IN THE SUPREME COURT OF MISSOURI

SC 95719

STATE OF MISSOURI,
APPELLANT

v.

PHILLIP DOUGLASS and JENNIFER M. GAULTER,
RESPONDENTS.

On Appeal
From The Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 15
Honorable Robert M. Schieber, Judge
Case Nos. 1316-CR03008-01 and 1316-CR03009-01

SUBSTITUTE RESPONDENTS' BRIEF OF PHILLIP DOUGLASS and JENNIFER M. GAULTER

Clayton E. Gillette
600 E 8th Street, Suite A
Kansas City, Missouri 64106
Tel: (816) 895-2529
clay@moappeals.com
Limited Appearance Attorney for Respondents

John Robert Humphrey
121 W. 63rd St., Suite 201
Kansas City, MO 64113
Tel: (816) 333-2000
jrhatty@hotmail.com
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

Constitutional Provisions

STATEMENT OF FACTS

For the purposes of this appeal, Respondents Jennifer Gaulter and Philip Douglass (together "Respondents") generally do not object to the State's Statement of Fact.[1] The State acknowledges that Detective Estes ("Estes") falsely represented to Judge Powell that Estes had probable cause to search for a "Deceased human fetus or corpse, or part thereof" (hereinafter the "Corpse Clause"). Tr. 12-13, 16; App.'s Br., pp. 9-11. Further, Estes admitted, and the State acknowledged, this was done because the Fourth Amendment's requirement that searches be made with probable cause is a huge hassle which would have required Estes to obtain another warrant to investigate a corpse, if Estes had come across a corpse (referred to as a "piggyback warrant"). Tr. 12-13, 16; App.'s Br., pp. 9-11. The State's Brief also seems to accept the fact that casually checking the Corpse Clause (without probable cause) is standard procedure for the Kansas City Police Department ("KCPD"). Tr. 12-13, 16; App.'s Br., pp. 9-11.

The State's Statement of Fact is incomplete and omits a number of facts supporting the trial court's decision. These missing facts generally include (but are not limited to) the following:

- Other aspects of the underlying warrant's search also lacked probable cause (*e.g.*, "Any person for whom a valid felony arrest warrant is outstanding.");

[1] Respondents do assert that the State's Statement of Fact, even if presumed true does not make for a submissible case, given the nature of the facts.

- Respondents' Motion to Suppress sought suppression for ***three*** reasons: (1) Estes executed the search warrant outside his jurisdiction; (2) bad faith regarding the Corpse Clause; and (3) Estes' failure to leave a receipt. L.F., pp. 11-12;
- The State's Response to the Motion to Suppress set forth substantial legal argument that the evidence should not be suppressed, because checking the Corpse Clause was a "typographical error." L.F., p. 15; and
- Additionally, the State responded that Estes' failure to leave a receipt was a "ministerial act" which does not require suppression. L.F., p. 16.

These facts (as well as the facts which suggest Estes executed the warrant outside his jurisdiction) are expanded upon in the appropriate sections.

ARGUMENT

Respondents agree with the State that this is a mixed question of law and fact for which this Court will defer to the trial court on all factual findings, but review legal conclusions *de novo*. *See e.g.*, *State v. Taylor*, 298 S.W.3d 482, 492, 503-04 (Mo. banc 2009). In a unanimous Opinion from 2009, this Court explained the standard of review for "mixed" questions of law and fact:

> For instance, appellate review of the trial court's legal determination of whether a statement is hearsay is given no deference and is reviewed *de novo* … Once a statement is classified as hearsay, the court must determine whether a hearsay exception applies. The trial court's findings as to the factual underpinnings of a hearsay exception are subject to deferential

> review, but whether those findings qualify as an exception to the hearsay rule is a legal question subject to *de novo* review.

Id. at 492 n.4 (emphasis added); *see also State v. Sisco*, 458 S.W.3d 304, 312-13 (Mo. banc 2015).

I. The neglected decision of *Merriweather v. State*, 294 S.W.3d 52 (Mo. banc 2009) (*relates to good faith arguments of Appellant's Points I and II*).

In 2009, this Court held that the State has "an affirmative requirement of diligence and good faith on the state to locate records not only in its own possession or control but also in the control of other governmental personnel." *Merriweather v. State*, 294 S.W.3d 52, 55 (Mo. banc 2009). This duty to retrieve information from "other governmental personnel" includes authorities in other States – *Merriweather* explicitly involved records that this Court held the State of Missouri had a duty to obtain from the State of Illinois. *Id*. *Merriweather* dealt with criminal discovery Rule 25.03; but did explicitly hold that "[i]nadvertence and good faith do not excuse a failure to comply with Rule 25.03." *Id*. at 56. Further, Rule 25.03 and *Merriweather* generally stand for the proposition that State Prosecutors will be presumed to know everything that other state actors, including the police, know, *so they better go talk to the police before filing documents and responding to discovery*. *See e.g.*, *id*. at 54-55.

Respondents filed a Motion to Suppress evidence seized because: (1) Estes executed the search warrant outside his jurisdiction; (2) bad faith regarding the Corpse Clause; and (3) Estes' failure to leave a receipt. L.F., pp. 11-12. As explained more completely below, the Corpse Clause argument was that Estes checked the Corpse Clause

without probable cause and the warrant was therefore invalid. *Id*. Similarly, Respondents argued that Estes failed to leave a receipt, as required under the law and warrant, and so the search was invalid. *Id*. at 12.

Thirty days later, the State filed a Response to the Motion to Suppress which detailed the assertion that Estes had checked the Corpse Clause as a "result of an unintentional typographical error." *Id*. at 15. Additionally, the State's Response asserted that the failure to conduct a ministerial act does not invalidate a search:

> The officers in this case failed to leave a receipt for the property recovered from the defendant and co-defendant's home. However, the act of leaving the receipt is ministerial and does not invalidate the officers' prior valid acts.

Id. at 16.

At the suppression hearing, the State called Estes to testify. Tr. 10. Almost immediately the State put into evidence Estes' evidence that he had, in fact, left a receipt. *Id*. at 11 ("That is the return receipt for the search warrant."). Estes' return receipt evidence was sufficient to cause Respondents' trial counsel to withdraw that aspect of the Motion to Suppress. The receipt was deposited with this Court on August 24, 2016. Additionally, Estes was asked why the Corpse Clause was checked and – as acknowledged above – Estes testified that it was checked because of the hassle involved in a piggyback warrant. Tr. 12-13, 16; App.'s Br., pp. 9-11. Estes had the return receipt and openly admitted that the Corpse Clause was not checked due a "typographical error."

II. Under no circumstances can either the Missouri Constitution or the Federal Constitution tolerate a "redaction" of the invalid portions of the warrant in this case (*relates to Appellant's Point I*).

Respondents agree with the State that "Missouri's constitutional 'search and seizure' guarantee, article I, section 15, is co-extensive with the Fourth Amendment." *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999). However, ***this Court*** is free to interpret Missouri's Constitution as providing ***greater*** protections than the federal government and – *if this Court agrees that federal courts provide no protection from flagrant Fourth Amendment violations* – Respondents urge this Court to reconsider the co-extensiveness of those protections. However, as set forth below, there are several clear bases to suppress the evidence herein.

A. The Courts Cannot Redact Invalid Elements Of A Search Warrant Which Were Placed In The Warrant In Bad Faith.

This section of Respondents' Brief paraphrases portions of Judge Gary D. Witt's thoughtful Dissenting Opinion or otherwise adopts sections wholesale (while also adding some research uncovered in the interim, hopefully adding to its persuasiveness). Counsel for Respondents hopes that Judge Witt interprets this as a compliment regarding the well-reasoned arguments contained therein. Similarly, Counsel for Respondents takes it as the highest compliment that Judge Witt's Dissenting Opinion heavily borrowed from a number of Counsel for Respondents' Briefs filed at the Western District outlining the absurdity of the Western District *continually* chastising KCPD and/or the Jackson County Prosecutor's office for their conduct of criminal prosecutions *and then affirming the*

convictions obtained by that conduct. E.g., *State v. Clark*, 486 S.W.3d 479, 484 n.2 (Mo. App. W.D. 2016) (affirming a conviction, but dropping a footnote which "urge[d]" KCPD and the Jackson County Prosecutor to start complying with valid discovery requests under Rule 25.03); *State v. Tony K. Lyles*, WD76786 (September 2, 2014) (unpublished) (affirming a conviction, but describing Jackson County Prosecutor's discovery practices as "reprehensible"); *Wallar v. State*, 403 S.W.3d 698 (Mo. App. W.D. 2013) (affirming denial of post-conviction relief, while chastising "deceptive" discovery practices). Wrongful conduct is not deterred when it is rewarded.

1. Redaction Doctrine Generally.

"The normal rule is that 'all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in state court.'" *State v. Grayson*, 336 S.W.3d 138, 146 (Mo. banc 2011). The severance doctrine is an exception to the exclusionary rule; the State bears the burden of establishing the appropriateness of the exception. *United States v. Leon*, 468 U.S.897, 924 (1984). The State cannot meet this burden herein.

In certain limited cases, where a discrete and minor part of a warrant is found to be invalid for either lacking particularity or lacking probable cause but the remainder of the warrant passes constitutional scrutiny, courts have found that the application of the exclusionary rule may be too harsh. Accordingly, a number of courts have held that in such circumstances it may be appropriate to redact severable portions of a warrant, unsupported by probable cause, and to exclude from trial only those items seized for which there was no probable cause to search. Courts have referred to this doctrine as the

severance doctrine. *E.g.*, *United States v. Galpin*, 720 F.3d 436, 448 (2d Cir. 2013). To apply the severance doctrine, the court must first decide whether a warrant is severable. A warrant is severable where "the valid portions of the warrant [are] sufficiently particularized,[2] distinguishable from the invalid portions, and make up the greater part of the warrant." *United States v. Sells*, 463 F.3d 1148, 1155 (10th Cir. 2006). The severance doctrine is purportedly necessary to "balance the considerable social costs of suppressing evidence of guilt against the need to deter police misconduct." *Galpin*, 720 F.3d at 448 (citing 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.6(f) (5th ed. 2012)). A number of courts have adopted this approach,[3] *e.g.*, *Sells*, 463 F.3d at 1154-55; *United States v. Christine*, 687 F.2d 749, 754 (3d Cir. 1982), including one Court of Appeals in Missouri, *State v. Horsey*, 676 S.W.2d 847 (Mo. App. S.D. 1984). *See Slip Op.*, Witt, J., dissenting, pp. 5-6.

In *Horsey*, the Court decided that even if the affidavit in support of the warrant did not support probable cause for one of the addresses, the warrant was not invalid *in toto*, due to the severability doctrine. *Id*. at 852-53. The warrant could be redacted to suppress only the property for which there was no probable cause to search. *Id*. at 853. The Court in *Horsey* agreed with the Third Circuit's opinion in *Christine*, which found that the practice of redaction is consistent with the Fourth Amendment and should be used to

[2] The particularized requirement also failed here and is discussed below.

[3] Respondents could find no Opinions rejecting the *idea* of the severance doctrine.

salvage partially invalid warrants. *Id*. (citing *Christine*, 687 F.2d at 750–51). *See Slip Op.*, Witt, J., dissenting, pp. 6-7.

Christine provides a thorough analysis of redaction and how it relates to the Fourth Amendment's Warrant Clause, which is often cited in other courts. 687 F.2d at 756. The Third Circuit identified five purposes served by the Warrant Clause; analyzed those purposes; and ultimately concluded that redaction of a warrant containing invalid severable phrases or clauses is, ***under certain circumstances***, consistent with the purposes of the Warrant Clause. *Id*. at 758. *See Slip Op.*, Witt, J., dissenting, pp. 7-8.

2. Redaction Requires Good Faith.

Given that the exclusionary rule's primary purpose is to sanction police misconduct, in cases where a warrant is partially defective for more benign reasons, excluding all the evidence under the warrant may not be justified. However, where police misconduct and bad faith are the very reason why the warrant needs be severed, the doctrine cannot and must not be allowed to protect police or prosecutors from their own misconduct. *Horsey*, 676 S.W.2d at 853. The cases repeatedly state that the severance doctrine is inappropriate where bad faith or pretext is present. *Id*. ("[i]f the overall tenor of the warrant or search smacks of a general warrant or an abuse of the prospective availability of redaction, then the entire search and seizure may be treated as a single illegality" (emphasis added)); *United States v. Fitzgerald*, 724 F.2d 633, 636-37 (8th Cir. 1984) (holding that absent a showing of pretext or bad faith on the part of the police or prosecution, the invalidity of part of a search warrant does not require suppression of all the evidence seized during its execution); *United States v. Cook*, 657 F.2d 730, 735 n.6

(5th Cir. 1981) (adopting severance and specifying this case was not a situation where the faulty warrant was the result of pretext by police); *United States v. Freeman*, 685 F.2d 942, 952-53 (5th Cir. 1982) (stating that use of severance to work an abuse of the warrant procedure could not be tolerated). *See Slip Op.*, Witt, J., dissenting, pp. 8-10.

In support of the State's argument that redaction is available in cases of bad faith,[4] the State has included a footnote citation to *Virgin Islands v. John*, 654 F.3d 412 (3d Cir. 2011). In *John*, the defendant moved to suppress specifically identified "pornographic magazines, pornographic photographs of children, and computer files containing pornographic notes and photographs of children" for which the state did not have probable cause. *Id*. at 414. The defendant did not, apparently, seek to suppress two red and blue spiral notebooks for which the state had probable cause. *Id*. The court in *John* did specifically find that the officer seeking the warrant did not act in good faith in seeking the listed items and suppressed that evidence. *Id*. at 421. The State, here, asserts that this "supports" their argument. App.'s Br., p. 24 n.11.

> [However, the defendant] concede[d] that the warrant was valid insofar as it authorized a search for the red and blue spiral notebooks that had been specifically identified as containing evidence of his alleged crimes. He

[4] The State argues it should be afforded authority and freedom to circumvent the Fourth Amendment in bad faith. The State does not assert that Estes' conduct was in good faith, merely that it is not sufficiently "flagrant" to warrant reprisal. *E.g.*, App.'s Br., pp. 28-32.

> [sought] only to suppress the journals, which were found after the search's admittedly legal objects had been seized.

John, 654 F.3d at 418 n.2. Thus, at most this assertion is dicta, as the defendant in *John* never even asserted that redaction was not available when bad faith is found. *Id*.

Therefore, the redaction doctrine requires the lack of "bad faith" or "pretext" and no case has directly controverted this requirement. *E.g.*, *Horsey*, 676 S.W.2d at 853. The Fourth Amendment can only offer protection insofar as individuals, vested with the authority of the State, exercise their authority in good faith and in accordance with the procedures required by the Warrant Clause. The absence of bad faith or pretext is necessary before redaction may be considered, as ignoring bad faith by the police or prosecution would undermine many of the purposes of the Warrant Clause as identified by *Christine*. 687 F.2d at 756. *See Slip Op.*, Witt, J., dissenting, pp. 8-10.

For example, the first purpose of the Warrant Clause, identified in *Christine*, is the protection of citizens from unreasonable interference with privacy by requiring that warrants be justified by an antecedent showing of probable cause. *Id*. An officer who intentionally submits a false statement to the judge issuing a warrant or indicates he has probable causes to search for items for which he knows there is no probable cause completely undermines this protection. Redaction of the offending provision does not negate the unreasonable interference by the State where such interference is premised on or expanded by an intentionally false statement under oath or other malfeasance. *See Slip Op.*, Witt, J., dissenting, p. 10.

The second purpose identified is the protection of privacy from police overreach by requiring a neutral and objective judicial officer to serve as an intermediary. *Id*. A neutral intermediary must have reasonable confidence that the affiant is, to the best of his knowledge, telling the truth. This is especially the case where the affiant is a member of law enforcement. As this Court has noted, "courts have consistently held that another law enforcement officer is a reliable source and that consequently no special showing of reliability need be made as a part of the probable cause determination." *State v. Baker*, 103 S.W.3d 711, 720-21 (Mo. banc 2003). Deliberate deception undermines the ability of the neutral arbiter to make an informed decision. *See Slip Op.*, Witt, J., dissenting, pp. 10-11.

The third purpose of the Warrant Clause is to limit the intrusion by requiring things to be seized to be described with particularity. *Christine*, 687 F.2d at 756. If an officer is allowed to include items he knows are not supported by probable cause, there is no limit to the intrusion. It likely increases the intrusion exponentially. ***First***, if other officers are executing the warrant, they will continue to search for the items if they believe they are listed in good faith. ***Second***, given human nature, it seems likely that an officer executing a search warrant which authorizes a search for "coach sunglasses" and "dead babies," the officer might search a little more zealously for the latter. Redaction does nothing to limit the intrusion. *See Slip Op.*, Witt, J., dissenting, p. 11.

The fourth purpose of the Warrant Clause is to inform the subject of the search of the authority of the officer and limits of his power. *Id*. However, if items are included in the warrant beyond the power of the officer to search, because they are not supported by

probable cause, then the notification is meaningless and there can be no confidence in the warrant. Again, post-hoc redaction does not protect these interests where the police have undermined the protections of the Fourth Amendment in bad faith. *See Slip Op.*, Witt, J., dissenting, p. 11.

Especially where, as here, a systemic practice of a police department is designed to abuse or take advantage of the prospect of redaction, no court can sanction the behavior and apply the redaction doctrine.

3. The Fourth Amendment Is Meaningless If Courts Refuse To Suppress Illegally-Obtained Evidence.

The Western District's Opinion curtails the ability of trial courts to use the exclusionary rule to sanction abusive police practices. The majority opinion recognizes that the conduct in this case was neither excusable nor justifiable and states that it must be discontinued. However, the only circumstance in which the majority would allow the trial court to sanction the egregious and likely systematic behavior of the Kansas City Police Department in this case is when the invalid portions of the warrant create a "general warrant." *See Christine*, 687 F.2d at 752. Accordingly, the risk of sanction faced by law enforcement for these abusive practices is distressingly small. Under the Western District's analysis, there is ***zero*** incentive for this officer or KCPD – or any police department in Missouri – to curtail the practice of checking the Corpse Clause on every warrant. The exclusionary rule is designed to deter illegal behavior:

> Although [the] exclusionary principle is driven by dual "considerations of deterrence and of judicial integrity," the deterrence rationale is paramount:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it."

Grayson, 336 S.W.3d at 147 (internal citations omitted). Exceptions to the alleged harshness of the exclusionary rule have been crafted by the courts where exclusion of the evidence obtained in violation of Fourth Amendment rights would not serve to deter future violations. For example, in *Leon*, the United States Supreme Court held that evidence obtained by police officers in objectively reasonable reliance on a subsequently invalidated search warrant should not be suppressed pursuant to the exclusionary rule. 468 U.S. at 922. *See Slip Op.*, Witt, J., dissenting, pp. 12-14.

As noted by the State, in light of the purposes of (and exceptions to) the exclusionary rule, the question of whether the exclusionary rule should be applied has been formulated as the following:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Herring v. United States, 555 U.S. 135, 144 (2009). The conduct at issue in this case is sufficiently egregious to warrant the application of the exclusionary rule. Applying the exclusionary rule here would result in "appreciable deterrence," as the conduct here is a

deliberate circumvention of the basic requirement that probable cause be established before law enforcement may enter and search for items in the home. Estes' testimony suggests that the arbitrary checking the Corpse Clause box for convenience was not a onetime occurrence but is more widespread (even if it is not widespread, it is certainly egregious). The testimony suggests that this may be a regular KCPD practice. *See Slip Op.*, Witt, J., dissenting, pp. 14-15.

The second question here is whether the benefits of applying the exclusionary rule outweigh the costs. The United States Supreme Court has found in several cases that the benefits of applying the rule do not outweigh the costs, but in each of those cases the police were found to be acting in good faith. *E.g.*, *Leon*, 468 U.S. at 922; *Illinois v. Krull*, 480 U.S. 340, 349-350 (1987) (exclusionary rule does not apply to warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional); *Arizona v. Evans*, 514 U.S. 1, 14-15 (1995) (exclusionary rule does not apply where police reasonably rely in good faith on mistaken information in a court's database that an arrest warrant was outstanding). *See Slip Op.*, Witt, J., dissenting, p. 16.

On the other hand, cases in which the Supreme Court has found abuses giving rise to the exclusionary rule include conduct that is patently unconstitutional. *E.g.*, *Weeks v. United States*, 232 U.S. 383, 398, 34 S.Ct. 341, 58 L.Ed. 652 (1914) (overruled by *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (exclusionary rule applicable where officers broke into defendant's home without a warrant and could not have gotten a warrant had they tried, as they were lacking in any sworn or particularized information to justify the warrant)); *Mapp*, 367 U.S. at 655-657, 81 S.Ct. 1684 (exclusionary rule applied where officers

forced open door to home with a false warrant in a flagrant or deliberate violation of rights). *See Slip Op.*, Witt, J., dissenting, p. 16.

The trial court found the conduct at issue to be deliberate misconduct by the detective: "Estes acknowledged that he intentionally checked a box identifying that probable cause existed to search for 'deceased human fetus or corpse, or part thereof,' knowing that to be a false statement." L.F. pp. 42-43. In addition, the trial court found that Estes "disingenuously failed to call the Court's attention to the fact that he had checked that box [and] cannot reasonably be found to have been acting on an objective good faith belief that the warrant was valid …" *Id.* at 43. Further, the trial court found "[i]t would be a miscarriage of justice to permit an officer to knowingly bypass the particularity requirement of a warrant by checking boxes that allow officers to search for items where no probable cause exists…" *Id.* at 44. This Court must defer to the trial court's findings on facts and credibility. *Taylor*, 298 S.W.3d at 492, n.4. This was an intentional act of including items for which the police knew there was no probable cause to search. It rose above mere negligence and is no "typographical error." The conduct at issue here – *the deliberate circumvention of fundamental Fourth Amendment protections for the sake of convenience* – is exactly the type of conduct that the exclusionary rule was crafted to deter. *See Slip Op.*, Witt, J., dissenting, pp. 17-18.

B. Redaction Cannot Salvage A General Warrant.

Additionally, as above, some portions of this section are borrowed wholesale or paraphrased from Judge Mark D. Pfeiffer's Dissenting Opinion (again, Counsel has added research and case law discovered in the interim). Counsel for Respondents hopes

that Judge Pfeiffer likewise takes this as a compliment. One issue which appears to have been glossed over completely by the Majority Opinion and both Dissenting Opinions below is the fact that redaction is ***also*** not available to salvage a general warrant. *Christine*, 687 F.2d at 758 ("It is beyond doubt that all evidence seized pursuant to a general warrant must be suppressed."); *Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137, 149 (3d Cir. 2002) (contrasting general warrants with overly broad warrants by stating, in part, that overly broad warrants can be cured by redaction); *see also Horsey*, 676 S.W.2d at 853 (noting two ways in which redaction is ***not*** available: When the "overall tenor of the warrant smacks of a general warrant or an abuse of the prospective availability of redaction.").

United States v. Fleet Management Ltd., 521 F.Supp.2d 436 (E.D. Penn. 2007), contains a thoughtful and exhaustive analysis of "general" and "overly broad" warrants in the context of both *Leon*'s good faith analysis and the redaction doctrine analysis. "A ***general warrant*** is one that so clearly violates the particularity requirement that it 'vest[s] the executing officers with unbridled discretion to conduct an exploratory rummaging through [defendants'] papers in search of criminal evidence.'" *Fleet Management*, 521 F.Supp.2d at 442 (quoting *Christine*, 687 F.2d at 753, and citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (stating that the problem with general warrants is that they authorize "a general exploratory rummaging in a person's belongings")) (emphasis added). "[A] warrant that is ***merely overly broad*** 'describe[s] in both specific and inclusive generic terms what is to be seized,' but authorizes the seizure of items for which there is no probable cause." *Fleet Management*, 521 F.Supp.2d at 442 (quoting

Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents, 307 F.3d at 148) (emphasis added).

All evidence seized pursuant to a ***general warrant*** must be suppressed, while evidence seized pursuant to an ***overly broad warrant*** can – at least theoretically – be salvaged by either the redaction doctrine or *Leon*'s good faith analysis. *Fleet Management*, 521 F.Supp.2d at 442-46 (finding that the warrant was general and neither doctrine could salvage the search). Even without Estes' deceit upon the warrant court, the fruits of the search must be suppressed, because it was a general warrant.[5]

As explained in Judge Pfeiffer's Dissenting Opinion, the warrant herein was a general warrant as it authorized the search of every molecule at the search location. The Corpse Clause authorizes a search for any part of a deceased human fetus or corpse. Such a search is so broad that it swallows everything else identified in the subject warrant—no matter how "particularized" the other items may be. Any "part" of a deceased human fetus or corpse would include any microscopic particle that attaches within it the signature of human DNA. Necessarily, then, a corpse provision authorizes a search far more broad than anything else listed in the search warrant with any amount of specificity. Nothing in the home is off limits under the Corpse Clause. *See Slip Op.*, Pfeiffer, J., dissenting, p. 2.

---

[5] That Estes obtained and executed the warrant further taints this analysis for the State, given that Estes *knew* that the general warrant was obtained simply because piggyback warrants are a hassle. *E.g.*, *United States v. Foster*, 100 F.3d 846 (10th Cir. 1996).

The Corpse Clause thereby transforms a warrant into "a general, exploratory rummaging in a person's belongings," *Coolidge*, 403 U.S. at 467, "with unbridled discretion," *Christine*, 687 F.2d at 753. Further, as discussed above, officers will likely search more vigorously for a dead body (or part thereof) than they might otherwise search for sunglasses. Even if the officers would search for the stolen purse with the same vigor; the fact that the police would never actually find the dead body (or part thereof) means that the search could go on indefinitely. As such, redaction is not available to salvage this general warrant. *E.g.*, *Horsey*, 676 S.W.2d at 853. "It is beyond doubt that all evidence seized pursuant to a general warrant must be suppressed. The cost to society of sanctioning the use of general warrants – abhorrence for which gave birth to the Fourth Amendment – is intolerable by any measure. No criminal case exists even suggesting the contrary." *Christine*, 687 F.2d at 758 (footnote omitted). All evidence seized pursuant to this general warrant was correctly suppressed. *See Slip Op.*, Pfeiffer, J., dissenting, pp. 2-3.

C. Even If Redaction Were Available For This Warrant, It Fails The "Redaction Test" Urged By The State.

The State urges this Court to ignore the federal (and Southern District) opinions which forbid redaction in bad faith cases and, instead urges this Court to skip directly to the test put forth in those cases. App.'s Br., p. 19; quoting *Sells*, 463 F.3d at 1151. Even without Estes' admitted deceit, the underlying warrant does not pass muster. As applicable to this case, the test requires the following:

- First, this Court should divide the warrant into commonsense clauses/categories;

- Second, this Court must determine whether the valid portions are sufficiently distinguishable from the invalid portions;
- Third, this Court should ascertain whether the invalid portions can be meaningfully severed and – once severed – whether the "greater part of the warrant" was valid or invalid; and
- Finally, if this Court determines that the warrant was "mostly valid" then this Court can sever the invalid portions and suppress only the evidence seized pursuant to the invalid portions of the warrant.

See Sells, 463 F.3d at 1151.

From the outset, the State puts its finger on the scale and, rather than describing the stolen property in checkbox terms, the "property was specifically described in categories (1)-(9)." App.'s Br., p. 20 n.8. The State then adds the Corpse Clause *generally* as a tenth category. This description is disingenuous, for at least two reason:

- ***First***, the warrant contains three checkboxes for generally describing three types of stolen property.[6] L.F., p. 40. The "common sense" way to divide the warrant

[6] "[Checkbox 1] Property, article, material or substance that constitutes evidence of the commission of a crime;" "[Checkbox 2] Property that has been stolen or acquired in any manner declared an offense;" and "[Checkbox 3] Property for which possession is an offense under the laws of this state." L.F., p. 40.

would be across these lines,[7] such that ***at most***, these three categories are potentially valid. Respondents further assert that, ***realistically***, only the first two of the three checkboxes (*which cover the same items*) are potentially applicable here; whereas the third checkbox is not (*as possession of coach sunglasses have not yet been made unlawful in Missouri*). L.F., p. 40.

- ***Second***, the State completely ignores the fact that, apparently, Estes also did not have probable cause regarding the fourth checkbox ("Any person for whom a valid felony arrest warrant is outstanding."), which should be part of this analysis.

As such, a "common sense" way to divide the warrant would be to consider checkbox 1 and checkbox 2 as one "category" for which there may be probable cause and each of checkboxes 3, 4, and 5 as separate "categories" for which there was no probable cause. As such, 75% of the "categories" are invalid. *See Sells*, 463 F.3d at 1151. Even considering checkboxes 1 and 2 as separate categories, 60% of the "categories" are invalid. *See id.*

Ultimately; however, this mathematical formula is unnecessary given that *Sells* requires this Court to look to the practical effect of the various parts:

[7] Conversely, given the proximity to Halloween, if this Court wanted to be macabre, the Corpse Clause could be divided into the infinite potential "parts thereof" for the human body, starting with the roughly 206 bones in the adult human body or approximately 300 bones in a "human fetus." Mammal Anatomy: An Illustrated Guide (2010), p. 129.

> "A warrant's invalid portions, though numerically fewer than the valid portions, may be so broad and invasive that they contaminate the whole warrant." []*Sells*, 463 F.3d [at] 1160[]. "[M]erely counting parts, without any evaluation of the *practical eff*ect of those parts, is an improperly 'hypertechnical' interpretation of the search authorized by the warrant." *Id*. (emphasis added).

Slip Op., Pfeiffer, J., dissenting, p. 2. As noted above and in Judge Pfeiffer's dissent, denoting that an investigation is no longer a search for stolen sunglasses, but rather a search for a dead body, greatly increases the scope, vigor, and time any officers will spend searching the residence. *E.g.*, *id*., p. 3. The simple fact that the officers will never find something the search warrant has directed searching officers to find, means that the warrant has become "'a general, exploratory rummaging in a person's belongings... with unbridled discretion.'" *Id*. (quoting *Coolidge*, 403 U.S. at 467 and *Christine*, 687 F.2d at 753). As such, the warrant fails the test put forth by the State, *plus the test is irrelevant, given Estes' deceit in obtaining the warrant initially*.

III. Estes' conduct is exactly the type of misconduct which should be punished through suppression (*relates to Appellant's Point II directly and Point I indirectly*).

The State's Brief uses a number of platitudes to attempt to minimize what *exactly* Estes did in this case. App.'s Br., pp. 28-32. However, there is no mistake here that the trial court found that Estes lied to a judge in order to obtain a warrant which, *at best*, was overly broad simply because the Fourth Amendment is an "inconvenience" to the police. This Court is bound by the trial court's factual findings:

> Officer Estes acknowledged that he intentionally checked a box identifying that probable cause existed to search for "deceased human fetus or corpse, or part thereof," ***knowing that to be a false statement***. As such, the warrant rendered was invalid. The good faith exception was designed to prevent punishing an officer, acting in good faith, for a judge's error. In this case, the "judge's error" was occasioned because the officer preparing the warrant checked a box on a pre-printed form for something for which there was absolutely no probable cause. Thereafter, he disingenuously failed to call the Court's attention to the fact that he had checked that box. ***Officer Estes cannot reasonably be found to have been acting on an objective good faith belief*** that the warrant was valid, since it was the officer's own action that rendered the warrant invalid. In fact, this is exactly the type of situation that the exclusionary rule was designed to deter: ***intentional police misconduct, malfeasance or negligence***.

L.F., pp. 42-43 (emphasis added); *see also id*. at 44 ("…simply because it is an inconvenience to the officer to follow the U.S. Constitution, the Missouri Constitution and the laws in the state of Missouri.").

Further, as noted in Judge Witt's Dissenting Opinion, it seems clear that Estes' conduct – as a twenty-year veteran – is the standard operating procedure for the KCPD. *Slip Op.*, Witt, J., dissenting, pp. 2 ("systemic police misconduct"), 12 ("likely systemic behavior of the [KCPD]"), 15 ("[Estes'] testimony suggests that the arbitrary checking the corpse clause box for convenience was not a onetime occurrence but is more

widespread."). Against this backdrop of flagrantly violating the Fourth Amendment, because it is "inconvenient," the State's assertion that Estes' conduct is a "minor transgression" is simply not supported by any factual evidence.

Further, the State's circular logic in asserting that there can be no "bad faith" because Estes *could have seized a dead body, if he found one* must be rejected *as explained in one of the State's own footnotes*. App.'s Br., pp. 30-31 n.13 ("Although the officers could have validly seized a fetus, corpse, or part thereof, it is possible that officers may have needed an additional search warrant if they wished to do further investigation based upon the discovery of that evidence."). Of course, Estes could have seized a dead body found in the residence. The "piggyback warrant," which Estes finds to be such a hassle, is that "additional warrant" which would be required to investigate this hypothetical discovery. Arguing that bad faith does not exist, because KCPD can seize dead bodies found while executing a search warrant, disregards the exact reason Estes stated he sought to deceive Judge Powell and violate the Fourth Amendment. *E.g.*, Tr. 12-13, 16. The evidence was correctly suppressed.

IV. This Court Can Also Affirm the Trial Court's Decision for Any Reason (*relates to Appellant's Points I and II*).

"Even if the stated reason for a circuit court's ruling is incorrect, the judgment should be affirmed if the judgment is sustainable on other grounds." *Swallow v. State*, 398 S.W.3d 1, 3 (Mo. banc 2013). There are at least three additional reasons to affirm the trial court's decision:

A. Even If The Trial Court May Have Skipped The Redaction Step, Leon *Still Requires Suppression.*

Even if a warrant could be rehabilitated via redaction, this Court should look to the circumstances surrounding Estes' obtaining and executing the warrant. *E.g.*, *United States v. Foster*, 100 F.3d 846 (10th Cir. 1996). In *Foster*, it was the "standard practice" of the local police to seize anything and everything of value[8] from every residence in which a search warrant was executed. *Id*. at 849-52. The officer obtaining the warrant also executed the warrant and "admitted that this was the standard practice in Sequoyah County, that the officers in the county had been conducting searches this was for as long as he could remember, and that they did so in an effort to turn up evidence of additional crimes." *Id*. at 850-51. The court found that blanket suppression was the correct remedy, even though the warrant was sufficiently particular in its description of the items to be seized ***because the officer obtaining the warrant knew the ulterior motive of the local police and the warrant would be executed as a general warrant***. *Id*. at 852.

Similarly, even if the warrant at issue herein somehow rehabilitated, it is of no avail, given that Estes obtained and executed the warrant, knowing that it contained at least one checkbox for which there was no probable cause. *Id*.

B. The Warrant Was Executed Outside Of Estes' Jurisdiction.

Although no factual findings were made on this point, the testimony of Estes was clear that officers from Blue Springs did not "execute" the search warrant, but rather Blue

[8] And they meant *everything*, including "a metal rod." *Foster*, 100 F.3d at 848 n.1.

Springs officers "secured" the residence and KCPD "executed" the warrant. Tr. 14 ("They actually served the search warrant and made sure that the residence was cleared and then turned it over to us."). The search warrant was not "executed… within the territorial jurisdiction of the officer executing the warrant," as required by Section 542.286.2. *See also e.g., State v. Elliott*, 845 S.W.2d 115 (Mo. App. S.D. 1993). The Blue Springs Police Department had jurisdiction over the residence and search at issue. Yet, the search was carried out and accomplished by KCPD. The trial court's decision to suppress the evidence was correct.

C. The Totality Of The Circumstances Requires Suppression To Punish Intentional, Egregious, And Systemic Misconduct.

Looking at the totality of the circumstances of this case, this Court is faced with a number of intentional, egregious, and systemic violations of the "U.S. Constitution, the Missouri Constitution and the laws of the state of Missouri." *See* L.F., p. 44.

- Estes intentionally lied to Judge Powell to obtain a search warrant lacking probable cause, because the Fourth Amendment is an "inconvenience." *E.g.*, Tr. 12-13, 16; L.F., pp. 42-44;
- Estes' conduct is most likely part of a systemic KCPD problem. Witt, J., dissenting, pp. 2, 12, 15; and
- Even when these issues were presented to Judge Schieber to address, the State failed to follow the mandate of investigation required under *Merriweather* and provided a motion which (1) argued that the Corpse Clause was checked as a "typographical error" – *while Estes openly admitted the actual reason for checking*

the Corpse Clause as soon as he was asked and (2) argued that failure to leave a receipt was a "ministerial act" – *while Estes had proof that he left a receipt*. *E.g.*, 294 S.W.3d at 55.

This conduct must be deterred and – as pointed out in Judge Witt's Dissenting Opinion and evidenced in numerous other cases – simply pleading with KCPD to comply with the Fourth Amendment will not serve as a deterrence. Witt, J., dissenting, pp. 12-15.

CONCLUSION

For the foregoing reasons, and any further reasons this Court may explore, the decision of the trial court should be affirmed.

Respectfully submitted,

GILLETTE LAW OFFICE, LLC

/s/ Clayton E. Gillette

Clayton E. Gillette 57869
Gillette Law Office, LLC
600 E 8th Street, Suite A
Kansas City, MO 64106
Tel: (816) 895-2529
Email: clay@moappeals.com
Limited Appearance Attorney for Respondents

John R. Humphrey (34178)
121 West 63rd Street, Suite 201
Kansas City, MO 64113
Tel: (816) 333-2000
Fax: (816) 942-3112
Email: jrhatty@hotmail.com
Attorney for Respondents

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that the foregoing document, has a word count of 7,542 using Microsoft Word's tools calculated in accordance with the Missouri Supreme Court Rules and is otherwise in compliance with this Court's Rules and was filed via this Court's Electronic Filing System on October 21, 2016, and thereby served upon all counsel of record.

/s/ Clayton E Gillette