No. SC98376

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,
Appellant,
v.
JAMES CHRISTOPHER BALES,
Respondent,

On transfer to the Missouri Supreme Court
From an appeal to the Missouri Court of Appeals
Southern District
From the Circuit Court of Pulaski County, Missouri
25th Judicial Circuit, Division II
The Honorable John Beger, Judge

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

Respectfully Submitted,

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Jurisdictional Statement

On April 26, 2019, the Pulaski County Grand Jury charged the Respondent, James Christopher Bales, by direct indictment in case number 19PU-CR00610 with Domestic Assault in the First Degree, two counts of Abuse of a Child and two counts of Endangering the Welfare of a Child. The case was assigned to Division Two of the Pulaski County Circuit Court before the Honorable John Beger.

On May 2, 2019, the Respondent filed a "Motion to Quash Search Warrant, Order Return of Cell Phone and all Items Obtained/Received/Copied from Cell Phone"

On June 11, 2019 an evidentiary hearing was held. Evidence and argument were heard and the Court took the matter under advisement. On July 1, 2019, the Trial Court entered a formal order granting "Defendant's Motion to Suppress Evidence and Quash" and suppressing any evidence seized from the Black Samsung cell phone pursuant to search warrants obtained by the State of Missouri.

An interlocutory appeal may be taken by the state from any order or judgment which results in the suppression of evidence. *See* Section 547.200 RSMo. Jurisdiction lies in this Court pursuant to the Missouri Constitution Article V, Section 3 and Section 547.200 RSMo.

The State filed a Notice of Appeal in the Court of Appeals on July 8, 2019. Oral arguments were heard on January 7, 2020. On January 14, 2020, the Southern District Court of Appeals filed a unanimous opinion overturning the Circuit Court's order. Respondent filed a motion for rehearing, which was denied by the Court of

Appeals. Respondent filed an Application for Transfer to this Court, which was granted on June 2, 2020.

Statement of Facts

The Pulaski County Grand Jury charged the Respondent James Christopher Bales, by direct indictment in case number 19PU-CR00610 with Domestic Assault in the First Degree, two counts of Abuse of a Child and two counts of Endangering the Welfare of a Child. (Legal File [hereinafter "L.F."] at 28).

On May 2, 2019, the Respondent filed a "Motion to Quash Search Warrant, Order Return of Cell Phone and all Items Obtained/Received/Copied from Cell Phone" alleging that the "'Black Samsung with black case even described as a cell phone does not particularly describe the place to be searched and the persons or things to be seized," that the description set out was fatally defective to any search and/or seizure under the warrant and that any items taken from the cell phone were fruit of the poisonous tree. (L.F. 29, p. 2). The Motion also alleged that information provided to counsel and the Respondent was that the entire cell phone could be downloaded in less than three hours and that the Respondent was unable to run his business without his cell phone. (L.F. 29, p. 2). Respondent also alleged that it should take less than four hours to download a phone and that the warrant did not authorize the phone to be retained and the prosecution was refusing to return it. (L.F. 29, p. 3). Respondent also made an allegation that the return on the warrant was not true. (L.F. 29, p. 3). Respondent requested that the Court quash the warrant, order that any and all data obtained from the cell phone be given to the Respondent and to order the return of the cell phone or in the alternative the SIM card from the phone. (L.F. 29, p. 3).

On June 11, 2019 an evidentiary hearing was held. (L.F. 39). The State objected to proceeding upon Respondent's Motion to Quash based on the fact that the phone had

already been seized and downloaded and the issue was moot. (Transcript [hereinafter "TR"] 3). Further, the State argued that the Respondent had not filed a proper Motion to Suppress Evidence. (Tr. 3). The Court overruled this objection and proceeded with an evidentiary hearing, treating Respondent's Motion to Quash as a Motion to Suppress. (Tr. 3).

The State presented testimony from Detective Thomas Fenton of the Pulaski County Sheriff's Department. Detective Fenton testified that he had responded to a call regarding a juvenile male, L.B., who was a patient at the St. Louis Children's Hospital with what was described as shaken baby syndrome. (Tr. 6). Detective Fenton interviewed defendant who was the only adult at the residence at the time of L.B.'s injury. (Tr. 9). The defendant stated that earlier that night the kids were running around playing and the child had tripped or fell and hit his head on the foot of the bed in the bedroom. (Tr. 9). The defendant also described to the Detective that he had awaken sometime around 12:30 or 1:00 in the morning to L.B. crying and banging his head against the wall. (Tr. 7). The defendant stated to the Detective that he had a video of L.B. sitting on the flooring banging his head and had shown the Detective the video on his Samsung cell phone. (Tr. 7-8). Defendant handed the Detective the cell phone to review the video, which was captured on the Detective's body cam. (Tr. 8).

The video showed L.B. rocking back and forth, crying and face planting. The Detective described that on the video the juvenile then went limp and started breathing heavy. (Tr. 8). The Detective stated that he spoke to the defendant a couple of days later and the defendant again showed him the video on his cell phone. (Tr. 9-10).

Based on the video the Detective had seen on the defendant's phone, the

Detective applied for a search warrant for the cell phone. (Tr. 10). The Detective testified that he received the search warrant signed by a judge, and that he believed it was issued correctly. (Tr. 10-11). He testified that the defendant came back in for a third interview and the defendant had the phone in his possession at the time of the interview. (Tr. 11). During this third interview, the defendant was looking for the video again on the cell phone at which time the Detective presented the defendant and his attorney with the search warrant. (Tr. 9-11). The Detective described the phone seized as a Samsung Galaxy black in color. (Tr. 12).

During a review of the download of the phone, Investigator Bryan Gibbs, who was assisting Detective Fenton, discovered additional evidence of possible criminal activity. (L.F. 37). This evidence included nude photographs of an unconscious female believed to the mother of L.B. Investigator Gibbs applied for and received a second search warrant for this phone for the newly discovered evidence as well. (L.F. 37, 38).

The trial court took the issue under advisement. (Tr. 22). On July 1, 2019, Judge John D. Beger entered a formal order granting Defendant's Motion to Quash and ordering all evidence seized pursuant to both search warrants to be suppressed. (L.F. 32).

The State filed a Notice of Appeal in the Court of Appeals on July 8, 2019. Oral arguments were heard on January 7, 2020. On January 14, 2020, the Southern District Court of Appeals filed a unanimous opinion overturning the Circuit Court's order. Respondent filed a motion for rehearing, which was denied by the Court of Appeals. Respondent filed an Application for Transfer to this Court, which was granted on June 2, 2020.

Point Relied on – I

I. THE TRIAL COURT ERRED IN QUASHING A SEARCH WARRANT AND SUPPRESSING EVIDENCE FROM THAT SEARCH WARRANT AND A SUBSEQUENT SEARCH WARRANT BECAUSE THE SEARCH WARRANT WAS A FACIALLY VALID SEARCH WARRANT IN THAT THE SEARCH WARRANT WAS ISSUED BY A JUDGE AFTER A FINDING OF PROBABLE CAUSE AND THE SEARCH WARRANT ADEQUATELY DESCRIBED THE PARTICULAR ITEM TO BE SEIZED WITH SUFFICIENT PRECISION.

- *State v. Corneliusm*, 1 S.W.3d 603 (Mo. App. S.D. 1999)

- *Groh v. Ramirez*, 540 U.S. 551 (2004)

- *State v. Brown*, 708 S.W.2d 140, 143 (Mo. banc 1986)

- *State v. Johnson*, 576 S.W.3d 205 (Mo. App. W.D. 2019)

Point Relied on – II

II. THE TRIAL COURT ERRED IN FINDING THAT A SEARCH WARRANT WAS SO FACIALLY DEFICIENT THAT THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DID NOT APPLY AND SUPPRESSING EVIDENCE FROM THAT SEARCH WARRANT AND A SUBSEQUENT SEARCH WARRANT BECAUSE THE GOOD FAITH EXCEPTION WOULD APPLY IN THAT THE WARRANT ADEQUATELY DESCRIBED THE PARTICULAR ITEM TO BE SEIZED SO THAT IT WAS REASONABLE FOR THE DETECTIVE TO PRESUME IT WAS VALID AND THE POLICE

CONDUCT WAS NOT SUFFICIENTLY DELIBERATE, RECKLESS, OR GROSSLY NEGLIGENT TO WARRANT SUPPRESSION.

- *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984)

- *State v. Sweeney*, 701 S.W.2d 420 (Mo. banc 1985)

- *State v. Buchli*, 152 S.W.3d 289 (Mo. App. W.D. 2005)

-*State v. Brown*, 741 S.W.2d 53, 59 (Mo. App. W.D. 1987)

Argument – I

I. THE TRIAL COURT ERRED IN QUASHING A SEARCH WARRANT AND SUPPRESSING EVIDENCE FROM THAT SEARCH WARRANT AND A SUBSEQUENT SEARCH WARRANT BECAUSE THE SEARCH WARRANT WAS A FACIALLY VALID SEARCH WARRANT IN THAT THE SEARCH WARRANT WAS ISSUED BY A JUDGE AFTER A FINDING OF PROBABLE CAUSE AND THE SEARCH WARRANT ADEQUATELY DESCRIBED THE PARTICULAR ITEM TO BE SEIZED WITH SUFFICIENT PRECISION.

Standard of Review

An appellate court reviews a trial court's ruling on a motion to suppress to determine whether there was substantial evidence to support the decision. *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. banc 2003). The appellate court views the evidence in the light most favorable to the ruling. *State v. Newberry*, 157 S.W.3d 387, 397 (Mo. App. S.D. 2005). The appellate court defers to the trial court's determinations of credibility and findings of fact, but reviews the court's conclusions of law de novo. *Id.* (*citing State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998)). A trial court's ruling on a motion to suppress will be reversed on appeal if the decision is clearly erroneous, and the reviewing court is left with a definite and firm impression that a mistake has been made. *Newberry*, 157 S.W.3d at 397–98.

Analysis

Both the United States and Missouri Supreme Courts have stated that great deference should be given to the initial judicial determination of probable cause made at

the time of the issuance of a search warrant. The judicial determination of probable cause should be made based on the totality of the circumstances and make a "practical, commonsense decision whether…there is a fair probability that contraband or evidence of a crime will be found." *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990) (*citing Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). The court reverses only if that determination is clearly erroneous. *Id.*

In determining whether or not the issuing judge was clearly erroneous, the court looks to the four corners of the affidavit in support of the search warrant. *State v. Laws*, 801 S.W.2d 68, 70 (Mo. banc 1990). Further, courts have noted that the supporting affidavit "should be weighed as understood by those versed in law enforcement and not in terms of library analysis by scholars…[as][a] grudging or negative attitude toward warrants by reviewing courts is inconsistent with the Fourth Amendment's preference for searches by warrant; and courts should not invalidate warrants by interpreting affidavits in a hypertechnical rather than common sense manner." *State v. Corneliusm*, 1 S.W.3d 603, 605 (Mo. App. 1999) (*citing State v. Hill*, 854 S.W.2d 814, 818 (Mo. App. S.D. 1993)). Detective Fenton testified that defendant had shown him evidence on the phone on two previous occasions. (Tr. 8-10). Based upon this knowledge and other evidence gathered, Detective Fenton applied for a search warrant. The warrant itself described the thing to be seized as "[a] cell phone located at, 13251 Highway O Dixon, in Pulaski County Missouri. This cell phone is described as Black Samsung with black case." The Complaint and Application for Search Warrant, however, further described the phone as "[a] cell phone located at 13251 Highway O Dixon, in Pulaski County

Missouri. This cell phone is described as a black in colored Samsung with a black case cell phone number 573-855-6174 belonging to James Christopher Bales." (L.F. 36).

The trial court relied on *Groh v. Ramirez*, 540 U.S. 551 (2004) in its suppression order. In *Groh*, the application described the place to be searched and the contraband to be seized, but the warrant itself failed to identify any of the items that the petitioner intended to seize. In the section of the form calling for a description of the "person or property" to be seized, there was only a description of the house rather than the items to be seized. *Id.* at 554. That is not the case here. Though the Complaint and Application were more descriptive, the warrant itself describes the phone as a Black Samsung cell phone in a black case. (L.F. 36). It clearly provides a description for a specific item and limits the search by describing the color and brand name, along with a unique characteristic of a black case.

In finding the warrant invalid, the *Groh* court noted that the warrant "did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items. *Id*. at 558. Nor did it make what fairly could be characterized as a mere technical mistake or typographical error." The court further noted the warrant did not describe the items to be seized "*at all*." *Id*. (Emphasis added). The concern expressed by the court in *Groh* was that "…there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." *Id*. at 560. The *Groh* court discussed theoretical situations where the issuing court might be satisfied that there was probable cause to search for some items, such as weapons and explosives, but not others such as files and receipts. *Id*. at 560-561. Without a warrant

listing items to be searched for and seized, there can be no assurance that the issuing court agreed with the scope of the request of the affidavit. *Id*.

These facts and concerns are clearly distinguished from the case before the Court. The scope of the search was only one item: the black Samsung cell phone. Neither the affidavit, nor complaint and application, ever requested the court find probable cause to search for any items other than the specific black Samsung cell phone. Although the complaint and affidavit included additional detail, the cell phone was described *in the warrant itself* by both color and make.

In *State v. Brown*, 708 S.W.2d 140, 143 (Mo. banc 1986), the search warrant described the items as "1 XL-12 Homelite," "1 Bench grinder (Dark gray)," and "3 saw sprocket." The court found that these descriptions were sufficient to ensure the property taken was not left to the officer conducting the search. *Id.* at 143. Further, the court found that the warrant was not fatally defective simply because the descriptions could have included more precision such as brand name or serial number, which is not required. *Id*. In this case, the warrant states "This cell phone is described as Black Samsung with black case." (L.F. 36). It is difficult to imagine how the Detective could have been more descriptive without first seizing the phone from the defendant to check for serial numbers or a specific model number.

For example, in *State v. Johnson*, 576 S.W.3d 205 (Mo. App. W.D. 2019), the description contained in the warrant was for "all cell phones" without any specific identifiers. *Id.* at 216. In addition, it allowed for the search of "all data/software as defined by RSMo 556.063 pertaining to the offense of Distribution Deliver and Manufacture of a Controlled Substance RSMo 195.211 and Rape in the First Degree

RSMo 556.030" *Id.* The Court found that these descriptions were sufficiently particular and were not overbroad. *Id*. at 11. In the present case, the description is much more limited and specific than the one in *Johnson.* In fact, in the present case only one specific brand of cell phone and one color of phone was authorized to be seized and searched, a black Samsung phone with a black case. Thus, the Detective in this case was much more limited than the officers in the *Johnson* case. By the words of this warrant, every I-phone, Motorola phone, and Nokia phone, any other color of Samsung phone and Samsung phones without cases were off limits as this search was very specifically limited to a black Samsung phone.

It should also be noted that the trial court's ruling sets a precedent that places law enforcement in a difficult position. The Detective in this case asked for a warrant prior to the seizure of the phone with as much information as he could ascertain from a brief visual inspection of the phone when the defendant showed him a video. He could not get an identification or serial number, or even a specific model without actually seizing the phone first. The trial court, by its ruling, would seem to require law enforcement to seize the item first to get more specific information, and then apply for a warrant. The trial court's reasoning is contrary to the Constitutional requirement to obtain a warrant **before** a seizure with as much specificity as the government's knowledge and circumstances allow, as the Detective did in this case. *See Johnson,* 576 S.W.3d 205 (Mo. App. 2019)

The trial court failed to apply the proper analysis, which is whether or not the issuing judge on consideration of all material and information on the application and affidavit could reasonably believe there was probable cause. *State v. Brown,* 382 S.W.3d

147, 170 (Mo. App. W.D. 2012). The trial court was therefore clearly erroneous in suppressing the evidence obtained from this valid warrant and the subsequent search warrant obtained by law enforcement.

Argument-II

II. THE TRIAL COURT ERRED IN FINDING THAT A SEARCH WARRANT WAS SO FACIALLY DEFICIENT THAT THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DID NOT APPLY AND SUPPRESSING EVIDENCE FROM THAT SEARCH WARRANT AND A SUBSEQUENT SEARCH WARRANT BECAUSE THE GOOD FAITH EXCEPTION WOULD APPLY IN THAT THE WARRANT ADEQUATELY DESCRIBED THE PARTICULAR ITEM TO BE SEIZED SO THAT IT WAS REASONABLE FOR THE DETECTIVE TO PRESUME IT WAS VALID AND THE POLICE CONDUCT WAS NOT SUFFICIENTLY DELIBERATE, RECKLESS, OR GROSSLY NEGLIGENT TO WARRANT SUPPRESSION.

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the reviewing court is left with a definite and firm impression that a mistake has been made. *Newberry*, 157 S.W.3d at 397–98.

Analysis

Even assuming *arguendo* the search warrant was invalid, the evidence obtained from the phone should still not have been excluded by the trial court as the officer acted in good faith and acted in reliance on the warrant.

Noting the costs and benefits of suppressing reliable physical evidence, the United States Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), provided for a good-faith exception to the traditional, judicially-created, Fourth Amendment exclusionary rule. "The teaching of *Leon*'s good-faith exception is that evidence pursuant to a warrant issued by a detached and neutral magistrate should not be excluded, irrespective of the actual validity of the warrant, so long as the officer conducting the search acted in objectively reasonable reliance on that warrant." *State v. Brown*, 708 S.W.2d 140, 145 (1986). Both *Leon* and *Sheppard* dealt with situations where police officers acted in reliance upon search warrants that subsequently were held to be defective. In other words, the judge or magistrate, not the police, made the critical mistake. *Sheppard*, 104 S.Ct. at 3429. In those situations, the Fourth Amendment does not mandate suppression of the evidence "particularly where an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Leon*, 104 S.Ct. 3405, 3420 (1984). "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 104 S.Ct. at 3418. *State v. Varvil*,

686 S.W.2d 507, 511 (Mo. App. E.D. 1985). *See also State v. Wilbers*, 347 S.W.3d 552 (Mo. App. W.D. 2011).

In *State v. Sweeney*, 701 S.W.2d 420 (Mo. banc 1985), the Missouri Supreme Court modified Missouri's judicially created exclusionary rule to allow for the good-faith exception, finding that the officers had "acted in reasonable reliance on a search warrant issued by a detached and neutral judge." *Id.* at 426 (*cited in Brown*, 708 S.W.2d 140, 145). 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. 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. 134, 143-144 *(2009) cited in State v. Wilbers*, 347 S.W.3d 552, 562 (Mo. App. W.D. 2011). Whether the exclusionary rule applies in a particular case, however, is a question of law that is reviewed de novo. *State v. Johnson*, 354 S.W.3d 627, 632 (Mo. banc 2011). *See also State v. Robinson*, 454 S.W.3d 428 (2015).

Suppression, under the Good Faith analysis, remains an appropriate remedy in four situations:

1) if the affiant provides information he knows or should know is false;

2) the magistrate wholly abandons his judicial role;

3) if the affidavit is so lacking in probable cause as to render official belief in its existence entirely unreasonable; or

4) if the warrant is so facially deficient the executing officers cannot reasonably presume it to be valid. *State v. Brown,* 741 S.W.2d 53, 59 (Mo. App. W.D. 1987) *quoting United States v. Leon,* 104 S.Ct. 3405, 3421 (1984).

In the present case, the trial court erred by citing reason number four as justification for suppressing the evidence in this case despite the good faith exception. In a similar case, *State v. Buchli*, 152 S.W.3d 289 (Mo. App. W.D. 2005), the defendant argued that the application and warrant were not particular enough concerning documents to be seized during a search. The warrant listed only "receipts, documents, and correspondence," permitting officers to conduct "an unrestrained search." *Id.* at 305. The Court ruled that, "[a]ssuming, however, that the warrant was defective for lack of particularity, the evidence was admissible nonetheless because officers acted in good faith reliance on the search warrant and did not conduct an unbounded search." *Id.*

In this case, there was no police misconduct and the exclusion of the evidence would provide no deterrent effect. Here, the detective knew of the existence of the evidence on the defendant's phone. In fact, he testified he had been shown the evidence on the Respondent's phone on at least two prior occasions by the Respondent. The detective did not seize the phone immediately but instead sought a warrant with the only description he could have provided to the Court without first seizing the Respondent's phone to obtain serial numbers and other descriptors.

After obtaining the warrant, the detective testified that he reasonably relied on the warrant issued by the issuing judge. In addition, the detective testified that he did not need to search the Respondent's home for the cell phone, the Respondent brought the cell phone to the detective who seized it at that time. The cell phone that was the subject

of the search warrant was the only item seized by the detective. When additional evidence of criminal activity was discovered on the phone not covered by the first warrant, the investigators took the additional step of seeking and obtaining a second search warrant to cover those materials. In this case, the investigators were most certainly acting in good faith with seeking not one, but two warrants. The detective also seized the only item named in the warrant. This was not an "unbounded warrant" that allowed the detective to go on a fishing expedition. *See Buchli*, 152 S.W.3d at 305. Instead, it was a limited search governed by the terms of the warrant and there was no misconduct by detective as he was acting in good faith in accordance with the terms of the warrant.

In addition, the detective had advanced knowledge and personally knew of the item that he was looking for that was the basis of the warrant. The Respondent had showed it to him on prior occasions and brought the item with him when he visited with the detective at the time the detective made the seizure. Several Eighth Circuit Court cases have cited this as an important factor in Good Faith Analysis. When evaluating whether officers relied in good faith on a warrant containing inaccurate information affecting particularity, the Eighth Circuit has found relevant that "the agents executing the warrant personally knew which [vehicle] w[as] intended to be searched," that the vehicle was "under constant surveillance while the warrant was obtained," and that the vehicle "which w[a]s intended to be searched w[as], in fact, [the vehicle] actually searched." *United States v. Gitcho*, 601 F.2d 369, 371-72 (8th Cir. 1979), (upholding search when the warrant listed a nonexistent address for the house to be searched and no other description); *see United States v. Thomas*, 263 F.3d 805, 809 (8th Cir.

2001)(upholding search when the warrant listed an incorrect, existing address because the residence to be searched was under surveillance while the warrant was obtained, and the officer executing the warrant had personal knowledge of the residence to be searched); *Lyons v. Robinson*, 783 F.2d 737, 738 (8th Cir. 1985) (per curiam) (upholding search when a house sat on an intersection of two streets and officers mistakenly listed the wrong intersecting street in the house's address, because the warrant provided an accurate physical description of the premises and officers executing the warrant knew which house was supposed to be searched); see also *United States v. Gamboa*, 439 F.3d 796, 806-07 (8th Cir. 2006); *United States v. McCain*, 677 F.2d 657, 660-61 (8th Cir. 1982).

Cases where the warrant has been determined to be "so facially deficient the executing officers cannot reasonably presume it to be valid," generally require a significant glaring error. *Brown*, 741 S.W.2d at 59 *quoting United States v. Leon*, 104 S.Ct. 3405, 3421 (1984). In *Groh v. Ramirez*, 540 U.S. 551 (2004), the case relied upon by the trial court in quashing the warrant and suppressing the evidence in this case, the description of the property to be seized was completely left out of the warrant. Likewise, in *State v. Douglass*, 544 S.W.3d 182 (Mo. 2018), the Missouri Supreme Court invalidated a check-box style search warrant which included items for which there was no showing of probable cause in the affidavit. Part of the reason the officer checked the boxes in that case was so that he would not have to go back and get a "piggyback" warrant for any items discovered during the search. *Id.* at 188.

In the present case, neither of those types of "glaring errors" are present in the warrant issued. First, though slightly different than the affidavit, the warrant itself did

contain a description of the item, including make and color of the item. If this was an error, it was made by the issuing judge, and not the detective. Secondly, this was not a checkbox style warrant with every box checked. It also was not a general warrant. It was a specific warrant for a specifically described item, a black Samsung cellphone in a black case. It was in no way a general warrant or one with such errors that the detective should have been alerted to the "glaring error."

Unlike the officer in the *Douglass* case who unlawfully checked the blocks because he did not want to have to go back and get a "piggyback" warrant if additional evidence of criminal activity was found, the investigators in this case did exactly that. When they found additional evidence of criminal activity, they went back and did what the Constitution requires; they got a second or "piggyback warrant." Their actions in this case demonstrate that the police were acting with good faith, even if there was a technical problem with the warrant. As such, the Good Faith exception clearly applies and the evidence obtained by both search warrants should not have been suppressed.

The trial court also attempted to justify suppression of the evidence because the detective seized the black Samsung cell phone at the Sheriff's Department when the Respondent appeared for an interview versus waiting and seizing it at the address described in the warrant at a later date. This seems counterintuitive that a court would require a detective not to seize an item that could be easily destroyed or erased, such as a phone, at the earliest possible time with the least amount of intrusion on a defendant. The other option would have been to wait, hope the evidence was not destroyed, and then conduct a search of the Respondent's home for the phone, which would have been much more intrusive than the steps the detective took in this case. His actions in limiting

the intrusiveness of the search all point to his good faith and the reason why the Good Faith Exception clearly applies in this case.

Exclusion of evidence "has always been our last resort, not our first impulse." *United States v. Richards*, 659 F.3d 527, 537 (6th Cir. 2011) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). The exclusionary rule is not an individual right, but instead as applied only where it will serve to deter Fourth Amendment violations in the future, and where the deterrent benefit outweighs the cost of applying the rule. *Herring*, 129 S. Ct. at 700. The principle cost of applying the rule is allowing guilty and possibly dangerous defendants to go free, which offends the basic concepts of the criminal justice system. *Id.* at 701. The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application. *Id.*

There was no police misconduct in this case that requires the suppression of evidence as a deterrent to future misconduct. If there was anything, the investigators in this case went above and beyond the requirements of the Constitution and minimized any intrusion on the Respondent by getting two warrants, seizing the item when it was located with the Respondent at the Sheriff's Department, versus searching the Respondent's home, and only seizing the one specific item detailed in the warrant. In addition, the warrant contained no "glaring error" or as a result of an omission caused it to be a general warrant allowing the detective to go on a fishing expedition. It is clear from his testimony and actions that his search was limited to one item, which he had personal knowledge of, and he seized that item after he believed he had a valid search warrant. In addition, when the investigators found evidence of additional crimes, they went back for a second search warrant. Clearly the investigators were acting in good

faith and the Good Faith Exception of *Leon* applies in this case. As such, the good faith exception applies and the trial court was clearly in error in suppressing evidence in response to the motion to quash.

Conclusion

WHEREFORE, based on the arguments in Point I and Point II of Appellant's Substitute Brief, it is clear that the warrant was not facially invalid and even if it was, the Good Faith Exception applies. Appellant prays that this Court uphold the decision of the Southern District Court of Appeals and allow evidence from the search warrants to be used by the State against the Respondent at trial.

Respectfully submitted:

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on this 21st day of July 2020, a true and correct copy of the foregoing brief and the attached appendix were served via the efiling system and by e-mail to Ms. Erica Mynarich, attorney for Respondent, at Erica@carvercantin.com. In addition, pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font and does not exceed 31,000 words. The word processing software identified that this brief contains 6,156 words.

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