No. 07-513

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not dispute the importance of the question whether the Fourth Amendment requires evidence found during a search incident to an illegal arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but incorrect information negligently provided by another law enforcement agent. Nor does the government dispute that this issue arises frequently. Nor does the government seriously dispute that this case is a suitable vehicle to resolve this issue.

The government does not even deny that federal courts of appeals and state courts of last resort are divided over this issue. Instead, the government attempts to downplay that conflict by discussing particular facts from a fraction of those lower court opinions – facts that those courts did not find relevant to the legal issue before them. The government also attempts to defend the decision below. Both attempts are unavailing.

1. Since this Court's decision in *Arizona v. Evans*, 514 U.S. 1 (1995), federal courts of appeals and state courts of last resort have divided five-to-four over the question whether the exclusionary rule applies when law enforcement agents' negligent errors cause illegal arrests and searches. *See* Pet. 7-17. The government does not seriously contest that five of those nine courts (including the Eleventh Circuit) have confronted that issue and arrived at conflicting holdings. The government concedes that the Fourth Circuit "considered the issue [and] reached the same conclusion as the decision below." BIO 16 (describing *United States v. Williams*, 1998 WL 276460 (4th Cir. 1998)). The

government also concedes that the Fifth Circuit has concluded that "'the good faith exception to the exclusionary rule applies regardless of whether the error was by court clerks or police personnel.'" BIO 15 n.2 (quoting *United States v. Castaneda*, 2001 WL 1085086, at *1 (4th Cir. 2001)). The government never contests (or even mentions) that the Georgia Supreme Court likewise has concluded that evidence obtained under the circumstances of this case cannot be suppressed in its courts. *Harvey v. State*, 469 S.E.2d 176 (Ga. 1996); *see* Pet. 12. And the government does not dispute that those three decisions and the decision below conflict with the Arkansas Supreme Court's decision in *Hoay v. State*, 71 S.W.3d 573 (Ark. 2002), instead tepidly suggesting that "the Arkansas court may choose to reconsider that decision in the future." BIO 21.

Having conceded that a conflict exists, the government then tries to distinguish away the other state supreme court decisions that have taken the same position adopted by the Arkansas Supreme Court. None of the government's purported distinctions has merit.

In the Eleventh Circuit, the government acknowledged the salience of *Shadler v. State*, 761 So. 2d 279 (Fla.), *cert. denied*, 531 U.S. 924 (2000), and argued that the case had been decided incorrectly. *See* Gvt. CA11 Br. 15 n.2. Now, however, the government has switched course, contending that *Shadler* poses no conflict with the Eleventh Circuit's decision here because the agency in *Shadler* that employed the clerically negligent law enforcement agent also employed the arresting officer. BIO 18-19. The

government is incorrect. The negligent agent and arresting officer worked in different law enforcement agencies: the negligent agent worked in Florida's Department of Highway Safety and the arresting officer worked in the Putnam County Sheriff's Office. *See Shadler,* 761 So. 2d at 280-81 (identifying arresting officer as Deputy Gary Bowling and source of error as the Department of Highway Safety).[1] In any event, it was irrelevant to *Shadler*'s analysis whether the arresting officer was a "fellow employee" (BIO 18) of the negligent actor. The Florida Supreme Court held that the exclusionary rule applied because the clerically negligent agency was "an integral part of law enforcement *in the State*." 761 So. 2d at 286 (emphasis added).

The government likewise asserts that *People v. Willis*, 46 P.3d 898 (Cal. 2002), is distinguishable because the recordkeeping error there "was committed by the agency employing one of the two officers involved in the search." BIO 19 n.6. This statement, however, tells only part of the story, because the investigation was instigated by an officer in a different

[1] Additional documents related to the case confirm that Deputy Bowling worked for the Putnam County Sheriff's Office. *See* Petitioner's Brief at 2, *Shadler v. State*, No. 93-784 (Fla. Jan. 7, 1999), *available at* www.law.fsu.edu/library/flsupct/sc93784/93784init.pdf (stating that arresting officer was a Deputy Sheriff for the Putnam County Sheriff's Office); Florida Office of the Attorney General, AG Headnote to Slip Opinion in *Shadler v. State of Florida*, http://www.hsmv.state.fl.us/CASES/Shadler.htm (describing arresting officer as "sheriff's deputy"); Putnam County Sheriff's Office Website, About Major Gary Bowling, http://www.pcso.us/htdocs/bio/bowling.html (indicating that at the time of the arrest, then-Deputy Gary Bowling was a member of the Putnam County Sheriff's Office).

agency. 46 P.3d at 900. In any event, the agency employing the person who made the clerical error (the Department of Corrections) was significant to the California Supreme Court only for the question of whether that person was an "adjunct to the law enforcement team." *Id.* at 908; *see also id.* at 912. Once the court concluded that Department of Corrections employees are adjuncts to the law enforcement team, the court held the exclusionary rule applied to the seized evidence because "law enforcement is collectively at fault for an inaccurate record that results in an unconstitutional search." *Id.* at 915.

The government's attempt to deny that the Nebraska Supreme Court's decision in *State v. Allen*, 690 N.W.2d 582 (Neb. 2005), conflicts with the decision below (BIO 21-22) also fails. The decision in *Allen* turned on two considerations: (1) whether an "adjunct to law enforcement" committed the negligent error that caused the unlawful arrest (690 N.W.2d at 591); and (2) whether applying the exclusionary rule in such a case "will have a significant effect" in deterring law enforcement agents' clerical negligence (*id.* at 593). Contrary to the government's assertion (BIO 22), "the considerations relied upon in *Allen*" *are* present in petitioner's case. First, an adjunct to the law enforcement team committed the negligent error that caused the unlawful arrest. Second, petitioner's case presents the question whether the exclusionary rule would deter such negligence just as squarely as *Allen* did. Nothing in the Nebraska Supreme Court's opinion suggests it mattered whether the officer who made the clerical error worked for the same agency as the officer who conducted the illegal search. The differing conclusions regarding deterrence reached by the

Eleventh Circuit and Nebraska Supreme Court simply mean that the cases conflict, not that they are distinguishable. *See* Pet. 15.

The government is also unable to explain away the conflict between the decision below and the Colorado Supreme Court's decisions in *People v. Fields*, 785 P.2d 611 (Colo. 1990), and *People v. Blehm*, 983 P.2d 779 (Colo. 1999). The government suggests that the strict dichotomy those decisions establish – and that the government here shuns – between "errors of court employees" and "police error" (*Blehm,* 983 P.2d at 796) derives from a state exclusionary statute. BIO 22-23. But the Colorado Supreme Court made clear that its state statutory test is "substantially similar" to the standard recognized in *United States v. Leon*, 468 U.S. 897 (1984): "under either test, our inquiry must be whether it was objectively reasonable for the officer to rely upon the warrant." *People v. Altman,* 960 P.2d 1164, 1169 (Colo. 1998). Lest there be any doubt, the Colorado Supreme Court explicitly grounded its analysis in *Blehm* in a detailed consideration of *Evans*. *Blehm,* 983 P.2d at 795-96.

Finally, the government's suggestions that the size of a particular law enforcement recordkeeping database might affect the Fourth Amendment's suppression analysis (BIO 19, 20, 24) are specious. The government fails to offer any coherent rationale for why the exclusionary rule should turn on details concerning the accessibility of erroneous information (whether computerized or not). Nor could it. Law enforcement is necessarily collaborative and requires many actors and agencies to move beyond county boundaries to access and utilize collective law

enforcement knowledge. Therefore, regardless of whether a recordkeeping system is a national or local computerized database – or indeed, a paper ledger – inaccurate law enforcement recordkeeping cuts across jurisdictions to cause baseless arrests and unlawful seizures. There is no way to confine law enforcement errors to the jurisdiction in which they originate. Suppressing the evidence obtained from such illegal searches will strongly discourage inaccurate record-keeping – regardless of the scale of the database – because law enforcement agents will know that their clerical negligence could severely hamper their own cases and those of agents from sister jurisdictions with whom they regularly work in concert.

2. The government is also wrong on the merits. This Court's jurisprudence leaves no room for the police to profit from their own negligent errors that directly cause illegal arrests and searches. Indeed, for over ninety years, this Court has enforced the exclusionary rule every time the government in a federal criminal prosecution has sought to rely on evidence that it would not have obtained but for illegal law enforcement conduct. *See* Pet. 21-22.

The government advocates a totality-of-the-circumstances exception to this unbroken line of authority. The government argues that "where, as here, (1) the error was negligent rather than deliberate, (2) the error was made by a different law enforcement agency than the one that made the arrest, and (3) the recordkeeping system is generally reliable, *the balance tips* against suppressing" the illegally seized evidence. BIO 10 (emphasis added). Not only does this multi-factor analysis fail to distinguish

conflicting decisions from other courts, but it also fails, for several reasons, to withstand scrutiny on its own terms.

First, this multi-factor test cannot be squared with this Court's reasoning in *Evans*. At every step of its analysis in *Evans*, this Court relied on the distinction between court clerks and law enforcement agents: This Court explained that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees." 514 U.S. at 14. The Court held that applying the exclusionary rule was unwarranted "[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime." *Id.* at 15. In contrast to law enforcement agents, court clerks "have no stake in the outcome of particular criminal prosecutions." *Id.* Nothing in this dichotomy retreats from this Court's longstanding categorical treatment of law enforcement errors as triggering the exclusionary rule.

Second, suppressing evidence seized as a result of law enforcement personnel's negligent errors *will* "result in appreciable deterrence." Pet. App. 9a. "Under [this Court's] precedents," "application of the exclusionary rule depends on the existence of a 'sufficient causal relationship' between the unlawful conduct and the discovery of evidence." *Hudson v. Michigan*, 126 S. Ct. 2159, 2170-71 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (describing *United States v. Ramirez*, 523 U.S. 65, 72 n.3 (1998)). In the instant scenario, the "causal relationship" between unlawful law enforcement conduct and the discovery of evidence could not be

tighter. But for the law enforcement error leading to the illegal search, the officers would not have obtained the evidence at issue. And this is true regardless of the perceived reliability of the faulty recordkeeping system, or whether the negligent agency employs the arresting officer: in all those events, law enforcement error directly causes the illegal seizure of evidence. To prevent such illegal arrests and seizures, law enforcement agents need a strong incentive to maintain clerical diligence. Application of the exclusionary rule is the only incentive likely to be effective. *See* Pet. 24-27.

Third, the government's totality-of-the-circumstances test would generate costly litigation and unpredictable results. Each time a defendant seeks to suppress evidence seized as a direct result of law enforcement agents' negligence, a court would have to undertake a fact-intensive and time-consuming investigation to determine whether to grant the motion to suppress. In *Williams*, for example, the arresting officer came from a county that had both a police department and a sheriff's office. *See United States v. Williams*, 1998 WL 276460, at *1 (4th Cir. 1998). Under the government's balancing test, it is unclear whether officers from those different departments of the same county would be "fellow employees." The *Willis* case illustrates, moreover, that determining the agency affiliation of just one officer can be complex: the arresting officer in *Willis* was "working out of the Bakersfield Police Department as part of the Kern County Narcotics Enforcement Team." 46 P.3d at 900. The government's balancing test would require courts artificially to assign such officers to a single agency.

Any multi-factor analysis becomes even messier when several agencies are involved, with each playing a slightly different role in an arrest and search. In *Willis*, for example, a state parole agent, relying on inaccurate information from the California Department of Corrections, authorized a search in an investigation initiated by the city policeman, and then jointly executed the search with city police and a sheriff's detective. *Id.* The government's test offers no guidance on how a court should even begin its suppression analysis in such a multi-agency, multi-jurisdictional case, let alone how to apportion fault by agency. Even once a court settled the question whether the arresting officer and the negligent agent worked for the same agency, it is unclear, under the government's test, how important that determination would be, in relation to any other factors relevant to the test. But whatever its precise weight, that determination would be just one step in the hard slog of determining which way "the balance tips" regarding suppression. BIO 10.

Finally, the government's proposed rule would not only be inadministrable, it would also disregard reality. Neither criminal activity nor any investigative target's criminal history is hermetically sealed by county. Law enforcement is by nature a collaborative effort. It brings together many different agencies, divisions, and departments from across jurisdictions, and rarely is any one agency tasked with the exclusive duty of fighting any particular crime. All law enforcement records – whether computerized or not, and whether instantly accessible across jurisdictions or not – are part of the interwoven repository of information from which investigators can and must

draw on a daily basis. Accordingly, the relevant inquiry when dealing with negligently provided information that causes an illegal search should be simply whether "[t]he exclusionary rule [would provide] an incentive for the law enforcement profession *as a whole* to conduct themselves in accord with the Fourth Amendment." *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring in the judgment) (emphasis added).

Here, there should be no doubt that it would. As at least five lower courts have held, illegally obtained evidence should be suppressed when law enforcement personnel, rather than court clerks, commit a record-keeping error that results in the unlawful seizure of evidence. This simple test comports with law enforcement realities and this Court's precedents. This Court should make clear that the Eleventh Circuit should not have shirked from applying it here.

CONCLUSION

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

Respectfully submitted,

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