

ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Case No. 2010-1315

Plaintiff-Appellant,

On Appeal from the
Lucas County Court
of Appeals, Sixth
Appellate District

-vs-

DENNIS GOULD,

Court of Appeals

Defendant-Appellee.

Case No. L-08-1383

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTING
ATTORNEY RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLANT
STATE OF OHIO**

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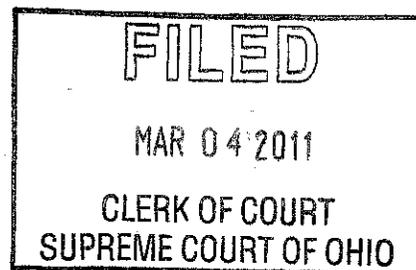


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INTRODUCTION

This case tests the extent to which the exclusionary rule under the Fourth Amendment of the United States Constitution requires suppression of evidence. In *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695, the United States Supreme Court reiterated that “[t]he 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.” *Id.* at 700, citing *Illinois v. Gates* (1983), 462 U.S. 213, 223. “Indeed, exclusion ‘has always been our last resort, not our first impulse[.]’” *Herring*, 129 S.Ct. at 700, quoting *Hudson v. Michigan* (2006), 547 U.S. 586, 591.

Herring further held that courts may apply the federal exclusionary rule only when the rule’s deterrence rationale outweighs the substantial societal costs of excluding evidence of the defendant’s guilt. In conducting this balancing test, a Fourth Amendment violation that results from mere negligence on the part of the police is not enough to justify suppression. Rather, in order for the exclusionary rule to achieve any meaningful deterrence, the defendant must show that the police engaged in “deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systemic negligence.” *Herring*, 129 S.Ct. at 702.

Herring is a landmark case and represents a substantial shift in how courts are to apply the federal exclusionary rule. The central tenet of *Herring*—*i.e.* that any deterrence benefits of exclusion must outweigh the costs of excluding relevant evidence of guilt—applies in all search cases, including those in which the police rely on an exception to the warrant requirement.

Although *Herring* has been on the books now for over two years, as of the writing of this brief, this Amicus’s research has found only eight Ohio appellate cases that have cited *Herring*. The Sixth District in this case did not mention *Herring* and improperly treated the question of whether there was a Fourth Amendment violation as the beginning and ending point of its exclusionary-rule analysis. Even if there was a Fourth Amendment violation (a point this

Amicus does not concede), the police's conduct was at worst negligent. So whatever minimal deterrence excluding the evidence would achieve, it comes nowhere near outweighing the costs of depriving the factfinder of highly relevant evidence of defendant raping a child and committing other child-oriented sex crimes. The Sixth District's opinion simply does not withstand scrutiny under *Herring*.

Amicus curiae Franklin County Prosecutor Ron O'Brien respectfully requests that this Court reverse the Sixth District's judgment and hold that lower courts must adhere to *Herring* in applying the federal exclusionary rule.

STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecuting Attorney prosecutes thousands of felony cases every year and routinely defends against motions seeking to suppress evidence under the federal exclusionary rule. Because the exclusionary rule exacts a "costly toll upon truth-seeking and law enforcement objectives," *Pennsylvania Bd. of Probation and Parole v. Scott* (1998), 524 U.S. 357, 364, current Franklin County Prosecutor Ron O'Brien has a strong interest in assuring that courts do not improperly expand the scope of the exclusionary rule. In the interest of aiding this Court's review of this appeal, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of Plaintiff-Appellant State of Ohio.

STATEMENT OF THE FACTS

Amicus Curiae adopts by reference the procedural and factual histories of the case contained in Plaintiff-Appellant State of Ohio's brief.

ARGUMENT

Proposition of Law: The federal exclusionary rule will only be applied to suppress evidence when the Fourth Amendment violation is the result of deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights or involves circumstances of recurring or systemic negligence. *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695, followed.

In reversing the trial court's refusal to suppress evidence, the Sixth District focused only on whether the police violated the Fourth Amendment. The Court never addressed the separate and controlling question of whether the police's conduct was sufficiently culpable to justify excluding this highly relevant evidence of defendant's crimes. Because suppressing this evidence is not "worth the price paid by the justice system," *Herring*, 129 S.Ct. at 702, the Sixth District's judgment should be reversed.

I. FOR THE FEDERAL EXCLUSIONARY RULE TO APPLY, THE CULPABILITY OF THE POLICE MUST BE SUCH THAT THE RULE'S DETERRENCE RATIONALE OUTWEIGHS ITS COSTS.

A. Under *Herring*, Courts Must Weigh the Deterrence Benefits of Applying the Exclusionary Rule Against the Rule's Substantial Societal Costs.

In *Herring*, the Court surveyed its prior exclusionary-rule precedents and established "important principles that constrain application of the exclusionary rule." *Herring*, 129 S.Ct. at 700. "First, the exclusionary rule is not an individual right and applies only where it "result[s] in appreciable deterrence.'" *Herring*, 129 S.Ct. at 700, quoting *United States v. Leon* (1984), 468 U.S. 897, 909, quoting *United States v. Janis* (1976), 428 U.S. 433, 454. "[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." *Herring*, 129 S.Ct. at 700, citing *United States v. Calandra* (1974), 414 U.S. 338, 347-55, and *Stone v. Powell* (1976), 428 U.S. 465, 486.

Second, "the benefits of deterrence must outweigh the costs." *Herring*, 129 S.Ct. at 700, citing *Leon*, 468 U.S. at 910. "[T]o the extent that application of the exclusionary rule could

provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” *Herring*, 129 S.Ct. at 700, quoting *Illinois v. Krull* (1987), 480 U.S. 340, 352-53. “The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that ‘offends basic concepts of the criminal justice system.’” *Herring*, 129 S.Ct. at 701, quoting *Leon*, 468 U.S. at 908. “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” *Herring*, 129 S.Ct. at 701, quoting *Scott*, 524 U.S. at 364-65. In an earlier case, the Court observed that “[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.” *Powell*, 428 U.S. at 490.

This Court has similarly recognized that applying the exclusionary rule generates “‘substantial social costs’ in permitting the guilty to go free and the dangerous to remain at large.” *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, ¶ 12, quoting *Hudson*, 547 U.S. at 591, quoting *Leon*, 468 U.S. at 907. “Because of that “‘costly toll,’” the courts must apply the exclusionary rule cautiously and only in cases where its power to deter police misconduct outweighs its costs to the public.” *Oliver*, at ¶ 12, quoting *Hudson*, 547 U.S. at 591, quoting *Scott*, 524 U.S. at 363-65.

Indeed, these same concerns were at play 75 years ago when this Court refused to adopt any exclusionary rule at all under Section 14, Article I of the Ohio Constitution. *State v. Lindway* (1936), 131 Ohio St. 166, paragraphs four, five and six of the syllabus. In *Lindway*, which has never been overruled, this Court noted that “the people of the state ought not to be penalized by the suppression of evidence tending to prove an offense against the peace and dignity of the state to shield a criminal from deserved punishment, when the Constitution by its plain

language makes no such demand.” *Id.* at 173. This Court then offered this general criticism of the exclusionary rule:

“All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, this view appears indifferent to the direct and immediate result, viz., of making Justice inefficient, and of coddling the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.” And to bring the list more up to date we might add the terms gangster, gunman, racketeer and kidnaper.

Id. at 181 (quoting treatise).

To “bring the list more up to date” even further, one can add individuals like defendant Dennis Gould, who committed several child-victim sex crimes. While the Sixth District’s opinion did not mention the Ohio Constitution, the logic of these general observations in *Lindway* applies equally to the federal exclusionary rule.

B. Mere Negligence on the Part of the Police Does Not Justify Applying the Exclusionary Rule.

The outcome of the exclusionary rule’s cost-benefit analysis “varies with the culpability of the law enforcement conduct.” *Herring*, 129 S.Ct. at 701. Police conduct that is merely negligent will not justify excluding evidence:

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.

Id. at 702.

Even if there is *some* deterrence value to excluding evidence that is the product of police negligence, the deterrence must “be weighed against the ‘*substantial*’ social costs exacted by the

exclusionary rule[.]” Id. at 702, n. 4, quoting *Krull*, 480 U.S. at 352-53, quoting *Leon*, 468 U.S. at 907 (emphasis added). In other words, “when police mistakes are the result of negligence,” “rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not ‘pay its way.’” *Herring*, 129 S.Ct. at 704, quoting *Leon*, 468 U.S. at 907-08. “In such a case, the criminal should not “go free because the constable has blundered.” *Herring*, 129 S.Ct. at 704, quoting *People v. Dafore* (1926), 242 N.Y. 13, 21.

C. *Herring’s* Balancing Test Applies in All Search Cases, Including When the Police Rely on an Exception to the Warrant Requirement.

Any argument that the balancing test in *Herring* does not apply when the police rely on an exception to the warrant requirement would be without merit. Importantly, the principles animating the holding in *Herring* apply in all search cases. That is to say, the rationale for the exclusionary rule is *always* to deter police misconduct, and applying the exclusionary rule *always* imposes substantial societal costs. Thus, applying the exclusionary rule should *always* be reserved for those cases in which the deterrence benefits outweigh the costs of excluding relevant evidence of guilt.

In other words, the federal exclusionary rule should have no greater application merely because the police rely on an exception to the warrant requirement. Indeed, numerous courts have applied *Herring* in the search-incident-to-arrest context. Specifically, courts have concluded that when a search of a vehicle is unconstitutional under *Arizona v. Gant* (2010), 129 S.Ct. 1710, suppression is unwarranted if the search was constitutional at the time under *New York v. Belton* (1981), 453 U.S. 454. See, e.g., *United States v. Buford* (C.A. 6, 2011), ___ F.3d ___, ___ - ___; *United States v. Davis* (C.A. 11, 2010), 598 F.3d 1259, 1265-68, cert. granted, (2010), 131 S.Ct. 502; *United States v. McCane* (C.A. 10, 2009), 573 F.3d 1037, 1042-45; *State v. Dearborn* (Wisc., 2010), 327 Wis.2d 252, 2010-WI-84, ¶¶ 35-49; *State v. Baker* (Utah, 2010),

229 P.3d 650, 2010-UT-18, ¶¶ 35-39; but see, *United States v. Gonzalez* (C.A. 9, 2009), 578 F.3d 1130, 1132-33.

In another case, the Ninth Circuit remanded for the district court to apply *Herring* to determine whether suppression was appropriate when the police had erroneously concluded that the defendant had relinquished his expectation of privacy in a closed container. *United States v. Monghur* (C.A. 9, 2009), 576 F.3d 1008, 1013-14. It is also significant that *Herring* itself relied heavily on *Krull*. In *Krull*, the police relied on a statute that authorized warrantless searches. Although the statute was found unconstitutional, the Court held that the exclusionary rule did not apply, because the minimal deterrence benefits did not outweigh the “substantial social costs exacted by the exclusionary rule.” *Krull*, 480 U.S. at 349, quoting *Leon*, 468 U.S. at 907.

In short, *Herring* is not a fact-specific holding. True, the outcome of *Herring*’s balancing test will vary depending on the specific facts of each case. But even when the police rely on an exception to the warrant requirement, courts must still engage in the balancing test before applying the federal exclusionary rule.

II. THE COSTS OF APPLYING THE EXCLUSIONARY RULE IN THIS CASE FAR OUTWEIGH WHATEVER MINIMAL DETERRENCE BENEFITS EXCLUSION WOULD HAVE.

In reversing the trial court’s refusal to suppress the evidence obtained from the computer hard drive, the Sixth District held that defendant had not abandoned the computer and that, although the police’s seizure of the computer was constitutional, the search of the computer’s contents was unlawful. *State v. Gould*, 6th Dist. No. L-08-1383, 2010-Ohio-3437, ¶¶ 31, 33. But the Sixth District did not cite—let alone apply—*Herring*. Rather, the Court held that suppression was required merely because a Fourth Amendment violation occurred. *Id.* at ¶ 34.

This Amicus does not agree with the Sixth District’s conclusion that the police’s search of the computer violated the Fourth Amendment. But even assuming for the sake of argument

that the Sixth District was correct in this regard, the costs of excluding the evidence in this case far outweigh whatever minimal deterrence benefits exclusion would bring.

A. Excluding This Evidence Would Result in Minimal, if Any, Deterrence.

To start, one can hardly describe the police's conduct as "deliberate, reckless, or grossly negligent" or the result of "systemic negligence." *Herring*, 129 S.Ct. at 702. Defendant's mother Sharon Easterwood gave the computer to Detective Gina Lester in September 2006. *Gould*, at ¶ 8. At that time, Easterwood told Lester that defendant had given her the computer in December 2005 and that he had subsequently abandoned the computer. *Id.* at ¶¶ 9-10. A couple months later, Easterwood gave Lester defendant's cell phone number; Lester repeatedly attempted to reach defendant, but to no avail. *Id.* at ¶¶ 11-12. In December 2006, Easterwood completed a consent-to-search form. *Id.* at ¶ 12. It was only at this point that Lester submitted the computer for forensic analysis. *Id.*

In concluding that defendant had not abandoned the computer, the Sixth District relied heavily on Easterwood's testimony at the suppression hearing. Easterwood testified that she had given the computer back to defendant in June 2006. *Id.* at ¶ 23. When defendant later went "missing" in August 2006, Easterwood retrieved the computer from defendant's apartment. *Id.* at ¶¶ 25-26. Thus, unbeknownst to Lester, Easterwood had obtained the computer only a few weeks before giving it to Lester.

But despite Easterwood's suppression-hearing testimony, the fact remains that Easterwood told Lester that defendant had abandoned the computer. Relying on Easterwood's statements, Lester believed in good faith that defendant had "voluntarily discarded, left behind, or otherwise relinquished his interest" in the computer. *State v. Freeman* (1980), 64 Ohio St.2d 291, 297, quoting *United States v. Colbert* (C.A. 5, 1973), 474 F.2d 174, 176; c.f., *City of*

Maumee v. Weisner (1999), 87 Ohio St.3d 295, 300 (tips from “identified citizen informants” are considered “highly reliable”). That Lester acted in good faith is further shown by her repeated attempts to contact defendant when she learned his cell phone number, and by the fact that she obtained Easterwood’s consent to search the computer before submitting it for analysis.

The Sixth District held that Lester should have further questioned Easterwood regarding the circumstances surrounding her access to the computer. *Gould*, at ¶ 31. But even if this is so, the most that can be said is that Lester was negligent in failing to question Easterwood in this regard. Excluding the evidence obtained from the hard drive would achieve minimal deterrence.

Moreover, the United States Supreme Court’s precedents establish that suppression is not warranted when the police reasonably rely on information that later turns out to be false. In *Herring*, the Court held that the police’s negligent reliance on false information from another police agency does not justify suppression. Nor is suppression required when the police rely on false information provided by court employees. *Arizona v. Evans* (1995), 514 U.S. 1, 14-15. And, absent a “deliberate falsehood” or “reckless disregard for the truth,” when the police themselves provide false information to obtain a search warrant, not only is suppression not required, but there is no Fourth Amendment violation at all. *Franks v. Delaware* (1978), 438 U.S. 154, 171. In short, penalizing Lester for Easterwood’s error “cannot logically contribute to the deterrence of Fourth Amendment violations.” *Leon*, 468 U.S. at 921.

B. Excluding This Evidence Would Deprive the Factfinder of Highly Relevant Evidence of Defendant’s Crimes.

On the other side of the *Herring* balancing test, the costs of excluding the evidence is exceedingly heavy. The hard drive contained “pornographic videos of children, as well as photographs of appellant engaging in sexual acts with a minor child.” *Gould*, at ¶ 13.

It is always a bitter pill to swallow when a court relies on the Fourth Amendment to exclude highly-relevant evidence of a defendant's criminal conduct. But the costs of exclusion are too heavy to bear when the evidence shows the defendant committing child-oriented sexual offenses. After all, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber* (1982), 458 U.S. 747, 757. When dealing with the sexual abuse of children, "[s]tatutes and case law in Ohio, as well as the rest of the country, seek to protect and ensure the safety of children of tender years." *State v. Hensley* (1991), 59 Ohio St.3d 136, 138.

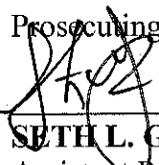
In the final analysis, the deterrence benefits of excluding this evidence are minimal at best and come nowhere near to paying for the costs of depriving the factfinder of highly relevant evidence of defendant raping a child and committing other child-oriented sex crimes.

CONCLUSION

For the foregoing reasons, Amicus Curiae Franklin County Prosecutor Ron O'Brien respectfully requests that this Court reverse the judgment of the Sixth District.

Respectfully submitted,

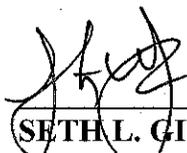
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day, March 4, 2011, to Jeremy J. Masters, Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for Defendant-Appellee; and Evy Jarrett, Assistant Prosecuting Attorney, Lucas County Courthouse, Toledo, Ohio 43624, counsel for Plaintiff-Appellant.



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