

# THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Legal Currents

### Why not err on the side of caution?

This column, featured every Monday, tackles timely issues important to the local legal community.

BY NICOLE BLACK

Daily Record Columnist



NICOLE BLACK

Last week the U.S. Supreme Court granted certiorari in *Herring v. United States*, 07-513.

At issue in *Herring* is whether the exclusionary rule should apply when a suspect's arrest was based on erroneous information from another law enforcement officer.

The court considered a similar issue in *Arizona v. Evans*, 514 U.S. 1 (1995). In *Evans*, marijuana was discovered on the defendant during the execution of what the arresting officer mistakenly believed was a valid arrest warrant. The court concluded the marijuana was not subject to suppression even though the warrant, which had been quashed, remained in the computer system due to a court clerk's clerical error: "If court employees were re-sponsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. ... 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."

In so holding, the court left open the possibility that the exclusionary rule might apply to evidence discovered due to an error caused by a law enforcement officer, as was the case in *Herring*, where a member of the Sheriff's Department, rather than a court clerk, failed to modify the computer records to indicate the arrest warrant was recalled.

I suspect the current court will extend the *Evans* holding and conclude the exclusionary rule is inapplicable under these facts as well.

To do so would be a mistake.

As Justice Ruth Bader Ginsberg astutely noted in her dissent

in *Evans*, society's newfound reliance on computers and technological advancements presents unusual issues for law enforcement: "Widespread reliance on computers to store and convey information generates, along with manifold benefits, new possibilities of error, due to both computer malfunctions and operator mistakes. ... [C]omputerization greatly amplifies an error's effect, and correspondingly intensifies the need for prompt correction; for inaccurate data can infect not only one agency, but the many agencies that share access to the database."

Justice Ginsberg's insight from 1995 rings all the more true in our post-9/11 era as our government mines and collects vast amounts of data regarding its citizens, both from public and private sources.

The more data is collected, the more time and money will be required to manage the data. It is unlikely, however, that sufficient resources will be allotted for regulating, reviewing and updating the massive databases used by law enforcement agencies in the absence of strong incentives such as the deterrent effect of the exclusionary rule.

Should the court carve out a "computer error" exception to the exclusionary rule, the possibility of perpetual arrest warrants is not all that farfetched. Realistically, what incentive would there be to promptly remove recalled arrest warrants from government databases if any evidence obtained as a result of a mistakenly executed, recalled warrant could be used at trial?

To err is human. We all know that. But when one of our most fundamental constitutional rights is at stake—freedom from unlawful governmental intrusion—shouldn't we err on the side of caution and discourage the perpetuation of human error?

Nicole Black is of counsel to *Fiandach & Fiandach* and co-authors *Criminal Law* in New York, a West-Thomson treatise. She also publishes a popular New York law blog, *Sui Generis*, [nylawblog.typepad.com](http://nylawblog.typepad.com) and a blog devoted to legal humor, *Legal Antics*, [nylawblog.typepad.com/legalantics](http://nylawblog.typepad.com/legalantics).