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Carelessness trumps the exclusionary rule

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In February 2008, I wrote an column about the U.S. Supreme Court's decision to grant *certiorari* in *Herring v. U.S.*

I predicted the court would conclude that the exclusionary rule did not apply to the facts of the case. At issue in *Herring* was whether the exclusionary rule should apply to evidence discovered during an unlawful arrest, when a suspect's arrest is based on erroneous information from another law enforcement officer. *Herring* was arrested based on an arrest warrant that was recalled, but not purged, from the computer database, as it should have been.

Earlier this month, the court issued its decision in *Herring v. U.S.*, No. 07-513, and confirmed my suspicion that it would, once again, chip away at the exclusionary rule: "In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, e.g., *Leon*, 468 U. S., at 909-910, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.' *Id.*, at 907-908, n. 6 (internal quotation marks omitted). In such a case, the criminal should not 'go free because the constable has blundered.'" *People v. Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926) (opinion by Cardozo, J.).

The holding is problematic for any number of reasons, but two of the court's underlying assumptions are particularly disturbing: One being that any deterrent effect of the exclusionary rule in the case would be "marginal"; the second, that all arrestees are necessarily criminals.

Justice Ginsberg wrote the dissent in the 5-4 decision, noting that the most troublesome outcome likely will be an increase in the wrongful arrests of innocent citizens: "[T]he 'most serious impact' of the Court's holding will be on innocent persons 'wrongfully arrested based on erroneous information [carelessly main-

tained] in a computer data base.'"

She also addressed the concern I previously raised — that a decision holding the exclusionary rule inapplicable in such a situation would remove any incentive to promptly remove recalled arrest warrants from government databases: "The Court assures that 'exclusion would certainly be justified' if 'the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests.' ... This concession threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. ... In keeping with the rule's 'core concerns,' ... suppression should have attended the unconstitutional search in this case."

As Justice Ginsberg notes, widespread use of computer databases is now the norm in America and massive amounts of data are collected, stored and shared among various governmental agencies.

Undoubtedly, such sharing of information has the potential to increase law enforcement's ability to protect U.S. citizens from harm. The *Herring* decision, however, essentially guarantees just the opposite will occur. As the economy falters and budgets tighten, governmental entities most certainly will fail to allocate sufficient resources toward the periodic regulation and review of law enforcement databases, since there is now little, if any, incentive to do so.

As a result, ordinary, law-abiding citizens — especially those with common names or names resembling those on terror watch lists — will bear the brunt of the decision.

Such an outcome is unfortunate, unacceptable and un-American.

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