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UNRAVELING THE EXCLUSIONARY RULE: FROM LEON TO HERRING TO ROBINSON—AND BACK?

David H. Kaye^{*}

The Fourth Amendment exclusionary rule began to unravel in United States v. Leon. The facts were compelling. Why exclude reliable physical evidence from trial when it was not the constable who blundered, but “a detached and neutral magistrate” who misjudged whether probable cause was present and issued a search warrant? Later cases applied the exception for “good faith” mistakes to a police officer who, pursuing a grudge against a suspect, arrested and searched him and his truck on the basis of a false and negligent report from a clerk in another county of an outstanding arrest warrant. The California Supreme Court recently applied this line of cases in People v. Robinson to support the conviction of a man whose DNA was taken by correctional officials who misunderstood the scope of the state’s DNA database statute. This Essay shows how the Robinson court exceeded the boundaries of the U.S. Supreme Court’s good-faith exception. It then proposes several ways to modify or confine the exception to achieve better protection of the Fourth Amendment right to be free from unreasonable searches and seizures.

In a case that has attracted surprisingly little commentary, the California Supreme Court wrote the first reported opinion in the nation that declined to apply the exclusionary rule to evidence (presumably) acquired in violation of the Fourth Amendment by a police agency relying on its own, mistaken information.¹ The case in question is *People v. Robinson*.² At first blush, a series of U.S. Supreme Court cases spanning the last twenty-five years might seem to make *Robinson*’s rejection of the exclusionary rule inevitable. But this impression is mistaken.

In 1984, the Supreme Court loosened a thread in the protective fabric of the Fourth Amendment exclusionary rule. *United States v. Leon*³

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1. The exclusionary rule generally precludes admitting trial evidence acquired in violation of the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

2. 224 P.3d 55 (Cal. 2010).

3. 468 U.S. 897 (1984).

announced a “good-faith” exception for “reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate.”⁴ Later cases unraveled the rule a bit more. In 1987, *Illinois v. Krull*⁵ applied *Leon*’s exception to a police officer’s reliance on an unconstitutional state statute that authorized the warrantless seizure of evidence from an automobile wrecking yard. In 1995, *Arizona v. Evans*⁶ applied the exception to a police officer’s arrest of a driver based on a false report of an outstanding arrest warrant transmitted from a court database. Most recently, in 2009, *Herring v. United States*⁷ stretched the exception slightly more to reach reliance on a false report of an outstanding warrant from a police clerk in a separate county. And more ominously for the integrity of the rule, the Court defined *Leon*’s “reasonable reliance”⁸ to amount to anything short of systematic and recurring negligence.⁹ In sum, *Leon* and its progeny stand for the proposition that police acting in “good faith”¹⁰—broadly construed—may rely on information or apparent authority supplied by courts, legislatures, and other police agencies without triggering the exclusionary rule for Fourth Amendment violations.

In the wake of *Herring*, the California Supreme Court tugged—unanimously and sharply—at this weakened structure. When California’s DNA and Forensic Identification Data Base and Data Bank Act of 1998¹¹ went into effect, Paul Eugene Robinson “was in custody at [a detention center] for two misdemeanor convictions and awaiting transfer to state prison based on a parole revocation [for a] burglary.”¹² Although Robinson’s crimes did not qualify him for inclusion in the new database for convicted offenders, “an unknown person in the Center’s records department . . . mistakenly identified [him] as a prisoner with a qualifying offense As a result of that mistake, a [blood] sample . . . was

4. *Id.* at 913.

5. 480 U.S. 340 (1987).

6. 514 U.S. 1 (1995).

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

8. *Leon*, 468 U.S. at 922.

9. *Herring*, 129 S. Ct. at 701, 704.

10. *Leon*, 468 U.S. at 924, 925.

11. CAL. PENAL CODE §§ 295–300 (1999).

12. *People v. Robinson*, 224 P.3d 55, 63 (Cal. 2010).

drawn”¹³ The California Department of Justice laboratory analyzed the sample, uploaded the DNA profile, and got a cold hit to the man wanted on a “John Doe” DNA warrant for “five felony sexual offenses, all perpetrated against Deborah L. on August 25, 1994.”¹⁴ A jury convicted Robinson of these offenses.¹⁵ The California Court of Appeal affirmed, and the state supreme court granted review.¹⁶

The California Supreme Court held that the arrest warrant was valid and thus tolled the statute of limitations on rape prosecutions.¹⁷ It held that the erroneous extraction of blood violated state law but not the Fourth Amendment.¹⁸ For good measure, it added that even if there had been a constitutional violation, it would not have mattered under the good-faith exception.¹⁹

This last dictum is my target here. As indicated above, in the *Leon* line of cases the U.S. Supreme Court did not go so far as to approve the admission of evidence seized in violation of the Fourth Amendment by a police agency relying on its own, mistaken information—and for good reason. When the police department conducting the unreasonable search or seizure is itself the source of the mistake that appears to justify the search, it can hardly be said, as the *Leon* Court did, that “there is no police illegality and thus nothing to deter.”²⁰ Rather, one must make the more troubling argument, embraced in *Herring*, that even though the exclusionary rule can deter negligent and unconstitutional conduct, the cost of doing so is too high to pay.

Thus, the *Robinson* court made no direct mention of *Leon*, instead relying largely on the controversial *Herring* decision.²¹ In *Herring*, police

13. *Id.* at 64.

14. *Id.* at 59, 60.

15. *Id.* at 62.

16. *Id.*

17. *Id.* at 80.

18. *Id.* at 66–67.

19. *Id.* at 69–71.

20. *United States v. Leon*, 468 U.S. 897, 921 (1984).

21. 129 S. Ct. 695 (2009). See generally Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009); Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 191–92 (2010); George M. Dery, III, *Good Enough for Government Work: The Court's Dangerous Decision*, in *Herring v. United States, to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior*, 20 GEO. MASON U. C.R. L.J. 1, 27–28 (2009); Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009); *The Supreme Court*,

officers arrested and searched Herring and his vehicle, uncovering contraband and an illegally possessed weapon.²² The officers lacked probable cause to detain or search Herring until a police clerk in a neighboring county advised them that a current warrant called for his arrest.²³ However, the police database that the clerk had relied on reported a warrant when in fact it had been recalled.²⁴ Regarding the false report as a single act of “nonrecurring and attenuated negligence,”²⁵ a bare majority of the Court held that the application of the exclusionary rule was not warranted.²⁶ Four justices objected that acts of distinct but cooperating police agencies supplied “no occasion to further erode the exclusionary rule.”²⁷

Despite the Court’s division in *Herring*, one thing is clear. In every Supreme Court case that has treated an officer’s reliance on erroneous information as grounds for suspending the exclusionary rule, the information has come from an unrelated and apparently reliable governmental source—a judicial officer (*Leon*), a legislature whose enactments enjoy a presumption of constitutionality (*Krull*), judicial staff (*Evans*), and a records clerk at another police department (*Herring*).²⁸ In these circumstances, courts may balance “the culpability of the police [against] the potential of exclusion to deter wrongful police conduct.”²⁹ Within these boundaries, ordinary and “isolated negligence” normally is not enough to warrant exclusion.³⁰

These boundaries should not be expanded. To apply this balancing test more widely would open every Fourth Amendment violation case arising from inaccurate information supplied by fellow police officials to litigation over how the balance should be struck in light of the facts of each case. Courts would need to draw a difficult line between simple

2008 Term—*Leading Cases*, 123 HARV. L. REV. 153 (2009) (discussing possible readings of the *Herring* opinion).

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

23. *Id.*

24. *Id.*

25. *Id.* at 702.

26. *Id.* at 704.

27. *Id.* at 710 (Ginsburg, J., dissenting).

28. See *supra* text accompanying notes 3–10.

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

30. *Id.*

negligence and “deliberate, reckless, or grossly negligent conduct,”³¹ or between “isolated” negligence and “recurring or systematic negligence.”³² Police officers could be tempted to avoid the dictates of the Amendment by dividing up investigations so that each officer can rely on a negligent report from a colleague rather than pursuing the investigations in a more direct fashion. Even without a conscious strategy of avoidance, coworkers would have less incentive to avoid supplying mistaken information that would trigger unconstitutional arrests or searches.³³ The resulting regime would benefit neither the public, nor the police, nor the courts.

Robinson’s theory that a police agency may rely on its own negligence to avoid the exclusionary rule thus deviates from *Herring’s* suggestion that the negligence be not merely “isolated” (itself a contested proposition in *Robinson*) but “attenuated.”³⁴ As I have emphasized, in *Herring* and in every other Supreme Court case applying *Leon* to admit evidence, the negligent misstatement was attenuated in the sense that a police officer reasonably relied on plausible information from an independent government agency.³⁵ In *Robinson*, however, the correctional facility misinformed itself. To allow such unattenuated official misconduct to escape the exclusionary rule would open the courthouse door to widespread, negligent police misconduct in violation of the Fourth Amendment.

Indeed, *Robinson* is not the only sign of the general unraveling of the exclusionary rule that is occurring under *Herring*. In *United States v. Song Ja Cha*,³⁶ for instance, the Court of Appeals for the Ninth Circuit assumed that *Herring* applies to an unreasonably long, warrantless seizure of a residence to allow officers time to obtain a warrant.³⁷ The circuits

31. *Id.* at 702.

32. *Id.* at 698, 702.

33. *State v. Handy*, No. A-108-09, 2011 WL 1544500, at *7 (N.J. Apr. 26, 2011) (declining to apply *Herring* when “suppressing the evidence garnered from this illegal search would have important deterrent value[and] would underscore the need for training of officers and dispatchers to focus on detail”).

34. *Herring*, 129 S. Ct. at 702.

35. See *supra* text accompanying notes 3–10, 20.

36. 597 F.3d 995 (9th Cir. 2010).

37. The court held that the delay was deliberate and culpable, making the evidence excludable even under *Herring*. *Id.* at 1004–06.

also are divided over whether the good-faith exception extends to reliance on Supreme Court case law that later is modified or overruled.³⁸

At least four corrections for this confused state of affairs are possible. The first is overruling *Herring*. As Justices Breyer and Souter emphasized in a separate dissent in *Herring*, this would reinstate the easily administered rule that only good-faith reliance by police officers on the erroneous action of other branches of government can suspend the exclusionary rule.³⁹ However, it seems improbable that a majority of the Supreme Court would embrace this position, which it so recently rejected and to which only the two justices subscribed.

Short of this unlikely step, a second solution would be to keep the *Leon* exception within its current confines of reliance by the police on generally accurate information or judgments from *unrelated* government officials. When a group of police officers in the same unit (or units who are working together as part of a combined investigation or common task) negligently produce inaccurate information, they should not be able to claim good-faith reliance—because they did not rely on any outside information and because they have the ability to control their own conduct. This different-department rule might seem like a fine point, but it is a reasonable construction of the references to the undefined “attenuation” in *Herring*.⁴⁰

Although this second strategy of confining a destabilizing case to its facts, or something close to them, is hardly a novel maneuver, more minor surgery still could be helpful. The third course of treatment would allow mistaken information or judgments within the same department to justify the admission of evidence seized in violation of the Fourth Amendment, but it would block *Herring*’s tolerance of negligent mistakes as a ground for admission. In same- or related-department situations, “good faith” should mean that the police took reasonable care to avoid infringing Fourth Amendment rights. Only if the government shows that

38. See Ross M. Oklewicz, Comment, *Expanding the Scope of the Good-Faith Exception to the Exclusionary Rule to Include a Law Enforcement Officer’s Reasonable Reliance on Well-Settled Case Law That Is Subsequently Overruled*, 59 AM. U. L. REV. 1715, 1732–39 (2010).

39. 129 S. Ct. at 710, 711 (Breyer, J., dissenting).

40. For a more thorough defense of reading *Herring* narrowly, see Hadar Aviram et al., *Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing*, 37 FORDHAM URB. L.J. 709 (2010).

it acted prudently rather than carelessly (or worse) should the exclusionary rule be blunted. The *Herring* Court rejected this demand, but it did so in the context of an interagency mistake.⁴¹ As applied to mistakes within a single agency, the good-faith standard should not be so toothless.

Finally, the fourth solution to fortify the good-faith standard could extend the previous suggestion to apply not merely to misinformation within the same agency, but to all cases of Fourth Amendment violations. Some judges and commentators have little sympathy for the exclusionary rule and would prefer to enable good-faith violations of the Constitution without incurring its costs. Even from this perspective, however, merely discarding the attenuation requirement and applying *Herring*'s expansive definition of good faith to every type of case may not be appropriate. Doing so "would leave most violations of the Fourth Amendment without a remedy [and] would create a regime in which courts would make most of their Fourth Amendment rulings in dictum if they decided Fourth Amendment questions at all."⁴² A less drastic outcome would follow from reexamining *Herring*'s emphasis on police culpability. The good faith recognized in *Leon* as warranting an exception to the exclusionary rule should mean more than the absence of bad faith. If the exception is to be applied to all unreasonable searches or seizures, the state should have to demonstrate that the false information on which an officer relied was not the product of negligence or other culpable conduct.

Under any of these approaches, and in contrast to *Robinson*, a police agency should not be permitted to escape the century-old rule⁴³ that "forbids the use of improperly obtained evidence at trial"⁴⁴ by relying on its own, negligent mistakes. In *Robinson*, not a single justice of the California Supreme Court seemed to perceive that the court was crossing a line rather than routinely applying settled doctrine. This is not a step that should have been taken blindly or lightly. Exempting ordinary negligence within a single police agency from the exclusionary

41. See 129 S. Ct. at 698.

42. Alschuler, *supra* note 21, at 463.

43. *Weeks v. United States*, 232 U.S. 383, 398 (1914); see generally Melvyn Zarr, *The Supreme Court's Long and Perhaps Unnecessary Struggle to Find a Standard of Culpability to Regulate the Federal Exclusionary Remedy for Fourth/Fourteenth Amendment Violations*, 62 ME. L. REV. 265 (2010).

44. *Herring*, 129 S. Ct. at 699.

rule goes well beyond the good faith reliance on a judicial warrant that swayed the Court in *Leon*, and it moves the law dangerously close to a total unraveling of the exclusionary rule.