LEADING CASES

I. CONSTITUTIONAL LAW

A. Criminal Law and Procedure

1. Fourth Amendment — Exclusionary Rule. — Among the Supreme Court's functions is to provide guidance to lower courts applying constitutional norms.[1] The Court achieves this aim by issuing "a clear, general, and subsequently usable statement of [its] reasoning or [its] view of the implications of its decision."[2] But the Court's Fourth Amendment decisions rarely provide such clarity.[3] Malleable phrases such as "reasonable expectation of privacy"[4] and rules riddled with exceptions have contributed to doctrine that is complex and difficult to navigate.[5] The ever-changing nuances of the exclusionary rule add to this complexity.[6] Last Term, in *Herring v. United States*,[7] the Supreme Court reentered the fray surrounding the exclusionary rule, holding that the rule did not apply when the Fourth Amendment violation at issue was caused by negligent police recordkeeping.[8] This holding might merely add the narrow category of minor police recordkeeping errors to the list of exceptions to the exclusionary rule. However, broad language in Chief Justice Roberts's majority opinion suggests that the decision might also except from the exclusionary rule any police misconduct that was merely negligent rather than reckless or deliberate. In the long run, the Supreme Court will likely resolve this ambiguity or render it moot. However, in the short run, *Herring*'s

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[1] *See generally* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807–11 (1982); Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 206–08 [hereinafter Schauer, *Abandoning*]; Frederick Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J.L. REFORM 1 (1983); Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1911 (2006).

[2] Schauer, *Abandoning*, *supra* note 1, at 207.

[3] *See, e.g.*, Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974).

[4] This formulation has its origins in Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 360 (1967). *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 769 & n.43 (1994).

[5] *See, e.g.*, Amar, *supra* note 4, at 757–58 ("Warrants are not required — unless they are. All searches and seizures must be grounded in probable cause — but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so."); George Kannar, *Liberals and Crime*, NEW REPUBLIC, Dec. 19, 1988, at 19, 21.

[6] *See, e.g.*, Bradley, *supra* note 3, at 1469–70.

[7] 129 S. Ct. 695 (2009).

[8] *Id.* at 698.

multiple personalities will prove significant as lower courts apply the exclusionary rule with poor guidance from the Supreme Court.

On July 7, 2004, Bennie Dean Herring went to the Coffee County, Alabama, Sheriff's Department to retrieve property from an impounded vehicle.[9] Investigator Mark Anderson, who had had previous contact with Herring and believed there might be a warrant out for his arrest, called the Coffee County Sheriff's warrant clerk.[10] The clerk told Anderson that there were no Coffee County warrants for Herring. The clerk then called the Dale County Sheriff's warrant clerk, who informed her that the county's database showed an active warrant for him.[11] Armed with this information, Anderson arrested Herring, and a search incident to that arrest revealed an illegal firearm and methamphetamine.[12] A few minutes later, Anderson received a call from the Coffee County warrant clerk, who informed him that the warrant had actually been recalled, but that the database had not been updated to reflect the recall.[13]

Prior to his trial for being a felon in possession of a firearm and for possessing methamphetamine, Herring moved to suppress the evidence seized in the search incident to his warrantless arrest.[14] The magistrate judge recommended that the motion be denied, and Judge Thompson, of the Middle District of Alabama, adopted that recommendation.[15] He endorsed an extension of the good faith exception to the exclusionary rule that the Supreme Court had previously established in *Arizona v. Evans*[16] and *United States v. Leon*.[17] Judge Thompson emphasized the reasonableness of the police conduct here and the lack of any evidence that this type of mistake was routine.[18]

The Eleventh Circuit affirmed. Writing for the panel, Judge Carnes[19] stated that even though the search violated Herring's Fourth Amendment rights, such a violation does not automatically require exclusion.[20] Instead, relying on *Leon*, the court identified three conditions that must be met before the exclusionary rule can be applied: (1) there must have been misconduct by the police or adjuncts of the police, (2) exclusion must lead to "appreciable deterrence of that miscon-

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9 *Id.*

10 United States v. Herring, 492 F.3d 1212, 1214 (11th Cir. 2007).

11 *Id.*

12 *Herring*, 129 S. Ct. at 698.

13 *Id.*

14 *See* United States v. Herring, 451 F. Supp. 2d 1290, 1291 (M.D. Ala. 2005).

15 *Id.* at 1293.

16 514 U.S. 1 (1995).

17 468 U.S. 897 (1984).

18 *See Herring*, 451 F. Supp. 2d at 1292.

19 Judge Carnes was joined by Judge Pryor and by Judge Farris of the Ninth Circuit, sitting by designation.

20 United States v. Herring, 492 F.3d 1212, 1215 (11th Cir. 2007).

duct," and (3) the benefits of exclusion must outweigh the costs.[21] Assessing these factors, Judge Carnes assumed that the error in this case was committed by an adjunct of the police.[22] However, he concluded that applying the exclusionary rule here would not appreciably deter the error because the error involved "a negligent failure to act, not a deliberate or tactical choice to act."[23] Moreover, the police already had sufficient incentives to keep accurate records, and excluding evidence from a Coffee County case would be unlikely to deter misconduct in Dale County, where the error occurred.[24] The court concluded that any deterrent effect of exclusion in this case "would not outweigh the heavy cost of excluding otherwise admissible and highly probative evidence."[25] Finally, Judge Carnes noted that the police acted reasonably and that the court's decision might have been different if faulty recordkeeping were endemic.[26]

The Supreme Court affirmed. Writing for the Court, Chief Justice Roberts[27] emphasized that the fact of a Fourth Amendment violation "does not necessarily mean that the exclusionary rule applies."[28] Evidence is excluded only when the benefit of doing so — the deterrent effect on police misconduct — outweighs the cost — the release of guilty or dangerous defendants.[29] In assessing the benefits of excluding evidence, Chief Justice Roberts explained that "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct."[30] Accordingly, the exclusionary rule should be applied when the police misconduct was deliberate, reckless, or grossly negligent, or was the result of recurring or systemic negligence.[31]

Applying these principles to Herring's case, Chief Justice Roberts concluded that although excluding the evidence might have some deterrent effect in causing police departments to act with greater care, "here exclusion is not worth the cost."[32] He emphasized that there was no evidence that this error was anything but a solitary instance[33] and

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[21] *Id.* at 1217 (citing *Leon*, 468 U.S. at 909–10, 913–17).

[22] *Id.*

[23] *Id.* at 1218.

[24] *Id.*

[25] *Id.* (citing *Leon*, 468 U.S. at 910).

[26] *See id.* at 1218–19.

[27] Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito.

[28] *Herring*, 129 S. Ct. at 700 (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)). Chief Justice Roberts questioned whether there actually was a Fourth Amendment violation in this case but assumed that there was for his analysis. *Id.* at 699.

[29] *See id.* at 700–01.

[30] *Id.* at 701.

[31] *Id.* at 702.

[32] *Id.* at 702 n.4.

[33] *Id.* at 704.

that "[i]n a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system."[34] The isolated, negligent error in this case stood in contrast to the flagrant errors to which the Court had applied the exclusionary rule in the past.[35]

Justice Ginsburg dissented.[36] She argued that the exclusionary rule is an "essential auxiliary" to the Fourth Amendment and that it is necessary to ensure that the Fourth Amendment is observed.[37] Apart from exclusion of evidence, there is generally no remedy for Fourth Amendment violations.[38] Justice Ginsburg reasoned that the exclusionary rule serves important purposes besides deterrence, including preventing the judiciary from being tainted by the use of illegally obtained evidence and maintaining popular confidence in the government by assuring people that the government would not benefit from behaving lawlessly.[39]

On the issue of deterrence, Justice Ginsburg disagreed with the majority's analysis.[40] Noting the importance of electronic databases to law enforcement, she argued that police need more incentives to maintain up-to-date records.[41] Excluding evidence in cases of negligent recordkeeping would provide such an additional incentive.[42] Moreover, under the Court's rule, even deliberate or reckless police misconduct would likely not be deterred since defendants would face a steep evidentiary hurdle before evidence could be excluded.[43]

Justice Breyer wrote a separate dissent,[44] in which he emphasized that the Court's previous good faith exceptions to the exclusionary rule relied on the distinction between police errors and judicial errors.[45] Thus, he reasoned, prior decisions holding exclusion inapplicable in

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[34] *Id.* at 704 (citing Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring); Arizona v. Evans, 514 U.S. 1, 17 (1995) (O'Connor, J., concurring)).

[35] *See id.* at 702 ("An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place."). Specifically, Chief Justice Roberts contrasted the error in *Herring* with the police conduct in *Weeks v. United States*, 232 U.S. 383 (1914), in which officers broke into the defendant's house, confiscated papers, and later returned to confiscate more papers, all without a warrant, and *Mapp v. Ohio*, 367 U.S. 643 (1961), in which officers forced open the door of a house, displayed a fake warrant, and handcuffed the defendant without a warrant. *See Herring*, 129 S. Ct. at 702.

[36] Justice Ginsburg was joined by Justices Stevens, Souter, and Breyer.

[37] *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting).

[38] *Id.* at 707–08.

[39] *Id.* at 707 (citing United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

[40] *See id.* at 708.

[41] *Id.* at 708–09.

[42] *Id.* at 708.

[43] *See id.* at 710 (questioning how a defendant would be able to prove deliberate misconduct or recklessness).

[44] Justice Breyer was joined by Justice Souter.

[45] *See Herring*, 129 S. Ct. at 710–11 (Breyer, J., dissenting).

cases involving judicial recordkeeping errors did not apply to this case.[46] Because the error here was committed by the police, Justice Breyer concluded that the exclusionary rule should apply.[47] He noted that such a clear distinction would be far easier for lower courts to apply than the majority's "case-by-case, multifactored inquiry into the degree of police culpability."[48]

Of the three opinions in *Herring*, only Justice Breyer's short dissent considered how the Court's decision would be applied by the lower courts that decide the overwhelming majority of exclusion issues. Relying on the majority opinion, such courts are faced with two possible contradictory interpretations: On the one hand, certain passages suggest that the decision was meant to be limited to negligent police recordkeeping errors. On the other hand, Chief Justice Roberts often used sweeping language that suggests a general exception to exclusion for negligent — rather than reckless or deliberate — police misconduct. Thus far, lower courts have tended toward the broader interpretation, but because the Court provided so little clear guidance, there is no way to know whether this trend is properly implementing the decision until the Supreme Court again opts to decide an exclusionary rule case and clarify the field.

The exclusionary rule has uncertain origins[49] and unclear justifications.[50] However, in recent decades, deterrence of Fourth Amendment violations has emerged as the primary rationale.[51] Under this utilitarian approach to the exclusionary rule, the Court's rulings have followed a trend: the Court has created categorical exceptions to the rule when the deterrent effect of exclusion in a certain class of cases did not justify its social costs. For example, in *United States v. Janis*,[52] the Court held that the exclusionary rule does not apply to federal civil proceedings because such exclusion would have little effect on police

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[46] *See id.*

[47] *See id.*

[48] *Id.* at 711.

[49] For accounts of the origins of the exclusionary rule, see Amar, *supra* note 4, at 787–91; and Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1366–77 (1983).

[50] *See generally* Stewart, *supra* note 49, at 1373–75.

[51] *See, e.g.*, United States v. Leon, 468 U.S. 897, 906 (1984); United States v. Calandra, 414 U.S. 338, 347–48 (1974); Stewart, *supra* note 49, at 1389 (arguing that the exclusionary rule is necessary "to ensure that [Fourth Amendment] prohibitions are observed in fact"). Previously, the Court suggested two alternate rationales: that the exclusionary rule prevented the judiciary from being tainted by complicity in the use of unlawfully seized evidence and that the rule inhibited the government from profiting from its lawless conduct. *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961). Justice Ginsburg's dissent in *Herring* may have revitalized these alternate rationales. *See Herring*, 129 S. Ct. at 706–08 (Ginsburg, J., dissenting).

[52] 428 U.S. 433 (1976).

behavior.[53] Likewise, in *Stone v. Powell*,[54] any deterrence added by considering exclusion on collateral attack was held not to justify the added social costs.[55] And, in *INS v. Lopez-Mendoza*,[56] the Court ruled that illegally obtained evidence need not be excluded from civil deportation proceedings because of the minimal added deterrence.[57]

Prior to *Herring*, the Court took a similar category-based approach to the creation of good faith exceptions to exclusion. *United States v. Leon* established that exclusion does not apply when the Fourth Amendment violation is caused by police officers' reasonable reliance on a magistrate's determination that a warrant was supported by probable cause.[58] The Court then held in *Illinois v. Krull*[59] that exclusion is inappropriate when police reasonably rely on a statute later found to be unconstitutional.[60] And, in *Arizona v. Evans*, the Court created an exception to exclusion for Fourth Amendment violations caused by a court clerk's recordkeeping error.[61] In each of these cases, the Court determined that based on the type of error at issue, any deterrent effect that exclusion could have on the conduct of the police did not justify its costs.

The Court continued this categorical approach in *Hudson v. Michigan*,[62] its last major exclusionary rule decision before *Herring*. In *Hudson*, the police obtained a valid search warrant but violated the knock-and-announce rule while serving it.[63] Writing for a five-Justice majority, Justice Scalia considered the potential deterrent effect of applying the exclusionary rule to the class of cases involving knock-and-announce violations.[64] He concluded that any deterrence of police misconduct achieved by applying the exclusionary rule in such cases was insufficient to justify the costs of exclusion.[65]

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[53] *Id.* at 454.
[54] 428 U.S. 465 (1976).
[55] *Id.* at 493.
[56] 468 U.S. 1032 (1984).
[57] *Id.* at 1050.
[58] *See* United States v. Leon, 468 U.S. 897, 922 (1984).
[59] 480 U.S. 340 (1987).
[60] *Id.* at 352–53.
[61] *See* Arizona v. Evans, 514 U.S. 1, 16 (1995).
[62] 547 U.S. 586 (2006).
[63] *Id.* at 588, 590.
[64] *See id.* at 596.
[65] *See id.* at 599 ("In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial . . . . Resort to the massive remedy of suppressing evidence of guilt is unjustified."). Although language in Justice Scalia's opinion seemed to call into question the continuing viability of deterrence as a justification for the exclusionary rule, *see id.* at 596–99, Justice Kennedy — whose vote was needed to create a majority — wrote a separate concurrence to emphasize that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *Id.* at 603 (Kennedy, J., concurring in

The language in Chief Justice Roberts's majority opinion in *Herring* does not clearly indicate whether the decision should be interpreted as a continuation of this trend of creating specific, narrow categorical exceptions to the exclusionary rule or as something more. At the beginning of his opinion, Chief Justice Roberts stated the Court's holding: "Here the error was the result of isolated negligence attenuated from the arrest. We hold that *in these circumstances* the jury should not be barred from considering all the evidence."[66] In his conclusion, he reiterated this holding: "[W]e 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.'"[67] In each of these statements, the language used creates ambiguity: Does the phrase "these circumstances" refer to a minor police recordkeeping error or to any police conduct that was negligent rather than reckless or deliberate? Does "negligence such as that described here" mean a clerical mistake or any police misconduct?

On the one hand, the Court's decision in *Herring* can be read narrowly so that it only adds minor police recordkeeping errors to the list of specific categories of cases to which the exclusionary rule does not apply. Portions of the Court's decision support this interpretation, as Chief Justice Roberts devoted a significant section of his opinion to a discussion of police databases and their reliability.[68] Moreover, the dissenters in *Herring* seemed to view the Court's ruling in this way: Justice Ginsburg analyzed police recordkeeping at length and nowhere in her dissent addressed the possibility that the majority's analysis might extend to all police negligence.[69] She summarized her position that "[n]egligent recordkeeping errors by law enforcement threaten individual liberty [and] are susceptible to deterrence by the exclusionary rule."[70] Read in this narrow way, *Herring* would be a minor extension of the good faith exception to the exclusionary rule previously created for administrative errors by court clerks.[71]

On the other hand, the Court's opinion is open to a much broader interpretation: it could be read to hold that the exclusionary rule

part and concurring in the judgment); *cf.* David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005–2006 CATO SUP. CT. REV. 283, 307–09 (assessing the position of Justice Kennedy in *Hudson*).

66 *Herring*, 129 S. Ct. at 698 (emphasis added).

67 *Id.* at 704 (emphasis added) (quoting United States v. Leon, 468 U.S. 897, 907 n.6 (1984)).

68 *See id.* at 703–04.

69 *See id.* at 708–10 (Ginsburg, J., dissenting).

70 *Id.* at 710.

71 *See* Arizona v. Evans, 514 U.S. 1 (1995). Professor Orin Kerr interpreted *Herring* in this way. *See* Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/archives/archive_2009_01_11-2009_01_17.shtml (Jan. 14, 2009, 13:38).

should not apply to any merely negligent police error. Such a view draws strong support from the language of Chief Justice Roberts's opinion, which stated:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[72]

The majority opinion also approvingly cited two well-known critics of broad application of the exclusionary rule: Justice Cardozo[73] and Judge Friendly.[74] These aspects of the decision suggest that the Court intended to create a general exception to exclusion for good faith police errors.[75] Such a change would be dramatic: if a defendant could not show that a police error was more than merely negligent, the exclusionary rule would not apply.

Despite the language in support of the broad reading, ambiguity arises due to the mixed signals in other parts of the majority opinion and the fact that the four dissenting Justices seemed to adopt the recordkeeping interpretation. Lower courts will be required to resolve this ambiguity in applying *Herring*. Such a choice gives lower court judges substantial discretion in deciding exclusion issues[76] and will likely have one of three potential results: courts may favor the narrow reading, they may split between the narrow and broad interpretations thereby inconsistently applying the exclusionary rule, or they may tend to adopt the broader interpretation.

Thus far, although some judges have expressed uncertainty about the proper breadth of *Herring*,[77] lower courts applying the Court's decision have tended toward the broader interpretation. For example, in *United States v. Otero*,[78] a postal inspector obtained a search warrant

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[72] *Herring*, 129 S. Ct. at 702.

[73] *See id.* at 704. Then-Judge Cardozo famously criticized the result that "[t]he criminal is to go free because the constable has blundered." People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

[74] *See Herring*, 129 S. Ct. at 702; *see also* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953 (1965) ("The beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights.").

[75] Tom Goldstein holds this view of *Herring*. *See* Posting of Tom Goldstein to SCOTUSblog, http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/ (Jan. 14, 2009, 11:32).

[76] *See* Craig Bradley, *Red* Herring *or the Death of the Exclusionary Rule*, TRIAL, Apr. 2009, at 52, 54; Posting of Kent Scheidegger to Crime and Consequences Blog, http://www.crimeandconsequences.com/crimblog/2009/01/the-exclusionary-rule-seismic.html (Jan. 14, 2009, 14:07).

[77] *See, e.g.*, United States v. Jones, 620 F. Supp. 2d 163, 177 (D. Mass. 2009); United States v. Thomas, No. 08-cr-87-bbc-02, 2009 WL 151180, at *8–9 (W.D. Wis. Jan. 20, 2009).

[78] 563 F.3d 1127 (10th Cir. 2009).

that authorized the seizure of any and all information or data on the defendant's computer.[79] Even though this warrant failed the Fourth Amendment's particularity requirement,[80] the Tenth Circuit ruled that the seized evidence need not be excluded because exclusion is proper only when the officer knew or should have known that the search was unlawful.[81] The court noted that there had been no "flagrant or deliberate violation of rights," so exclusion was inappropriate.[82]

Similarly, in *Logan v. Commonwealth*,[83] a police officer with no warrant entered the common area of the rooming house in which the defendant was staying and observed the defendant in possession of cocaine.[84] A divided panel of the Court of Appeals of Virginia had previously ruled that this action constituted a violation of the Fourth Amendment.[85] However, the court decided that despite this violation, exclusion was inappropriate in light of *Herring*. Given the disagreement among the panel on the constitutionality of the police action, the officer could not be charged with having acted in bad faith for incorrectly guessing the outcome of the constitutional adjudication.[86]

Even courts that have distinguished *Herring* and excluded evidence in its wake have adopted the broad interpretation in doing so. In *United States v. Toledo*,[87] a local police officer arrested the defendant, whom he suspected was an illegal immigrant, despite having been told by an INS agent that no arrest authority existed.[88] The court analyzed the case under *Herring* but concluded that in this case, exclusion was appropriate since the police "were not merely negligent, but rather 'reckless[] or grossly negligent.'"[89] Likewise, in *United States v. Ryan*,[90] police officers obtained a warrant that listed only the address of the house to be searched under "items to be seized," rendering it facially invalid.[91] None of the officers who served the warrant read it beforehand. The court excluded the seized evidence because "the agents' failure to even read the warrant constituted gross negligence."[92]

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[79] *See id.* at 1130–31.
[80] *Id.* at 1132–33.
[81] *Id.* at 1133–34.
[82] *Id.* at 1134 (quoting *Herring*, 129 S. Ct. at 702) (internal quotation marks omitted).
[83] 673 S.E.2d 496 (Va. Ct. App. 2009).
[84] *Id.* at 496.
[85] Logan v. Commonwealth, 616 S.E.2d 744, 747 (Va. Ct. App. 2005), *aff'd en banc*, 622 S.E.2d 771 (Va. Ct. App. 2005).
[86] *See Logan*, 673 S.E.2d at 498–99.
[87] 615 F. Supp. 2d 453 (S.D. W. Va. 2009).
[88] *Id.* at 459–61.
[89] *Id.* at 461 (alteration in original) (quoting *Herring*, 129 S. Ct. at 702).
[90] No. 2:07-CR-35, 2009 WL 1545794 (D. Vt. May 26, 2009).
[91] *Id.* at *1, *3.
[92] *Id.* at *4.

Lower courts' adoption of the broad reading of *Herring* despite the ambiguities in the Court's decision is problematic, since it cannot be known for certain that this was the intent of the five Justices who joined the majority opinion. Justice Kennedy may have demanded the hedging passages in Chief Justice Roberts's opinion as a condition of his joining the majority without writing a separate, limiting concurrence as he did in *Hudson*.[93] However, instead of mitigating the effects of the decision, such language may have merely made the opinion less clear and hurt the ability of lower courts to discern the true intentions of the Court.[94]

This lack of clear guidance on matters of criminal procedure marks a dramatic shift from the era of *Miranda v. Arizona*,[95] in which the Court essentially provided a script for officers to follow in implementing its mandates.[96] This difference is situated within the Supreme Court's broader shift toward reducing the degree to which it provides clear and explicit guidance to lower courts and practitioners,[97] a shift that may be the result of the modern Court's preference for narrow, minimalist opinions.[98] Whatever the causes, if the Court does not provide clear guidance, it loses much of its ability to shape the outcomes of countless lower court decisions.

It remains to be seen whether *Herring* will be a minor case or a landmark decision in the Supreme Court's Fourth Amendment exclusionary rule jurisprudence. Conflicting signals from the majority opinion allow commentators, practitioners, and courts to interpret the case reasonably either way. Ultimately, the uncertainty will likely be resolved by subsequent Supreme Court decisions, but given the historically low number of cases the Court hears annually,[99] such resolution may not come for several years. In the meantime, lower courts will have to draw from *Herring* what guidance they can and hope that it reflects the true intent of the Court.

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[93] *See supra* note 65.

[94] *Cf.* Traciel V. Reid, *Judicial Policy-Making and Implementation: An Empirical Evaluation*, 41 W. POL. Q. 509, 518 (1988) ("[P]olitical scientists have concluded that the clarity of Supreme Court decisions has an impact on lower court compliance."); Elise Borochoff, Comment, *Lower Court Compliance with Supreme Court Remands*, 24 TOURO L. REV. 849, 868 (2008) (arguing that there exists a direct relationship between Supreme Court opinion clarity and lower court compliance).

[95] 384 U.S. 436 (1966).

[96] *See id.* at 467–73; *see also* Schauer, *Abandoning*, *supra* note 1, at 207.

[97] *See* Schauer, *Abandoning*, *supra* note 1, at 206–08.

[98] *See* Sunstein, *supra* note 1, at 1903–07. *But cf.* William J. Rinner, *Roberts Court Jurisprudence and Legislative Enactment Costs*, 118 YALE L.J. POCKET PART 177, 179–81 (2009), http://yalelawjournal.org/images/pdfs/761.pdf (arguing that by creating uncertainty about constitutionality, minimalist decisions can deter actors from taking the risk of making potentially unconstitutional decisions).

[99] *See* Schauer, *Abandoning*, *supra* note 1, at 205.