SUPREME COURT OF THE UNITED STATES

No. 93–1660

ARIZONA, PETITIONER *v.* ISAAC EVANS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

[March 1, 1995]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

This case portrays the increasing use of computer technology in law enforcement; it illustrates an evolving problem this Court need not, and in my judgment should not, resolve too hastily.[1] The Arizona Supreme Court relied on "the principles of a free society" in reaching its decision. This Court reviews and reverses the Arizona decision on the assumption that Arizona's highest court sought assiduously to apply this Court's Fourth Amendment jurisprudence. The Court thus follows the presumption announced in *Michigan* v. *Long*, 463 U. S. 1032 (1983): If it is unclear whether a state court's decision rests on state or federal law, *Long* dictates the assumption that the state court relied on federal law. On the basis of that assumption, the Court

[1]We have in many instances recognized that when frontier legal problems are presented, periods of "percolation" in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court. See, *e.g.*, *McCray* v. *New York*, 461 U. S. 961, 961, 963 (1983) (STEVENS, J., respecting denial of petitions for writs of certiorari) ("My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue . . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

asserts jurisdiction to review the decision of the Arizona Supreme Court.

The *Long* presumption, as I see it, impedes the States' ability to serve as laboratories for testing solutions to novel legal problems. I would apply the opposite presumption and assume that Arizona's Supreme Court has ruled for its own State and people, under its own constitutional recognition of individual security against unwarranted state intrusion. Accordingly, I would dismiss the writ of certiorari.

Isaac Evans was arrested because a computer record erroneously identified an outstanding misdemeanor arrest warrant in his name. The Arizona Supreme Court's suppression of evidence obtained from this unlawful arrest did not rest on a close analysis of this Court's Fourth Amendment precedents. Indeed, the court found our most relevant decision, *United States* v. *Leon*, 468 U. S. 897 (1984), "not helpful." *State* v. *Evans*, 177 Ariz. 201, 203, 866 P. 2d 869, 871 (1994). Instead, the Arizona court emphasized its comprehension of the severe curtailment of personal liberty inherent in arrest warrants.

Specifically, the Arizona Supreme Court saw the growing use of computerized records in law enforcement as a development presenting new dangers to individual liberty; excluding evidence seized as a result of incorrect computer data, the Arizona court anticipated, would reduce the incidence of uncorrected records:

> "The dissent laments the `high costs' of the exclusionary rule, and suggests that its application here is `purposeless' and provides `no offsetting benefits.' Such an assertion ignores the fact that arrest warrants result in a denial of human liberty, and are therefore among the most important of legal documents. It is repugnant to the principles of a free society that a person

> should ever be taken into police custody because of a computer error precipitated by government carelessness. As automation increasingly invades modern life, the potential for Orwellian mischief grows. Under such circumstances, the exclusionary rule is a `cost' we cannot afford to be without." *Id.,* at 204, 866 P. 2d, at 872.

Thus, the Arizona court did not consider this case to involve simply and only a court employee's slip in failing to communicate with the police, or a police officer's oversight in failing to record information received from a court employee. That court recognized a "potential for Orwellian mischief" in the government's increasing reliance on computer technology in law enforcement. The Arizona Supreme Court concluded that *Leon*'s distinction between police conduct and judicial conduct loses force where, as here, the error derives not from a discretionary judicial function, but from inattentive recordkeeping. Application of an exclusionary rule in the circumstances Evans' case presents, the Arizona court said, "will hopefully serve to improve the efficiency of those who keep records in our criminal justice system." *Ibid.*

Invoking *Long*, this Court's majority presumes that the Arizona Supreme Court relied on federal law. *Long* instructs that a state-court opinion discussing both state and federal precedents shall be deemed to rely on federal law, absent a plain statement in the opinion that the decision rests on state law. *Long*, 463 U. S., at 1040–1042.[2] For reasons this case

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[2]The *Long* presumption becomes operative when two conditions are met: (1) the state-court decision must "fairly appea[r] to rest primarily on federal law, or to be interwoven with the federal law"; and (2) "the adequacy and independence of any possible state law ground [must] not [be] clear from the face of the opinion." 463 U. S., at 1040–1041.

illustrates, I would choose the opposite plain statement rule. I would presume, absent a plain statement to the contrary, that a state court's decision of the kind here at issue rests on an independent state-law ground.[3]

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. Most germane to this case, computerization 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. The computerized databases of the FBI's National Crime Information Center (NCIC), to take a conspicuous example, contain over 23 million records, identifying, among other things, persons and vehicles sought by law enforcement agencies nationwide. See Hearings before the Subcommittee on the Departments of Commerce, Justice, and State,

[3]I recognize, in accord with *Long* on this point, that there will be cases in which a presumption concerning exercise of the Court's jurisdiction should yield, *i.e.*, exceptional instances in which vacation of a state court's judgment and remand for clarification of the court's decision is in order. See *id.,* at 1041, n. 6 ("There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action."); *Capital Cities Media, Inc.* v. *Toole*, 466 U. S. 378, 379 (1984) *(per curiam)* (post-*Long* decision vacating state-court judgment and remanding for such further proceedings as the state court might deem appropriate to clarify the ground of its decision).

the Judiciary, and Related Agencies of the House Committee on Appropriations, 102d Cong., 2d Sess., pt. 2B, p. 467 (1992). NCIC information is available to approximately 71,000 federal, state, and local agencies. See Hearings before the Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Committee on Appropriations, 103d Cong., 1st Sess., pt. 2A, p. 489 (1993). Thus, any mistake entered into the NCIC spreads nationwide in an instant.

Isaac Evans' arrest exemplifies the risks associated with computerization of arrest warrants. Though his arrest was in fact warrantless—the warrant once issued having been quashed over two weeks before the episode in suit—the computer reported otherwise. Evans' case is not idiosyncratic. *Rogan* v. *Los Angeles*, 668 F. Supp. 1384 (CD Cal. 1987), similarly indicates the problem. There, the Los Angeles Police Department, in 1982, had entered into the NCIC computer an arrest warrant for a man suspected of robbery and murder. Because the suspect had been impersonating Terry Dean Rogan, the arrest warrant erroneously named Rogan. Compounding the error, the Los Angeles Police Department had failed to include a description of the suspect's physical characteristics. During the next two years, this incorrect and incomplete information caused Rogan to be arrested four times, three times at gunpoint, after stops for minor traffic infractions in Michigan and Oklahoma. See *id.*, at 1387–1389.[4] In another case of the same genre, the District Court observed:

> "Because of the inaccurate listing in the NCIC computer, defendant was a `marked man' for the five months prior to his arrest . . . . At any

[4]See also *Finch* v. *Chapman*, 785 F. Supp. 1277, 1278–1279 (ND Ill. 1992) (misinformation long retained in NCIC records twice caused plaintiff's arrest and detention), aff'd without opinion, 991 F. 2d 799 (CA7 1993).

> time . . . a routine check by the police could well result in defendant's arrest, booking, search and detention. . . . Moreover, this could happen anywhere in the United States where law enforcement officers had access to NCIC information. Defendant was subject to being deprived of his liberty at any time and without any legal basis." *United States* v. *Mackey*, 387 F. Supp. 1121, 1124 (Nev. 1975).

In the instant case, the Court features testimony of the chief clerk of the justice court in East Phoenix to the effect that errors of the kind Evans encountered are reported only "on[c]e every three or four years." *Ante*, at 13 (citing App. 37). But the same witness also recounted that, when the error concerning Evans came to light, an immediate check revealed that three other errors of the very same kind had occurred on "that same day." *Ibid.*; see *ante*, at 4–5, and n. 3 (STEVENS, J., dissenting).

This Court and the Arizona Supreme Court hold diverse views on the question whether application of an exclusionary rule will reduce the incidence of erroneous computer data left without prompt correction. Observing that "court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime," the Court reasons that "there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed." *Ante*, at 13. In the Court's view, exclusion of evidence, even if capable of deterring police officer errors, cannot deter the carelessness of other governmental actors.[5]

[5]It has been suggested that an exclusionary rule cannot deter carelessness, but can affect only intentional or

Whatever federal precedents may indicate—an issue on which I voice no opinion—the Court's conclusion is not the lesson inevitably to be drawn from logic or experience.

In this electronic age, particularly with respect to recordkeeping, court personnel and police officers are not neatly compartmentalized actors. Instead, they serve together to carry out the State's information-gathering objectives. Whether particular records are maintained by the police or the courts should not be dispositive where a single computer database can answer all calls. Not only is it artificial to distinguish between court clerk and police clerk slips; in practice, it may be difficult to pinpoint whether one official, *e.g.*, a court employee, or another, *e.g.*, a police officer, caused the error to exist or to persist. Applying an exclusionary rule as the Arizona court did may well supply a powerful incentive to the State to promote the prompt updating of computer records. That was the Arizona Supreme Court's hardly unreasonable expectation. The incentive to update promptly would be diminished if court-initiated

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reckless misconduct. This suggestion runs counter to a premise underlying all of negligence law—that imposing liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care.

That the mistake may have been made by a clerical worker does not alter the conclusion that application of the exclusionary rule has deterrent value. Just as the risk of *respondeat superior* liability encourages employers to supervise more closely their employees' conduct, so the risk of exclusion of evidence encourages policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems. In the words of the trial court, the mistake in Evans' case was "perhaps the negligence of the Justice Court, or the negligence of the Sheriff's office. But it is still the negligence of the State." App. 51.

records were exempt from the rule's sway.

The debate over the efficacy of an exclusionary rule reveals that deterrence is an empirical question, not a logical one. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). With that facet of our federalism in mind, this Court should select a jurisdictional presumption that encourages States to explore different means to secure respect for individual rights in modern times.

Historically, state laws were the source, and state courts the arbiters, of individual rights. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 382 (1980). The drafters of the federal Bill of Rights looked to provisions in state constitutions as models. *Id.*, at 381. Moreover, many States that adopted constitutions after 1789 modeled their bills of rights on pre-existing state constitutions, rather than on the federal Bill of Rights. *Ibid.* And before this Court recognized that the Fourteenth Amendment—which constrains actions by States—incorporates provisions of the federal Bill of Rights, state constitutional rights, as interpreted by state courts, imposed the primary constraints on state action. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 501–502 (1977).

State courts interpreting state law remain particularly well situated to enforce individual rights against the States. Institutional constraints, it has been observed, may limit the ability of this Court to enforce the federal constitutional guarantees. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1217–

1218 (1978). Prime among the institutional constraints, this Court is reluctant to intrude too deeply into areas traditionally regulated by the States. This aspect of federalism does not touch or concern state courts interpreting state law.

Under *Long*, when state courts engage in the essential process of developing state constitutional law, they may insulate their decisions from this Court's review by means of a plain statement of intent to rest upon an independent state ground. The plain statement option does not, however, make pleas for reconsideration of the *Long* presumption much ado about nothing.[6] Both on a practical and on a symbolic level, the presumption chosen matters.

The presumption is an imperfect barometer of state courts' intent. Although it is easy enough for a state court to say the requisite magic words, the court may not recognize that its opinion triggers *Long*'s plain statement requirement. "[A]pplication of Long's presumption depends on a whole series of `soft' requirements: the state decision must `fairly appear' to rest `primarily' on federal law or be `interwoven' with federal law, and the independence of the state ground must be `not clear' from the face of the state opinion. These are not self-applying concepts." P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 552 (3d ed. 1988) (hereinafter Hart and Wechsler); cf. *Coleman* v. *Thompson*, 501 U. S. 722, 735–740 (1991) (declining to apply *Long* presumption

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[6]*Long* has generated many pages of academic commentary, some supportive, some critical of the presumption. See, *e.g.*, P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 553, n. 3 (3d ed. 1988) (citing commentary).

to summary dismissal order).

Can the highest court of a State satisfy *Long*'s "plain statement" requirement in advance, through a blanket disclaimer? The New Hampshire Supreme Court, for example, has declared: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions." *State* v. *Ball*, 124 N. H. 226, 233, 471 A. 2d 347, 352 (1983). See also *State* v. *Kennedy*, 295 Ore. 260, 267, 666 P. 2d 1316, 1321 (1983) ("Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines."). This Court's stated reluctance to look beneath or beyond the very state-court opinion at issue in order to answer the jurisdictional question, see *Long*, 463 U. S., at 1040, may render such blanket declarations ineffective. Cf. Hart and Wechsler 553 ("[T]he Court's protestations— that its presumption shows greater respect for state courts than asking them to clarify their opinions—ring hollow: Long simply puts the burden of clarification on the state court in advance.").

Application of the *Long* presumption has increased the incidence of nondispositive U. S. Supreme Court determinations—instances in which state courts, on remand, have reinstated their prior judgments after clarifying their reliance on state grounds. Westling, Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine, 63 Tulane L. Rev. 379, 389, and n. 47 (1988) (pre–*Long*, *i.e.*, between January 1, 1978, and June 30, 1983, 14.3% of decisions (2 of 14) involving potentially adequate and independent state grounds were reinstated on state grounds upon remand; post–

Long, *i.e.*, between July 1, 1983, and January 1, 1988, 26.7% of such decisions (4 of 15) were reinstated on remand). Even if these reinstatements do not render the Supreme Court's opinion technically "advisory," see Hart and Wechsler 537, they do suggest that the Court unnecessarily spent its resources on cases better left, at the time in question, to state-court solution.

The *Long* presumption, in sum, departs from the traditional understanding that "every federal court is `without jurisdiction' unless `the contrary appears affirmatively from the record.'" *Delaware* v. *Van Arsdall*, 475 U. S. 673, 692 (1986) (STEVENS, J., dissenting) (quoting *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887)). And it is out of sync with the principle that this Court will avoid constitutional questions when an alternative basis of decision fairly presents itself. *Ashwander* v. *TVA,* 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). Most critically, as this case shows, the *Long* presumption interferes prematurely with state-court endeavors to explore different solutions to new problems facing modern society.

I recognize that "[s]ince *Long*, we repeatedly have followed [its] `plain statement' requirement," *Harris* v. *Reed*, 489 U. S. 255, 261, n. 7 (1989), and that precedent ought not be overruled absent strong cause. But the *Long* ruling itself did

> "a virtual about-face regarding the guidelines for determining the reviewability of state court decisions in situations where the state court opinion is not absolutely clear about the bases on which it rests. The traditional presumption was that the Court lacked jurisdiction unless its authority to review was clear on the face of the state court opinion. When faced with uncertainty, the Court in the past occasionally remanded such cases to the state court for clarification. But more commonly, the Court would deny

jurisdiction where there was uncertainty." G. Gunther, Constitutional Law 56 (12th ed. 1991).

Restoring a main rule "deny[ing] jurisdiction where there [is] uncertainty," *ibid.*, would stop this Court from asserting authority in matters belonging, or at least appropriately left, to the States' domain. Cf. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 77–80 (1938). Recognizing that "adequate state grounds are independent unless it clearly appears otherwise," *Long*, 463 U. S., at 1066 (STEVENS, J., dissenting),[7] would also avoid premature settlement of important federal questions. The submission for the United States is telling in this regard. While filing in support of petitioner, the United States acknowledges the problem occasioned by "erroneous information contained in law enforcement computer-information systems," but does not see this case as a proper vehicle for a pathmarking opinion. The United States suggests that the Court "await a case in which relevant characteristics of such systems and the legal questions they pose can be thoroughly explored." Brief for United States as *Amicus Curiae* 13.

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The Arizona Supreme Court found it "repugnant to the principles of a free society," 177 Ariz., at 204, 866 P. 2d, at 872, to take a person "into police custody because of a computer error precipitated by government carelessness." *Ibid.* Few, I believe, would disagree. Whether, in order to guard against such errors, "the exclusionary rule is a `cost' we

[7]For instances in which a state court's decision, even if arguably placed on a state ground, embodies a misconstruction of federal law threatening gravely to mislead, or to engender disuniformity, confusion, or instability, a Supreme Court order vacating the judgment and remanding for clarification should suffice. See Hart and Wechsler 554; see also *supra*, at 4, n. 3.

cannot afford to be without," *ibid.*, seems to me a question this Court should not rush to decide. The Court errs, as I see it, in presuming that Arizona rested its decision on federal grounds. I would abandon the *Long* presumption and dismiss the writ because the generally applicable obligation affirmatively to establish the Court's jurisdiction has not been satisfied.