Just A Simple Little Clerical Error?

One of the trends of the fledgling Roberts Court has been a disturbing chipping away at the protections of the Fourth Amendment. As I have written in this column many times, the Fourth Amendment protects all of us from unreasonable searches and seizures. In Herring v. United States, decided January 14, the U.S. Supreme Court, in a 5-4 decision authored by the Chief Justice himself, approved a "pass" for a police mistake that wasn't "bad" enough to warrant exclusion of improperly seized evidence. Here's what happened.

A man named Bennie Dean Herring, who was well known to law enforcement, had driven to the sheriff's department in Coffee County Alabama to get something out of his impounded truck. An investigator named Mark Anderson asked county warrant clerk Sandy Pope to see if there were any outstanding warrants for Herring's arrest. You know the drill from TV. The warrant clerk ran the computer data base. But she found nothing.

Anderson asked Pope to check with her counterpart in neighboring Dale County. The warrant clerk there found an active

arrest warrant against Herring for his failure to appear on a felony charge. That clerk faxed a copy of the warrant to Anderson who arrested Herring. Anderson then searched Herring and his car and found drugs and a gun. All of this would be perfectly fine and by the book, except that it turned out that there was a mistake about the warrant. It had been recalled, but that information didn't make it into the computer data base. So the police had no probable cause to arrest Herring, which also meant no right to do the search.

Herring moved to suppress the evidence against him on the grounds that his arrest was illegal. The lower federal courts found that the evidence did not need to be excluded because the arresting officers acted on a good faith belief about the validity of the warrant. A majority of the high court agreed that the evidence did not need to be suppressed, drawing a distinction between an inadvertent police mistake, which should not warrant exclusion of evidence, and deliberate police misconduct, which should.

Most cases in this area of law turn on a disagreement over whether a criminal defendant's Fourth Amendment rights have been violated, but not this case. The parties agreed there had been such a

violation. The disagreement in this case is about the consequence of that violation.

The Fourth Amendment itself does not contain an exclusionary rule. That rule has been created and developed by the Court through case law as a remedy and a deterrent for police misconduct. A majority of the justices in Herring believe that a “little” mistake like this one does not warrant the exclusion of evidence; that remedy should be reserved for serious police misconduct.

Chief Justice Roberts noted that exclusion of wrongly seized evidence ‘has always been our last resort, not our first impulse.’” The Chief would limit application of the exclusionary rule only to police conduct that is “sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price that is paid by the justice system.” The Chief seems to be saying that excluding tainted evidence wasn’t worth letting a guilty man go free in this case. The recordkeeping error in the case wasn’t objectively bad enough to warrant exclusion of the evidence against Herring.

Justice Ruth Bader Ginsburg wrote the lead dissent, joined by Justices Stevens, Souter, and Breyer. She looked at the facts of the

case differently from the Chief Justice—“here the officer wanted to arrest Herring and consulted the Department’s records to legitimate his predisposition.” She wrote, “in my view, the Court’s opinion underestimates the need for a forceful exclusionary rule and the gravity of record keeping errors in law enforcement.” To Ginsburg, exclusion of evidence gained in violation of a person’s constitutional rights is the only effective way to deter the police from violating the Constitution. She makes the crucial point that in this case Herring has no remedy at all for the admitted violation of his Constitutional rights. “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.” And she sees the insidiousness of uncorrected errors in computer data bases. “Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty.” Any citizen who has tried to correct erroneous information in a data base surely can understand her concern.

Justice Stephen Breyer wrote a dissent of his own, joined by Justice Souter. He noted that the Court’s own precedents have always made a distinction between errors made by court employees

and by police. He would apply the exclusionary rule when “police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation.” That was what happened in this case.

A few years ago, in the case of Hudson v. Michigan, the same 5-4 line-up of justices forgave another “trivial” Fourth Amendment violation in which police busted into a man’s house without first knocking and then announcing their presence, as the law requires them to do. The police found guns and drugs in that case, too. But majority opinion author Antonin Scalia found exclusion of the unconstitutionally seized evidence too drastic, and suggested that for his remedy, Hudson could always go sue the police in civil court. Little chance of that, Justice Breyer retorted.

I find disturbing the notion that there is somehow a “weighting” of Fourth Amendment violations, and that it’s ok just to ignore the “little” ones.