Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Search and Seizure

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Herring v. United States, 555 U.S. 135 (2009)

Bennie Dean Herring was arrested after Inspector Mark Anderson of the Coffee County, Alabama Police Department was informed that an active arrest warrant existed for Herring in Dale County, Alabama. During the search incident to that arrest, Anderson found Herring was carrying methamphetamine and an illegal weapon. Within minutes of the search, Anderson learned that the clerk in Dale County had made a mistake, that no active arrest warrant existed for Herring. Herring was subsequently indicted for violating federal gun and drug laws. At trial, he moved to have the evidence discovered during his arrest suppressed because the arrest was illegal. While all parties agreed the arrest was illegal, the trial court refused to suppress the evidence. The Court of Appeals for the Eleventh Circuit sustained that ruling. Herring appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote agreed that no suppression was necessary. Chief Justice Robert's majority opinion held that suppression is required only when police recklessly or intentionally violate the Fourth Amendment. How did the Chief Justice reach this conclusion? Did he merely apply or extend past precedents? Why did the dissents disagree? After Herring, does the exclusionary rule have much practical bite?

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Fourth Amendment forbids "unreasonable searches and seizures," and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution.

Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. 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.

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The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. . . . Indeed, exclusion "has always been our last resort, not our first impulse" . . . and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it "'result[s] in appreciable deterrence.'" . . .

In addition, the benefits of deterrence must outweigh the costs. . . .

These principles are reflected in the holding of *United States v. Leon* [1984]. When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant.

. . . In [*Arizona v. Evans* (1995)] we applied this good-faith rule to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding. We held that a

mistake made by a judicial employee could not give rise to exclusion for three reasons: The exclusionary rule was crafted to curb police rather than judicial misconduct; court employees were unlikely to try to subvert the Fourth Amendment; and "most important, there [was] no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in deterring the errors. . . .

2. The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in Leon, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. . . .

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Indeed, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. In [*Weeks v. United States* (1914)], a foundational exclusionary rule case, the officers had broken into the defendant's home (using a key shown to them by a neighbor), confiscated incriminating papers, then returned again with a U.S. Marshal to confiscate even more. . . . Not only did they have no search warrant, which the Court held was required, but they could not have gotten one had they tried. They were so lacking in sworn and particularized information that "not even an order of court would have justified such procedure." . . .

Equally flagrant conduct was at issue in *Mapp v. Ohio* (1961), which . . . extended the exclusionary rule to the States. Officers forced open a door to Ms. Mapp's house, kept her lawyer from entering, brandished what the court concluded was a false warrant, then forced her into handcuffs and canvassed the house for obscenity. . . . 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. And in fact since Leon, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than this.

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. The error in this case does not rise to that level.

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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, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. . . . Petitioner's fears that our decision will cause police departments to deliberately keep their officers ignorant . . . are thus unfounded.

Justice Ginsburg's dissent . . . adverts to the possible unreliability of a number of databases not relevant to this case. In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system. . . . But there is no evidence that errors in Dale County's system are routine or widespread. . . .

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JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

Petitioner Bennie Dean Herring was arrested, and subjected to a search incident to his arrest, although no warrant was outstanding against him, and the police lacked probable cause to believe he was engaged in criminal activity. The arrest and ensuing search therefore violated Herring's Fourth Amendment right "to be secure . . . against unreasonable searches and seizures." The Court of Appeals so determined, and the Government does not contend otherwise. The exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search. The rule thus strongly encourages police compliance with the Fourth Amendment in the future. The Court, however, holds the rule inapplicable because careless recordkeeping by the police—not flagrant or deliberate misconduct—accounts for Herring's arrest.

I would not so constrict the domain of the exclusionary rule and would hold the rule dispositive of this case: "[I]f courts are to have any power to discourage [police] error of [the kind here at issue], it must be through the application of the exclusionary rule." . . . .

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. . . In my view, the Court's opinion underestimates the need for a forceful exclusionary rule and the gravity of recordkeeping errors in law enforcement.

. . . Protective of the fundamental "right of the people to be secure in their persons, houses, papers, and effects," the Fourth Amendment "is a constraint on the power of the sovereign, not merely on some of its agents. . . .

The exclusionary rule is "a remedy necessary to ensure that" the Fourth Amendment's prohibitions "are observed in fact." . . .

Beyond doubt, a main objective of the rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." . . . But the rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." . . . .

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The Court maintains that Herring's case is one in which the exclusionary rule could have scant deterrent effect and therefore would not "pay its way." I disagree.

The exclusionary rule, the Court suggests, is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless. The suggestion runs counter to a foundational premise of tort law—that liability for negligence, i.e., lack of due care, creates an incentive to act with greater care. . . .

That the mistake here involved the failure to make a computer entry hardly means that application of the exclusionary rule would have minimal value. "Just as the risk of respondeat superior liability encourages employers to supervise . . . their employees' conduct [more carefully], 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."

Consider the potential impact of a decision applying the exclusionary rule in this case. . . . The record reflects no routine practice of checking the database for accuracy, and the failure to remove the entry for Herring's warrant was not discovered until Investigator Anderson sought to pursue Herring five months later. Is it not altogether obvious that the Department could take further precautions to ensure the integrity of its database? . . .

Is the potential deterrence here worth the costs it imposes? . . . In light of the paramount importance of accurate recordkeeping in law enforcement, I would answer yes. . . .

Electronic databases form the nervous system of contemporary criminal justice operations. In recent years, their breadth and influence have dramatically expanded. Police today can access databases that include not only the updated National Crime Information Center (NCIC), but also terrorist watchlists, the Federal Government's employee eligibility system, and various commercial databases. . . . As a result, law enforcement has an increasing supply of information within its easy electronic reach.

The risk of error stemming from these databases is not slim. Herring's amici warn that law enforcement databases are insufficiently monitored and often out of date. Government reports describe, for example, flaws in NCIC databases, terrorist watchlist databases, and databases associated with the Federal Government's employment eligibility verification system.

Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty. "The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base" is evocative of the use of general warrants that so outraged the authors of our Bill of Rights. . . .

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[B]y restricting suppression to bookkeeping errors that are deliberate or reckless, the majority leaves Herring, and others like him, with no remedy for violations of their constitutional rights. . . .

I doubt that police forces already possess sufficient incentives to maintain up-to-date records.

[E]ven when deliberate or reckless conduct is afoot, the Court's assurance will often be an empty promise: How is an impecunious defendant to make the required showing? . . .

Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule. The rule "is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera." . . .

JUSTICE BREYER, with whom JUSTICE SOUTER joins, dissenting.

[Past precedents] noted that "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees.". . . 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." . . . These reasons explain why police recordkeeping errors should be treated differently than judicial ones.