

This copy is for your personal, noncommercial use only. You can order presentation-ready copies for distribution to your colleagues, clients or customers [here](#) or use the "Reprints" tool that appears next to any article. Visit www.nytimes.com for samples and additional information. [Order a reprint of this article now.](#)

PRINTER-FRIENDLY FORMAT
SPONSORED BY



January 16, 2009

EDITORIAL

The Fourth Amendment Diluted

With a lamentable 5-to-4 ruling on Wednesday, the Supreme Court carved a new exception to the nearly century-old exclusionary rule, which forbids prosecutors from using evidence obtained by the police as the result of an improper search. The result was a meaningful dilution of Americans' Fourth Amendment protections and one more instance of the court's conservative majority upsetting precedent without admitting that it is doing so.

The case centered on the 2004 arrest of Bennie Dean Herring by police officers in Coffee County, Ala., based on a mistaken belief that he was the subject of an outstanding warrant. It turned out that the warrant, although still in the computerized database of a neighboring town, had been withdrawn five months earlier. By the time the error was discovered, officers had stopped Mr. Herring, handcuffed him, searched him and his truck and found methamphetamine and an unloaded pistol.

No one disputed that Mr. Herring's arrest lacked probable cause and that both the arrest and the search were therefore unconstitutional. Nevertheless, the Supreme Court declined to exclude the seized evidence, and upheld Mr. Herring's conviction on drug and gun charges. The arrest was based on careless police record-keeping rather than intentional misconduct, the court reasoned.

"To trigger the exclusionary rule," Chief Justice John Roberts wrote for the majority, "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." The decision instructs judges to use a sliding scale to decide whether police misconduct warrants suppressing evidence.

That may seem reasonable, but it ignores both the inadequacy in the real world of using a cost-benefit calculus to deter unconstitutional law enforcement conduct, and the harm of involving the courts in trampling on people's rights by admitting the fruits of an unconstitutional search. The decision also overlooks the importance of preserving a strong incentive for maintaining accurate, up-to-date records in an era of increased law-enforcement reliance on coordinated computer databases. These points were noted by Justice Ruth Bader Ginsburg in a thoughtful dissenting opinion.

The outcome was not very surprising. In recent years, the court has carved out several "good faith" exceptions to the exclusionary rule, and justices on the court's right flank have made no secret of their ambition to carve out more. But until this week, those exceptions were limited to instances when the improper search resulted from nonpolice errors, say by judicial officers or a legislature — not solely from police behavior.

The danger of this ruling is that judges will read its broad reasoning to prevent the exclusion of evidence in

cases of negligent police conduct going well beyond sloppy record-keeping.

[Copyright 2009 The New York Times Company](#)

[Privacy Policy](#) | [Search](#) | [Corrections](#) | [RSS](#) | [First Look](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#)
