SUPREME COURT COPY

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February 23, 2009

Honorable Frederick Ohlrich
Court Administrator and Clerk of the Supreme Court
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102-3600

Re: People v. Paul Eugene Robinson
Cal Supreme Court dock. no. S158528
3rd Crim. App. no. C044703
Sacramento County no. 00F06871

Dear Mr. Ohlrich:

On February 11, 2009, the Court ordered the parties in this case to file simultaneous letter-briefs, no later than February 25, 2009, on the impact of a recent United States Supreme Court decision.

Therefore, on behalf of appellant Paul Eugene Robinson, please convey the following to the Court:

The Issue

This Court asked for supplemental briefing on the impact, if any, of the United States Supreme Court's recent decision in Herring v. United States (2009) ___ U.S. ___ [129 S.CT. 695], to the third issue granted review in this case; specifically,

> "whether the exclusionary rule applies to blood samples mistakenly collected from defendant Robinson by law enforcement for inclusion in our state DNA data base?"

Appellant's Conclusion

For purposes of what transpired in this case, where appellant's blood was drawn under the state DNA Collection Act even though appellant did not have a "qualifying" offense at that time, the five-to-four Herring decision is instructive, but does not obviate the need in this case for application of the exclusionary rule for its deterrent effect, for three reasons:

- in this case (unlike Herring), there was not a single careless error, but a cascading series of them indicative of a systemic breakdown;

- the "arrest warrant" here (i.e., the order to draw blood), was not attenuated from the "arrest" (i.e., the seizure of blood from appellant); and,

- the search in Herring was limited to the suspect's clothes and vehicle, whereas the seizure here occurred from appellant's very body.

The Facts

In Herring an Alabama investigator, Mark Anderson, saw defendant Herring (who "was no stranger to law enforcement"), retrieve something from his truck, which at the time was impounded at a Coffee County Sheriff's station. Anderson asked the county's warrant clerk, Sandy Pope, to check for any outstanding arrest warrants for Herring; Coffee County had none, so Pope called her counterpart in neighboring Dale County, Sharon Morgan, who found on the Dale County computer database what she thought was an active arrest warrant for Herring's prior failure to appear on a felony charge. (Id., at 698.)

Dale asked Morgan to fax her a copy of the warrant for confirmation, while at the same time relaying the information to Anderson; Anderson and a deputy arrested Herring as he left the impound lot. A search incident to Herring's arrest revealed methamphetamine in his pocket and a gun in his car; as a felon, he was not allowed to possess the latter. (Ibid.)

Meanwhile, when Morgan went to the Dale County files to retrieve the actual warrant to FAX to Pope, she was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier, but through some oversight information about the recall of Herring's warrant did not appear in Dale County's database. (Ibid.)

Morgan immediately called Pope, and Pope immediately contacted Anderson; no more than 10 to 15 minutes had elapsed, but by then Herring already had been arrested and the gun and drugs found. (Ibid.)

The Lower Court Rulings

In the District Court for the Middle District of Alabama Herring moved to suppress the evidence, as his arrest based on a rescinded warrant was illegal. His motion was denied as the district court found the arresting officers acted in a good faith belief that the warrant was outstanding, thus "there was 'no reason to believe that application of the exclusionary rule ... would deter in the occurrence of any future mistakes.'" (Id., at 699.)

Herring's appeal to the Eleventh Circuit was similarly unsuccessful; the Circuit court assumed that whoever failed to update the Dale County records was also a law enforcement official, but because the error was both negligent (as opposed to a deliberate or tactical choice), and also was attenuated from the arrest, the Eleventh Circuit concluded there would be marginal, if any, benefit to suppressing the evidence, which therefore was admissible under the good-faith rule of United States v. Leon (1984) 468 U.S. 897 [104 S.Ct. 3405].

As this conflicted with decisions of other courts which had required the exclusion of evidence obtained through police errors, the High Court granted certiorari to resolve the conflict, and to address an issue it had left unresolved from an earlier case: whether evidence should be suppressed if police personnel (rather than police officers themselves), were responsible for the error that led to an unlawful search. (Id., at 699, 701.)

The Supreme Court then affirmed the Eleventh Circuit. (Id., at 699.)

The High Court's Analysis,
And Holding

Although the arresting officers did not know the warrant had been recalled, everyone agreed this nevertheless was a Fourth Amendment violation. (United States v. Herring, *supra*, 129 S.Ct. at 698 ["The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment ...."], and 699 ["We accept the parties' assumption that there was a Fourth Amendment violation"].)

And so the question the High Court addressed was, if an officer reasonably believes he has a right to search, but that belief turns out to be wrong because of a negligent error by another police employee, is suppression an automatic consequence of the violation? (Id., at 698.)

The Court began by noting that the exclusionary rule is a creature of decisional law, "and that this judicially created rule 'is designed to safeguard Fourth Amendment rights generally through its deterrent effect. [Citation].'" (Id., at 699.) Thus it "is not an individual right and applies only where it '"result[s] in appreciable deterrence."'" (Id., at 700, quoting United States v. Leon, *supra*, 468 U.S. at 909.)

Accordingly, the Court reaffirmed that suppression is not automatically required for Fourth Amendment violations. (Id., at 698, 700.) Instead, it turns on the culpability of the police, and the potential for exclusion as a remedy to deter future negligent conduct by police. (Id., at 698, 700 ["we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future"].)

And finally, it warned that even where the exclusionary rule could provide some "incremental deterrent," that possible benefit must be weighed against its "substantial social costs," which the High Court defined as "letting guilty and possibly dangerous defendants go free," a concept it deemed offensive to "basic concepts of the criminal justice system." (Id, at 700-701, citing United States v. Leon, *supra*, 468 U.S. at 908.)

Notwithstanding the Decision In **Herring**, The Exclusionary Rule Remains The Remedy To Apply In This Case

For the following three reasons the decision in Herring does not bar application of the exclusionary rule as the remedy to apply to the police personnel errors that occurred in this case.

1. A Consideration of the Actions Of All Who Were Involved Reflects Multiple Errors Indicative Of A System-Wide Breakdown

In Herring the High Court noted that Leon requires a court consider the actions of all the police officers involved, and that "It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officer who originally obtained it or who provided information material to the probable-cause determination." (Id., at 699-700, quoting United States v. Leon, *supra*, 468 U.S. at 923, fn. 24.)

After conducting this analysis the Court concluded there had been only one error -- Dale County's failure to update its computer database to reflect the recall of the arrest warrant -- but that the Coffee County officers did nothing improper and that the error was noticed as quickly as it was because Coffee County had requested a faxed confirmation of the warrant. (Id., at 700.)

That this single error was negligent, but not reckless or deliberate, the High Court found "crucial to our holding that this error is not enough by itself to require 'the extreme sanction of exclusion.'" (Ibid.)

For "the abuses that gave rise to the exclusionary rule featured conduct that was patently unconstitutional." (Id., at 702.) On the other hand, "[a]n 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." (Ibid.; emphasis added.)

And so in the case before it the High Court refused to apply the exclusionary rule, determining that the single error (by Dale County), did not rise to the level that required it. (Ibid.)

But it did repeat that, "as laid out in our cases, the exclusionary rules serves to deter deliberate, **reckless or grossly negligent conduct**, or in some circumstances **recurring or systemic negligence**." (Ibid.)

By contrast, in this case there were a series of errors. Some were caught at various "checkpoint" levels, but others were not, reflecting not only recurrent negligence in the system, but also reckless and grossly negligent conduct.

As was explained in greater detail in appellant's Opening Brief on the Merits, at pages 62-65, the following errors occurred in this case:

- The Department of Justice initially made an inadequate presentation of the new DNA collection law to various law enforcement agencies;

- The deputies at the Sacramento County jail responsible for implementing the collection program were not given clear instructions summarizing who "qualified" for collection, but instead were given only a copy of the Assembly Bill (and failed to read all of it);

- Not all the record clerks tasked with identifying "qualifying" inmates were required to, or did, attend the meeting explaining the collection statute;

- As a result, despite subsequent *ad hoc* training of those clerks, it remained unclear whether all the staff dealing with collection samples received any training;

- They were not told that misdemeanor convictions did not qualify for collection (which was true at the time of the 1999 blood draw in this case);

- For months thereafter personnel at the jail were not told that juvenile adjudications also did not qualify for collection;

- They were told, however, to focus on qualifying **charges** in an inmate's criminal history, even if that included the offense for which the inmate currently was awaiting trial -- and which he had not yet been convicted of.

- 'Borderline chaos" accompanied the implementation of the collection act;

- Appellant was improperly deemed qualified for blood collection based on a misdemeanor offense;

- When this sample was verified by one of the Department of Justice's satellite crime labs, a staffer realized appellant's misdemeanor conviction was not a qualifying offense, but then found a **charge** of an offense which (had it been an adult felony conviction), would have been a qualifying offense, and therefore re-qualified this blood sample;

- But this charge had resulted in a juvenile adjudication only, thus did not "qualify" appellant either.

Because the unlawful seizure in this case stemmed from what clearly was recurring negligence approaching reckless or grossly negligent conduct (or to put it another way, "recurring or systemic negligence"), the Supreme Court's decision in Herring does not bar application of the exclusionary rule to the facts of this case, as the behavior of police personnel or police adjuncts (as opposed to police officers), is far more egregious here than it was in Herring. (*See*, United States v. Herring, *supra*, 129 S.Ct. at 702.)

In Herring the majority did "not suggest that all recordkeeping errors by the police are immune from the exclusionary rule" (id., 129 S.Ct. at 703), and it "did not quarrel with Justice Ginsburg's claim [in dissent] that 'liability for negligence ... creates an incentive to act with greater care....'" (Id., at 702, fn. 4.) But it concluded that in the case before it "the conduct at issue was not so objectively culpable as to require exclusion" (id., at 703), and that "exclusion is not worth the cost," as the error was minimal and limited (id., at 702, fn. 4), and there was "no evidence that errors in Dale County's system are routine or widespread." (Id., at 704.)

The Court cautioned, however, that "**If the police had 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." (Id., at 703; emphasis added.)

Thus, in situations where, as here, ongoing and systemic negligence leads to errors that cause a Fourth Amendment violation, exclusion retains its deterrent effect.

The exclusionary rule therefore should be applied in this case, for as the Opening Brief noted (at page 61), its application "will have the deterrent effect of preventing the kind of sloppy implementation of criminal procedures" that occurred here, and "will force police departments to act more responsibly in the future, when departmental personnel must learn new criminal procedures, and then train and supervise departmental 'adjuncts' in carrying out those procedures."

2. Attenuation Of the Arrest Warrant From the Arrest

Although the High Court's opinion mentions this point only in passing, it does state that "the error was the result of isolated negligence **attenuated from the arrest**," and that "in these circumstances the jury should not be barred from considering all the evidence." (Id., at 698; emphasis added.)

And so to the extent the High Court has considered as a factor whether a police personnel error directly led to an arrest (or a search, or a seizure), that factor also does not bar the exclusionary rule in this case.

For in Herring the recalled arrest warrant was from a county other than the county in which the defendant was arrested, and he was not punished for the offense for which that arrest warrant issued (a failure to appear), but instead was convicted of possession offenses stemming from his arrest itself. (Id., 129 S.Ct. at 699.)

Thus the negligently issued arrest warrant was wholly attenuated from the defendant's subsequent convictions.

By contrast, in this case the negligently issued form requiring that a blood sample be collected from appellant (which stands in the place of an arrest or a search warrant), is the sole reason blood was collected from appellant; without that form, Deputy Ortiz and the jail nurse would have had no color of law under which to draw that blood sample.

That sample, in turn, was developed into a DNA profile, uploaded into the state database, and resulted in a "cold hit" to the unsolved Deborah L. case; thus it led directly to appellant being arrested for that offense and to the unsolved Heather O. case.

Therefore the negligently issued collection form was not in the least attenuated from appellant's subsequent convictions.

3. The Different Seizures At Issue

Because the Herring case involved a search incident to an arrest on a recalled warrant, and because the search was limited to the defendant's clothing and the vehicle he was leaving in (id., at 698), the High Court had no reason to address whether its decision would have been different if a seizure of biological material from the defendant's body was at issue, rather than contraband.

But appellant brings this distinction to this Court's attention precisely because the High Court has not yet addressed whether it makes a difference if a negligent error results in a seizure of evidence from a suspect's body rather than from the suspect's "person". Appellant respectfully requests this Court bear that in mind when determining the applicability of Herring to this appeal.

Respectfully submitted,

Cara DeVito, Attorney at Law

CDV:sfb

PROOF OF SERVICE BY MAIL

State of California)
) ss.
County of Los Angeles)

I am employed in the County aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business address is PMB 834, 6520 Platt Avenue, West Hills, CA 91307-3218.

On February 23, 2009, I served the within Letter Brief (appellant Paul Eugene Robinson), on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Summerlin, Nevada, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California, and that this Proof of Service was executed at Summerlin, Nevada, on February 23, 2009.

Cara DeVito