

# Recent Case Report

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## Herring v. United States

(2009) \_\_ U.S. \_\_ [2009 WL 77886]

### Issue

Should evidence be suppressed as the result of an isolated incident of marginal negligence?

### Facts

A sheriff's deputy in Coffee County, Alabama, received word that Bennie Herring was presently at the department's impound yard, retrieving something from his impounded truck. As Herring was "no stranger" to local law enforcement, the deputy asked his dispatcher to see if there were any outstanding warrants in Coffee County for his arrest. The dispatcher found nothing, so she checked with neighboring Dale County and was informed there was a warrant in their database for failure to appear on a felony. The deputy then arrested Herring and, during a search incident to the arrest, he found methamphetamine and a handgun.

Meanwhile, the Dale County dispatcher started looking for the hard copy of the warrant to fax to Coffee County, but she couldn't find it. So she checked with the court clerk who said the warrant had been recalled five months earlier. She immediately notified Coffee County, but it was too late—Herring had already been arrested and searched.

Herring was indicted for possession of methamphetamine and being a felon in possession of a firearm. The trial court denied his motion to suppress the evidence on grounds that the deputy had acted in good faith reliance on the information from Dale County. The Court of Appeals agreed, and Herring appealed to the United States Supreme Court.

### Discussion

It was undisputed that Herring's arrest was unlawful because there was no warrant. Thus, the only issue was whether the evidence in his possession should have been suppressed. As noted, the lower courts ruled the evidence was admissible under the good faith rule.<sup>1</sup>

Although the Court seemed to agree, it went further and ruled that evidence can no longer be suppressed unless the "deterrence benefits" of suppression (i.e., curbing police misconduct) outweigh the "substantial social costs" of suppression. What are those costs? The principle one, said the Court, is "letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system."

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<sup>1</sup> **NOTE:** These rulings constituted an expansion of the good faith rule because, to date, it has been applied only when the person who made the error that resulted in an illegal search or seizure was someone other than an officer or an adjunct to law enforcement. In fact, with few exceptions, the courts have applied the good faith rule only when the mistake was made by a judge who issued a search or arrest warrant based on information that a higher court ruled did not constitute probable cause.

The Court then concluded that the deterrence of police misconduct cannot outweigh these substantial costs unless the officers' actions amounted to something more than an isolated incident of mere negligence. As the Court explained:

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.<sup>2</sup>

In applying these criteria to the facts, the Court ruled that the evidence in Herring's possession was not subject to suppression because the misconduct attributable to the police was insufficiently blameworthy. Said the Court, "[T]here is no evidence that errors in Dale County's system are routine or widespread. [The deputy] testified that he had never had reason to question information about a Dale County warrant, and [both dispatchers] testified that they could remember no similar miscommunication ever happening on their watch."

Consequently, the Court ruled that the drugs and firearm in Herring's possession were admissible at his trial even though his arrest was unlawful. In the words of the Court, "[W]hen 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.'"

## Comment

The Court's ruling in *Herring* represents a significant shift in the rules pertaining to search and seizure. Although it is too early to tell how broadly the courts will interpret it,<sup>3</sup> *Herring* should result in an immediate reduction in the number of cases in which evidence is suppressed for relatively minor Fourth Amendment infractions.

There is, however, some uncertainty as to whether *Herring* can be applied if the misconduct was attributable to the same officer who arrested the suspect or conducted the search. This is because the error in *Herring* was made by a civilian employee of sheriff's department, not the arresting officer.<sup>4</sup> And the Court took note of this, referring to the negligence in the case as "attenuated."

Still, there is reason to believe that attenuation is not an absolute requirement. This is because the Court repeatedly emphasized that the propriety of suppression depends on the blameworthiness of the transgression, not the identity of the transgressor. Thus, the Court pointed out that it has "never applied the [exclusionary] rule to exclude evidence obtained in violation of the Fourth Amendment where the police conduct was no more

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<sup>2</sup> ALSO SEE *United States v. Leon* (1984) 468 U.S. 897, 911 ["[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus [of applying the exclusionary rule]."]; *Illinois v. Krull* (1987) 480 U.S. 340, 348-49 ["[E]vidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."].

<sup>3</sup> See *US v. Farias-Gonzalez* (11C 2009) \_\_ F3 \_\_ [2009 WL 232328] ["[As the result of *Herring* [w]e now apply the cost-benefit balancing test to the case before us."].

<sup>4</sup> NOTE: Although it was possible that the error had been made by a judge or clerk in Dale County who failed to notify the sheriff's department that the warrant had been recalled, the Court assumed that the arrest was the result of a "negligent bookkeeping error" someone with the Dale County Sheriff's Department.

intentional or culpable than this.” Moreover, in its most expressive clarification of its new rule, the Court focused entirely on the officers’ culpability and ignored attenuation. “To trigger the exclusionary rule,” said the Court, “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.”<sup>5</sup> POV

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<sup>5</sup> ALSO SEE *United States v. Knights* (2001) 534 U.S. 112, 117 [Court noted that when it upholds a particular type of search it does not necessarily mean that any search that is “not like it” is unlawful].