No. SC96095

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

BRYAN MARSDON PIERCE,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 11
The Honorable W. Brent Powell, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant Bryan M. Pierce appeals his conviction following a bench trial in the Circuit Court of Jackson County in which he was found guilty of possession of child pornography as a prior and persistent offender in violation of § 573.037.[1] (LF 54-58; App'x A2; Tr. 238-247).[2] On June 19, 2015, the Honorable W. Brent Powell sentenced Mr. Pierce to fifteen years' incarceration. (LF 55-58; App'x A3-A4, A5-A6; Tr. 286). Mr. Pierce timely filed his notice of appeal on June 22, 2015. (LF 60-62).

The Court of Appeals, Western District, issued an order and supporting memorandum affirming Mr. Pierce's conviction, but remanded his case for resentencing. This Court ordered transfer on April 4, 2017, after Mr. Pierce's application. Mo. Const., Art. V, § 9; Rule 83.04.

[1] All statutory citations are to Missouri Revised Statutes 2000, as updated, unless otherwise stated.

[2] The Record on Appeal consists of a Legal File ("LF") and Transcript ("Tr.").

STATEMENT OF FACTS

Responding to a call for an emotionally disturbed person, Kansas City Police Officers Robert Erpelding and Paul Russo went to 4912 Paseo in the late hours of June 18 and early hours of June 19, 2013. (Tr. 30, 31, 37, 97, 98). The officers were met at the front door by Bryan Pierce, who said he was hearing voices. (Tr. 37, 38, 42, 99). Mr. Pierce came out on the front porch and spoke to Officer Erpelding, explaining that his cat had told him to stab himself in the heart. (Tr. 31, 36, 37, 99). Officer Erpelding then offered to check out Mr. Pierce's residence to "make sure it's safe" and to give Mr. Pierce "a little peace of mind." (Tr. 31, 100). Mr. Pierce agreed. (Tr. 32, 100).

Officer Russo and another officer, Sergeant Patrick Kelly, searched the residence while Officer Erpelding stayed outside with Mr. Pierce, waiting for an ambulance. (Tr. 32, 33, 51, 100, 110). Mr. Pierce was taken by ambulance to a local hospital (Tr. 33, 101). Sometime after Mr. Pierce left in the ambulance, Sergeant Kelly asked Officer Erpelding to "verify some things" inside the residence. (Tr. 35, 39, 101).

A computer was found in the last room checked by the officers. (Tr. 43, 53, 111). A slideshow screensaver running on the computer drew the officers' attention. (Tr. 44, 53, 111). The photos contained images that appeared to be of underage children in sexual poses. (Tr. 44, 53, 111). Sergeant Kelly stopped the slideshow then called Officer Erpelding and Sergeant Tammy Pronske into the room. (Tr. 45, 54, 56-57, 101-102, 111). Officer Erpelding agreed the subjects of the images seemed to be under the age of 18. (Tr. 35, 36). The officers clicked through the images on the computer to determine the

age of the subjects in the images. (Tr. 47, 112). Officer Erpelding recovered the computer as evidence. (Tr. 36, 102-103).

Following months of investigation, the State charged Mr. Pierce with one count of possession of child pornography, § 573.037, and alleged Mr. Pierce possessed more than twenty images of individuals less than eighteen years of age engaged in sexually explicit conduct. (LF 44-49).

Defense counsel filed a Motion to Suppress and argued Mr. Pierce was unable to give consent because of his emotionally disturbed state that ultimately led to him being taken to the hospital. (Tr. 59-60). Defense counsel argued that, even if Mr. Pierce had given consent, he was unable to withdraw that consent once he was taken to the hospital. (Tr. 59). Following a hearing on Mr. Pierce's motion, the trial court ruled that, although Mr. Pierce was unable to give consent because of his mental state, the officers were justified in their search of his residence based on the exigent circumstances exception to the warrant requirement. (LF 40-43).

The trial court found Mr. Pierce to be a prior and persistent offender pursuant to 558.016 and 557.036. (Tr. 80, 83). Following a bench trial, Mr. Pierce was found guilty of possession of child pornography and sentenced to 15 years in prison. (LF 54, 57-58; Tr 238-247, 286). At the sentencing hearing, the trial court sought to clarify the range of punishment Mr. Pierce faced:

> The Court: However, having proven the defendant up as a prior and persistent offender, it's my understanding that the defendant, his range of

punishment was, pursuant to statute, extended to ten to 30 years, is that correct?

[State]: We had agreed to a lid of 20, Your Honor.

The Court: A lid of 20 in exchange for the waiver of the jury trial, is that correct?

[State]: Yes, Your Honor,

[Defense Counsel]: Correct

(Tr. 249).

This appeal follows.

POINTS ON APPEAL

Point I:

The trial court plainly erred in sentencing Mr. Pierce when the trial court had a materially false understanding of the possible range of punishment, because sentencing a defendant based on a materially false understanding of the possible range of punishment is a fundamental denial of the right to due process as guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Mr. Pierce as a prior and persistent offender faced a range of punishment of five years' incarceration (the minimum punishment for a B felony) to thirty years or incarceration for life (the maximum punishment for an A felony), but the trial court understood Mr. Pierce to face a range of punishment of ten to thirty years or incarceration for life (the range of punishment for an A felony). Mr. Pierce's sentence, based on a misunderstanding of the possible range of punishment by the trial court, is a manifest injustice and miscarriage of justice.

U.S. Const. Amend. XIV

Mo. Const. Art. I, § 10

Mo. S. Ct. Rule 30.20

§ 558.011 RSMo

§ 558.016 RSMo.

State v. Troya, 407 S.W.3d 695 (Mo. App. W.D. 2013)

State v. Cowan, 247 S.W.3d 617 (Mo. App. W.D. 2008)

Point II:

The trial court clearly erred in overruling Mr. Pierce's motion to suppress evidence, overruling Mr. Pierce's objections to the admission of the recovered evidence, and failing to exclude the recovered evidence as fruit of the poisonous tree, because the state failed to prove by a preponderance of the evidence that the recovered evidence were not obtained as the result of an unlawful search and seizure in violation of Mr. Pierce's rights to due process and freedom from unreasonable searches and seizures, under the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 15 in the Missouri Constitution, and § 542.296, in that Mr. Pierce was not in a mental state in which he was capable of consenting to a search, and the situation did not rise to the level of exigent circumstances or the "emergency doctrine" that would allow the warrantless search of Mr. Pierce's residence. Because the recovered evidence was the fruit of the unlawful search, the evidence should have been excluded.

U.S. Const. Amends. IV, XIV

Mo. Const. Art. I, § 10, 15

Mo. S. Ct. Rule 29.11

§ 542.296 RSMo

State v. Hastings, 450 S.W.3d 479 (Mo. App. E.D. 2014)

State v. Miller, 894 S.W.2d 649 (Mo. banc 1995)

State v. Troya, 407 S.W.3d 695 (Mo. App. W.D. 2013)

ARGUMENTS ON APPEAL

Point I:

The trial court plainly erred in sentencing Mr. Pierce when the trial court had a materially false understanding of the possible range of punishment, because sentencing a defendant based on a materially false understanding of the possible range of punishment is a fundamental denial of the right to due process as guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Mr. Pierce as a prior and persistent offender faced a range of punishment of five years' incarceration (the minimum punishment for a B felony) to thirty years or incarceration for life (the maximum punishment for an A felony), but the trial court understood Mr. Pierce to face a range of punishment of ten to thirty years or incarceration for life (the range of punishment for an A felony). Mr. Pierce's sentence, based on a misunderstanding of the possible range of punishment by the trial court, is a manifest injustice and miscarriage of justice.

Standard of Review

When there is no objection to a claimed error during a bench trial, that error may only be reviewed under the plain error standard. *State v. Freeman*, 189 S.W.3d 605, 608 (Mo. App. W.D. 2006); Mo. S. Ct. Rule 30.20.[3] As defense counsel did not object at trial, Mr. Pierce respectfully requests plain error review of this claim.

[3] All citations are to Missouri Supreme Court Rules unless otherwise noted.

Plain error review involves a two-step process: (1) this Court determines whether "the claimed error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted[;]" and (2) this Court, at its discretion "consider[s] whether or not a miscarriage of justice or manifest injustice will occur if the error is left uncorrected." *State v. Mullins*, 140 S.W.3d 64, 68 (Mo. App. W.D. 2004) (internal citations and quotation marks omitted).

Plain error review is appropriate when a court sentences a defendant based on a mistaken understanding of the available range of punishment. *See State v. Olney*, 954 S.W.2d 698, 700-01 (Mo. App. W.D. 1997) (granting plain error review and relief when the sentencing court stated its belief that a conviction for armed criminal action must run consecutively with other sentences); *State v. Rowan*, 165 S.W.3d 552, 554-56 (Mo. App. E.D. 2005) (granting plain error review and relief when the sentencing court expressed a mistaken belief about the range of punishment available to it and the defendant's possible parole date); *State v. Taylor*, 67 S.W.3d 713, 716 (Mo. App. S.D. 2002) (granting plain error review and relief when the sentencing court "may have believed" a sentence for armed criminal action must run consecutively with other sentences).

Discussion

Sentencing a defendant based on a materially false understanding of the possible range of punishment is a fundamental denial of the right to due process as guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution. "'A sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the

question of punishment in the light of the true facts, regardless of the eventual outcome.' This is so even if it is likely the court will return the same sentence." *State v. Cowan*, 247 S.W.3d 617, 619 (Mo. App. W.D. 2008) (citing *Wraggs v. State*, 549 S.W.2d 881, 884 (Mo. banc 1977)) (internal citation omitted). A sentencing court's mistaken belief about the range of punishment is a materially false foundation that entitles a defendant to resentencing. *Id.*

In its Information in Lieu of Indictment, the State charged Mr. Pierce with the B felony of possession of child pornography, under § 573.037.2(a). (App'x A7).[4] The State also charged Mr. Pierce as a prior and persistent offender under §§ 557.036 and 558.016. (App'x A8-9).[5] The effect of finding a defendant to be a persistent offender is the maximum authorized penalty increases to that of the next grade of felony, but the minimum penalty remains the same. *State v. Cowan*, 247 S.W.3d 617, 619 (Mo. App. W.D. 2008); § 558.016.7(2). The result in this case was Mr. Pierce faced the minimum punishment of 5 years, § 558.011.1(2), and the maximum term was raised to that of a class A felony which is 30 years to life, § 558.011.1(1). (App'x A10-A11).[6]

As filed, however, the Information in Lieu of Indictment did not specifically address the range of punishment Mr. Pierce faced:

[4] The text of § 573.037 is included in Appellant's Appendix on page A7.

[5] The text of § 558.016 is included in Appellant's Appendix on pages A8-A9.

[6] The text of § 558.011 is included in Appellant's Appendix on pages A10-A11.

> Defendant is a prior offender under Section 558.016, RSMo. Defendant is also a persistent offender and is punishable by sentence to an extended term of imprisonment under Sections 558.016 and 557.036 in that he has (pleaded guilty to) (been found guilty of) (been convicted of) [sic] two or more felonies committed at different times. …

(LF 48).

At the sentencing hearing on June 19, the court sought to clarify the range of punishment Mr. Pierce faced:

> The Court: However, having proven the defendant up as a prior and persistent offender, it's my understanding that the defendant, his range of punishment was, pursuant to statute, extended to ten to 30 years, is that correct?
>
> [State]: We had agreed to a lid of 20, Your Honor.
>
> The Court: A lid of 20 in exchange for the waiver of the jury trial, is that correct?
>
> [State]: Yes, Your Honor,
>
> [Defense Counsel]: Correct

(Tr. 249). Neither defense counsel nor the prosecutor ever pointed out the court's error in its understanding of the range of punishment Mr. Pierce faced. At no time did defense counsel object to or seek correction to the range of punishment available to the trial court at sentencing.

Even in situations where the trial court's misstatement of the applicable law was not as clear or as timely as in this case, courts have found error. In *State v. Troya*, 407 S.W.3d 695, 700 (Mo. App. W.D. 2013), Mr. Troya was a prior and persistent offender charged with B felony driving while intoxicated. Plain error was found. *Id.* at 701. The appellate court held the trial judge misunderstood the possible range of punishment to be ten to thirty years or life imprisonment, when the correct range of punishment was five to thirty years or life imprisonment. *Id*. The appellate court held that the circuit court's acceptance, prior to trial and sentencing, of the First Substitute Information, which listed an incorrect range of punishment, and the court's statements of the A felony range of punishment throughout the proceedings indicated Mr. Troya's sentence was given based on a mistaken belief that ten years' imprisonment was the minimum allowed. *Id.* at 701. Due to the circuit court's plainly erroneous understanding of the range of punishment, the appellate court reversed the sentence and ordered resentencing. *Id.*

In *Cowen*, 247 S.W.3d at 618, Mr. Cowen sought to withdraw a guilty plea for B felony burglary. Before allowing him to withdraw his guilty plea, the court warned him that if he went to trial he would be charged as a prior and persistent offender, which would subject him to the range of punishment of a class A felony – 10 to 30 years or life. *Id.* Mr. Cowen withdrew his guilty plea, and at the subsequent trial, was found guilty. *Id.* Later, at sentencing, his attorney argued the court could sentence him to 5 years' incarceration, the prosecutor objected but did not provide a reason, and the trial court made no direct ruling on the objection but, instead, "responded: 'Okay, thank you. Is there anything else by the parties in this matter? Well, the Court, having considered the

alternatives and having granted allocution in this matter, now asks is there any just cause or legal reason why the Court should not impose sentence at this time?'" *Id.* The court then sentenced Mr. Cowen to 10 years on the burglary charge. *Id.* Mr. Cowen appealed, and plain error was found. *Id* at 618-19. Mr. Cowen's sentence was vacated because, "Although there was a significant amount of time between the trial court's statement defining the range of punishment and the sentencing hearing, the trial court never acknowledged that a mistake was made nor did the trial court state that Mr. Cowan's sentence was based on the correct range of punishment." *Id.* at 619.

In *State v. Elam*, the State outlined an incorrect range of punishment to the trial court. 493 S.W.3d 38, 43 (Mo. App. S.D. 2016). The Court held that "when the record indicated that the trial court's sentence was a product of the trial court's own valid considerations and not a mistaken apprehension of what was required under the law, our appellate courts have refused to reverse for new sentencing." In its holding, the Court in *Elam* stated three reasons plain err did not exist: (1) the trial court explained its rationale for the sentences; (2) the "sentence were based on valid considerations"; and (3) *nothing* in the record indicated the sentences were based on the trial court having a misapprehension of the applicable law. *Id.* at 44. While the trial court's voiced considerations may have been valid, and the rationale behind the reasons explained, the third requirement was not present: the record specifically shows the trial court was incorrect in the range of punishment Mr. Pierce was facing – showing the trial court's misapprehension of the applicable law. (Tr. 249, Tr. 274-279). The record *does not* merely indicate the sentence was based on the trial court having a misapprehension of

law, the record shows it clearly. Additionally, because the record does not show the trial court made its sentence based on a consideration of the valid range of punishment, but instead shows the opposite; the misstated range of punishment frustrates the reasoning that the trial court's sentence was "a product of the trial court's own valid considerations." *Elam*, 493 S.W.3d at 43. While a court may give five valid reasons for a decision, a sixth reason, if invalid, can void the validity of the other reasons. *See Aptheker v. Sec'y of State*, 378 U.S. 500, 508 (1964) (A legitimate government purpose cannot be pursued through unconstitutional means).

Additionally, in *State v. Scott*, the prosecutor argued consecutive sentences were required by law. 348 S.W.3d 788, 800 (Mo. App. S.D. 2011), *abrogated on other grounds by State v. Sisco*, 458 S.W.3d 304 (Mo. 2015). The trial court asked defense their position on the issue, and defense argued the trial court had discretion. *Id.* The court sentenced Mr. Scott consecutively and the Court held:

> The trial court's comments, along with the action of asking Defendant's attorney for a response to the State's position, indicate that, unlike the judges in *Williams*, *Burgess*, and *Freeman*, the judge in the present case did not simply rely on the prosecutor's incorrect interpretation of the statute but exercised his independent discretion in determining that consecutive sentences were appropriate.

Id. (Referencing *Williams v. State*, 800 S.W. 2d 739 (Mo. banc 1990) (The trial court incorrectly believed the law required consecutive sentences); *State v. Burgess*, 800 S.W.2d 743, (Mo. banc 1990) (Resentencing ordered because record indicated court

believed 558.026 required consecutive sentences for convictions of multiple counts of sex offenses); and *State v. Freeman*, 212 S.W.3d 173 (Mo. App. S.D. 2007) (Resentencing ordered because record indicated court believed § 558.026 required consecutive sentences for convictions of multiple counts of sex offenses).

In *State v. Seaton*, another case involving whether consecutive sentences were required by law, the sentencing court stated:

> I'm going to try to sort of send a little message to the people in the Department of Corrections, that at least I think the crime that you committed is very, very serious and that I think the punishment should be very severe.
>
> * * * * * *
>
> [E]verything is consecutive. And all six of these are consecutive with whatever time you are now doing.

815 S.W.2d 90, 92 (Mo.App. E.D. 1991). The Court found this evidence that the trial court would have sentenced Mr. Seaton to consecutive time even had he understood the law to allow concurrent time because the record showed the sentencing court expressed a desire "to impose the maximum sentence." *Id*. Such a desire, however, was not expressed in Mr. Pierce's case.

Respondent is expected to argue that because Mr. Pierce's sentence fell within the unenhanced range of punishment for a B felony, there is no indication the trial court took Mr. Pierce's persistent offender status into consideration. However, there is no evidence in the record that the trial court considered the unenhanced minimum when sentencing

Mr. Pierce and that is where the plain error lies. The rationale detailed by the trial court applies whether the trial court considered the minimum sentence allowable as five years or ten. However, it is evident, obvious, and clear the trial court *did not* consider a minimum of five years when deciding what sentence to give Mr. Pierce. The trial court explicitly states it believed the range of punishment to be between 10 years and 20 years:

> The Court: However, having proven the defendant up as a prior and persistent offender, it's my understanding that the defendant, his range of punishment was, pursuant to statute, extended to ten to 30 years, is that correct?
>
> [State]: We had agreed to a lid of 20, Your Honor.
>
> The Court: A lid of 20 in exchange for the waiver of the jury trial, is that correct?

(Tr. 249). This clearly and obviously states the trial court's misapprehension of the applicable law.

The above cases, when argued together, show that misapprehension of law is not necessarily present when a trial court fails to correct a prosecutor's misstatement of the law; but when the record shows the trial court misunderstood the law, then such error exists and due process demands the error's correction. The logic underlying this distinction is the presumption that trial courts know the law. *State v. Amick*, 462 S.W.3d 413, 415 (Mo. banc 2015). When a trial court explicitly misstates the law, however, that presumption is rebutted.

Because the court sentenced Mr. Pierce based on the materially false foundation that he was subject to the range of punishment for an A felony, Mr. Pierce is entitled to resentencing with the Court aware of the actual range of punishment available to it. *See Troya,* S.W.3d at 700.

Point II:

The trial court clearly erred in overruling Mr. Pierce's motion to suppress evidence, overruling Mr. Pierce's objections to the admission of the recovered evidence, and failing to exclude the recovered evidence as fruit of the poisonous tree, because the state failed to prove by a preponderance of the evidence that the recovered evidence were not obtained as the result of an unlawful search and seizure in violation of Mr. Pierce's rights to due process and freedom from unreasonable searches and seizures, under the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 15 in the Missouri Constitution, and § 542.296, in that Mr. Pierce was not in a mental state in which he was capable of consenting to a search, and the situation did not rise to the level of exigent circumstances or the "emergency doctrine" that would allow the warrantless search of Mr. Pierce's residence. Because the recovered evidence was the fruit of the unlawful search, the evidence should have been excluded.

Preservation and Standard of Review

To preserve a suppression issue for appellate review, the issue must be raised in a motion to suppress and the defendant must timely object to every instance in which the evidence is offered at trial with proper reasons in support and must include the issue in the motion for new trial. *State v. Mateo*, 335 S.W.3d 529, 534 n.5 (Mo. App. W.D. 2011).

Defendant filed a motion to suppress and objected at trial when the evidence sought to be suppressed was admitted. (LF 25-28; Tr. 84). Since Mr. Pierce's case was

tried to the court, no motion for new trial was required to preserve the issue for appeal. Rule 29.11(e)(2).[7]

"A trial court's ruling on a motion to suppress will be reversed on appeal only if it is clearly erroneous. This Court defers to the trial court's factual findings and credibility determinations, and considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling. Whether conduct violates the Fourth Amendment is an issue of law that this Court reviews *de novo*." *State v. Pesce*, 325 S.W.3d 565, 569 (Mo. App. W.D. 2010) (quoting *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007)). Evidence presented at both the suppression hearing and at trial will be considered to determine whether sufficient evidence exists in the record to support the trial court's ruling. *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005).

Discussion

The trial court clearly erred in overruling Mr. Pierce's motion to suppress evidence, overruling Mr. Pierce's objections to the admission of the recovered evidence, and failing to exclude the recovered evidence as fruit of the poisonous tree, because the State failed to prove by a preponderance of the evidence that the recovered evidence was not obtained as the result of an unlawful search and seizure in violation of Mr. Pierce's rights to due process and freedom from unreasonable searches and seizures, under the

[7]Should this Court find the claim to be unpreserved, Mr. Pierce requests plain error review. Rule 30.20.

Fourth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 15 in the Missouri Constitution, and § 542.296.

People have the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures by government agents. U.S. Const., Amend. IV, XIV. Missouri's constitutional protection under Article I, §15 is coextensive with that provided by the Fourth Amendment. *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996); U.S. Const., Amend. IV; Mo. Const., Art. I, §15.

Evidence obtained by searches and seizures in violation of the Fourth Amendment is inadmissible in court. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); U.S. Const., Amend. IV. This evidence is excludable as fruit of the poisonous tree where it is obtained as a direct result of an illegal search or seizure. *Arizona v. Evans*, 514 U.S. 1, 10 (1995); *State v. Taber*, 73 S.W.3d 799, 707 (Mo. App., W.D. 2002); *State v. Miller*, 894 S.W.2d 649, 654 (Mo. banc 1995).

A warrantless search or seizure that occurs on a suspect's premises is presumptively unreasonable. *State v. Rutter*, 93 S.W. 3d 714, 723 (Mo. banc 2002). When the constitutionality of a warrantless search is challenged, the state has the burden to show that it falls under one of the well-recognized exceptions to the requirement of a warrant. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *Pike*, 162 S.W.3d at 472; *State v. Hampton*, 959 S.W.2d 444, 450 (Mo. banc 1997); §542.296.6. Many of the exceptions are based on the presence of exigent circumstances. *State v. Simmons*, 158 S.W.3d 901, 906 (Mo. App. S.D. 2005). Exigent circumstances include: pursuing a fleeing felon, preventing the imminent destruction of evidence, preventing a suspect's

escape, or mitigating the risk of danger to law enforcement or other persons inside or outside of the dwelling. *Id*. The "emergency doctrine," another exception, and allows police to make a warrantless entry in the case of an emergency. *State v. Rogers*, 573 S.W.2d 710 (Mo. App. K.C. 1978). The doctrine has also been found as a basis for finding a warrantless search reasonable and not unconstitutional. See e.g. *Id.*; *State v. Miller*, 486 S.W.2d 435 (Mo. Div. 1 1972); *State v. Sutton*, 454 S.W.2d 481 (Mo. Div 2 1969). Entry must be made without intent to search or arrest. *Rogers*, 573 S.W.2d at 716.

Whether exigent circumstances existed is determined on a case by case basis. *State v. Cromer*, 186 S.W.3d 333, 344 (Mo. App. W.D. 2005). The circumstances are evaluated on the basis of how they would appear to a prudent, cautious, and trained officer. *Id*. (citing *State v. Glisson*, 80 S.W. 3d 915, 919 (Mo. App. S.D. 2002)).

"[A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Sutton*, 454 S.W.2d at 485 (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)).

Said another way:

> [P]olice officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance. In applying this doctrine, two principles must be kept in mind. (1) Since the doctrine is an exception to the ordinary Fourth Amendment

> requirement of a warrant for entry into a home, the burden of proof is on the state to show that the warrantless entry fell within the exception. (2) An objective standard as to the reasonableness of the officer's belief must be applied.

Root v. Gauper, 438 F.2d 361, 365 (8th Cir. 1971) (citing *McDonald v. United States*, 335 U.S. 451 (1948)) (internal citations omitted). [8]

Trial Court's Finding that Emergency Exception Applied is Erroneous

State failed to establish the entry fell within the emergency exception and no evidence of a reasonable belief that an emergency existed

In its Order Denying Defendant's Motion to Suppress (LF 40-43), the trial court found the State failed to establish Mr. Pierce's consent to search was the "product of a rational intellect and free will" citing *State v. Berry*, 526 S.W.2d 92, 98-100 (Mo. App. Sprngfld. 1975) and that the State failed to establish Mr. Pierce's consent was voluntarily given. (LF 41).

> The officers were responding to a call from an "emotionally disturbed party." When they arrived, [Mr. Pierce] advised that he was hearing voices. Based on

[8] In *State v. Sutton*, 454 S.W.2d 481, Missouri accepted the "emergency doctrine" as the basis for finding a warrantless search valid when a dead person may be inside the premises. However, the factual basis for application in *Sutton* of the "emergency doctrine" was rejected by the Eighth Circuit Court of Appeals in *Root v. Gauper*, but the court specifically recognized that "the Supreme Court of Missouri has the prerogative of accepting that doctrine." *Gauper*, 438 F.2d at 365.

> these circumstances, the State cannot established [sic] that [Mr. Pierce's] consent to search his residence was the "product of a rational intellect and free will," and therefore, voluntarily given.

(LF 41).

The trial court, however, clearly erred by also finding "the officers reasonably believed that someone could be in the residence who could harm [Mr. Pierce] or themselves[,]" justifying the officers' actions as an "emergency situation to sweep or 'clear the residence' and determine if anyone was in the home." (LF 41). This rationale was *not* specified nor articulated by the officers either during the hearing on the Motion to Suppress or during the trial. Because there was no evidence of an emergency to justify a warrantless entry, the evidence presented, even when viewed in the light most favorable to the court's ruling, does not support such a finding.

There was no testimony related to an emergency situation involving the protection of life or the need to avoid immediate physical injury that required the officers to enter Mr. Pierce's residence without a warrant. During the hearing on the Motion to Suppress, Officer Erpelding testified:

> A: … So I then talked to him and I said, sir, if you'd like, we can check out the residence for you, make sure it's safe, however, I've got to know first that you have no one else living with us – with you, because we do not want you – you know, we don't want a surprise; somebody to jump out, you know, and it could be a bad situation. And he informed me that no one lived with him.

Q: Did he tell you that he would like you to search his residence?

A: Yes, he did.

Q: And he told you?

A: To clear his residence.

Q: And he said that to you specifically?

A: Yes.

Q: And after he told you that, what happened?

A: PO Russo and also Sergeant Kelly, who came to the scene, cleared the residence and they were gone for quite some time.

(Tr. 31-32). At no time did Officer Erpelding testify that he believed someone could be in the residence who could harm Mr. Pierce of the officers.

Officer Russo's testimony during the suppression hearing was of the same affect:

Q: What does it mean to clear a residence?

A: In this particular case, I believe at the request of the defendant, was to make sure there was nobody else in the house.

Q: Did you hear him request that, or did someone tell you?

A: No, I heard him request that.

Q: And after he made that request, what did you do?

A: Myself and Sergeant Kelly proceeded to clear the house which consisted of just walking through, room to room, making sure there was no people inside.

(Tr. 42-43).

Officer Erpelding's trial testimony showed no concerns for safety or any hint that he considered the situation to be an emergency.

> Q: When you came into contact with [Mr. Pierce], what happened?
>
> A: I asked him what was going on tonight. And he informed me that his was hearing voices, that he believed from the TV to tell himself to kill himself with a knife. And he was also hearing voices about - - from his cat to stab himself in the heart.
>
> Q: Okay. When he told you that, what did you do?
>
> A: Basically, I just tried to talk to him about small talk. And I asked him, I said, well, sir, you know, if you'd like, we can go ahead and we can clear your residence, make sure there's nobody inside and - - you know, if that works for you, that way give you a little peace of mind.

(Tr 99-100).

Sergeant Kelly testified at the trial "that the civilian that lived in the house requested that we clear the house because he thought someone or something was after him." (Tr. 109). It is clear from the testimony, however, that officer's did not take this as a serious danger, given Mr. Pierce's state of mind and belief that his cat was talking to him. (Tr. 100).

The reasonableness of entry by the police without a warrant is measured by the circumstances and the reasonableness of the belief by the police that an emergency existed. *Sutton*, 454 S.W.2d at 486. The testimony of the officers does not support the

idea the officers believed an emergency situation was at-hand. First, it is clear the officers did not feel unsafe, as they sought consent to search his home rather than rushing into the house to look for suspicious or threatening activity. *See Rogers*, 573 S.W. 2d at 714-15. Second, all three officers stated the search was done at the request of Mr. Pierce – who the trial court found was not in a state of mind to make such a request voluntarily. Lastly, in testimony, Officer Erpelding said he used "small talk" and offered to clear the house to give Mr. Pierce "a little peace of mind." These are not the words of officers who believed an emergency situation was at hand requiring the immediate search of Mr. Pierce's premises for purposes of "rendering aid to the injured or protecting an occupant from imminent injury." See *State v. Hastings*, 450 S.W.3d 479, 485 (Mo. App. E.D. 2014).

Reasonableness determinations are not subjective. *State v. Epperson*, 571 S.W.2d 260, 264 (Mo. banc 1978). The facts must be judged against objective standards. *Id*. The facts are as follows: Police were responding to a call about an "emotionally disturbed person." (Tr. 31). When police arrived, they were met by Mr. Pierce, who joined them on the porch. (Tr. 33, 38, 42, 99). "Small talk" followed between Mr. Pierce and Officer Erpelding. (Tr. 100). There is no record of anything threatening being said. With these facts in mind, a reasonably cautious police officer would not believe an emergency situation existed inside the residence warranting application of the "emergency doctrine" and a warrantless search to render aid to anyone or protect an occupant from imminent injury. The only potential injury was of Mr. Pierce committing self-harm – something a search of his home would not have prevented.

Mr. Pierce's "consent" was not voluntarily or knowingly given

In its Order Denying Defendant's Motion to Suppress (LF 40-43), the trial court correctly found the State failed to establish Mr. Pierce's consent to search was the "product of a rational intellect and free will" citing *State v. Berry*, 526 S.W.2d 92, 98-100 (Mo. App. Sprngfld. 1975) and that the State failed to establish Mr. Pierce's consent was voluntarily given. (LF 41).

The officers' conduct in this case cannot be considered objectively reasonable – the officers knew there was no reason to search the house without Mr. Pierce's permission, as evinced by their request for permission to search. The officers' testimony that the search was at Mr. Pierce's request is misleading when viewed in its totality. As Officer Erpelding's testimony shows, it was the officer's suggestion, made to give Mr. Pierce "peace of mind," that led to Mr. Pierce agreeing to the officer's searching the house, not a request by Mr. Pierce. A reasonable officer would have known Mr. Pierce was unable to consent to such a search. Given the circumstances facing the officers, believing Mr. Pierce's mental state to need "a little peace of mind" shows the officers recognized and acknowledged Mr. Pierce was not in a clear state of mind. The officer's knew Mr. Pierce was in distress, that he had experienced auditory hallucinations, that he believed his cat was telling him to kill himself, and the officers believed he needed medical assistance because of his mental issues. (Tr. 31-32; 98-100).

The search did not include the entire house and was halted upon seeing the images on the computer. (Tr. 115). Additionally, the officer's knew Mr. Pierce was not in a lucid state of mind from which to give permission, as evinced by the ambulance the officers called to take Mr. Pierce to the hospital. The officers knew Mr. Pierce would be leaving

in the ambulance and it was while waiting for the ambulance to arrive that officers suggested searching Mr. Pierce's home. (Tr. 100). Also, the search was not halted when Mr. Pierce was taken in the ambulance. *See State v. Lucas*, 452 S.W.3d 641, 644 (Mo. App. W.D. 2014) (Good faith exception did not apply when officers exceeded the scope of the search warrant).

The State failed to show the warrantless entry into Mr. Pierce's residence fell under any exception to the Fourth Amendment, and the trial court clearly erred by *sua sponte* proclaiming the emergency doctrine to be applicable when the evidence presented did not support such a conclusion.

Exclusion Necessary for Deterrence

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citations and internal quotation marks omitted). Thus, the presumption is that the officers acted unreasonably. The purpose of the exclusionary rule is not to repair the victim of a warrantless search, but instead to *deter future unlawful police behavior*. *United States v. Calandra*, 414 U.S. 338, 347 (1974). The actions of the police do not have to be deliberate; reckless or gross negligence also could warrant exclusion if deterrence was found necessary. *Davis v. U.S.*, 564 U.S. 229, 240 (2011). "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the benefits of exclusion tend to outweigh the costs. *Id*.

As stated in the Western District's opinion in this case, *State v. Pierce*, WD78739 (Oct. 18, 2016):

> When the State relies on consent to justify a search, the State has the burden of proving the consent was freely and voluntarily given. The State does not satisfy this burden merely by showing a submission to a claim of lawful authority. Voluntariness of the consent is determined by looking at the totality of the circumstances. Consent is freely and voluntarily given if, considering the totality of the circumstances, the objective observer would conclude that the person giving consent made a free and unconstrained choice to do so. This determination involves a consideration of a number of factors, including, but not limited to, the number of officers present, the degree to which they emphasized their authority, whether weapons were displayed, whether the person was already in custody, whether there was any fraud on the part of the officers, and the evidence of what was said and done by the person consenting.

State v. Selvy, 462 S.W.3d 756, 769 (Mo. App. E.D. 2015) (citations omitted); *accord State v. Cady*, 425 S.W.3d 234, 243 (Mo. App. S.D. 2014); *State v. Solis*, 409 S.W.3d 584, 591 (Mo. App. S.D. 2013).

The subject's mental state, such as a state of intoxication, is also relevant to the voluntariness of consent to search. *State v. Dowdy*, 332 S.W.3d 868, 872 (Mo. App. S.D. 2011). "Consent is involuntary if the officer 'has reason to know that the consent was not knowingly granted. '" *Id.* (quoting *State v. Earl*, 140 S.W.3d 639, 641 (Mo. App. W.D. 2004)).

(Slip. Op. 12)(Internal citations included).

The Western District did not analyze whether Mr. Pierce's auditory hallucinations and emotional disturbance was enough to render his consent involuntary because the Court held the circumstances of the case did not warrant exclusion. (Slip. Op. 12-13). However, given the totality of circumstances before the officers in this case, acting on the belief that Mr. Pierce was capable of voluntary consent was at the very least, grossly negligent or reckless. The search of Mr. Pierce's residence served no explainable purpose. Nothing in the record indicated the officers would have any reason to search Mr. Pierce's home at all except the purported intention of giving him "a little peace of mind." (Tr. 100). Nor does the record indicate the search was at Mr. Pierce's request, but rather at the suggestion of the officer. (Tr. 31, 32, 100).

The exclusionary rule applies where deterrence benefits outweigh "substantial social costs." *Hudson v. Michigan*, 547 U.S. 586, 586 (2006). "The value of deterrence depends on the strength of the incentive to commit the forbidden act." *Id*. The question to be asked is when someone is at their most vulnerable – mentally unstable, hallucinatory, suicidal – do we allow police to take advantage of their weakness in order to search their home, without probable cause, in violation of basic privacy rights? In this case, there was no incentive to search Mr. Pierce's home. Suppression would deter officers from asking for consent to search from someone who they know has been hallucinating and is not capable of clearly thinking and knowingly waiving privacy rights. Mr. Pierce was not simply in the wrong state of mind when he called for help – he was also taken away in an ambulance after the police talked with him and determined a need for such intervention.

This is clearly a situation where the officer should have recognized that Mr. Pierce could not have consented, not only by knowledge of Mr. Pierce's recent symptoms, but also the fact the officer chose to have an ambulance take Mr. Pierce to the hospital based on his state of mind. An objective observer cannot help but see someone who is unfit to remain alone at home because they are a danger to themselves cannot weigh the necessary information required for a valid and voluntary waiver of the Fourth Amendment.

The officers acted recklessly in violating Mr. Pierce's Fourth Amendment right, and exclusion is warranted because suppression would deter police misconduct in these circumstances. "Put another way, exclusion in a case such as this will give officers an 'incentive to err on the side of constitutional behavior,' *United States v. Cornejo*, 196 F. Supp. 3d 1137, 1158 (E.D. Cal. 2016)(finding the exclusionary rule should apply to evidence obtained during an unconstitutional traffic stop prolonged without reasonable suspicion) (citing *U.S. v. Johnson*, 457 U.S. 537, 561 (1982)); *See also Brown v. Illinois*, 422 U.S. 590, 605 (1975) (excluding evidence where detectives' actions were purposefully calculated to procure evidence).

Conclusion

After this Court reviews the totality of the circumstances, this Court should find that the trial court clearly erred in overruling Mr. Pierce's motion to suppress evidence, overruling Mr. Pierce's objections to the admission of the recovered evidence, and failing to exclude the recovered evidence as fruit of the poisonous tree, because the State failed to prove an exception to the warrant requirement existed by a preponderance of the evidence and deterrence warrants exclusion. §542.296.6. Therefore, this Court should

reverse Mr. Pierce's conviction and sentence, and remand this case for a new trial, since the recovered evidence was obtained as a direct result of an illegal search and thus was fruit of the poisonous tree. *Evans*, 514 U.S. at 10; *Taber*, 73 S.W.2d at 707.

CONCLUSION

Based on the arguments presented, Mr. Pierce respectfully requests this Court reverse the judgment of the trial court and remand the case with instructions for the court to vacate and set aside the judgment and sentence in the underlying criminal action and set that matter for retrial or resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Natalie T. Hull, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **8,198** words, which does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.04.

A true and correct copy of the attached brief was sent through the e-filing system on April 24, 2017, to: Nathan Aquino, Criminal Appeals Division, Office of the Attorney General, at Nathan.Aquino@ago.mo.gov.

/s/ Natalie T. Hull
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