ORIGINAL

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | * | Case No. 2010-1315 |
| Plaintiff-Appellant, | * | On appeal from the Lucas County Court of Appeals, Sixth Appellate District |
| -vs- | * | |
| DENNIS GOULD, | * | |
| Defendant-Appellee. | * | Court of Appeals Case No. L-08-1383 |
| | * | |

# MERIT BRIEF OF PLAINTIFF-APPELLANT


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## INTRODUCTION

The crimes involved in this case are serious and predatory, and the evidence of appellee's guilt is incontrovertible. Appellee photographed himself committing acts of rape and gross sexual imposition on a seven-year-old-girl who appeared to be intoxicated. He stored those images, along with other pornographic images of children, on a computer hard drive. Appellee's mother voluntarily and of her own initiative took the hard drive to Toledo police.

Evidence obtained from the hard drive was central to appellee's convictions of numerous sexually oriented offenses, including rape and gross sexual imposition, as well as charges of pandering sexually oriented materials and the illegal use of a minor in nudity oriented material. On appeal, the Sixth Appellate District reversed, reasoning that the search of the hard drive was improper. The Sixth District took issue with the trial court's finding that the hard drive had been abandoned, and further held that the detective's subjective belief that the hard drive had been abandoned was not supported by the "objective facts" or by the testimony of appellee's mother at the suppression hearing. As a consequence, the Court held that the evidence obtained from the hard drive should have been excluded at trial. See *State v. Gould*, 6th Dist. No. L-08-1383, 2010-Ohio-3437, ¶34.

The Sixth District's reasoning and its automatic application of the exclusionary rule failed to comply with the recent decision of *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496. In *Herring,* the Supreme Court reinforced earlier holdings that suppression is not an automatic right arising out of a violation of

the Fourth Amendment. *Herring* also noted that the exclusionary rule may be applied only when the conduct of law enforcement officials is deliberate, reckless, or grossly negligent or involved circumstances of recurring or systemic negligence. Finally, *Herring* provided that the exclusionary rule may be applied only when the deterrent value of application outweighs the social cost.

Here, the trial court found that the police detective "reasonably could have believed that the defendant had abandoned" the hard drive, a finding that suggests no culpability whatsoever on the part of the police officer. Although reversing the trial court, the Sixth District merely found that the detective was mistaken in her conclusion, based on the testimony and the "objective facts" in the record. However, the Sixth District did not find that the detective's mistaken belief was "deliberate, reckless, or grossly negligent," the threshold requirement for application of the exclusionary rule. Additionally, after finding that the search of the hard drive was unconstitutional, the Sixth District held that the evidence from the hard drive should have been suppressed, without giving any consideration to the social cost of applying the exclusionary rule in this case. The State therefore seeks reversal of the Sixth District's decision as contrary to the requirements imposed by *Herring.*

## STATEMENT OF THE CASE

On June 12, 2007, appellee was indicted on two counts of rape, a single count of gross sexual imposition, six counts of pandering sexually oriented matter involving a minor, and five counts of illegal use of a minor in nudity oriented material or performance.

Before trial, appellee moved to suppress evidence of materials discovered on his computer hard drive, including a photograph showing his face while he performed oral sex on a seven-year-old girl. After an evidentiary hearing, the trial court found that appellee had abandoned the hard drive, and that a police detective could reasonably have believed that appellee abandoned the hard drive. The court therefore overruled the motion to suppress. Appellee was found guilty by a jury of all counts charged, and he was sentenced to prison.

On appeal, the Sixth Appellate District reversed based solely on the suppression issue, holding that there was no credible, competent evidence to support a finding of abandonment and that the objective facts of the case did not support the detective's subjective belief that the hard drive was abandoned. See *State v. Gould,* 6th Dist. No. L-08-1383, 2010-Ohio-3437. The State sought this Court's review based on the United States Supreme Court's decision in *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496.

## STATEMENT OF FACTS

At the suppression hearing, Detective Regina Lester testified that on September 6, 2006, Sharon Easterwood brought a computer hard drive to the Toledo Police Northwest District station. (Tr. Nov. 27, 2007 at p. 31.) Ms. Easterwood told Detective Lester that she believed that the hard drive might contain child pornography. (Id. at p. 32.) Ms. Easterwood said that her son (later identified as appellee's twin brother Douglas) had told her that he caught appellee viewing child pornography when appellee was living with him in another state several years earlier. Douglas suspected that the hard drive contained pornography. (Id. at pp. 6, 51.) Ms. Easterwood had not viewed the contents of the hard drive herself, and she did not know of any other witnesses who might know whether the hard drive contained evidence of criminal activity. (Id. at pp. 32, 51.)

At that first meeting in September, 2006, Detective Lester spoke with Ms. Easterwood for 30-40 minutes in an effort to verify how she had come to possess the hard drive. (Id. at 31.) Detective Lester testified that Ms. Easterwood said that the computer hard drive had been in her possession since December, 2005, that the hard drive had belonged to her son, and that he had abandoned it at her residence. Because she suspected the hard drive might contain child pornography, she no longer wanted it in her home. (Id. at p. 32.)

Detective Lester testified that Ms. Easterwood did not know appellee's whereabouts, and that Ms. Easterwood said she had very limited contact with him. At that time, in September, 2006, Ms. Easterwood did not have any contact number for him at all. (Id. at p. 32.) Ms. Easterwood said that when appellee gave her the hard

drive, he said "take care of it and don't let it out of your possession," but the statement was made nine to ten months earlier. During the intervening time, Ms. Easterwood "indicated he had made no contact to retrieve said property." Detective Lester said she asked Ms. Easterwood, "do you believe the property is abandoned, and she said, yes, I have for some time." (Id. at p. 53.)

Detective Lester booked the hard drive into the property room on September 6, 2006. (Id. at p. 35). She did not immediately request an examination of the contents of the hard drive, but had the property room retain the hard drive while she attempted to verify the information Ms. Easterwood had provided.

A month or two later, in October or November of 2006, Ms. Easterwood provided Detective Lester with appellee's current cell phone number. Detective Lester testified that she tried to reach appellee at the number several times. (Id. at p. 49.) In November, 2006, she left a message for appellee to call her. (Id. at p. 33). Appellee did not respond to the calls. (Id.). Detective Lester also tried to contact Douglas in order to obtain more information about Ms. Easterwood's statement and to verify whether the hard drive in the property room might have been used in the incident Douglas had described to Ms. Easterwood. Douglas also failed to respond to her calls. (Id. at p. 51).

Three months after she had first booked the hard drive into the property room, Detective Lester requested that Ms. Easterwood return to the station. Based on Detective Lester's understanding that Ms. Easterwood had been in possession of the hard drive for an extended period before bringing the hard drive into the station, and based on her own personal knowledge that the hard drive had been in the property room for almost three months without anyone making a claim, Detective Lester testified

that she believed the hard drive had been abandoned:

> A. Based--based on the fact that she was in possession of the property for an extended period, that she said to me based on the fact I had had said property over three months I went forward with Mrs. Easterwood signing the content [sic] form due to the fact it was in her possession last.
> ***
> Q. Detective Lester, on December 2nd, when you had Mrs. Easterwood come in and sign the consent to search, what was your belief as to the status of hard drive?
> A. There was no doubt in my mind. My belief was the hard drive had been abandoned by the Defendant.
> ***
> I had received the property in September obviously of '06. I had that property in my possession of Toledo Police Property Room for approximately three months where at any point in time we could be contacted to claim said property. No claim was made on the property, and it was my complete belief that Mrs. Easterwood had the full right to provide consent as it had been left in her possession and abandoned.

(Id. at pp. 55-57.) Ms. Easterwood signed a consent-to-search form on December 2, 2006. (Id. at p. 34). Detective Lester then requested a forensic analysis of the hard drive. (Id. at p. 41.)

Detective Lester was not able to speak with appellee until June 4, 2007, after his arrest. (Id. at p. 36.) He told her then that he had given the hard drive to his mother, but that he retrieved it from her when he moved to an apartment at 1427½ Ontario Street. He moved out of that address in July, 2006, leaving all his property, including the hard drive, behind. (Id. at pp. 38-39; 57). Detective Lester stated twice that appellee, rather than Ms. Easterwood, first told her about his move from his mother's house to the apartment on Ontario. Until Detective Lester spoke with him in June, 2007, after the hard drive had been searched, she was unaware that he had moved out of his mother's house and taken the hard drive to the new apartment. (Id. at pp. 38,

56.)

Sharon Easterwood also testified at the suppression hearing. Ms. Easterwood noted that appellee lived with her for several months beginning in January, 2006. (Id. at p. 5.) While he was living with her, he gave her a hard drive and told her "take this and keep it and don't let anybody get their hands on it." (Id. at p. 6.) She put the hard drive in a manila envelope which she put in her nightstand. (Id. at p. 6.) After she received the hard drive, appellee's twin, Douglas, told her that he had caught appellee viewing child pornography while he was living in Mississippi. (Id. at p. 6.) As a result of that disclosure, Ms. Easterwood gave the hard drive back to appellee in June, 2006, when he moved to an apartment at 1427 1/2 North Ontario. (Id. at p. 7.)

According to Ms. Easterwood, appellee lived with his brother Greg in the apartment on North Ontario for a short time. (Id. at p. 7.) Around August, 2006, appellee left Toledo abruptly, without telling anyone where he was going. (Id. at pp. 25, 26.) Appellee took his brother Greg's truck without permission when he fled from Toledo, but he left his personal property behind in the apartment. (Id. at p. 8-9, 26.) His cell phone was disconnected, and she had no way of contacting him and did not know of anyone else who had any way to contact him. (Id. at p. 26.)

Ms. Easterwood testified that appellee called her on October 10, 2006 and asked whether Greg had filed charges against him for stealing the truck. (Id. at p. 8.) When Ms. Easterwood said no, he hung up. He did not ask about the possessions he left behind. (Id. at p. 9.) Ms. Easterwood testified that she marked the date of the phone call on her calendar, and that appellee didn't call again until after his arrest. (Id. at p. 16.) No one else heard from him after he left town. (Id. at p. 9.)

Ms. Easterwood stated that Greg allowed his girlfriend to move into the Ontario Street apartment and take appellee's bedroom after his departure. (Id. at p. 10.) She knew that Greg and his girlfriend were holding a garage sale at which they were selling all appellee's possessions, so Ms. Easterwood went to the apartment and retrieved the hard drive and pictures of appellee's daughter. At the time, the hard drive was still sealed in an envelope. (Id. at p. 15, 28.)

Finally, Ms. Easterwood confirmed that at some point, appellee's mail began coming to her house. Although his cell phone had been disconnected when he left, he received a T-mobile bill at her house some time after his departure. She opened the bill, found a new cell phone number for appellee, and called Detective Lester and gave her the number. (Id. at p. 17.) Ms. Easterwood was specifically asked whether she told Detective Lester that she took the hard drive from the apartment. Ms. Easterwood admitted that she did not:

> Q. Did you tell Detective Lester that you went and got [the hard drive] from all that abandoned property that you talked about?
> A. I don't believe I did. I told her it was in my possession when I gave it to her.

(Id. at p. 28.)

Ms. Easterwood acknowledged at the hearing that when appellee went missing, she was upset because he had disappeared with Greg's truck, and because he had stolen food stamps and money from his nieces. (Id. at pp. 21-22.) However, she denied that she was motivated by anger to turn the hard drive over to police. (Id. at pp. 28, 17, 23.)

At trial, evidence was introduced of a video and a number of photographs

discovered on the computer hard drive. The video was part of known series of child pornography movies featuring a victim known as "Vicky." (Tr. September 9, 2008 at p. 275.) Other explicit photographs, recognized as known child pornography, were also recovered from the drive. (Id. at p. 279-282.)

Additionally, a number of photographs depicting the same child victim, M.S., were found on the hard drive, all taken in what appeared to be the same hotel room. The photographs showed M.S. holding an adult's penis, with ejaculate on her stomach; a man's face and a man in profile with his tongue on M.S.'s vagina; M.S. with an adult's penis in her mouth; an adult's penis touching the M.S.'s vagina; and an adult's penis penetrating the M.S.'s vagina. (Id. at pp. 258-272.) In some of the photographs, M.S. was shown holding a Jack Daniel's whiskey bottle, and her eyes were half-closed and unfocused.

The computer forensics examiner testified that he obtained a photograph of appellee and compared it to the photograph of the male performing oral sex on M.S. The examiner concluded that appellee was the male in the photograph. (Id. at p. 273.) Appellee's mother also confirmed that the man in two of the photographs was her son. (Id. at p. 233).

Russell Sherick also testified and identified M.S. as his daughter, who was seven years old at the time the photographs were taken. M.S.'s mother was appellee's former girlfriend. (Id. at p. 303.)

The manager of the Best Motel in Toledo testified that the hotel room shown in the photographs was Room 22 of his motel. (Id. at pp. 331-332.) He also identified a registration card filed under appellee's name. (Id. at p. 330.)

A recording of Detective Lester's interview of appellee was also played at the trial. During the interview, appellee stated that his mother had given him back the hard drive when he moved into the apartment on Ontario Street, and that he left the hard drive in a closet in the apartment he shared with his brother when he left town in July. (Id. at pp. 379.) He acknowledged that a registration card from the Best Motel appeared to have his signature on it, and he identified the child victim as the daughter of his former girlfriend. (Id. at p. 370.)

Appellee also claimed in the interview that he didn't know there was anything on the hard drive and that he couldn't get the hard drive to work. Later he maintained that he could not get the drive to work properly, and that he couldn't remember what he copied to the drive. Eventually he acknowledged that he had pictures of his girlfriend's children on the drive.

## ARGUMENT

**Proposition of Law: The exclusionary rule may only be applied to conduct by law enforcement officers that is deliberate, reckless, or grossly negligent, or where the conduct is part of recurring or systemic negligence. Evidence may not be excluded unless the conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496, explained.**

In *Herring*, the Supreme Court emphasized its previous holdings that the exclusionary rule "is not an individual right." *Herring*, supra, 129 S.Ct. at 700. See also *Stone v. Powell* (1976), 428 U.S. 465, 495, 96 S.Ct. 3037, 49 L.Ed.2d 1067 at f.n. 37. The exclusionary rule is not intended to operate to the benefit of the individual or to "cure the invasion of the defendant's rights which he has already suffered." *United States v. Leon* (1984), 468 U.S. 897, 906, 104 S.Ct. 3405; 82 L.Ed. 2d 677. Rather, the exclusionary rule is a "judicially created remedy." Id. See also *Herring,* supra, 129 S.Ct. at 699; *Illinois v. Krull* (1987), 480 U.S. 340, 347, 107 S.Ct. 1160, 94 L.Ed.2d 364; and *Stone,* supra, 428 U.S. at 495, f.n. 37. The purpose of the rule is to prevent future violations of the Fourth Amendment through the rule's "general deterrent effect." *Arizona v. Evans* (2005), 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L.Ed. 2d 34. In short, the exclusionary rule "is calculated to prevent, not to repair." *United States v. Calandra* (1974), 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561, quoting *Elkins v. United States* (1960), 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669.

As a consequence, the exclusionary rule "applies only where it results in appreciable deterrence." *Herring*, supra, 129 S.Ct. at 700, quoting *Leon,* supra, 468 U.S. at 906. See also *Hudson v. Michigan* (2006), 547 U.S. 586, 594, 126 S. Ct. 2159,

165 L. Ed. 2d 56. *Herring* was thus consistent with earlier decisions in which the Supreme Court warned against "indiscriminate" or "reflexive" application of the exclusionary rule upon a finding that the Fourth Amendment was violated. See *Evans*, supra, 514 U. S. at 13; and *Leon*, supra, 468 U.S. at 908.

*Herring* emphasized 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., 129 S.Ct. at 700. In fact, the presumption is against exclusion, which "'has always been our last resort, not our first impulse.'" Id., quoting *Hudson v. Michigan,* 547 U.S. at 591. In contrast with an automatic application of the exclusionary rule upon a finding of a Fourth Amendment violation, *Herring* permits application of the exclusionary rule only when the police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, supra, 129 S.Ct., at 702.

In this case, the Sixth District erred by automatically applying the exclusionary rule after finding that the detective was mistaken in her belief that the hard drive was abandoned. The Sixth District neither examined the level of culpability of the officer, nor weighed the deterrent value of exclusion against the price of exclusion. Such automatic application of the rule runs contrary to both *Herring* and the Supreme Court's prior precedents.

## I. The exclusionary rule is intended to deter misconduct by law enforcement officials and has no application to misconduct by private citizens.

"In evaluating the need for a deterrent sanction, one must first identify those who are to be deterred." *United States v. Janis* (1976), 428 U.S. 433, 448, 96 S. Ct. 3021, 49 L. Ed. 2d 1046. *Herring* unambiguously answered the question of precisely who may be deterred by application of the exclusionary rule. Consistent with the Court's prior precedents, *Herring* held that application of the exclusionary rule "turns on the culpability of the police and the potential of the exclusion to deter wrongful police conduct." *Herring*, supra, 129 S.Ct. at 698.

*Herring* began its analysis by summarizing several prior precedents in which application of the exclusionary rule would not have deterred police misconduct. First, *Herring* noted that *Leon* held that the exclusionary rule does not apply if police acted "in objectively reasonable reliance" on a subsequently invalidated search warrant. *Herring*, supra, 129 S.Ct. at 701. As *Leon* noted, '[p]enalizing the officer for the [court's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, supra, 468 U.S. at 920, 921. Similarly, *Krull* held that suppression was not required when a warrantless administrative search was performed in good-faith reliance on a statute later declared to be unconstitutional. *Herring,* supra, 129 S.Ct. at 701.

Finally, *Herring* noted that *Evans* held that a judicial employee's mistake would not justify application of the exclusion rule. *Evans* reasoned that the exclusionary rule was established to deter police misconduct, not the conduct of court employees, that there was no evidence that court employees were likely to "ignore or subvert the Fourth

Amendment," and that there was no basis for believing application of the exclusionary rule would deter the conduct at issue. "[C]ourt clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime," so that "they have no stake in the outcome of particular criminal prosecutions." Id., 514 U.S. at 14-15.

Consistent with these precedents, *Herring* makes clear that exclusion is not appropriate when the only misconduct is committed by parties other than law enforcement personnel. *Herring* and its antecedents thus preclude application of the exclusionary rule as a result of actions or misconduct by Ms. Easterwood. For example, any suspicion that she took the hard drive from the apartment and provided it to the police because she was angry with appellee is not a sufficient basis for application of the exclusionary rule. As recently noted by the Twelfth Appellate District, "[t]he exclusionary rule was not designed to exclude evidence of misconduct by an actor outside of law enforcement." *State v. Baughman*, 12th Dist. Nos. CA2010-08-069, CA2010-08-070, 2011-Ohio-162, ¶31. Even when police act upon a private citizen's representations, and even when those representations are later determined to be deliberately false, evidence gathered as a result of the police action may not be excluded, because the rule "[e]xcluding the evidence can in no way affect [the officer's] future conduct unless it is to make him less willing to do his duty." Id., ¶32, quoting *Leon*, supra, 468 U.S. at 919-20.

The holding in *Baughman* is consistent with the body of case law holding that the Fourth Amendment provides no protection whatsoever against "a search or seizure,

even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen* (1983), 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85, quoting *Walter v. United States* (1980), 447 U.S. 649, 662, 100 S.Ct. 2395, 65 L.Ed.2d 410 (Blackmun, J., dissenting). See also *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 487-488, 91 S.Ct. 2022, 29 L.Ed.2d 564; and *Burdeau v. McDowell* (1921), 256 U.S. 465, 476, 41 S.Ct. 574, 65 L.Ed. 1048. Accord *Colorado v. Connelly* (1986), 479 U.S. 157, 166, 107 S.Ct. 515, 93 L.Ed. 2d 473 ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.").

The policy of not holding private citizens to the same standard as law enforcement officials is a sound one. Application of the Fourth Amendment to public officials serves to discourage official misconduct by removing incentives to disregard constitutional rights. The same concerns do not exist with respect to private citizens. As the Supreme Court has recognized, "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Coolidge*, supra, 403 U.S. at p. 488.

*Herring* and the Supreme Court's prior precedents thus compel the conclusion that even if Mrs. Easterwood acted improperly in taking the hard drive, and even if she intentionally or unintentionally misrepresented the circumstances leading to her possession of the hard drive, her actions alone cannot be used as a basis for application of the exclusionary rule. Rather, there has to be some misconduct by the

police in order for the exclusionary rule to be applied, and *Herring* made clear that the misconduct in question must more than simple negligence.

## II. The exclusionary rule may be applied only to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."

Consistent with earlier precedents, *Herring* emphasized that the degree of culpability of conduct was the key factor in determining the value of the exclusionary rule. "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." Id., 129 S.Ct. at 701. Accord *Leon*, supra, 468 U.S. at 911 ("an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of whether the costs of the exclusionary rule outweigh its benefits).

*Herring* was noteworthy because it precluded application of the exclusionary rule even when an error was committed by law enforcement officials, as opposed to third parties, because the error did not result from misconduct that was "sufficiently deliberate" to be deterred through application of the exclusionary rule. *Herring* unambiguously held that "the exclusionary rule serves to deter **deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence**." Simple negligence, unless it is part of a recurring or systemic pattern of negligence, is insufficiently deliberate to be deterred by application of the exclusionary rule. *Herring*, supra, 129 S.Ct. at 702.

The parting between the majority and the dissent in *Herring* makes clear that omission of simple negligence from the list of deterred conduct was not inadvertent.

The dissenting opinion authored by Justice Ginsburg argues, in part, that "liability for negligence . . . creates an incentive to act with greater care." The rejection of this view by the majority is a clear indication that *Herring* stands for the proposition that simple negligence, even simple negligence committed by police officers, is insufficiently deliberate to be deterred by application of the exclusionary rule. *Herring,* supra, 129 S.Ct. at f.n. 4.

*Herring's* rationale applies even when the error was apparent to the officer acting on the error. See, e.g., *United States v. Hamilton* (C.A. 8, 2010), 591 F.3d 1017, 1029 (the inadvertent deletion of the list of items to be seized from the face of a search warrant "cannot be construed as more than nonrecurring negligence" that would be required to suppress evidence seized during the search, even if the warrant failed on its face to meet the particularity required by the Fourth Amendment).

In this case, the trial court found that Detective Lester "reasonably could have believed" that appellee abandoned any expectation of privacy in the hard drive. *Gould,* supra, at ¶31. That finding indicates that the trial court, which had the benefit of actually hearing and seeing the witnesses testify, found no culpability on the part of Detective Lester. The trial court's finding is, of course, entitled to deference. See *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277.

Although reversing the trial court, the Sixth District fell short of actually assessing any supposed culpability on Detective Lester's part. Based on its review of the transcript of the suppression hearing, the Court of Appeals determined that "Detective Lester's subjective belief that the hard drive had been abandoned was unsupported by

the objective facts and Easterwood's testimony." *Gould*, supra, ¶31. That assessment amounts to a finding that Detective Lester was mistaken, but it does not amount to a finding that Detective Lester's actions were "deliberate, reckless, or grossly negligent" or part of "recurring or systemic negligence." *Herring* does not permit application of the exclusionary rule when neither the trial court nor the Court of Appeals made an explicit finding that the officer acted with the requisite level of culpability. Further, an examination of the circumstances of this case reveals no support for the conclusion that Detective Lester acted with the requisite level of culpability.

**III. *Herring* does not permit a finding that an officer's belief, based on representations of an identified, private citizen and coupled with efforts to verify those representations, is "deliberate, reckless, or grossly negligent conduct," or evidence of "recurring or systemic negligence."**

Detective Lester testified that in September, 2006, she interviewed Ms. Easterwood for thirty to forty minutes when she first brought the hard drive into the police station. She testified that she believed the hard drive had been in Ms. Easterwood's possession since December, 2005. Detective Lester accepted the hard drive and booked it into the property room, but she did not immediately request a search of its contents. Rather, she allowed the drive to remain in the property room for the next three months while she attempted to contact appellee's brother Douglas, the one individual who reportedly had first-hand knowledge of appellee's possession of child pornography. Detective Lester also made attempts to call appellee at the number furnished by Ms. Easterwood. She did not succeed in either effort. Ms. Easterwood knew of no other individuals who knew about appellee's use or possession of child pornography, and Detective Lester was unable to verify whether the incident involving

child pornography in Mississippi involved the same hard drive.

The Sixth District's decision turned on its view of "the objective facts and Easterwood's testimony." However, to the extent Ms. Easterwood's testimony differed from the information she reported to Detective Lester in 2006, those differences do not suggest that Detective Lester acted with any degree of culpability. Rather, those differences at most suggest a mistake of fact based on the representations of a third party. Such mistakes should not be used as the basis for suppression of evidence, particularly when steps were taken to verify the accuracy of the representations.

**Reliance upon third parties' representations.** Courts have occasionally observed that mistakes of law "can be deterred more readily than mistakes of fact" because knowledge of the law is within the control of the officer. Further, penalizing officers for legal mistakes provides an incentive "for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *United States v. Cha* (C.A. 9, 2010), 597 F.3d 995. In contrast, Fourth Amendment law frequently forgives an officer's mistaken belief in a fact,[1] particularly when that belief is based on a third party's representations.

For example, consent to search cases are often premised on representations by third parties. When the third party has the apparent authority to consent, the Supreme Court has not imposed an additional requirement that police officers confirm that the

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[1]The issue of whether actions constitute abandonment of property is a factual determination. See *State v. Freeman*, 64 Ohio St.2d 291, 297, 414 N.E.2d 1044 ("The issue is, therefore, factual as to whether the appellant's action herein constitutes abandonment of the suitcases."). Accord *United States v. Nordling* (C.A. 9, 1986), 804 F.2d 1466, 1469; *United States v. Ramos* (C.A. 11, 1994), 12 F.3d 1019, 1022; *United States v. Austin* (C.A. 10, 1995), 66 F.3d 1115, 1118.

party has actual authority. See, e.g., *Illinois v. Rodriguez* (1990), 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148. Nor must officers ask every possible question of the consenting individual in order to verify their conclusion that the individual has authority to consent. When officers testified that an apartment manager took them to a "vacant" apartment, reliance on his actions and their conversations was objectively reasonable, even when the manager had the rent ledger in front of him and knew that the apartment was rented to the defendant, who was current with his rent. *United States v. Green* (S.D. Oh., 2000), 102 F. Supp.2d 904, 911. Accord *United States v. Sledge* (C.A. 9, 1981), 650 F.2d 1075, 1079 (landlord's conclusion that tenants had moved out of an apartment based on their failure to respond to his notes and a lack of furnishings could be relied upon by law enforcement officers, when that conclusion was also consistent with the officers' own observations); and *United* States *v. Brazel* (C.A. 11, 1997), 102 F.3d 1120, 1148-1149 (landlord's conclusion that apartment was vacant could be relied upon by officer, even when landlord later testified that he could not remember why he had thought so at the time).

In this case, certain factors enhanced Ms. Easterwood's apparent reliability. First, Ms. Easterwood was an identified private citizen reporting a suspected crime, and Ohio case law permits officers to assume the reliability of an identified private individual who makes a report to police. See *State v. Otte* (1996), 74 Ohio St.3d 555, 559, 660 N.E.2d 711. Of course, such reports are occasionally revealed to be false or incomplete, but any review of the reasonableness of an officer's conduct must take into account the normal reliability afforded a private citizen. See *State v. Baughman*, supra,

¶19.

Second, Detective Lester was entitled to take into account Ms. Easterwood's relationship with appellee. A family relationship, particularly when coupled with some evidence of physical control over property, supports reliance on the individual, and may preclude the need for further inquiry. See, e.g., *United States v. Kimoana* (C.A. 10, ), 383 F.3d 1215, 1223-24 (officers knew that individual was the cousin of the registered occupant of a hotel room, had stayed overnight in the room and had a key); and *United States v. Romero* (D.N.M. Aug. 20, 2010), 2010 U.S. Dist. LEXIS 91598 at [*51-52] (noting that certain relationships between third parties and defendant give rise to a presumption that the third party has control of property for most purposes, and that included among such relationships are the parent-child relationship, even when the child is an adult).

Third, Detective Lester was entitled to consider her own observations during the lapse of time from September 6 until the consent-to-search form was executed on December 2, 2006. When Detective Lester received a current cell phone number for appellee, she tried repeatedly but without success to contact appellee. His lack of response corroborated Ms. Easterwood's statements that he had left town and made no effort to reclaim or inquire as to the location or condition of any of his personal property.

Appellee's failure to claim property left behind, or even to inquire about the status of that property, supports Detective Lester's conclusion that the property was abandoned. See *United States v. Chandler* (C.A. 8, 1999), 197 F.3d 1198, 1201 (where defendant police officer left a duty bag in his supervisor's office after he was

called in to be suspended, and then failed to reclaim or to inquire about the bag for several months, the trial court's finding that the bag was abandoned was not clearly erroneous); *United States v. Davis* (S.D.N.Y., Oct. 10, 2008), 2008 U.S. Dist. LEXIS 86756 at [*23] (defendant abandoned a safe when he moved out of his ex-wife's apartment, leaving the safe behind and failing to return phone calls or to contact her in any other way for three months); *United States v. Potter* (E.D. Va., 1999), 71 F. Supp.2d 543, 549 (when defendant failed to pay rent on a trailer or to visit the trailer for several months, "enabling others to exercise dominion and control over the trailer," and his phone numbers and pager numbers were disconnected, defendant had no reasonable expectation that the trailer would remain secure and free of government intrusion).

Finally, in this case, as in *Herring,* the law governing the validity of affidavits supporting search warrants is instructive and requires a finding that Detective Lester did not act with the requisite degree of culpability to justify application of the exclusionary rule. *Herring*, supra, 129 S.Ct. at 703. Inaccuracies in affidavits may result either from mistakes by the officer drafting the affidavit or from incorrect information provided by third parties. Regardless of the source of the inaccuracies, more than simple negligence on the part of the police must be evident before a false statement will void a warrant. "There must be allegations of deliberate falsehood or of reckless disregard for the truth," but "[a]llegations of negligence or innocent mistake are insufficient." *Herring,* supra, 129 S.Ct. at 703, quoting *Franks v. Delaware* (1978), 438 U.S. 154, 155-156, 98 S.Ct. 2674, 57 L.Ed.2d 667. See also *State v. Waddy* (1992), 63 Ohio St.3d 424, 441,

588 N.E.2d 819; *State v. McKnight*, 107 Ohio St.3d 101, 105, 2005-Ohio-6046, 837 N.E.2d 315, ¶31; and *State v. Messer*, 12th Dist. No. CA2008-04-039, 2009-Ohio-929, ¶22.

"Reckless disregard" requires that the officer must have "serious doubts about the truth of the allegations." *McKnight*, supra, ¶31. The failure to conduct a full investigation does not meet this standard. *United States v. Dale* (C.A. D.C. 1994), 991 F.2d 819, 844 ("[I]n general, the failure to investigate fully is not evidence of an affiant's reckless disregard for the truth.") See also *United States v. Ranney* (C.A. 1, 2002), 298 F.3d 74, 78; and *United States v. Young Buffalo* (1979), 591 F.2d 506, 510, cert. denied 441 U.S. 950, 99 S.Ct. 2178, 60 L.Ed.2d 1055.

In this case, the Sixth District's worst criticism of Detective Lester's conduct amounted to no more than a claim that she failed to "obtain[] additional information" and seek a search warrant. *Gould,* supra, at ¶31. Of course, the testimony at the suppression hearing reveals that there was no apparent source of this "additional information," and Detective Lester should not be faulted for failure to pursue leads that did not exist. But even if ready sources of additional information existed, a failure to investigate fully is not proof of "serious doubts about the truth of the allegations" sufficient to void a search warrant. Any failure to conduct further investigation should likewise not be construed as proof that Detective Lester had "serious doubts about the truth" of Ms. Easterwood's statements and acted recklessly in requesting a search based on those statements.

In fact, Detective Lester's own personal knowledge corroborated Ms.

Easterwood's statements. Appellee did not respond to Detective Lester's phone calls, and he failed to claim his property for several months once it was booked into the Toledo Police property room. The State therefore does not concede that Detective Lester acted with any degree of culpability in authorizing the search. As the Supreme Court has noted, "[t]he only basis for contending that the constitutional standard could not possibly have been met here is the argument that reasonableness must be judged by the facts as they were, rather than by the facts as they were known." Such reasoning "has long since been rejected," and it should be in this case as well. *Illinois v. Rodriguez*, supra, 497 U.S. at 186, f.n. 1.

However, even assuming for the sake of argument that the search was negligent, application of the exclusionary rule is not a proper remedy in this case. The culpability in this case is minimal, when considered in relation to the social cost of allowing appellee to go free.

**IV. In this case, the benefit gained through deterrence is minimal and far outweighed by the cost of letting a guilty party go free.**

The culpability of law enforcement officials is a threshold requirement but not a guarantee of exclusion. Before application of the exclusionary rule, the benefits of deterrence must be balanced against the social cost of allowing a guilty party to go free:

> In addition, the benefits of deterrence must outweigh the costs. We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. [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. 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. [T]he rule's costly toll upon truth-seeking and law enforcement

objectives presents a high obstacle for those urging [its] application.

*Herring*, supra, 129 S.Ct. at 700-701 (quotation marks and citations omitted).

The balancing test in *Herring* is case-specific: "*Herring* requires careful consideration by district courts of whether the goal of deterring violations of the Fourth Amendment outweighs the costs to truth-seeking and law enforcement objectives in each case." *United States v. Julius* (C.A.2, 2010), 610 F.3d 60. See also *Herring*, supra, 129 S.Ct. at 711 (Breyer, J., dissenting) (describing the majority's approach as a "case-by-case, multifactored inquiry into the degree of police culpability"). This case-by-case analysis is essential to fulfill the purpose of the exclusionary rule:

> Application of the rule thus deflects the truth-finding process and often frees the guilty. The 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. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

*Stone v. Powell*, supra, 428 U.S. at 490.

Because of the unique circumstances of this case, application of the exclusionary rule is unlikely to have any deterrent effect whatsoever in the future. Toledo police had not targeted appellee for investigation and did not initiate contact with appellee's mother. Detective Lester did not entice Ms. Easterwood to bring the hard drive in by virtue of promises, nor did she coerce Ms. Easterwood's actions by means of threats.

Furthermore, Detective Lester authorized the search based on her belief that Ms.

Easterwood had possessed the hard drive for nine months, followed by the three months it was maintained in the Toledo Police Department property room, during which time appellee made no effort to claim the drive. At worst, this case involves a mistaken belief based on a third party's statements, and those statements were made after the third party initiated contact with police. The voluntary act by appellee's mother in bringing the hard drive to police is an unusual circumstance, unlikely to be repeated. The unusual nature of the case is compounded by the frustration of the detective's efforts to contact appellee, because that inability actually corroborated Ms. Easterwood's report that appellee had left town, severed contact with his family, and did not care about the disposition of his property.

In short, the unusual circumstances of the case mean that application of the exclusionary rule in this case will have limited deterrent effect in future cases. In the end, suppression of the evidence from the hard drive may serve only to make officers wary of private parties' representations. A policy that encourages a skeptical view of private parties' reports is contrary to fundamental principles of Ohio law and may ultimately undermine the potential for effective law enforcement.

On the other side of the scale, application of the exclusionary rule in this case exacts a significant social cost. This case involves not only the possession of child pornography, but also the rape and sexual abuse of a minor in the course of the creation of child pornography. Sexual crimes were indisputably committed against a seven-year-old child. Appellee's relationship with the child's mother facilitated the crimes, and the photographic evidence of those crimes indicated that the victim was intoxicated at the time. The severity and the predatory nature of the crimes--the social

cost of letting a guilty man go free--weigh heavily against suppression of the evidence.

The United States Supreme Court has observed that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber* (1982), 458 U.S. 747, 756-757, 102 S.Ct. 3348, 73 L.Ed.2d 1113, quoting *Globe Newspaper Co. v. Superior Court* (1982), 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248. See also *State v. Hensley* (1991), 59 Ohio St. 3d 136, 138, 571 N.E.2d 711 ("Statutes and case law in Ohio, as well as the rest of the country, seek to protect and ensure the safety of children of tender age.")

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber,* supra, 458 U.S. at 758. As a result, the Supreme Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." Id., 458 U.S. at 757. Despite the importance of preventing abuse, it is commonly recognized that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." See *Pennsylvania v. Ritchie* (1987), 480 U.S. 39, 60, 107 S.Ct. 989, 94 L.Ed.2d 40.

In this case, the intoxication of the victim meant that there was essentially no witness to the crime. Despite the victim's inability to act as a witness, appellee's crimes nevertheless have the potential to have a lasting and negative impact on her. Child pornography is ". . . a permanent record of a child's abuse," and its existence and

potential for dissemination represents an ongoing risk of "new injury to the child's reputation and emotional well-being." *Ashcroft v. Free Speech Coalition* (2002), 535 U.S. 234, 250, 122 S.Ct. 1389, 152 L.Ed.2d 403, citing *Ferber*, supra, 458 U.S. at 759 and n. 10.

The deterrent value of suppressing evidence in this case is slight. The social cost is tremendous. Pursuant to *Herring* and the Supreme Court's earlier precedents, the exclusionary rule should not apply to this case, and the Sixth District's decision should be reversed.

## CONCLUSION

Contrary to the requirements of *Herring*, the Sixth Appellate District failed to find the requisite degree of culpability for application of the exclusionary rule and failed to weigh the deterrent value of the rule against the social cost of its application. The principles and precedents relied upon in *Herring* offer no basis for application of the exclusionary rule in this case. The State therefore respectfully requests that the Court reverse the decision of the Sixth Appellate District and reinstate the jury's verdict and the trial court's sentence.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

## CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 7th day of March, 2011, to Jeremy J. Masters, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; and to Seth L. Gilbert, 373 South High Street, 13th Floor, Columbus, Ohio 43215.

Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

# APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | * | Case No.: 10-1315 |
| | | C.A. Case No.: L-08-1383 |
| | * | C.P. Case No.: CR07-2249 |
| Appellant, | | |
| | * | APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS, |
| -vs- | | |
| | * | SIXTH APPELLATE DISTRICT |
| DENNIS GOULD, | | |
| | * | |
| Appellee. | | |
| | * | |

**NOTICE OF APPEAL OF THE STATE OF OHIO**


JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

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FILED
JUL 28 2010
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUL 28 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant the State of Ohio hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-08-1383 on July 23, 2010.

The case raises a substantial constitutional question and a matter of public or great general interest. See S.Ct.Prac.R.II, §2(B)(iii) and (v).

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Counsel for Appellee

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 27th day of July, 2010, to Deborah Kovac Rump, 1700 Canton Ave., Ste. 2, Toledo, Ohio 43604, and to the Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Counsel for Appellee

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BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Dennis Gould

Appellant

Court of Appeals No. L-08-1383

Trial Court No. CR0200702249

**DECISION AND JUDGMENT**

Decided:

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which denied appellant's motion to suppress evidence. For the reasons set forth below, this court reverses the judgment of the trial court.

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JOURNAL ID: 4773093

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{¶ 2} On June 12, 2007, appellant was indicted on two counts of rape, both felonies of the first degree; one count of gross sexual imposition, a felony of the third degree; six counts of pandering sexually-oriented material involving a minor, one of which was a felony of the second degree, and the remainder of which were felonies of the fourth degree; and five counts of the illegal use of a minor in nudity-oriented material or performance, all of which were felonies of the fifth degree.

{¶ 3} Appellant moved to suppress all evidence obtained from a computer hard drive. Of greater relevance, the evidence sought to be excluded contained images of appellant engaging in sexual acts with a minor child. The motion to suppress was premised upon grounds that the hard drive was searched without a warrant or valid consent. On November 11, 2007, an evidentiary hearing was conducted. The trial court held that the hard drive was abandoned property and, as such, the police had a reasonable basis to believe that appellant had relinquished any expectation of privacy pertaining to it.

{¶ 4} Subsequent to the suppression ruling against appellant, the case proceeded to a jury trial. Appellant was found guilty of all charges. On September 30, 2008, appellant was sentenced to a term of imprisonment of approximately 13.5 years, followed by two concurrent life sentences for the rape convictions, and a four year term for the gross sexual imposition conviction.

{¶ 5} On appeal, appellant sets forth the following sole assignment of error:

{¶ 6} "The state's case rests entirely on evidence seized during a search of Gould's computer hard drive. Gould had originally left that drive in the possession of his

mother with instructions that she was not to give it to anyone. She agreed. Gould's mother eventually took it from Gould's apartment and turned the drive over to the police. Gould did not consent to the search of the drive, and no exigent circumstances existed for the police to search it without warrant. The state argued it was abandoned property even though it was in Gould's apartment. Gould believes that the state failed to prove it was abandoned and, as such, his motion to suppress should have been granted."

{¶ 7} The following undisputed facts are relevant to the issue raised on appeal. Appellant filed a motion to suppress the evidence, namely, the computer hard drive. Two witnesses testified at the hearing. Sharon Easterwood who is appellant's mother and Detective Gina Lester of the Toledo Police Division.

{¶ 8} Detective Lester testified that on September 6, 2006, appellant's mother, Sharon Easterwood, came to the Northwest District Police Station. Easterwood came to the police to turn over a computer hard drive that belonged to appellant. Though she had not viewed its contents, Easterwood indicated her suspicion that the hard drive contained child pornography to Detective Lester. She came to this belief after one of her sons, Douglas, indicated that he had seen child pornography on appellant's computer. The record does not reflect whether Douglas had knowledge that this particular hard drive came from the same computer.

{¶ 9} When asked how the hard drive came into her possession, Easterwood indicated to Detective Lester that appellant had given it to her in December 2005, and instructed her not to allow anyone else to have it. She further stated that the hard drive

had been abandoned by appellant, and that she no longer felt comfortable keeping it in her home.

**{¶ 10}** Upon further inquiry, Easterwood stated that she had no knowledge of appellant's whereabouts and that she had very limited contact with him at the time. Appellant had gone absent some months earlier. At the meeting's conclusion, Detective Lester took possession of the hard drive and booked it into the department's property room. Based on the discussion with Easterwood, Detective Lester indicated her belief that the hard drive was abandoned property.

**{¶ 11}** Within two months of the initial meeting, Easterwood provided Detective Lester with appellant's new cellular telephone number. Easterwood indicated that the telephone bill began coming to her home, and she opened it to retrieve the number. Detective Lester made multiple attempts to contact appellant at the number and left voicemail messages identifying herself and asking for him to return her call. These calls were never returned.

**{¶ 12}** After repeatedly attempting to contact appellant over the course of three months, Detective Lester asked Easterwood to return to the police station on December 2, 2006, to complete a consent form to search the hard drive. Easterwood voluntarily completed the form. Detective Lester subsequently forwarded the hard drive to another detective at the police division and requested that he conduct a forensic analysis of its contents.

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**{¶ 13}** On January 3, 2007, Detective Lester received a report on the hard drive's contents. It was found to contain pornographic videos of children, as well as photographs of appellant engaging in sexual acts with a minor child. Appellant was subsequently arrested in June 2007, in connection with the materials found on the hard drive.

**{¶ 14}** Easterwood's testimony at the suppression hearing appeared to conflict with the representations made to Detective Lester. Easterwood suggested that appellant initially gave her the hard drive in December 2005, when he temporarily moved into her home. Appellant then apparently took back the hard drive when he procured his own residence in June 2006.

**{¶ 15}** Easterwood conceded that in late August while appellant had gone absent, she asked her son Gregory's girlfriend, who had also moved into appellant's apartment, to go through appellant's belongings and retrieve the hard drive for her. The meeting with Detective Lester took place two weeks later and the hard drive was turned over.

**{¶ 16}** It is well-established that in reviewing a motion to suppress, the appellate court may not reverse the trial court ruling if it is supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665. The rationale underlying this deferential standard of review is in recognition that the trial court is most effectively situated to weigh and consider evidence, witness credibility, and resolve factual questions. *State v. Mills* (1992), 62 Ohio St.3d 357, 366.

**{¶ 17}** In his sole assignment of error, appellant asserts that the trial court erred by not suppressing the images on the hard drive. Appellant argues that the state failed to

establish that the hard drive was abandoned. Appellant further claims that his mother had no authority to consent to a search of the hard drive.

**{¶ 18}** A review of the record sub judice reveals that the trial court apparently accepted Detective Lester's testimony as an accurate recitation of the facts. In its decision on appellant's motion to suppress, the court cited a period of nine months as sufficient in finding the hard drive to have been abandoned. On that basis, the court determined that the subsequent search by police did not violate Fourth Amendment limitations.

**{¶ 19}** Our review of the record, particularly the testimony of appellant's mother, leads to a contrary conclusion. During testimony at the suppression hearing, Easterwood unambiguously represented that she first gained possession of the hard drive nine months prior to her meeting with Detective Lester. Appellant regained possession of the hard drive when he moved out of his mother's home some months later. Easterwood ultimately conceded that she again secured possession of the hard drive by going to appellant's home and removing it without his knowledge or consent.

**{¶ 20}** Easterwood ultimately conceded that she failed to disclose the truth of how she came into possession of the hard drive to Detective Lester. Easterwood testified that her son Dennis Gould, the appellant herein, moved into her house and began residing with her sometime in January 2006.

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{¶ 21} At some point during the period of time that he was living with his mother, appellant handed the hard drive to his mother and gave her explicit instructions to not let "anybody get their hands on it." It was Easterwood who then put the hard drive into a big brown manila envelope and put it in her nightstand.

{¶ 22} Appellant moved out of his mother's residence in May 2006, and was living at an Ontario Street address. The appellant had taken all of his personal possessions when he moved out of his mother's residence with the exception of the hard drive given to Easterwood in January. It remained in Easterwood's nightstand.

{¶ 23} At some undefined point in time after coming into possession of the hard drive, Easterwood had a telephone conversation with appellant's twin brother, Douglas. Douglas indicated that he had witnessed Dennis viewing child pornography on his computer when appellant lived in Mississippi and further surmised that such pornography was on the hard drive given to Easterwood. As a result of this telephone conversation, Easterwood gave the hard drive back to the appellant sometime around the first of June 2006.

{¶ 24} Appellant was living in his apartment by himself until the July 4th weekend of 2006 when his older brother Greg moved in with him. At some undetermined point in time, appellant's brother had a girlfriend also reside at the apartment.

{¶ 25} Easterwood had concluded that appellant had "gone missing essentially in August." She reached this conclusion from a statement made by appellant's brother. By

her own admission, she "wasn't around" appellant and could not indicate how or why she or her son Gregory had concluded that appellant had gone "missing" in August.

**{¶ 26}** After she concluded that appellant was "missing" in August, Easterwood went to appellant's apartment and asked "the girl" to "go through his things, which she did. And she gave it back to me. It was still in the brown manila envelope." It is undisputed that she took the drive to the Northwest District Police Station on September 6, 2006, several weeks after she obtained it from appellant's apartment.

**{¶ 27}** Her next contact with appellant occurred when she received a telephone call from him on October 10. Appellant asked Easterwood if his brother had filed a charge against him for stealing his truck. There was no discussion about his belongings or anything else concerning his apartment.

**{¶ 28}** The state contends that the hard drive was abandoned by appellant. Abandoned property is not subject to Fourth Amendment protection. *Abel v. United States* (1960), 362 U.S. 217. "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts." *United States v. Colbert* (C.A.5, 1973), 474 F.2d 174, 176. In determining whether someone has abandoned property, "[a]ll relevant circumstances existing at the time of the alleged abandonment should be considered." Id. "The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so



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that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." Id.

**{¶ 29}** At the suppression hearing, there was no evidence presented to demonstrate appellant's intent, by words spoken or acts done, to abandon the hard drive.

**{¶ 30}** While intent of one in possession of property or premises often cannot be inferred from his actions, abandonment will not be presumed. It must be clearly established by the party asserting it. *Coleman v. Maxwell* (C.A.6, 1967), 387 F.2d 134, certiorari denied (1968), 393 U.S. 1007. Mere absence from the premises without a clear intention to abandon could not legitimize a search of property found therein. *U.S. v. Robinson* (C.A.6, 1970), 430 F.2d 1141.

**{¶ 31}** Detective Lester's subjective belief that the hard drive had been abandoned was unsupported by the objective facts and Easterwood's testimony. More significantly, the detective could have obtained additional information concerning the circumstances surrounding Easterwood's access to the computer hard drive through further questioning and properly sought a search warrant for the hard drive. Accordingly, we find that the state failed to demonstrate by credible, competent evidence that the hard drive was abandoned.

**{¶ 32}** The state alternatively argues that the search of the hard drive did not exceed constitutional limitations because the Fourth Amendment proscribes only governmental search or seizure. The Fourth Amendment is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as





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an agent of the Government or with the participation or knowledge of any government official.'" *United States v. Jacobsen* (1984), 466 U.S. 109, 113, quoting *Walter v. United States* (1980), 447 U.S. 649, 662. The court stipulated that "additional invasions of * * * privacy by the Government agent must be tested by the degree to which they exceed the scope of the private search." Id. at 115. The *Belcastro* court held that "the government may not exceed the scope of the private search [or seizure] unless it has the right to make an independent search, e.g. through a warrant." *State v. Belcastro*, 8th Dist. No. 77443, 2002-Ohio-2556, ¶ 7.

**{¶ 33}** In applying this legal precedent to the instant case, the record shows that Easterwood acted as a private individual and not as an agent of the government when she acquired the hard drive from appellant's residence. Therefore, the government's *seizure* of the hard drive did not exceed Fourth Amendment limitations. However, there is no evidence that Easterwood, or anyone else, "opened" the hard drive and viewed its contents. The images on the hard drive were not manipulated until the police division did so at the direction of Detective Lester. Consequently, by conducting a warrantless search of the hard drive's contents absent exigent circumstances, the police exceeded the scope of Easterwood's private action.

**{¶ 34}** We find no credible, competent evidence to uphold the trial court's finding that the hard drive was abandoned property. The hard drive and its contents were subject to Fourth Amendment protections against warrantless governmental search. The state violated these protections when it exceeded the scope of the private seizure by appellant's

mother. As such, the disputed governmental search of the hard drive was unconstitutional and the evidence resulting from the search should have been suppressed. Appellant's sole assignment of error is found well-taken.

**{¶ 35}** On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. The case is remanded to the trial court for further proceedings. Appellee is ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. — JUDGE

Arlene Singer, J. — JUDGE

Thomas J. Osowik, P.J. — JUDGE

CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

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LUCAS COUNTY

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

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| State of Ohio, | * | |
| | * | |
| Plaintiff, | | Case No. CR0200702249 |
| | * | |
| vs. | | OPINION AND JOURNAL ENTRY |
| | * | |
| Dennis J. Gould, | | Hon. Charles J. Doneghy |
| | * | |
| Defendant. | | |
| | * | |

Following a November 27, 2007 hearing, this criminal case is before the Court for a written decision supporting the Court's oral recitation of its decision to overrule the motion to suppress filed by the defendant, Dennis Gould. Upon review of the record filings, documentary and testimonial evidence, memoranda of the parties, and applicable law, and in conformity with the oral decision previously issued from the bench, the Court overrules the motion to suppress.

## I. BACKGROUND

The State of Ohio ("State") indicted the defendant for several sex-related felonies following discovery of certain material stored on the hard-drive of the defendant's computer. In his motion to suppress, the defendant asserts that the State of Ohio engaged in an illegal search and



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seizure when it conducted a warrantless search of the hard-drive after the defendant's mother, Sharon Easterwood, delivered the hard-drive to Toledo Police Department detective Regina Lester. At the hearing, witnesses testified to two slightly different versions of events in this case.

Ms. Easterwood testified that the defendant gave her the hard-drive in December 2005 or January 2006 while he lived with her. The defendant told his mother "take this and keep it and don't let anybody get their hands on it." (Tr.6-7.) Ms. Easterwood put the item in a large envelope and laid the envelope on her night stand. (Id.) In June 2006, another son told Ms. Easterwood that the hard-drive held child pornography; the son told her to get rid of the device. (Tr.6-7.) Thereafter, Ms. Easterwood returned the hard-drive to the defendant at his new residence. (Tr.7.) In August, the defendant abruptly and without notice left Toledo taking a second brother's truck without permission. (Tr.7-9.) The defendant took none of his possessions, and failed to disclose his location to his family. (Tr.8-10.) Concerned about the reported contents of the hard-drive, Ms. Easterwood recovered the hard-drive from the second brother who had sold the rest of the defendant's belongings. (Tr.9-10.) Ms. Easterwood contacted detective Lester and gave the hard-drive to her. (Tr.8-9.) Ms. Easterwood consented to detective Lester opening the hard-drive. (Tr.10.)

Detective Lester testified that Ms. Easterwood contacted her in September 2006 about wanting to turn in the hard-drive to police because Ms. Easterwood said it was abandoned. (Tr.30-31.) Ms. Easterwood told the detective that the defendant left the hard-drive in Ms. Easterwood's possession in December 2005 and abandoned it; Ms. Easterwood no longer wanted it at her residence because she suspected the hard-drive contained child pornography. (Tr.32.) According to detective Lester, Ms. Easterwood said that the defendant told her, "take care of it and don't let it out of your possession." (Tr.54-55.) Detective Lester attempted to reach the defendant

via a cell-phone number his mother provided; the detective left several unreturned messages. (Tr.33.) Believing that the defendant had abandoned the hard-drive, detective Lester had Ms. Easterwood sign a"consent-to-search-electronic-media" form in December 2006. (Tr.34, 56-57.) The State conducted a warrantless inspection of the hard-drive and thereafter indicted the defendant.

## II. DISCUSSION

The defendant argues that the State's warrantless search of the hard-drive violated his Fourth Amendment rights protecting against an unreasonable search and seizure. The State contends that the search was proper for two reasons: 1) Ms. Easterwood properly consented to the search; and 2) the defendant had abandoned the hard-drive and thus had no reasonable expectation of privacy in its contents. The Court agrees with the State's second reason.

The Fourth Amendment generally guarantees an individual's right to be free from warrantless searches and seizures by ordinarily requiring an impartial judicial officer to determine the propriety of a governmental search before hand. See Katz v. United States (1967), 389 U.S. 347, 350-351, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (discussing the right to preserve certain matters and items as private). Whether a person is entitled to Fourth Amendment protection depends upon whether that person has a "legitimate expectation of privacy." Rakas v. Illinois (1978), 439 U.S. 128, 143, 58 L.Ed.2d 387, 99 S.Ct. 421. To warrant Fourth Amendment protection, the person must have an actual subjective expectation of privacy, and society must view the expectation as "reasonable." Katz at 361. Personal property law or societal norms often provide the sources for a legitimate expectation of privacy. Rakas at 143, fn.12. However, "if a person has voluntarily abandoned property, [she/he] has no standing to complain of its search or seizure." United States v. Veatch (C.A.9, 1981), 674 F.2d 1217, 1220. See, also, United States v. Tugwell (C.A.8, 1997),

125 F.3d 600, 602 (so stating).

> "Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts. * * *. Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." (Citations omitted; emphasis added.) United States v. Jackson (C.A.9, 1976), 544 F.2d 407, 409.

Viewing the "totality of the circumstances," courts determine whether a person has "abandoned" property by viewing the objective facts available to the investigating officers, not the owner's subjective state of mind. Tugwell at 602. Courts review two preeminent factors when deciding abandonment, these are "denial of ownership" and "physical relinquishment" of the property. Id.

In this case, under the fact scenarios presented by both Ms. Easterwood and detective Lester, the Court finds that detective Lester reasonably could have believed that the defendant had abandoned any reasonable expectation of privacy in the hard-drive. First, the Court notes that the defendant left the hard-drive with his mother for nine months, or with his brother for several months (along with most of the defendant's other possessions) after stealing his brother's truck, without leaving further instructions to preserve the device. Second, the Court finds that given this apparent lack of interest in diligently protecting the hard drive (or his other belongings), and given his failure to maintain contact with his mother, it is reasonable that the mother believed that the device contained child pornography and thus posed a threat to the public. It would be entirely reasonable in that setting for Ms. Easterwood to want to protect the public from the harmful contents by giving the hard-drive to the police.

**JOURNAL ENTRY**

The Court hereby ORDERS that the motion to suppress filed by the defendant is overruled.

Mar. 4, 2008

Charles J. Doneghy, Judge

pc: Christopher J. Anderson/Jennifer Lambdin
Francis C. Frey

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COMMON PLEAS COURT
BERNIE GUILLER
CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

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| STATE OF OHIO | * | CASE NO: |
| Plaintiff. | * | G-4801-CR-0200702249-000 |
| | * | |
| v. | * | JUDGMENT ENTRY |
| | * | |
| DENNIS GOULD | * | |
| Defendant. | * | JUDGE CHARLES J. DONEGHY |
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* * * * * * *

On September 30, 2008 defendant's sentencing hearing was held pursuant to R.C. 2929.19. Court reporter KELLY WINGATE, defense attorney FRANCIS C. FREY and the State's attorney JENNIFER LAMBDIN were present as was the defendant DENNIS GOULD, who was afforded all rights pursuant to Crim.R. 32.

The Court finds that Defendant was found Guilty by jury and convicted of the offenses of Counts 1 & 14, **RAPE**, in violation of R.C. 2907.02 (A)(1)(b) & (B), a felony of the first degree; Count 2, **GROSS SEXUAL IMPOSITION**, in violation of R.C. 2907.05 (A)(4) & (B), a felony of the third degree; Count 3, **PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR**, in violation of R.C. 2907.322 (A)(1), a felony of the second degree; Counts 4, 5, 6, 7 & 8, **ILLEGAL USE OF MINOR IN A NUDITY-ORIENTED MATERIAL OR PERFORMANCE**, in violation of R.C. 2907.323 (A)(3) & (B), a felony of the fifth degree; and Counts 9, 10, 11, 12 & 13, **PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR**, in violation of R.C. 2907.322 (A)(5) & (C), a felony of the fourth degree.

Defendant, having been convicted of sexually oriented offenses, a hearing held on Defendant's Sexual Classification, pursuant to R.C. 2950.09. As to Counts 1 & 14, the offense of RAPE, Defendant is Classified as a Tier III Offender. The Court further finds and order that Defendant shall be subject to Community notification under R.C. 2950.10 and 2950.11. As to Count

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2, GROSS SEXUAL IMPOSITION, Count 3, PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR, and Counts 9, 10, 11, 12 & 13, PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR, Defendant is Classified as a Tier II Offender. As to Counts 4, 5, 6, 7 & 8, ILLEGAL USE OF A MINOR IN NUDITY-ORIENTED MATTER, Defendant is Classified as a Tier I Offender.

Matter came on to be heard upon the Sentencing Hearing pursuant to R.C. 2929.19. The Court considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

The Court further finds the Defendant is not amenable to Community Control, and prison is consistent with the purposes of R.C. 2929.11.

Therefore, it is ORDERED that the Defendant's sentence is as follows: As to Counts 1 & 14, RAPE, Defendant is sentenced to a Mandatory LIFE prison term as to each count. As to Count 2, GROSS SEXUAL IMPOSITION, Defendant is sentenced to 4 years. As to Count 3, PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR, Defendant is ordered to serve a term of 7 years. As to Counts 4, 5, 6, 7 & 8, ILLEGAL USE OF A MINOR IN A NUDITY-ORIENTED MATERIAL, Defendant shall serve a term of 11 months as to each count. As to Counts 9, 10, 11, 12 & 13, PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR, Defendant shall serve a term of 17 months as to each count.

The sentences as to Counts 1 & 14 (RAPE), and Count 2 (GROSS SEXUAL IMPOSITION), shall be served concurrent to each other. The sentence as to Count 3, (PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR) shall be served consecutive to the sentences in Counts 1, 14 & 2. The sentence as to Counts 4, 5, 6, 7 & 8 (ILLEGAL USE OF A MINOR IN NUDITY-ORIENTED MATERIAL), shall be served concurrent to each other, but consecutive to the sentences in Counts 1, 14 & 2. The sentences as to Counts 9 & 10 (PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR), shall be served concurrent to each other, but consecutive to the sentence in Count 3. The sentence as to Counts 11, 12 & 13, (PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR), shall be served consecutive to each other, and consecutive to the sentences in Counts 9 & 10, and consecutive to Counts 4, 5, 6, 7 & 8.

**Defendant shall serve a total prison sentence of 13 Years & 7 Months, <u>followed by</u> the concurrent LIFE sentences in Counts 1 and 14, and the sentence in Count 2.**

Mandatory years pursuant to 2929.13 (F), 2929.14 (D)(3), or Chapter 2925.

Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28.

Defendant found ineligible for shock incarceration under R.C. 5120.031 or intensive program prison under R.C. 5120.032.

Defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Corrections forthwith. Credit for 503 days is granted as of this date along with future custody days while defendant awaits transportation to the appropriate state institution.

Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs. This order of reimbursement is a judgment enforceable pursuant to law by the parties in whose favor it is entered. Defendant further ordered to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021. Notification pursuant to R.C. 2947.23 given.

Defendant ordered remanded into custody of Lucas County Sheriff for immediate transportation to appropriate state institution.

JUDGE CHARLES J. DONEGHY

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