No. SC95719

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

PHILLIP DOUGLASS and JENNIFER M. GAULTER

Respondents.

Appeal from the Circuit Court of Jackson County
Sixteenth Judicial Circuit
The Honorable Robert M. Schieber, Judge

APPELLANT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

JURISDICTIONAL STATEMENT.....4

STATEMENT OF FACTS.....5

POINTS RELIED ON.....12

STANDARD OF REVIEW.....14

ARGUMENT 15

I.....15

II.....28

CONCLUSION.....33

CERTIFICATE OF COMPLIANCE.....34

TABLE OF AUTHORITIES

Cases

Franks v. Delaware, 438 U.S. 154 (1978).....23

Heien v. North Carolina, 135 S. Ct. 530 (2014).....17

Herring v. United States, 555 U.S. 135 (2009).....28, 29

Hudson v. Michigan, 547 U.S. 586 (2006).....17

State v. Allen, 274 S.W.3d 514 (Mo. App. W.D. 2008).....15-16, 30

State v. Horsey, 676 S.W.2d 847 (Mo. App. S.D. 1984).....17, 23, 26

State v. Johnson, 354 S.W.3d 627 (Mo. banc. 2011).....14

State v. Lachterman, 812 S.W.2d 759 (Mo. App. E.D. 1991).....16

State v. Wilbers, 347 S.W.3d 552 (Mo. App. W.D. 2011).....15

United States v. Christine, 687 F.2d 749 (3d Cir. 1982).....16, 17, 18, 26

United States v. Fitzgerald, 724 F.2d 633 (8th Cir. 1983).....22-23, 26

United States v. Galpin, 720 F.3d 436 (2d Cir. 2013).....19

United States v. Leon, 468 U.S. 897 (1984).....28, 29

United States v. Sells, 463 F.3d 1148 (10th Cir. 2006).....17, 19, 25

Virgin Islands v. John, 654 F.3d 412 (3d Cir. 2011).....24, 25

Whren v. United States, 517 U.S. 806 (1996).....23, 24

Constitutional Provisions

U.S. Constitution, Amendment IV.....15

Missouri Constitution, Article I, § 15.....15

Missouri Constitution, Article V, § 3.....4

Statutes

§ 477.070, RSMo.....4

§ 542.276, RSMo.....21

§ 547.200, RSMo.....4

Rule

83.04.....4

JURISDICTIONAL STATEMENT

In this interlocutory appeal, the State appeals the orders of the Jackson County Circuit Court sustaining respondents Phillip Douglass's and Jennifer M. Gaulter's motions to suppress evidence. Missouri law authorizes the State to appeal orders suppressing evidence in criminal cases. *See* § 547.200.1(3).[1]

Jurisdiction of this appeal originally lay in the Missouri Court of Appeals, Western District. *See* Mo. Const. art. V, § 3; § 477.070. This Court granted Defendants' application for transfer; therefore, this Court has jurisdiction. *See* Rule 83.04.

[1] Statutory references herein are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

The State charged Respondents (Defendants) with second-degree burglary and stealing property valued between $500 and $25,000, alleging that Defendants stole Melissa Garris's laptop, purses, and jewelry. (L.F. 9-10).[2] Defendants each filed a motion to suppress "the physical evidence constituting the basis for [this] cause." (L.F. 11). Defendants argued that the search warrant issued for their house was invalid because it allowed law enforcement officers to search for a deceased human fetus or corpse, or part thereof, without probable cause. (L.F. 11-12).

Detective Darold Estes of the Kansas City Police Department applied for the search warrant at issue. (L.F. 38-39). Detective Estes submitted an affidavit and application for a warrant to search Defendants' house and seize the following items that belonged to Ms. Garris:

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[2] Appellant refers to the legal file as "L.F." and the suppression hearing transcript as "Tr." Ms. Gaulter's and Mr. Douglass's proceedings were not consolidated until oral argument in the Western District. As such, the State filed two records on appeal—one for Ms. Gaulter and one for Mr. Douglass. The records are identical apart from the names of the defendants.

- Coach Purse that is silver with C's on it, a Coach purse with purple beading, Prada purse black in color, larger Louis Vuitton bag
- Toshiba Satellite laptop limited edition silver with black swirls on it
- Vintage/costume jewelry several items had MG engraved on them
- Coach, Lv, Hermes, Bestie Sunglasses
- Passport and Social Security card (Melissa Garris)
- Social Security Card/Birth Certificate in her son's name (Nikoli Lipp)
- Various bottles of perfume makeup brushes and Clinique and Mary Kay make up sets
- Keys not belonging to property or vehicle at scene
- Any property readily and easily identifiable as stolen

(L.F. 39).

In the affidavit and application, Detective Estes stated that he had probable cause to believe these items were at Defendants' house based on the following. Ms. Garris went to Argosy Casino to meet Defendants. (L.F. 38). Ms. Garris and Defendants had drinks at the Argosy Casino hotel, in room number 426. (L.F. 38). Ms. Garris began to feel uncomfortable because she

felt she was being pressured into a three-way sex act. (L.F. 38). Ms. Garris called her boyfriend, who picked her up and took her home. (L.F. 38). The next morning, Ms. Garris went to work, leaving her house locked and secured. (L.F. 38). While Ms. Garris was at work, she received a text message from Ms. Gaulter telling her that Ms. Garris had left her bag in the hotel room and Ms. Gaulter would leave the bag at the front desk for her. (L.F. 38). Ms. Garris told Ms. Gaulter that she would pick up the bag after work. (L.F. 38-39).

After Ms. Garris went home from work that evening, she saw that her apartment had been broken into, the apartment door was not damaged, and the above-listed items had been stolen. (L.F. 39). Ms. Garris called Argosy Casino and asked an employee to look in her bag for her keys; the employee told Ms. Garris the keys were not in the bag. (L.F. 39). Ms. Garris texted Ms. Gaulter about the theft and missing keys and Ms. Gaulter stopped replying to the text messages. (L.F. 39). Ms. Garris went to Argosy Casino to retrieve her bag, but the hotel told her that the bag had been picked up. (L.F. 39). Hotel staff at the Argosy Casino confirmed that Defendants had rented room number 426 and a bag had been left at the front desk for Ms. Garris. (L.F. 39).

Based on the affidavit and application, a judge issued a search warrant allowing a search of Defendants' residence. (L.F. 40). The search warrant

described the items to be searched for and seized, listing Ms. Garris's items that were in the application and affidavit. (L.F. 40). The warrant also listed—in a pre-printed section—five types of items, with a box next to each type of item for the court to check if it found there was probable cause to search for and seize that item. (L.F. 40). All five boxes were checked. (L.F. 40). One type of item was, "Deceased human fetus or corpse, or part thereof."[3] (L.F. 40).

Law enforcement officers conducted a search of Defendants' house and seized a "Toshiba laptop computer," a "Coach bag silver in color," a "red vinyl bag with misc. carrying purses," and "women's accessories." (*See*

[3] The other four boxes were: "Property, article, material or substance that constitutes evidence of the commission of a crime," "Property that has been stolen or acquired in any manner declared an offense," "Property for which possession is an offense under the laws of this state," and "Any person for whom a valid felony arrest warrant is outstanding." (L.F. 40). Defendants did not raise any issue regarding these four boxes, and counsel for Defendants acknowledged that "there may have been probable cause to believe that either of the listed subjects may have had warrants outstanding for them." (Tr. 17).

Return/Receipt for Search Warrant).[4] The officers did not seize any deceased human fetus or corpse, or part thereof. (*See* Return/Receipt for Search Warrant*)*.

At the hearing on Defendants' motions to suppress, Detective Estes testified regarding the checked box that allowed a search for a deceased human fetus or corpse, or part thereof. (Tr. 12-13). Detective Estes explained why he had checked that box:

> A. Basically, if we come across any of that during our investigation, you would require a piggyback warrant if you came across that to investigate it and kind of have to stop. Basically since it's there and we're already in there, if we came across it that tells the Judge that if we do come across it, we are going to initiate an action on this.
>
> Q. Are those things that if you came across it during the execution of a search warrant that you would investigate it anyway?
>
> A. That's correct.

[4] Defendants deposited this exhibit with the Western District Court of Appeals on January 28, 2016.

Q. And if they aren't marked on the search warrant that you are in the home for, you would then have to go out and get an additional search warrant?

A. That's correct. You would have to stop then and get a piggyback warrant to go back and cover that option.

Q. And so is that done for the purpose of if you run across those items, which are items that would require you to take action on anyway, that you can continue to do so instead of stopping the search and having to get an additional search warrant?

A. That's correct.

Q. Was that signed by Judge Powell?

A. Yes, it was.

Q. And on that search warrant, did Judge Powell make other corrections to the search warrant?

A. Yes, he did.

Q. But he did not make a correction to that?

A. That's correct.

(Tr. 12-13). Defense counsel asked Detective Estes if he had probable cause to believe there was a human corpse present at Defendants' house, and Detective Estes responded in the negative:

A. The probable cause was that what we were looking for were listed items. The actual human corpse is just an option on there that covers, like I said earlier, if we come across it, then we would actually investigate that.

(Tr. 16). Detective Estes testified that he had no reason to believe he might come across a dead body or part thereof in Defendants' house. (Tr. 16).

The trial court granted Defendants' motions to suppress, finding that the entire search warrant was invalid. (L.F. 44). The trial court found that the good faith exception to the exclusionary rule did not apply because "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" and "[t]hereafter, he disingenuously failed to call the Court's attention to the fact that he had checked that box." (L.F. 42-43). The trial court further found that it "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, thus, in essence, rendering the search warrant a general search warrant, 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." (L.F. 44).

POINTS RELIED ON

POINT I.

The trial court erred in granting Defendants' motions to suppress in their entirety because the search and seizure authorized by the warrant was not unreasonable under the Fourth Amendment of the U.S. Constitution and Article I, Section 15 of the Missouri Constitution, in that the warrant should have been redacted and the invalid portion of the warrant should have been stricken: the warrant could be readily severed into parts and all parts were constitutionally valid except for one minor clause of the warrant that was not supported by probable cause.

Franks v. Delaware, 438 U.S. 154 (1978)

State v. Horsey, 676 S.W.2d 847 (Mo. App. S.D. 1984)

United States v. Christine, 687 F.2d 749 (3d Cir. 1982)

United States v. Sells, 463 F.3d 1148 (10th Cir. 2006)

U.S. Constitution, Amendment IV

Missouri Constitution, Article I, § 15

POINT II.

The trial court erred in suppressing all evidence seized because application of the exclusionary rule was not warranted in that Detective Estes's purported misconduct in checking a box on the warrant that allowed officers to search for a fetus, corpse, or part thereof without probable cause was not the type of serious misconduct that should be deterred by the exclusion of otherwise lawfully seized evidence.

Herring v. United States, 555 U.S. 135 (2009)

State v. Allen, 274 S.W.3d 514 (Mo. App. W.D. 2008)

United States v. Leon, 468 U.S. 897 (1984)

STANDARD OF REVIEW

"A trial court's ruling on a motion to suppress must be supported by substantial evidence." *State v. Johnson*, 354 S.W.3d 627, 631 (Mo. banc. 2011). Although this Court considers all facts and reasonable inferences drawn from the facts in the light most favorable to the trial court's decision, questions regarding the permissibility of a search and seizure and the application of the exclusionary rule are reviewed *de novo*. *See id.* at 631-32.

ARGUMENT

I.

The trial court erred in granting Defendants' motions to suppress in their entirety because the search and seizure authorized by the warrant was not unreasonable under the Fourth Amendment of the U.S. Constitution and Article I, Section 15 of the Missouri Constitution, in that the warrant should have been redacted and the invalid portion of the warrant should have been stricken: the warrant could be readily severed into parts and all parts were constitutionally valid except for one minor clause of the warrant that was not supported by probable cause.

The U.S. and Missouri constitutions require that searches and seizures conducted by law enforcement be reasonable. *See* U.S. Const. amend. IV; Mo. Const. art. I, § 15.[5] Searches and seizures are reasonable if they are conducted pursuant to a warrant that is supported by probable cause and particularly describes the items to be searched for and seized. *State v. Allen*,

[5] Missouri's constitutional search and seizure provision is interpreted consistently with the Fourth Amendment of the U.S. Constitution. *State v. Wilbers*, 347 S.W.3d 552, 556 n.3 (Mo. App. W.D. 2011).

274 S.W.3d 514, 521 (Mo. App. W.D. 2008); *State v. Lachterman*, 812 S.W.2d 759, 763-64 (Mo. App. E.D. 1991) (overruled on other grounds).

In this case, a warrant was issued which authorized the police to search Defendants' residence and seize particularly listed items belonging to Ms. Garris. These parts of the warrant were constitutionally valid. The warrant also authorized the search for and seizure of a fetus, corpse, or part thereof; however, there was no probable cause to search for and seize a fetus, corpse, or part thereof. That clause of the warrant, being unsupported by probable cause, was invalid. The trial court erred in granting Defendants' motions to suppress in their entirety; instead, the trial court should have redacted the warrant and only any suppressed evidence seized pursuant to the invalid clause of the warrant.[6]

A. The trial court should have redacted the warrant.

Redacting a warrant involves "striking from a warrant those severable phrases and clauses that are invalid for lack of probable cause or generality and preserving those severable phrases and clauses that satisfy the Fourth Amendment." *United States v. Christine*, 687 F.2d 749, 754 (3d Cir. 1982). Items seized pursuant to the invalid parts of the warrant must be

[6] There was no evidence seized pursuant to the invalid clause of the warrant. (*See* Return/Receipt for Search Warrant).

suppressed, but items seized pursuant to the preserved, valid parts of the warrant should not be. *Id.* at 754.

The trial court should have redacted this warrant. Every federal circuit and courts in numerous states—including Missouri—have adopted the practice of redacting warrants, as opposed to applying a rule that requires blanket invalidation of overbroad warrants. *See United States v. Sells*, 463 F.3d 1148, 1150 n.1 (10th Cir. 2006); *see also State v. Horsey*, 676 S.W.2d 847, 853 (Mo. App. S.D. 1984) ("After examining the purposes of the warrant requirement and the means by which those purposes are served, we conclude that the practice of redaction is fully consistent with the Fourth Amendment and should be utilized to salvage partially invalid warrants." (quoting *Christine*, 687 F.2d at 750-51)).[7]

The U.S. Supreme Court has repeatedly affirmed that "the ultimate touchstone of the Fourth Amendment is reasonableness." *See Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). The Court has also noted that suppression of evidence "has always been [the Court's] last resort, not [its] first impulse." *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Redaction reconciles these two principles by allowing courts to avoid the costs of

[7] Courts also refer to redaction as "severability," "severance," or "partial suppression." *Sells*, 463 F.3d at 1150 n.1.

unnecessarily excluding validly seized evidence while still honoring the Fourth Amendment interest of protecting individuals from unreasonable searches and seizures. *See Christine*, 687 F.2d at 758 (adopting the practice of redaction because "[t]he cost of suppressing all the evidence seized, including that seized pursuant to the valid portions of the warrant, is so great that the lesser benefits accruing to the interests served by the Fourth Amendment cannot justify complete suppression.").

In light of these considerations, the trial court should have redacted the warrant. Redaction was created to cure the harsh results that would otherwise occur in a situation such as this one: where a failure to redact the warrant would result in suppression of evidence that would have been validly seized had one box not been checked on the warrant, and there was no evidence seized pursuant to that checked box. Suppression should not have been the trial court's first impulse: the trial court should have redacted the warrant.

B. Had the trial court redacted the warrant, items belonging to Ms. Garris that were seized from Defendants' house would not have been suppressed.

Had the trial court redacted this warrant, the invalid corpse clause would have been stricken from the warrant, but the remainder of the warrant would have been salvaged.

Courts apply a step-by-step process in redacting warrants. *Sells*, 463 F.3d at 1151; *see also United States v. Galpin*, 720 F.3d 436, 448-49 (2d Cir. 2013). "First, . . . the warrant [is divided] in a commonsense, practical manner into individual clauses, portions, paragraphs, or categories." *Sells*, 463 F.3d at 1151. Then, "the constitutionality of each individual part [is evaluated] to determine whether some portion of the warrant satisfies the probable cause and particularity requirements of the Fourth Amendment." *Id.* "If no part of the warrant particularly describes the item to be seized for which there is probable cause, then severance does not apply, and all items seized by such a warrant should be suppressed." *Id.*

"If, however, at least a part of the warrant is sufficiently particularized and supported by probable cause, then [a court must] determine whether . . . the valid portions are distinguishable from the invalid portions." *Id.* If the parts [can] be meaningfully severed, then [a court must] look to the warrant on its face to determine whether the valid portions make up 'the greater part of the warrant,' by examining both the quantitative and qualitative aspects of the valid portions relative to the invalid portion." *Id.* If the valid portions make up the greater part of the warrant, then the invalid portion is severed, *i.e.,* stricken from the warrant, and the evidence seized pursuant to the invalid portion is suppressed. *Id.*

Here, the warrant could be easily divided into distinct clauses or categories of evidence: (1) bags and purses; (2) Toshiba laptop; (3) costume jewelry; (4) sunglasses; (5) identification for Ms. Garris; (6) identification for Ms. Garris' son; (7) perfume and makeup-related items; (8) keys unrelated to the scene; (9) any other property readily and easily identifiable as stolen; and (10) deceased human fetus or corpse, or part thereof.[8]

Each of these clauses was supported by probable cause, with the exception of the corpse clause. In the application and affidavit, Detective Estes described which items Ms. Garris reported as missing and why he thought those items would be at Defendants' house. (L.F. 38-39). The facts stated in the application and affidavit were sufficient to show probable cause, and Defendants never argued that the parts of the warrant authorizing a

[8] As previously noted, another box was checked on the warrant indicating that there was probable to search for any person for whom a valid felony arrest warrant was outstanding. Defendants did not challenge the probable cause to support that clause. The other three checked boxes described Ms. Garris's stolen property in general terms, and that property was specifically described in categories (1)-(9) above. Defendants did not challenge the probable cause to support to those clauses either.

search for and seizure of Ms. Garris's property were not supported by probable cause.

Additionally, Detective Estes listed the items of Ms. Garris's property to be searched for and seized with sufficient particularity. He described the brand and edition of Ms. Garris's laptop, including its color and decorations. (L.F. 38). He listed the brands, colors, and sizes of Ms. Garris's purses and the types of Ms. Garris's jewelry, including that several pieces had MG engraved upon them. (L.F. 38). Detective Estes described the items "in sufficient detail and particularity that the officer executing the warrant [could] readily ascertain them," thus the part of the application and the warrant relating to Ms. Garris's property satisfied the particularity requirement. *See* § 542.276.2(3), .6(4), RSMo Supp. 2010.

Finally, the valid portions of the warrant made up the greater part of the warrant. Of the numerous clauses in the warrant, only one clause—the corpse clause—was invalid. Additionally, the valid portions of the warrant authorized a broad search: officers were looking for very small items, such as jewelry and identification, which could have been hidden in small containers or spaces. Anywhere in Defendants' residence that the officers could have searched for a part of a corpse or fetus, the officers could have validly searched for Ms. Garris's stolen property. As such, the corpse clause did not

expand the scope of the search.[9] In short, the corpse clause did not quantitatively or qualitatively make up the greater part of the warrant.

Because the valid portions made up the greater part of the warrant, the warrant was salvageable; therefore, the court should have redacted the warrant and stricken the invalid corpse clause. Only evidence seized pursuant to the corpse clause should have been suppressed. Items belonging to Ms. Garris should not have been suppressed because they were seized pursuant to the valid portions of the warrant.

C. The trial court should have redacted the warrant regardless of Detective Estes's purported misconduct.

Defendants will likely argue that the warrant should not have been redacted because Detective Estes acted in bad faith by checking a box allowing a search for a corpse, fetus, or part thereof, knowing that there was no probable cause to search for those items. Admittedly, some courts have indicated that the availability of the redaction doctrine may be limited if the officer acts in bad faith.[10] *See, e.g., United States v. Fitzgerald*, 724 F.2d 633,

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[9] Defendants have never claimed that the officers' search exceeded the scope of the warrant.

[10] Respondent could not find any case in which a court actually refused to redact a warrant based on an officer's "bad faith."

636-37 (8th Cir. 1983); *Horsey*, 676 S.W.2d at 853. But this Court should not fashion a rule that redaction is categorically unavailable if an officer acted in bad faith. Such a rule is inconsistent with well-settled law, and is unnecessary, as the redaction analysis necessarily excludes evidence obtained in bad faith. Furthermore, here, Detective Estes's conduct was not the type of pretextual or abusive conduct that should prevent the use of redaction.

A rule that makes redaction categorically unavailable if an officer acted in bad faith is inconsistent with well-settled law concerning officer misconduct in procuring warrants. An officer's intentional false statement in a warrant affidavit does not automatically render the entire warrant invalid. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Instead, the false statement is set aside and, if the remaining statements in the affidavit support a finding of probable cause, the warrant survives. *See id*. According to the framework set forth in *Franks*, Detective Estes's false statement should not have automatically rendered the entire warrant invalid, and should not have prevented the trial court from applying the "greater part of the warrant" redaction analysis.

Consistent with *Franks*, the U.S. Supreme Court has held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *See Whren v. United States*, 517 U.S. 806, 813 (1996). "[T]he Fourth Amendment's concern with 'reasonableness' allows certain

actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814 (emphasis in original). Because the subjective intent of an officer should not be the controlling factor in a Fourth Amendment analysis, consideration of an officer's bad faith should be limited to identifying which portion of the warrant should be stricken.[11]

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[11] That redaction is available when an officer acts in bad faith is supported by *Virgin Islands v. John*, 654 F.3d 412 (3d Cir. 2011). In *John*, the U.S. Court of Appeals for the Third Circuit found that the portion of the warrant authorizing a search for child pornography was invalid for lack of probable cause. *See* 654 F.3d at 418 n.2, 421. Relying on redaction principles, and citing to *Christine*, the Third Circuit held that "[t]he evidence obtained pursuant to the invalid portion of the warrant (i.e., the portion authorizing a search for child pornography) must be suppressed." *Id.* This evidence included the defendant's journals. *Id.* at 418 n.2. Other evidence obtained in the search, however, was admitted. *See id.* at 418 n.2, 422. The Third Circuit further found that the officers did not act in good faith, and therefore the journals could not be admitted under the good faith exception to the exclusionary rule. *See id.* at 421. *John* illustrates that an officer's lack of good faith does not categorically prevent a court from redacting a warrant: the Third Circuit found that the officers did not act in good faith, but redacted

Additionally, by applying the "greater part of the warrant" analysis, courts necessarily exclude evidence obtained in bad faith. When an officer obtains evidence in bad faith, the warrant provision allowing a search for that evidence will not be supported by probable cause or will lack particularity (or both). Because that warrant provision will be invalid, evidence obtained pursuant to that provision will be suppressed under the redaction analysis. If officer misconduct is such that the invalid provisions predominate the warrant, the entire warrant will be invalidated and all evidence will be suppressed—even evidence seized pursuant to the valid provisions. *See Sells*, 463 F.3d at 1158. Thus, the "greater part of the warrant" analysis ensures that evidence seized in bad faith will be excluded, and deters officers from abusing the redaction doctrine; therefore, a rule making redaction categorically unavailable if an officer acted in bad faith is unnecessary.

Furthermore, Detective Estes's conduct was not the type of pretextual or abusive conduct that should prevent the use of redaction in this case. Courts' concerns regarding redaction have focused on whether an officer

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the warrant and affirmed the lower court's suppression of evidence seized pursuant to the invalid portion of the warrant.

could abuse the doctrine to obtain a general warrant[12] or use the doctrine as pretext to conduct a general search. *See, e.g.*, *Christine*, 687 F.2d at 754 (recognizing the danger that "warrants might be obtained which are essentially general in character but as to minor items meets the requirement of particularity" and noting that "[s]uch an abuse of the warrant procedure . . . could not be tolerated"); *Fitzgerald*, 724 F.2d at 637 (recognizing the danger that "police might be tempted to frame warrants in general terms, adding a few specific clauses in the hope that under the protection of those clauses they could engage in general rummaging through the premises"); *Horsey*, 676 S.W.2d at 853 ("If 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."). Thus, to the extent that courts have indicated redaction may be unavailable if an officer acted in bad faith, the relevant inquiry is whether the officer's intent was to conduct an impermissible general search.

[12] "A general warrant is a warrant that authorizes a general exploratory rummaging in a person's belongings." *Christine*, 687 F.2d at 752. "The Fourth Amendment seeks to prevent general warrants by requiring all warrants to contain a 'particular description' of the things to be seized." *Id.*

Here, Detective Estes's motive in checking the box was not to obtain a general warrant or conduct a general search. Checking the box did not allow the officers to search anywhere that they could not have searched absent the checked box, as the valid portions of the warrant allowed the officers to search for very small items. Defendants have never argued that the officers exceeded the scope of the search. Further, the checked box was not pretext for the officers to search for items that they would not have been otherwise able to seize: under the plain-view doctrine, the officers could have seized a corpse, fetus, or part thereof without an additional warrant had they come upon such an item during their search. In short, Detective Estes's conduct was not the type of pretextual or abusive conduct that the courts describe when stating their concerns regarding redaction. Detective Estes's conduct should not have been a basis for the trial court to refrain from redacting the warrant.

In sum, the trial court should have redacted the warrant and stricken the only clause that was not supported by probable cause: the corpse clause. The remaining parts of the warrant relating to Ms. Garris's property were constitutionally valid, and made up the greater part of the warrant. Evidence seized pursuant to the remaining valid portions of the warrant should not have been suppressed.

II.

The trial court erred in suppressing all evidence seized because application of the exclusionary rule was not warranted in that Detective Estes's purported misconduct in checking a box on the warrant that allowed officers to search for a fetus, corpse, or part thereof without probable cause was not the type of serious misconduct that should be deterred by the exclusion of otherwise lawfully seized evidence.

The trial court found the warrant invalid in its entirety because of the corpse clause and applied the exclusionary rule to all evidence seized. (L.F. 42-44). The exclusionary rule should not have been applied here because Detective Estes's actions in obtaining the search warrant were not so culpable that the value in deterring his conduct outweighed the cost of excluding the evidence.

The exclusionary rule prevents the use of improperly obtained evidence at trial. *Herring v. United States*, 555 U.S. 135, 139 (2009). Whether the exclusionary rule is to be imposed is resolved by weighing the costs and benefits of preventing the use of inherently trustworthy evidence seized in reliance on a search warrant issued by a neutral judge that is ultimately found to be defective. *United States v. Leon*, 468 U.S. 897, 906-07 (1984). The cost of applying the exclusionary rule is that some guilty defendants may go

free. *Id.* at 907. If "law enforcement officers have acted in objective good faith or *their transgressions have been minor*, the magnitude of this benefit on such guilty defendants offends the basic concepts of the criminal justice system." *Id.* at 908 (emphasis added).

The purpose of the judicially created exclusionary rule is to deter police misconduct. *Id.* at 916. To trigger the exclusionary rule, two criteria must be satisfied. First, the police conduct must be sufficiently deliberate such that exclusion of the evidence can meaningfully deter it. *Herring*, 555 U.S. at 144. Second, the conduct must be "sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.*

It does not follow that anything which deters illegal searches is commanded by the Fourth Amendment. *Leon*, 468 U.S. at 910. As such, "an assessment of the flagrancy of the police misconduct constitutes an important step" in determining whether evidence should be excluded. *Id.* at 911. **"**The deterrent value of the exclusionary rule is most likely to be effective when official conduct was flagrantly abusive of Fourth Amendment rights." *Herring*, 555 U.S. at 143.

Detective Estes's behavior was not flagrantly abusive of Defendants' Fourth Amendment rights; at most, it was a minor transgression. Detective Estes's testimony indicated that the box next to the corpse clause was intentionally checked, and that was done so if the police came across a fetus,

corpse, or part thereof during the search, they could investigate those items without stopping to get an additional warrant. (Tr. 12-13). Detective Estes testified that the box was checked because if "we came across [a corpse, fetus, or part thereof] that tells the Judge that if we do come across [such evidence], we are going to initiate an action on [it]." (Tr. 12). Detective Estes did not need to have that box checked, however, to lawfully seize such items.

Under the "plain view doctrine," an officer who is lawfully located in a place can seize evidence not described in the search warrant if: (1) the evidence was in an area where the items described in the search warrant might be; and (2) the incriminating character of the evidence was apparent. *Allen*, 274 S.W.3d at 521. Here, any place in Defendants' residence that police officers could have found a fetus, corpse, or part thereof would have been an area where officers were authorized to search for Ms. Garris's stolen property. Additionally, the incriminating character of a fetus, corpse, or part thereof would be apparent. Thus, under the plain view doctrine, if officers had found a fetus, corpse, or part thereof during the search, they could have seized such evidence without stopping to obtain an additional search warrant.[13] By checking the box next to the corpse clause, Detective Estes was

[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

unnecessarily notifying the court that the officers would seize any such evidence it found. Committing this unnecessary step is not sufficiently egregious misconduct to warrant application of the exclusionary rule.

Moreover, Defendants' Fourth Amendment rights were not flagrantly abused. Detective Estes submitted an application and affidavit for a search warrant based on probable cause, listing specific items to be seized. He unnecessarily checked a box on the search warrant that stated the court found probable cause to search for a fetus, corpse, or part thereof in order to alert the court that such items would be seized if found. A judge reviewed the application and affidavit, corrected errors he found in the warrant—but not the error related to the corpse clause—and then issued the warrant. The fact that the box was checked did not expand the scope of the officers' search, and Defendants never complained that the officers exceeded the scope of the search. The officers found no evidence pursuant to the checked box. Considering the totality of these circumstances, Detective Estes's conduct did not result in a flagrant abuse of Defendants' Fourth Amendment rights such that suppression of all evidence seized was warranted.

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warrant if they wished to do further investigation based upon the discovery of that evidence.

Checking the box next to the corpse clause was, at most, a minor transgression on the part of Detective Estes. The cost of excluding lawfully seized evidence so as to deter law enforcement from checking this box is far too high, particularly where an officer who finds a fetus, corpse, or part thereof will be able to seize that evidence regardless of whether the box is checked, and where checking the box did not expand the scope of the search. When weighing the deterrent effect of excluding all evidence seized here against the cost exacted by the exclusionary rule—the suppression of evidence obtained pursuant to a search warrant that provided probable cause to search for such evidence—exclusion is not worth the cost. The trial court should not have applied the exclusionary rule.

CONCLUSION

The trial court's judgments granting Defendants' motions to suppress in their entirety should be reversed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,942 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were sent through the eFiling system on this 13th day of September, 2016 to:

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