterring." *Id.* at 14.

2. The Eleventh Circuit nevertheless declined to suppress the illegally obtained evidence here, proffering three reasons – the first two of which were not even advanced by the government – why it believed that the exclusionary rule would not appreciably deter law enforcement clerical errors. None of these rationales for extending *Evans'* exception to the exclusionary rule into the realm of law enforcement errors withstands analysis.

a. First, the Eleventh Circuit noted that "the conduct in question is a negligent failure to act, not a deliberate or tactical choice to act" and asserted that "only if the decision maker considers the possible results of her actions can she be deterred." App. 10a. But contrary to the Eleventh Circuit's supposition that negligence cannot be meaningfully deterred, this Court has made it clear that the exclusionary remedy can and does deter negligent conduct. "By refusing to admit evidence gained as a result of [police negligence], 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." *Michigan v. Tucker,* 417 U.S. 433, 447 (1974). Indeed, elementary tort law dictates that negligence can involve either acts or omissions, and that properly crafted legal rules will deter individuals from negligent failures to act. *See* RESTATEMENT (SECOND) OF TORTS §§ 282, 284 (1965) (defining negligence to include omissions). Commentators thus recognize that "[t]he task of the tort law, under an efficiency standard, is to find ways to induce [a person] to take [a certain] level of precaution . . . when the potential harms would be inflicted not on himself, but on

[someone] who . . . is unable to take precautions to protect herself." RICHARD EPSTEIN, TORTS 94 (1999).

That function is exactly what courts besides the Eleventh Circuit have confirmed the exclusionary rule serves in the context of law enforcement clerical errors. *See People v. Willis,* 46 P.3d 898, 912 (Cal. 2002) (applying exclusionary rule when "most important consideration" is whether "exclusion under these circumstances will have a significant effect on [law enforcement] clerks"); *Shadler v. State,* 761 So. 2d 279, 285 (Fla. 1999) (applying exclusionary rule to law enforcement's clerical errors is appropriate when it increases the chance that a "mistake" in recordkeeping "will not simply be overlooked"). Faced with the possibility of exclusion, police departments can reasonably be expected to step up their efforts to keep computer records up-to-date and accurate.

b. Second, the Eleventh Circuit suggested, without citing any authority or evidence, that law enforcement agencies "already [have] abundant incentives for keeping records current." App. 10a. None of the rationales that the Eleventh Circuit advanced in support of this assertion withstands scrutiny:

• *"First, there is the inherent value of accurate record-keeping to effective police investigation. Inaccurate and outdated information in police files is just as likely, if not more likely, to hinder police investigations as it is to aid them."* App. 10a. Police incentives are not so simple and uniform. While law enforcement departments certainly have an interest in keeping computer databases current with respect to newly issued active warrants, they have no compar-

able interest in expunging recalled or otherwise invalid warrants from such databases. As this case illustrates, police officers check computer databases only when they want to investigate an individual whom they suspect of wrongdoing. Under these circumstances, relaying erroneous information to officers that induces the officers reasonably to believe that they may detain and search such individuals can only aid police investigations by enlarging the officers' perceived authority to act. In fact, if relying on erroneous information that another law enforcement agent entered into a computer database insulates the fruits of illegal searches from the exclusionary rule (or even, as the Georgia Supreme Court has held, renders the searches perfectly constitutional, *see Harvey v. State,* 469 S.E.2d 176, 179 (Ga. 1996)), then law enforcement agents arguably have an incentive to *refrain* from expunging recalled or invalid warrants from their databases.

• *"Second, . . . there is the possibility of reprimand or other job discipline for carelessness in record keeping."* App 10a. There is no evidence that a reprimand or other disciplinary action occurred, or was even contemplated, in this case. Nor is there any reason to believe that any other law enforcement agent has ever been disciplined for similar negligence. Even if such evidence existed, the Eleventh Circuit's argument would prove far too much: reprimand or other discipline could also act as a deterrent in every one of the other situations in which the exclusionary rule historically applies. Indeed, discipline is most likely in those cases in which the exclusionary rule is most certain to be applied – purposeful violations of defendants' constitutional rights. Yet this Court has

continued to back the use of the exclusionary rule as an appropriate and necessary means of deterring Fourth Amendment violations. *See supra* at 21 (collecting cases).

• *"Third, there is the possibility of civil liability if the failure to keep records updated results in illegal arrests or other injury."* App. 10a. The Eleventh Circuit cited no authority for this proposition, and none exists. Plaintiffs cannot obtain civil damages under 42 U.S.C. § 1983 from police departments based on a theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). And this Court has indicated that when, as here, arresting officers rely in good faith on another police department's erroneous representation that an individual may be detained, the officers themselves have "a good-faith defense to any civil suit." *United States v. Hensley*, 469 U.S. 221, 232-33 (1985); *see also Baker v. McCollan*, 443 U.S. 137, 143-45 (1979). The victim of an illegal arrest cannot obtain relief against the law enforcement agent who made the clerical error either. Even when the culpable agent can be pinpointed, negligent recordkeeping does not itself violate the Fourth Amendment and thus cannot give rise to a lawsuit under 42 U.S.C. § 1983. *See, e.g.*, *Berg v. County of Allegheny*, 219 F.3d 261, 274 (3d Cir. 2000) (affirming dismissal of a civil rights action against a county warrant clerk who erroneously entered information leading to the plaintiff's illegal arrest), *cert. denied*, 531 U.S. 1072 (2001). Nor can a victim obtain state-law relief for negligent conduct leading to an improper arrest. Plaintiffs bringing false arrest claims under Alabama law, as in other states, must demonstrate that law enforcement agents acted with bad faith or

willful or malicious intent – a burden that, by definition, is impossible to meet in a negligent recordkeeping case. *See* ALA. CODE § 6-5-338(a); *Borders v. City of Huntsville*, 875 So. 2d 1168, 1178 (Ala. 2003).

• *"Fourth, there is the risk that the department where the records are not kept up to date will have relevant evidence excluded from one of its own cases as a result."* App. 10a-11a. The reasoning of the Eleventh Circuit's own holding precludes such exclusion. According to the Eleventh Circuit, so long as arresting officers rely in good faith on a computer record showing the existence of an outstanding warrant that another law enforcement agent negligently failed to delete, evidence the arresting officers uncover in a search incident to arrest is admissible at trial.

c. Finally, the Eleventh Circuit emphasized that the police department that made the recordkeeping error in this case was not the department that brought criminal charges against petitioner, and the court asserted that punishing one department for another department's negligent error would not deter future negligence. App. 11a. The Eleventh Circuit claimed that attempting to deter negligence under these circumstances "would be like telling a student that if he skips school one of his classmates will be punished." App. 11a.

Contrary to the Eleventh Circuit's assertion, exclusion is no less appropriate when the "sanction would be levied . . . [in] a case brought by officers of a different department." App. 11a. Even putting aside the reality that police officers do not bring criminal prosecutions (prosecutors do), this Court's cases

dictate that police officers working in concert in order to investigate crime are not the same as elementary school students who might skip school. The very essence of law enforcement is a collaborative effort aimed at a common crime-fighting goal; instead of presenting a "unique" circumstance, App. 11a, it is standard practice for police investigators to rely on information transmitted by different agencies. Accordingly, this Court has held that any single officer's or department's knowledge of facts that justify detaining a suspect is automatically imputed to all other law enforcement personnel working on the same investigation. *See, e.g., Hensley,* 469 U.S. at 232-33.

As the California Supreme Court has recognized, "if we impute to the arresting officer the collective knowledge of law enforcement agencies for the purpose of establishing probable cause, we must also charge him with the knowledge of information exonerating a suspect formerly wanted in connection with a crime." *Willis,* 46 P.3d at 915 (quoting *People v. Ramirez,* 668 P.2d 761, 764 (Cal. 1983)). This Court indicated as much in *Leon,* citing with approval its prior holding in *Whiteley v. Warden*, 401 U.S. 560 (1971), which required the suppression of evidence obtained in an unjustified search incident to arrest because "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.* at 568, *cited in Leon,* 468 U.S. at 923 n.24. This result also comports with Fifth Amendment jurisprudence, which follows the collective knowledge concept when enforcing *Miranda*'s exclusionary rule with respect to confessions. *See Arizona v. Roberson*, 486 U.S. 675, 687-88 (1988); *Alston v. Redman*, 34 F.3d 1237, 1243

(3d Cir. 1994) ("[O]fficers who interrogate a suspect after the suspect has invoked his right to counsel are charged with the knowledge of the prior invocation."); *United States v. Scalf*, 708 F.2d 1540, 1544 (10th Cir. 1983) (knowledge of a suspect's request for counsel "is imputed to all law enforcement officers who subsequently deal with the suspect").

In addition to ignoring the collective nature of the law enforcement enterprise, the Eleventh Circuit's reasoning misapprehends how the exclusionary rule's deterrent incentives operate. If courts exclude illegally seized evidence in interdepartmental cases such as this, police departments will have an incentive to maintain computer databases more carefully – not only because of the effect that such a rule would have on arrests and stops by other departments, but also because of the effect it would have on their own cases. The warrant information in Dale County's database was not maintained solely for the benefit of Coffee County; Dale County officers could just as easily have relied on the database to arrest petitioner. The prospect of having evidence excluded in a case initiated by Dale County investigators is a significant part of the deterrence calculus.

* * *

There can be little doubt that the benefits of enforcing the exclusionary rule outweigh the costs in cases in which law enforcement's negligence has triggered searches and seizures that would not otherwise have taken place. On the one hand, police departments will be deterred from maintaining sloppy records that allow them to arrest and search people

without just cause. Officers also will be encouraged, when feasible, to verify the accuracy of computerized records. Here, for example, if the arresting officers had simply waited the few minutes necessary for the Dale County Sheriff's Department clerk to complete her search for the supposed warrant, they would have learned that they had no legal authority to arrest petitioner. *See Adams v. Williams,* 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."). Even if computer databases do not "routine[ly]" provide incorrect information, App. 12a, it is common knowledge that they are sometimes wrong and it is thus unreasonable to "blindly" rely on them when speedy confirmation is possible. *See Evans,* 514 U.S. at 17 (O'Connor, J., concurring).

On the other hand, even in cases such as this, in which such illegal searches and seizures reveal evidence indicating criminality, excluding that evidence in a subsequent prosecution simply returns the government to the same position it occupied before its negligent and illegal conduct. And, as in other classic instances in which this Court has refused to allow the government to base a criminal prosecution upon evidence it obtained as a direct result of an illegal search, enforcing the exclusionary rule here does nothing more than apply "[t]he essence of a provision forbidding [law enforcement's unreasonable] acquisition of evidence." *Silverthorne Lumber,* 251 U.S. at 392.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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