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IN THE SUPREME COURT OF OHIO

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

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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.

Throughout appellee's brief, he attempts to minimize the significance of *Herring* by arguing that the decision merely applies prior precedents and offers nothing new for lower courts' consideration. In fact, *Herring* describes a very specific range of conduct capable of being deterred by application of the exclusionary rule, including **only** conduct that is "deliberate, reckless, or grossly negligent" or "in some circumstances recurring or systemic negligence." This case does not involve such conduct.

Herring also represented the United States Supreme Court's first analysis of the consequences of police negligence, as opposed to the error of third parties. *Herring* noted that when police negligence is not the result of "systemic error or reckless disregard of constitutional requirements," any "marginal deterrence" through application of the exclusionary rule "does not pay its way." *Herring*, 129 S.Ct. at 702, 704. The case before this Court also does not involve the "systemic error or reckless disregard of constitutional requirements" required to make the exclusionary rule "pay its way."

In addition to quarreling with the significance of *Herring*, appellee attempts to limit the factors a court may consider when performing the balancing process required by *Herring*. However, contrary to appellee's arguments, *Herring's* balancing process

does not preclude consideration of the nature of the evidence that will be lost through application of the exclusionary rule. Similarly, *Herring* does not preclude consideration of whether the error is likely to be repeated in weighing the future deterrent effect of excluding the evidence in question.

Allegations of misconduct against the detective in this case amount at most to a claim that she acted negligently in failing to ask enough questions of appellee's mother. The State does not concede that Detective Lester acted negligently, but in any event, no construction of the facts reveals "systemic error or reckless disregard of constitutional requirements." Because of the unusual circumstances of the case, application of the exclusionary rule is unlikely to provide a significant deterrent benefit in future cases. Moreover, because of the severity of the crimes involved, the social cost is great. Application of *Herring* to this case thus compels the conclusion that the trial court properly denied the motion to suppress evidence obtained from the search of appellee's computer hard drive.

I. The exclusionary rule may not be applied to deter simple negligence.

The Supreme Court's previous decisions made it clear that the exclusionary rule would be applied to deter "intentional conduct that was patently unconstitutional," but *Herring* explicitly limits the behaviors that the exclusionary rule might deter to "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 129 S.Ct. at 702. Simple negligence, unless it is part of a recurring or systemic pattern of negligence, is conspicuously absent from the list of behaviors suitably deterred by application of the exclusionary rule. *Id.* As the

Sixth Circuit has opined, "the *Herring* Court's emphasis seems weighed more toward preserving evidence for use in obtaining convictions, even if illegally seized, than toward excluding evidence in order to deter police misconduct unless the officers engage in 'deliberate, reckless, or grossly negligent conduct.'" *United States v. Master* (C.A. 6, 2010), 614 F.3d 236, 243.

In an effort to suggest that Detective Lester's conduct was suitable for deterrence, appellee claims that she made "a deliberate or tactical choice to act." Certainly it is undeniable that Detective Lester authorized the search of the hard drive. It is equally undeniable that Detective Lester's authorization of the search was not inadvertent or accidental but was based on facts reported by a third party and on the detective's personal knowledge. However, Detective Lester's consideration of those facts does not transform the authorization to search into a form of misconduct to be deterred by application of the exclusionary rule. The decision to search based on facts reported by a third party did not constitute a "deliberate or tactical choice" to be deterred by exclusion of evidence, any more than the search incident to the arrest in *Herring* was a "deliberate or tactical choice" suitable for deterrence.

II. The exclusionary rule may not be applied to deter police negligence which results in an improper search.

In an earlier case involving negligence resulting in an improper search, the Supreme Court "left unresolved 'whether the evidence should be suppressed if police personnel were responsible for the error.'" *Herring*, 129 S.Ct. at 701, quoting *Arizona v. Evans* (2005), 514 U.S. 1, 15, 115 S.Ct. 1185, 131 L.Ed.2d 34. Appellee suggests that an improper search may escape the effect of the exclusionary rule only when any

negligence is "attenuated" from a search. (Brief of Appellee at p. 15.) Although the negligence in *Herring* was described in passing as "attenuated" from the search, *Herring's* list of behaviors to be deterred by application of the rule did not include simple negligence, whether "attenuated" from the search or intrinsic to the search. *Herring*, 129 S.Ct. at 702. Moreover, *Herring* concludes that "when police mistakes are the result of negligence such as that described here, **rather than systemic error or reckless disregard of constitutional requirements**, any marginal deterrence does not 'pay its way.'" *Herring*, 129 S.Ct. at 704 (emphasis added). The absence of systemic error or reckless disregard of constitutional requirements appears to be the significant defining characteristic of the negligence at issue in the case.

Appellee suggests that the Supreme Court's use of the word "attenuated" means that the exclusionary rule applies unless the error is "made by someone other than the searching officers." (Brief of Appellee at p. 15.) Even assuming for purposes of argument that appellee's construction of the word "attenuated" is correct, that construction is sufficient to encompass the alleged "error" in this case. Both the facts reported to Detective Lester and her efforts to verify those facts supported her conclusion that the hard drive was abandoned property. If an error existed, the error lay in the incomplete or inaccurate report of facts by appellee's mother, not in the authorization of the search based on those reported facts. The error in this case was thus "attenuated" from the search.

The State notes that appellee faults Detective Lester for not questioning appellee's brother with whom he shared an apartment before fleeing the Toledo area.

(Brief of Appellee at pp. 19-20.) However, before the search was authorized, Detective Lester had no reason to question appellee's former roommate. At that time, she did not know appellee had retrieved the hard drive from his mother when he moved out; she first learned that information when she interviewed appellee after his arrest.

At bottom, appellee's criticisms of Detective Lester's conduct, like the Sixth District's criticisms, amount to no more than the notion that she should have asked more questions of Sharon Easterwood. With the benefit of hindsight, such a criticism is easily made, but the reasonableness of a person's actions is based on their knowledge at the time of their actions. Detective Lester had no reason to disbelieve that the hard drive had been in Sharon Easterwood's possession for nine months, and Detective Lester knew that the hard drive was in the TPD property room for three more months while she attempted to contact appellee. Under the circumstances, Detective Lester's actions were not negligent, attenuated or otherwise, and they certainly did not reflect "systemic error or reckless disregard of constitutional requirements."

III. The principles articulated in *Herring* govern application of the exclusionary rule, and those principles are not limited to cases involving a search warrant.

Appellee argues that the law has "a strong preference for warrants," and that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." (Brief of Appellee at pp. 14-15, citing *United States v. Leon* (1984), 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677.) Of course, despite any "preference" for warrants, recognized exceptions to the warrant requirement exist, and one of those recognized exceptions is for searches of abandoned property. See, e.g.,

State v. Freeman (1980), 64 Ohio St.2d 291, at paragraph two of the syllabus; *Abel v. United States* (1960), 362 U.S. 217, 241, 80 S.Ct. 683, 4 L.Ed.2d 668. See also *Hester v. United States* (1924), 265 U.S. 57, 58, 44 S.Ct. 445, 68 L.Ed. 898 (contents of various containers abandoned by defendant were admissible in evidence); and *United States v. Levasseur* (C.A. 2, 1987), 816 F.2d 37, 44 (where defendant abandoned a furnished home containing his clothing and weapons, police could properly search, without a warrant, a locked footlocker left behind in the house).

Further, the "preference" for warrants is relevant to the constitutionality of the search, but that "preference" does not impact *Herring's* guidance as to the appropriate treatment of evidence discovered as a result of an unconstitutional violation. Nothing in *Herring* limits its reasoning to cases in which a search warrant exists. In fact, *Herring* itself involved a search incident to arrest, another of the exceptions to the search warrant requirement. See, e.g., *Chimel v. California* (1960), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685.

IV. In concluding that the hard drive was abandoned, Detective Lester was entitled to rely on the representations of appellee's mother and on her own experiences in trying to contact appellee for three months.

Appellee criticizes Detective Lester's "judgment regarding the legal status of Mr. Gould's hard drive." (Brief of Appellee at p. 15.) However, it is clear that whether property is abandoned is an issue of fact. See *State v. Freeman*, 64 Ohio St.2d at 297 ("The issue is, therefore, factual as to whether the appellant's action herein constitutes abandonment of the suitcases."). Further, an officer's factual conclusions, even when mistaken, are frequently forgiven. See, e.g., *Illinois v. Rodriguez* (1990), 497 U.S. 177,

186, 110 S.Ct. 2793, 111 L.Ed.2d 148 (upholding the validity of a search of an apartment premised on an officer's factual mistake in believing a third party consenting to the search possessed sufficient common authority over the premises to give valid consent).

Appellee cites *United States v. Oswald* (C.A. 6, 1986), 783 F.2d 663, 665-666 for the proposition that the concept of abandonment is actually a mixed question of law and fact. The State respectfully submits that *Oswald* does not trump this Court's prior determination in *Freeman* that abandonment is a factual question. Moreover, several other jurisdictions also consider abandonment to be a factual issue. See *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; and *United States v. Thomas* (C.A. D.C., 1989), 275 U.S. App. D.C. 21, 864 F.2d 843, 846.

Appellee ignores *Freeman* and consequently fails to offer any justification for a departure from its holding. Appellant merely contends that "[w]hether the facts in a particular case warrant the conclusion that the property in questions was abandoned is a legal determination." (Brief of Appellee at p. 17.) The suggestion appears to be that if facts must be analyzed and a particular conclusion drawn from those facts, the issue is a mixed question of fact and law. Such a suggestion is overly broad and inconsistent with the everyday practices of Ohio courts. For example, juries frequently make findings of negligence based on facts in evidence, but the finding of negligence is a factual determination, not a determination as a matter of law or a determination of a

"mixed" issue of fact and law.

The determination of abandonment, like the determination of whether an individual has authority to consent to a search, is one of "the many factual determinations that must regularly be made by agents of the government -- whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement." *Illinois v. Rodriguez*, 497 U.S. at 185. As a mistake of fact, an erroneous conclusion of abandonment is not readily deterred through application of the exclusionary rule. See, e.g., *United States v. Cha* (C.A. 9, 2010), 597 F.3d 995.

The State notes that appellee chose to disregard case law governing officers' reliance upon third parties' representations in consent to search cases, as well as the case law involving reliance on third parties' representations in affidavits to support search warrants. The principles underlying those cases require the conclusion that at worst, Detective Lester's belief that the hard drive was abandoned was a mistake of fact based on the representations of a third party. Particularly where the third party was identified and had a close familial relationship with appellee, and where Detective Lester's attempts to contact appellee appeared to corroborate his mother's reports, such reliance fails to rise to the level of "deliberate" or "reckless" misconduct.

V. *Herring* anticipates a case-by-case analysis weighing the costs of suppression against the value of deterring the official conduct in question.

There can be little dispute that *Herring* requires a case-by-case balancing of the costs of the exclusionary rule against its deterrent value. As Justice Breyer noted, *Herring* appears to call for a "case-by-case, multifaceted inquiry into the degree of

police culpability." *Herring*, 129 S.Ct. at 711 (Breyer, J., dissenting).

A. The social costs of suppression.

Appellee has no apparent problem with a case-by-case examination of police culpability. However, he takes issue with a case-by-case examination of the social cost of suppression. According to appellee, the social cost of suppression does not vary from case to case, and the nature of the crime in question does not figure into the calculus.

Appellee identifies absolutely no language from *Herring* or any other case to suggest that the social costs of suppression remain constant from case to case. In fact, the language of *Herring* suggests otherwise: "[t]he principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free." Nothing in that quotation suggests that the cost or the social harm in suppression is the same in every case. Rather, by focusing on "guilty" and "possibly dangerous" defendants, *Herring* opens the door to consideration of the nature of the crimes at issue in a given case. Similarly, the Supreme Court had previously expressed concern that the exclusionary rule deprives factfinders of "reliable, probative evidence" of crime and "allow[s] many who would be incarcerated to escape the consequences of their actions." *Pa. Bd. of Prob. & Parole v. Scott* (1998), 524 U.S. 357, 364, 118 S.Ct. 2014, 141 L.Ed.2d 344. Consideration of "probative evidence" lost through application of the exclusionary rule may properly entail an examination of the offense of which the evidence is probative.

Examination of the nature of the crimes committed is also consistent with the Supreme Court's concern with "[t]he disparity in particular cases between the error

committed by the police officer" as compared to "the windfall afforded a guilty defendant" by application of the exclusionary rule. *Stone v. Powell* (1976), 428 U.S. 465, 490, 96 S.Ct. 3037, 49 L.Ed.2d 1067. The disparity in "particular cases" invites a case-by-case analysis of both the culpability of the police officer and the windfall to a guilty defendant. In this case, suppression of the evidence from the hard drive results in the loss of evidence of multiple sex crimes committed against a young child. The windfall to appellee far exceeds, for example, the windfall to a defendant who is found to be in possession of a single marijuana cigarette.

Appellee argues that factoring in the severity of the crime at issue will lead to overcharging of offenses. (Brief of Appellee at p. 18.) The judicial system provides safeguards against such abuses, not the least of which is the grand jury process. Moreover, any shortcomings in the evidence to support the charges in question would become apparent during the balancing process required by *Herring*. Application of the exclusionary rule would not result in the loss of "probative evidence" if there is some discrepancy between the offense charged and the evidence to be suppressed.

At its core, appellee's argument reflects a concern that consideration of the nature of the crimes on a case-by-case basis "offends the basic due process concepts of the criminal justice system." (Brief of Appellee at pp. 18-19.) However, the exclusionary rule is not an extension of due process or any other constitutional right. In fact, it is clear from both *Herring* and prior cases that the exclusionary rule is not an individual right but a judicially created remedy. *Herring*, 129 S.Ct. at 700. See also *Stone v. Powell*, 428 U.S. at 495, f.n. 37. Appellee simply has no constitutional right to

application of the exclusionary rule, so concerns with "basic due process concepts" are insufficient to preclude consideration of the nature of the crime at issue in a particular case.

B. The deterrent value of suppression.

Appellee also contends that the likelihood of an error's recurrence is an inappropriate consideration when weighing the deterrent value of suppression. (Brief of Appellee at p. 21.) According to appellee, *Herring* permits only a discussion of which actors would be deterred.

In fact, the likelihood of an error's repetition was central to *Herring's* analysis of the kinds of negligence that may be deterred by application of the exclusionary rule. By recognizing that the rule may deter negligence which is "recurring or systemic," *Herring* invites an examination of the likelihood of any recurrence of the error in question. *Herring's* discussion of reliance on electronic databases is instructive. *Herring* acknowledges that reliance on a database might be reckless, if errors in the database were "systemic," or if the record keeping system "routinely" led to false arrests, or if "a widespread pattern of violations were shown." *Id.*, 129 S.Ct. at 703. Such was not the case in *Herring*, where the officer testified he had no reason to question the information about the warrant, and there was no evidence that there had been problems in the past. Likewise, in this case, Detective Lester had no reason to disbelieve Ms. Easterwood's report, and there is no evidence of "systemic" negligence or a "widespread pattern of violations" in TPD's handling of reports by identified private citizens.

The likelihood of repetition of a similar situation is slim, and the conduct in

question is not the "flagrant" abuse appropriate for deterrence by application of the exclusionary rule. *Herring*, 129 S.Ct. at 701. The slight deterrent value of the exclusionary rule is vastly outweighed by the cost of the loss of evidence probative of appellant's guilt of serious crimes for which there is effectively no witness. Pursuant to *Herring*, evidence recovered from the hard drive should not be suppressed.

VI. *Arizona v. Gant* did not address application of the exclusionary rule, and may not be interpreted as minimizing the significance of *Herring*.

Appellee relies upon the Supreme Court's decision in *Arizona v. Gant* (2009), 556 U.S. ___, 129 S.Ct. 1710, 173 L. Ed. 2d 485, as support for the proposition that *Herring* breaks no new constitutional ground. Appellee reasons that if *Herring* were a landmark case, then it would certainly have been addressed in *Gant*. (Brief of Appellee at p. 14.) However, *Gant* involved only the issue of whether a particular search was constitutional and did not reach the consequence of such unconstitutionality.

The omission of any discussion of the exclusionary rule is not surprising. The prosecution in *Gant* did not seek review of whether the exclusionary rule was a necessary consequence of a constitutional violation, but presented only the issue of whether "the Arizona Supreme Court effectively 'overrule[s]' . . . *Belton*." See *Arizona v. Gant* (U.S. Oct. 19, 2007), 2007 U.S. Briefs 542, 2007 U.S. S. Ct. Briefs LEXIS 2580. The writ of certiorari in *Gant* was accordingly and explicitly limited to the question of whether "law enforcement officers [must] demonstrate a threat to their safety or a need to preserve evidence . . . in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured." *Arizona v. Gant* (2008), 552 U.S. 1230, 128 S.Ct. 1443. Because of the limited scope

of the issue accepted for review in *Gant*, its holding should not be construed as an implicit rejection or weakening of *Herring*.

Although *Gant* sheds no light on *Herring*, the lower courts' subsequent treatment of *Gant* is instructive. When considering searches lawful at the time they were conducted, but which were unconstitutional after *Gant*, several courts have found that *Herring* precludes suppression of evidence obtained in reliance on well-settled precedent prior to the change of law. See, e.g., *United States v. Buford* (C.A. 6, 2011), 632 F.3d 264; *United States v. Davis* (C.A. 11, 2010), 598 F.3d 1259, 1265-1268, cert. granted (2010), 131 S.Ct. 502; and *United States v. McCane* (C.A. 10, 2009), 573 F.3d 1037, cert denied, (2010) 130 S.Ct. 1686.

Appellee suggests that such cases involve a "mistake of law," and that the exclusionary rule applies to deter mistakes of law. Of course, the fact that the exclusionary rule is more likely to deter a mistake of law does not mean that any such mistake automatically results in application of the exclusionary rule. Moreover, these cases involve a proper interpretation of the law as it was known at the time of the search—they do not involve a mistake of law so much as reliance upon well-settled case law before a change in that law.

CONCLUSION

Appellee's brief repeatedly describes the search in this case as a "deliberate, warrantless search." *Herring's* logic does not require application of the exclusionary rule to all searches that are undertaken with consideration of the facts known to an officer. *Herring* likewise does not require application of the exclusionary rule to all searches undertaken without a warrant. In fact, *Herring* itself involved a warrantless search incident to an arrest based upon facts reported by another police department.

The issue in *Herring*, as in this case, was whether the search was the result of misconduct that could properly be deterred by application of the exclusionary rule, and whether the value of any such deterrence outweighed the costs of suppression. In *Herring*, as in this case, there was no such misconduct. The Sixth Appellate District's decision should therefore be reversed, and the jury's verdict and the trial court's sentence in this case should be reinstated.

Respectfully submitted,

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CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 14th day of May, 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.



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