

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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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.” <i>Herring v. United States</i> (2009), 555 U.S. 135, explained.		9
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STATEMENT OF THE CASE AND OF THE FACTS

This case involves the deliberate, warrantless search of Dennis Gould's computer hard drive. The State lacked probable cause to conduct that search and no exception to the search warrant requirement existed. The State's assertion that the hard drive was abandoned was not supported by competent, credible evidence. As a result, the State's search was unreasonable per se, and was not saved by an exception to the warrant requirement. The court of appeals was legally and factually correct when it held that the evidence gained as a result of the unlawful search should be suppressed in light of the police misconduct involved in that search. *State v. Gould*, 6th Dist. No. L-08-1383, 2010-Ohio-3437, ¶28-31, 34.

Before his trial on criminal charges, Mr. Gould moved to suppress evidence obtained from a computer hard drive. The motion to suppress was premised upon grounds that the hard drive was searched unlawfully. Two witnesses testified during the suppression hearing, Sharon Easterwood, who is Mr. Gould's mother, and Detective Regina Lester. *Gould*, at ¶7.

Detective Lester believed that she did not have enough information to obtain a warrant to search Dennis Gould's hard drive. (November 27, 2007 Transcript, p. 51). Detective Lester knew that Mr. Gould had given that hard drive to his mother, Ms. Easterwood, during a period of time in which Mr. Gould lived with his mother, with express instructions not to allow anyone to have access to it. (November 27, 2007 Transcript, p. 43-45). Detective Lester knew that Ms. Easterwood considered the hard drive to be Mr. Gould's property. (November 27, 2007 Transcript, p. 44). In an attempt to contact Mr. Gould, Detective Lester left one, non-specific telephone message for him, though she called several times. (November 27, 2011 Transcript, p. 50). Detective Lester concluded that that information "indicated" that Mr. Gould had abandoned the hard drive before Ms. Easterwood gave it to the detective. (November 27, 2007 Transcript,

p. 34). But Detective Lester could not recall whether Ms. Easterwood herself used the word “abandoned.” (November 27, 2007 Transcript, p. 52-53). Nevertheless, Detective Lester had Ms. Easterwood sign a consent form to search the hard drive because the detective believed some form of consent was required to search the hard drive. (November 27, 2007 Transcript, p. 43).

Contrary to Detective Lester’s testimony at the suppression hearing, Mr. Gould did not state that he had abandoned the hard drive during an interview with Detective Lester on June 3, 2007. (November 27, 2007 Transcript, pp. 38-29). Rather, Mr. Gould stated that he had asked his brother to keep his possessions, including the hard drive, in Mr. Gould’s closet in the Ontario Street Apartment that the brothers had shared. And Mr. Gould was surprised to learn that the hard drive was not still in that location. (State’s Exhibit 71A).

The court of appeals held that Detective Lester’s subjective belief that the hard drive had been abandoned was unsupported by the objective facts. The court of appeals held that had Detective Lester investigated further, she could have learned that Mr. Gould had reacquired the hard drive from his mother, and that his mother had removed the hard drive from his apartment, without his consent, approximately two weeks before turning it over to the police. *Gould*, at ¶28-31.

Detective Lester’s Suppression Hearing Testimony.

When asked about soliciting Ms. Easterwood’s consent to search the hard drive, Detective Lester stated:

A: Because she indicated that the Defendant had left the property with her for approximately nine plus months. She indicated that the property was abandoned. She indicated the property had been in her possession. Hence I had – because it was in her possession and she was the individual turning it into law enforcement I had her sign the consent form indicating that she gave me or the Toledo Police Department permission to examine the contents of said hard drive. (November 27, 2007 Transcript, pp. 34-44).

During cross-examination, Detective Lester was asked:

Q: All right. And did not – did Ms. Easterwood tell you that the hard drive was Dennis's, that it belonged to Dennis Gould, her son?

A: Yes, she did.

Q: She told you that it was not her's; is that right?

A: That's correct.

Q: And she specifically said to you Dennis gave this to me and said don't give this to anyone. Don't let this out of your possession, and I am paraphrasing slightly there, but something to that effect; is that right?

A: That's correct. (November 27, 2007 Transcript, pp. 45-46).

Detective Lester was asked whether she attempted to obtain a search warrant to search the hard drive:

Q: All right. Did you attempt to get a search warrant to search this hard drive?

A: No, I did not.

Q: Any reason why not?

A: I did not believe at that time when I obtained possession of said hard drive that I had enough information to obtain a search warrant. Ms. Easterwood did not have proof positive or could not indicate that she knew exactly what was contained on the hard drive. All she could state was that hard drive had belonged to her son that he abandoned it and left it in her possession. She indicated that there may possibly be child pornography but she did not know for positive.

She had no additional witnesses that had actually viewed that hard drive itself to tell me that it could contain some type of crime on the hard drive.

Q: Did she use the word abandoned?

A: I don't recall if that was her exact word was abandoned. She indicated he had left it with her for an extended period. She indicated he had made no contact to retrieve said property. I said do you believe the property was abandoned? And she said, yes, I have for some time. (November 27, 2007 Transcript, pp. 50-53).

Ms. Easterwood's Suppression Hearing Testimony.

Ms. Easterwood's testimony at the suppression hearing differed somewhat from that of Detective Lester. Ms. Easterwood indicated that Mr. Gould initially gave her the hard drive in December 2005, when he temporarily moved into her home. But Mr. Gould took back the hard drive after he was able to move into his own apartment in June 2006. *Gould*, at ¶14.

Ms. Easterwood explained that in late August, while Mr. Gould had gone absent, she asked the girlfriend of her other son, Gregory, who had also moved into Mr. Gould's apartment, to go through Mr. Gould's belongings and retrieve the hard drive for her. The meeting with Detective Lester took place only a few weeks later, and the hard drive was turned over. *Gould*, at ¶15. Ms. Easterwood was asked:

Q: When did you first come into contact with Detective Lester?

A: December 2nd of last year, 19—or 2006.

Q: How did that meeting come about?

A: I took a hard drive to her that was in my possession.

Q: How did you come into possession of that drive?

A: Originally it was given to me by Dennis when he moved into my house, and I took it to her on December 2nd. (November 27, 2007 Transcript, pp. 4-5).

Q: Can you describe the circumstances of your first becoming in possession of that hard drive?

A: He handed it to me one day when he was living there and he said, here, mom take, this and keep it and don't let anybody get their hands on it. I put it in a big brown manila envelope and put it in my nightstand.

Q: Did you have a conversation with Dennis's brother thereafter about the hard drive?

A: Yes, I did.

Q: Which brother was that?

A: Douglas his twin.

Q: Where were you when that conversation took place?

A: On the phone with him.

Q: What information did he provide you?

A: That he walked in on Dennis when Dennis lived in Mississippi and had seen pornography, child pornography on it. And he said, mom, get it out of your house. That's probably what is on it.

Q: What did you do after you got that information?

A: I gave it back to Dennis.

Q: You gave the hard drive back to him?

A: I did.

Q: Do you recall approximately when that was?

A: Probably the – about the first of June or so. (November 27, 2007 Transcript, pp. 5-7).

Q: Did you ever see the hard drive again?

A: Yes, I did.

Q: Approximately when was that?

A: Couple months or a couple weeks just before I gave it to Detective Lester.

Q: What were the circumstances of your then seeing the hard drive again?

A: Well, I – it bothered me that I knew what was on it, and he had gone missing essentially in August. He left Toledo. Nobody had ever heard from him. He did call me once October the 10th and said does Greg have a stolen vehicle out on me? And I said no, just unauthorized use because he had taken Greg's truck with him. So I called the detective in the child group there and got ahold of Detective Lester and took it over to her. (November 27, 2007 Transcript, pp. 5-8).

When asked if she told Detective Lester about returning the hard drive to Mr. Gould and then reacquiring it, Ms. Easterwood stated:

A: I don't believe I did. I told her it was in my possession when I gave it to her. (November 27, 2007 Transcript, p. 28).

During cross-examination, Ms. Easterwood testified about her reacquisition of the hard drive:

Q: When he handed this item to you what were the words that he used when he handed it to you?

A: He said here, mom, keep this for me and don't let anyone get ahold of it.

Q: So from that you gathered that it was important to him for some reason; is that correct?

A: I did.

Q: And you treated it accordingly?

A: Yes, I did. He watched me put it into the brown manila envelope.

Q: You said you placed it in your nightstand?

A: Nightstand, yes.

Q: When did it come out of the nightstand?

A: Shortly after he left the house. Maybe the first of June, middle of June. I might have had it until he moved out and then I remembered it was there and gave it to him.

Q: Now, and it was approximately six months later that you then met with Detective Lester about this same item?

A: Yes.

Q: And you had it back in your possession about two weeks or so at that point?

A: Before I could get to find someone that would take it, yes.

Q: And it came back into your possession how?

A: I went to his apartment and asked for the girl to go through his things, which she did. And she gave it back to me. It was still in the brown envelope.

Q: You asked specifically for that item, correct?

A: Yes, I did. Yes, I did.

Q: Why did you ask for that item?

A: Because I figured I knew what was on it, and I thought it needed to be taken to the police department. (November 27, 2007 Transcript, pp. 11-13).

After the evidentiary hearing, the trial court held that the hard drive was abandoned property and, as such, the police had a reasonable basis to believe that Mr. Gould had relinquished any expectation of privacy pertaining to it. *Gould*, at ¶3.

The court of appeals reversed, finding no credible, competent evidence to uphold the trial court's finding that the hard drive was abandoned property. The court of appeals stated that the hard drive was subject to Fourth Amendment protections against warrantless governmental search. After conducting its Fourth Amendment analysis, the court of appeals concluded that the

evidence resulting from the search of the hard drive should have been suppressed. *Gould*, at ¶3, 29-31, 34.

The court of appeals' Fourth Amendment analysis included a discussion of the relevant case law, the evidence presented during the suppression hearing, as well as Detective Lester's subjective beliefs and actions:

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, 80 S. Ct. 683, 4 L. Ed. 2d 668. "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 that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Id.*

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.

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, 89 S. Ct. 492, 21 L. Ed. 2d 472. 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.

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. *Gould*, at ¶28-31.

The hard drive constituted evidence obtained as a result of a deliberate, warrantless search, absent probable cause and an exception to the warrant requirement, and should have been suppressed. This Court accepted the State's appeal in the present case, with regard to its first proposition of law addressing *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695.

ARGUMENT

RESPONSE TO THE STATE'S PROPOSITIONS OF LAW

State's 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, explained.

The State has asked this Court to apply its interpretation of language contained in *Herring* to the present case. (March 7, 2011 Brief of Appellant, p. 11). But *Herring* is confined by the facts of that case and other United States Supreme Court decisions issued both before and after *Herring*. As a result, *Herring* did not create a new test for courts to implement in considering government searches and seizures. *Herring* merely built upon earlier, similar cases. The *Herring* Court reiterated that application of the exclusionary rule "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." At the core of the Court's decision in *Herring* was the fact that, "the error was the result of isolated negligence attenuated from the arrest." *Herring*, at 698.

Throughout its brief, the State appears to contest the court of appeals' holding that Mr. Gould did not abandon the hard drive at the center of the present case, and that the search of

that hard drive violated the Fourth Amendment. (March 7, 2011 State's Merit Brief pp. 13-16). However, those are not the issues contained in the Proposition of Law accepted for consideration by this Court. The State did raise those issues in its jurisdictional memorandum, but this Court did not accept the propositions of law containing those issues. (September 7, 2010 Memorandum in Support of Jurisdiction, pp. 11-14; December 15, 2010 Entry). Rather, the issue before this Court involves the application of the exclusionary rule to evidence obtained as the result of a deliberate, warrantless search conducted by the State in violation of the Fourth Amendment. To the extent that the State suggests otherwise, the State is incorrect.

SEARCHES AND SEIZURES.

A search or seizure conducted without a prior finding of probable cause by a judge or magistrate is per se unreasonable, subject to a few specific and well-delineated exceptions. *California v. Acevedo* (1991), 500 U.S. 565, 580, 111 S.Ct. 1982. A court may exclude any evidence obtained in violation of the defendant's Fourth Amendment rights. *Mapp v. Ohio* (1961), 367 U.S. 643, 655, 81 S.Ct. 1684. The purpose of the exclusionary rule is to remove any incentive to violate the Fourth Amendment and, thereby, deter police from unlawful conduct. *State v. Jones*, 88 Ohio St.3d 430, 435, 2000-Ohio-374.

This Court has recently stated:

[T]he language of Section 14, Article I of the Ohio Constitution is virtually identical to the language of the Fourth Amendment and that this court has accordingly interpreted Section 14, Article I of the Ohio Constitution as affording the same protection as the Fourth Amendment in felony cases. *State v. Robinette* (1997), 80 Ohio St.3d 234, 238-239, 1997 Ohio 343, 685 N.E.2d 762. In *State v. Brown*, 99 Ohio St.3d 323, 2003 Ohio 3931, 792 N.E.2d 175, however, we held that Section 14, Article I affords greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors. *State v. Smith*, 124 Ohio St.3d 163; 2009-Ohio-6426, footnote 1.

THE SEARCH IN THE PRESENT CASE WAS UNLAWFUL.

The present case involves the deliberate, warrantless search of Mr. Gould's hard drive, absent probable cause and an exception to the warrant requirement. As explained by the court of appeals, the State's assertion that the hard drive was abandoned was not supported by competent, credible evidence. As a result, the State's search was unreasonable per se, and was not saved by an exception to the warrant requirement. The court of appeals did not err in holding that the evidence gained as a result of the unlawful search should be suppressed in light of the police misconduct involved in that search. *Gould*, at ¶¶28-31, 34.

HERRING v. UNITED STATES: IN CONTEXT.

The ramifications of the United States Supreme Court's decision in *Herring* are limited by the facts of that case, as well as the Fourth Amendment search and seizure decisions issued by the Supreme Court both before and after *Herring*. *Herring* built upon the Supreme Court's earlier decisions in *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, *Illinois v. Krull* (1987), 480 U.S. 340, 107 S.Ct. 1160, and *Arizona v. Evans* (1995), 514 U.S. 1, 115 S.Ct. 1185. The contention that the *Herring* decision requires new or additional Fourth Amendment analysis in every search and seizure context is undercut by the United States Supreme Court's post-*Herring* decision in *Arizona v. Gant* (2009), 556 U.S. ___, 129 S.Ct. 1710.

United States v. Leon.

Leon involved a search warrant that was held to be defective because of the issuing magistrate's faulty probable-cause determination. The information contained in the affidavit in support of the warrant was held to be fatally stale, and also failed to establish the informant's credibility. *Leon*, at 904. The *Leon* court explained that the Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence

obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be invalid. *Leon*, at 905-925. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his or her judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more that a law enforcement officer can do in seeking to comply with the law. Penalizing the officer for the magistrate's error, rather than the officer's error, cannot logically contribute to the deterrence of Fourth Amendment violations. *Leon*, at 918-921.

Illinois v. Krull.

Krull involved evidence obtained as the result of an administrative search conducted under a statute that allowed for such searches to be conducted without a warrant. That statute was held to be unconstitutional. *Krull*, at 340. The *Krull* Court held that the exclusionary rule does not apply to evidence obtained by police who act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, which is subsequently found to violate the Fourth Amendment. *Krull*, at 349-355. The Supreme Court explained that application of the exclusionary rule would have little deterrent effect on future police misconduct, which is the basic purpose of the rule. Officers conducting such searches were simply fulfilling their responsibility to enforce the statute as written. If a statute is not clearly unconstitutional, officers cannot be expected to question the judgment of the legislature that passed the law. *Krull*, at 349-350. The *Krull* court explained that the exclusionary rule cannot be justified on the basis of deterring legislative misconduct. Police, not legislators, are the focus of the rule. *Krull*, at 350-353.

Arizona v. Evans.

Evans involved evidence obtained as the result of a police officer's reliance upon an arrest warrant that erroneously appeared in a database maintained by court personnel. *Evans*, at 3. Citing *Leon*, the *Evans* Court explained that the exclusionary rule does not require suppression of evidence seized in violation of the Fourth Amendment when the erroneous information resulted from clerical errors of court employees. The *Evans* court reasoned that there was no basis for believing that the application of the exclusionary rule would have a significant deterrence effect on court employees responsible for informing the police that a warrant has been quashed. Since they are not adjuncts to the law enforcement team engaged in ferreting out crime, they have no stake in the outcome of particular prosecutions. Application of the exclusionary rule also could not be expected to deter the arresting officer's behavior, since there was no indication that the officer in *Evans* was not acting reasonably when he relied upon the information from the database about the existence of a warrant. *Evans*, at 10-16.

Herring v. United States.

Mr. Herring was arrested based upon a warrant listed in a neighboring county's database. A search incident to that arrest yielded drugs and a gun. It was then revealed that the warrant had been recalled months earlier, though that information had never been entered into the database. The database was maintained by the neighboring county's police department. *Herring*, at 696. The Supreme Court extended its holding in *Evans* to include mistakes in warrant databases maintained by police, rather than court personnel. The *Herring* Court's conclusion turned on the fact that the error, like that in *Evans*, was the result of isolated negligence attenuated from the search. *Herring*, at 698, 702.

Arizona v. Gant.

In *Gant*, the Supreme Court examined the propriety of the search of a person's car, under the search-incident-to-arrest exception to the warrant requirement, when the person could not have accessed the car at the time of the search, and the search could not have resulted in evidence related to the arrest. *Gant*, at 1714-1724. Unlike *Leon*, *Evans*, and *Herring*, *Gant* did not involve a warrant that was later determined to be invalid. And *Gant* did not involve police misconduct attenuated from the search at issue. *Gant* shares those two facts with the present case. *Gant*'s Fourth Amendment search and seizure analysis did not contain a single reference to *Herring*. The fact that after *Herring*, the Supreme Court's next case involving the exclusionary rule did not expressly address *Herring* in any way undercuts the State's contentions regarding the significance of *Herring*.

Invalid Warrants v. Warrantless Searches.

Leon, *Evans*, and *Herring* share two important facts not found in the present case. First, each of those cases involved a warrant that was later determined to be invalid. Discussing the preference for warrants, the *Leon* Court explained:

Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination. (Internal citations omitted.) *Leon*, at 913-914.

While *Evans* and *Herring* involved faulty arrest warrants rather than invalid search warrants, the *Leon* Court's discussion of the preference for warrants remains relevant.

Furthermore, *Evans* and *Herring* both include extensive analysis and application of *Leon* and the implications of a police officer's good faith reliance upon a warrant, issued by a neutral and detached magistrate, that was later invalidated. *Leon*, at 10-15; *Herring*, at 669-702.

In the present case, Detective Lester did not rely upon the existence of a warrant issued by a neutral and detached magistrate. Rather, Detective Lester, while engaged in the enterprise of ferretting out crime, relied upon her judgment regarding the legal status of Mr. Gould's hard drive. Detective Lester admitted that she did not seek a warrant because she did not believe she had enough information to obtain one. (November 27, 2007 Transcript, p. 51). Instead, she based her deliberate, warrantless search of the hard drive upon her contention that the hard drive had been abandoned by Mr. Gould. (November 27, 2007 Transcript, pp. 30-60). As a result, the search in the present case is not saved by the sort of deference for warrants discussed in *Leon*.

Deterrence Goal Diminished by Attenuation.

Leon, *Krull*, *Evans*, and *Herring* share a second critical fact not found in the present case. The misconduct in those cases was attenuated from the search that was ultimately found to violate the Fourth Amendment. In each case, discussing the deterrence goal of the exclusionary rule, the Supreme Court focused on the fact that the error was made by someone other than the searching officers, and that suppression was unlikely to deter future Fourth Amendment violations as a result. *Leon*, *Krull*, and *Evans* involved errors made by government employees, but not police.

In *Leon*, the error was committed by a magistrate, and not the officers relying upon the magistrate's faulty probable-cause determination. The Supreme Court explained that judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have

no stake in the outcome of particular criminal prosecutions. The threat of exclusion could not be expected significantly to deter them. *Leon*, at 719.

In *Krull*, the error was committed by the legislature, and not the police relying upon the unconstitutional statute. The Supreme Court explained that application of the exclusionary rule cannot be justified on the basis of deterring legislative misconduct. Police, not legislators, are the focus of the rule. And the Court found no indication that the exclusion of evidence seized pursuant to a statute subsequently declared unconstitutional would have a significant deterrent effect on the enactment of similar laws. *Krull*, at 350-353.

In *Evans*, the error was committed by court personnel, and not the officers relying upon a warrant that had been quashed. The Supreme Court explained that if court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant suppression. And the Court reiterated its statement in *Leon* that the exclusionary rule was designed as a means of deterring police misconduct, not mistakes by court employees. *Evans*, at 15.

Herring merely extended the rationale of those cases, particularly *Evans*, to the unresolved issue of errors made by police in maintaining a warrant database, but attenuated from the officers relying upon the faulty information in that database. *Herring*, at 505. *Herring* did not announce a new rule or utilize a new analysis. Rather, *Herring* extended the rationale of the cases that came before it to the facts presented in *Herring*. The Court explained that the question of suppression turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.

The Court held that the error in *Herring* was the result of isolated negligence attenuated from the Fourth Amendment violation resulting from that error. *Herring*, at 698. The Court

reiterated its earlier holdings that the deterrence provided by suppression must outweigh the costs. *Herring*, at 700. In light of the low culpability, little deterrence value, and attenuated nature of the error in *Herring*, the Court held that exclusion was not worth the cost. *Herring's* discussion of balancing the deterrence value of suppressing evidence against the costs to society of that suppression was nothing new. *Leon*, *Evans*, and *Krull* all discussed the need to balance those interests. *Leon*, at 922; *Evans*, at 11-12; *Krull*, at 373.

Herring simply restated the Court's assessment that "[t]he extent to which the exclusionary rule is justified by its deterrent effect varies with the degree of law enforcement culpability," and that 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." *Herring*, paragraphs (b) and (c), of the syllabus, citing *Leon*.

Finally, the State has argued that with regard to deterrence, mistakes of law can be deterred more readily than mistakes of fact through use of the exclusionary rule. And that deterring officers from making legal mistakes provides an incentive for police to make certain that they properly understand the law. (March 7, 2011 Brief of Appellant, p. 19). The State identified abandonment as a factual issue, and argued that courts frequently forgive mistakes of fact. (March 7, 2011 Brief of Appellant, p. 19). However, the issue of abandonment is more accurately described as a mixed question of law and fact. *United States v. Oswald* (C.A.6, 1986), 783 F.2d 663, 665-666. Whether the facts in a particular case warrant the conclusion that the property in question was abandoned is a legal determination. As the State has pointed out, the exclusionary rule is appropriate to deter mistakes of law.

Costs of Suppression.

The Supreme Court has characterized the costs of the exclusionary rule in broad terms, cautioning that indiscriminate use of the rule may “generat[e] disrespect for the law and administration of justice.” *Stone v. Powell* (1976), 428 U.S. 465, 491, 96 S.Ct. 3037. *Leon*, *Krull*, *Evans*, and *Herring* each discussed the societal costs of suppression which are to be balanced against the deterrence effect of suppressing evidence obtained in violation of the Fourth Amendment. *Leon*, at 922; *Evans*, at 11-12; *Krull*, at 373; *Herring*, paragraphs (b) and (c) of the syllabus. The costs to society are the suppression of inculpatory evidence and potentially letting guilty defendants go free. But the costs to society do not vary according to the details of a particular case. *Leon* and its progeny do not support the contention that the societal costs of suppression are to be considered on a case-specific basis. None of those cases refer to the costs of the exclusionary rule in those terms. Yet that is what the State has argued. (March 7, 2011 Brief of Appellant, p. 25). The State is incorrect.

In arguing that a court’s consideration of the costs of suppressing evidence obtained in violation of the Fourth Amendment should be case specific, the State has highlighted the serious nature of the offenses involved in the present case. (March 7, 2011 Brief of Appellant, pp. 24-28). However, according to the State’s reasoning, the more serious the offense an individual is suspected of having committed, the less likely it is that the Fourth Amendment will be enforced through the deterrence effect of the exclusionary rule. *Leon*, *Evans*, and *Herring* do not indicate that the costs to society of suppression should be considered on a case-by-case basis in light of the seriousness of the alleged offenses. Were it otherwise, the motivation to overcharge offenses would be great, given the knowledge that the Fourth Amendment would be less vigorously enforced through suppression in cases involving more serious charges. Such a result offends

basic due process concepts of the criminal justice system. The laudable goal of deterring police from violating the Fourth Amendment should not fall to the wayside in serious cases.

The State has cited *United States v. Julius* (C.A.2, 2010), 610 F.3d 60, in support of its assertion that the costs to society of the exclusionary rule are case-specific. (March 7, 2011 Brief of Appellant, p. 25). However, the cited portion of that decision merely states that the deterrence value and costs of suppression must be considered in each case, not that the costs are to be calculated based upon the particular allegations against a unique defendant. *Julius*, at 68. Furthermore, the *Julius* court cautioned against an interpretation of *Herring* that would “serve as an enticement for law enforcement personnel to depart from search procedures which comply with the Fourth Amendment.” *Julius*, at 68.

While the general deterrence goal of the exclusionary rule is balanced against the general costs to society of suppression, it is true that courts must assess the culpability of the police based upon the misconduct at issue in a particular case. And in *Julius*, the court distinguished the police misconduct at issue in that case from that in *Herring*. “Unlike in *Herring*, in which the alleged error was attenuated from the search, the error here was made by the searching officer. Also unlike *Herring*, this case involves a warrantless search, which entails different concerns about deterrence of police misconduct.” *Julius*, at 67. The present case shares the same distinguishing facts.

THE SEARCH OF DENNIS GOULD'S HARD DRIVE.

Misconduct.

Unlike *Leon*, *Krull*, *Evans*, and *Herring*, the misconduct in the present case was not attenuated from the unconstitutional search. In the present case, the police misconduct was the unconstitutional search. Detective Lester did not search Mr. Gould's hard drive in reliance upon someone else's mistake regarding the existence of a valid warrant to do so. Nor did Detective Lester search the hard drive based upon a magistrate's faulty probable-cause determination or an unconstitutional statute. Rather, Detective Lester decided to search the hard drive after incorrectly deciding that the hard drive had been abandoned by Mr. Gould. In other words, Detective Lester deliberately conducted a warrantless search of the hard drive, based upon her incorrect subjective belief regarding the legal status of the hard drive.

Unlike the police misconduct in *Herring*, which the lower court described as a "negligent failure to act" on the part of the police maintaining the database, the police misconduct in the present case was a "deliberate or tactical choice to act." *Herring*, at 966. Detective Lester decided that Mr. Gould had abandoned the hard drive, despite her knowing that he had given the hard drive to his mother with explicit instructions not to let anyone have access to it, and that Ms. Easterwood considered it to be Mr. Gould's property. (November 27, 2007 Transcript, pp. 43-45). Furthermore, Detective Lester did not seek to obtain a search warrant because she did not believe that she had enough information to obtain a warrant. (November 27, 2007 Transcript, p. 51). And she believed that some kind of consent was required to search the hard drive. (November 27, 2007 Transcript, p. 43). Finally, Detective Lester only left one, non-specific telephone message for Mr. Gould and did not question Mr. Gould's brother, with whom

Mr. Gould shared his apartment, in an attempt to gain further information. (November 27, 2011 Transcript, p. 50).

As the court of appeals in the present case correctly held, “Detective Lester’s subjective belief that the hard drive had been abandoned was unsupported by the objective facts and [Ms.] Easterwood’s testimony. More significantly, the detective could have obtained additional information concerning the circumstances surrounding [Ms.] Easterwood’s access to the computer hard drive through further questioning and properly sought a search warrant for the hard drive.” *Gould*, ¶31.

In *Leon, Krull, Evans, and Herring*, the searches at issue were attenuated from the errors that resulted in the unconstitutional searches. Detective Lester’s unconstitutional search of the hard drive was not attenuated from the error that precipitated that search. Rather, Detective Lester made a tactical decision to search the hard drive, without a warrant, probable cause, or an exception to the warrant requirement. The court of appeals held that that search violated the Fourth Amendment. Detective Lester is directly accountable for that violation.

The State has argued that the deterrence value of suppression in the present case is low because the exact facts of this case are unlikely to reoccur. (March 7, 2011 Brief of Appellant, p. 25). However, *Leon, Krull, Evans, and Herring* did not discuss the value of deterrence in those terms. Rather, the deterrence value of suppression was discussed in terms of which actors would be deterred. In those cases, the errors were committed by someone other than the searching officer, so the deterrence value of suppression was held to be minimal. Unlike *Leon, Krull, Evans, and Herring*, the deterrence value of suppression in the present case is significant because the searching officer committed the misconduct at issue. And as a result of the

application of the exclusionary rule in this case, police officers will be unlikely to repeat that misconduct.

The exclusionary rule may not be appropriate when police officers conduct a search in good faith reliance upon some higher authority, such as a warrant or statute, that is later held to be invalid. *United States v. Buford* (C.A.6, 2011), __ F.3d __, 2011 FED App. 00043. No such reliance upon a higher authority justified Detective Lester's search in the present case. Rather, Detective Lester based her search upon her own conclusions regarding the legal status of Mr. Gould's hard drive. The exclusionary rule is appropriate in situations in which police officers engage in the sort of legal analysis better reserved to judicial officers, whose detached scrutiny is a more reliable safeguard against improper searches than the judgment of a police officer engaged in the competitive enterprise of ferretting out crime. *United State v. Davis* (C.A.11, 2010), 598 F.3d 1259, 1267. In other words, when police officers resolve legal questions, as to which reasonable minds may differ, the exclusionary rule is well-tailored to hold them accountable for their mistakes. *Davis*, at 1267.

Suppression was warranted.

The issue of suppression turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. The court of appeals examined Detective Lester's culpability in conducting a warrantless search of Mr. Gould's hard drive. The court stated that:

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. *Gould*, at ¶31.

Unlike *Leon, Krull, Evans, and Herring*, responsibility for the unlawful search in the present case rests upon the searching officer, Detective Lester. Because the error in the present case was not attenuated from the search, the deterrence effect of suppression in the present case justifies the application of the exclusionary rule, and is not outweighed by the general cost to society of withholding inculpatory evidence from the fact-finder at the risk potentially letting a guilty defendant go free.

ARGUMENT OF AMICUS.

The Franklin County Prosecutor has filed a brief as amicus curiae, in support of the State. The Amicus has referenced issues which this Court has declined to consider in the present case. Whether or not this Court's decision in *State v. Lindway* (1936), 131 Ohio St. 166, 2 N.E.2d 490, remains good law is not a question presently before this Court. (March 4, 2011, Brief of Amicus Curiae, p. 4-5). Whether Detective Lester's search of Mr. Gould's hard drive violated the Fourth Amendment is also not before this Court. (March 4, 2011, Brief of Amicus Curiae, pp. 7-9).

Balancing Interests.

The Amicus has addressed the issue of balancing the deterrence goal of the exclusionary rule against the costs to society of exclusion. In doing so, the Amicus has made two miscalculations. First, the Amicus has argued that the deterrence effect of suppression would be minimal in the present case because Detective Lester thought her actions were justified, and that she was acting in good faith. (March 4, 2011, Brief of Amicus Curiae, pp. 8-9). Having been informed otherwise by the court of appeals, police are likely to be deterred from making similar mistakes. Furthermore, the Amicus has failed to address the significance of the lack of attenuation with regard to the misconduct in the present case as it relates to the exclusionary rule's deterrence goal. *Leon, Krull, Evans, and Herring* all involved errors far removed from the

actual search that violated the Fourth Amendment. And it was that attenuation which weighed heavily in the Supreme Court's deterrence analysis in those cases.

The Amicus has made the same mistake as the State with regard to considering the costs to society of suppression. The Amicus has focused on the nature of the offenses and evidence at issue in this case, rather than the costs to society of suppression in general. (March 4, 2011, Brief of Amicus Curiae, pp. 8-9). The Amicus's argument would result in a paradox in which enforcement of the Fourth Amendment through the deterrence effect of the exclusionary rule would decrease as the gravity of the alleged offense increased. Such an inverse relationship offends basic concepts of the criminal justice system.

Herring v. United States: Out of Context.

The Amicus has argued that *Herring* "is a landmark case and represents a substantial shift in how courts are to apply the federal exclusionary rule." (March 4, 2011, Brief of Amicus Curiae, p. 1). The Amicus is incorrect. As explained above, *Herring* is the most recent case in a line of exclusionary rule decisions focusing upon deterrence, attenuation, and culpability, following *Leon*, *Krull*, and *Evans*. *Herring* constitutes the next logical step following *Evans*, extending *Evan's* holding regarding attenuated warrant database errors to databases maintained by police rather than court personnel. *Herring* broke no more new ground than that, contrary to the assertions of the Amicus.

The Amicus has also argued that its interpretation of *Herring* is applicable to all search and seizure cases, regardless of the context. (March 4, 2011, Brief of Amicus Curiae, p. 6). Again, Amicus is incorrect. As explained above, *Herring* must be viewed in the context of the cases that came before and after it. And as noted above, the Supreme Court did not expressly address *Herring* at all in its next examination of the Fourth Amendment in *Gant*. Nor did this

Court expressly address *Herring* in its decision in *Smith*. Finally, the Amicus's reliance upon post-*Herring* federal court decisions is misplaced.

United States v. Monghur.

In support of its contention that *Herring* is not limited to attenuated errors involving invalid warrants, the Amicus has cited *United States v. Monghur* (C.A.9, 2009), 576 F.3d 1008. *Monghur* involved the warrantless search of a closed container. After discussing the intervening decision in *Herring*, the court held that “[t]he warrantless search of the closed container . . . was unlawful and violated Monghur’s Fourth Amendment protection against unreasonable searches and seizures . . . we VACATE the conviction and the order denying Monghur’s suppression motion and REMAND to the district court to consider whether suppression is the appropriate remedy in light of *Herring*.” *Monghur*, at 1014.

However, the court issued an amended decision, removing all discussion of *Herring* and the instruction to consider the application of *Herring* on remand. The amended decision simply vacated the conviction and the lower court’s decision regarding the motion to suppress. *United States v. Monghur* (C.A.9, 2009), 588 F.3d 975, 975-982. A later decision from the same appellate circuit addressed the government’s misplaced reliance upon the first *Monghur* decision, “[b]ut after oral argument in this case, *Monghur* was amended to vacate the order of suppression *without* remanding for application of *Herring*. Thus, the case on which the United States relies no longer supports its argument.” (Emphasis in original.) (Internal citation omitted.) *United States v. Song Ja Cha* (C.A. 9, 2010), 597 F.3d 995, 1006. Similarly, the Amicus’s reliance upon the first *Monghur* decision is also misplaced.

Post-*Arizona v. Gant* Cases.

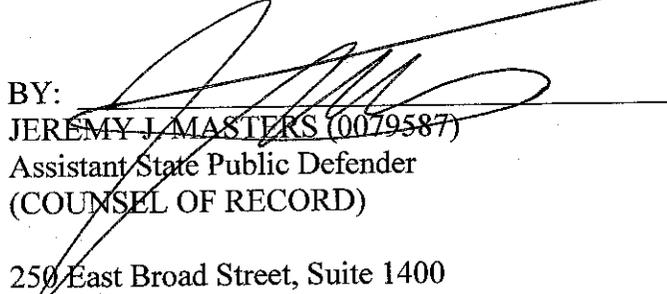
The Amicus has argued that the exclusionary rule “should have no greater application merely because the police rely on an exception to the warrant requirement.” (March 4, 2011, Brief of Amicus Curiae, p. 1). That statement is at odds with the Supreme Court’s discussion of the preference for warrants in *Leon*, addressed above. The Amicus has also asserted that numerous courts have extended *Herring* to search-incident-to-arrest situations. That assertion overlooks the fact that *Herring* was a search-incident-to-arrest case. In *Herring*, the police arrested Mr. Herring based upon an invalid arrest warrant, and the resulting search was incident to that arrest. *Herring*, at 697. The cases cited by the Amicus do involve searches resulting from warrantless arrests. However, those cases are more accurately framed as addressing the retroactive application of *Gant*. Specifically, whether the good faith exception applies to warrantless searches conducted in reliance upon *New York v. Belton* (1981), 453 U.S. 454, 101 S.Ct. 2860, but ultimately found to be unlawful after *Gant*, despite the retroactivity doctrine of *Griffith v. Kentucky* (1987), 479 U.S. 314, 107 S.Ct. 708. As the Amicus noted, the Supreme Court has accepted that issue for review. (March 4, 2011, Brief of Amicus, p. 6). Nevertheless, the retroactive application of *Gant* is not the issue presently before this Court in the present case.

CONCLUSION

The exclusionary rule is appropriately used to deter direct police misconduct that is not attenuated from a search that violates the Fourth Amendment. The deterrence value of excluding evidence gained under such circumstances is not outweighed by the costs to society of exclusion. For the foregoing reasons, Dennis Gould respectfully asks that this Court affirm the decision of the court of appeals in the present case.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

BY: 

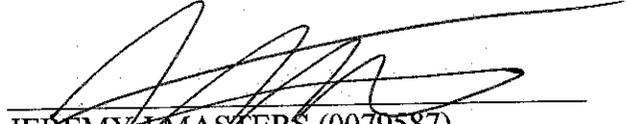
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing DEFENDANT-APPELLEE DENNIS GOULD'S MERIT BRIEF was sent by regular U.S. Mail, postage prepaid, to Evy M. Jerrett, Lucas County Prosecutor's Office, Lucas County Courthouse, 700 Adams Street, Toledo, Ohio 43624, and Seth L. Gilbert, Franklin County Assistant Prosecuting Attorney, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 26th day of April, 2011.


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