APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Order Denying Petition for Review in the Supreme Court of the State of Kansas (June 28, 2023) . . . . App. 1

Appendix B Opinion in the Court of Appeals of the State of Kansas (March 3, 2023) . . . . App. 2

Appendix C Transcript of District Court's Suppression Ruling in the District Court of Shawnee County, Kansas (June 14, 2022) . . . . App. 32

Appendix D Petition for Review of Appellant in the Supreme Court of the State of Kansas (March 30, 2023) . . . . App. 37

APPENDIX A

[SEAL]

Court:
IN THE SUPREME COURT
OF THE STATE OF KANSAS

Case Number: 125410

[Filed June 28, 2023]

Case Title:

STATE OF KANSAS,	APPELLANT,	)
		)
V.		)
		)
JEREMY A. CLINE,	APPELLEE.	)
		)

Type: Petition for Review (re: Opinion) by Appellant State of Kansas

Considered by the Court and denied.

SO ORDERED.

/s/ Marla J. Luckert
/s/ Marla J. Luckert, Chief Justice

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 125,410

[Filed March 3, 2023]

STATE OF KANSAS,	)
Appellant,	)
	)
v.	)
	)
JEREMY A. CLINE,	)
Appellee.	)
	)

SYLLABUS BY THE COURT

1.

Both the United States and Kansas Constitutions protect against unreasonable searches and seizures.

2.

Kansas law is clear that a seizure of a person occurs if there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is

not free to leave, and the person submits to the show of authority.

3.

The United States Supreme Court has held that all claims that law enforcement used excessive force during a seizure should be analyzed under the Fourth Amendment's objective reasonableness standard.

4.

Determining whether the force used to carry out a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. The proper application of this test requires careful attention to the facts and circumstances of each case.

5.

Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. The exclusionary rule is not an individual right and applies only when it results in appreciable deterrence.

Appeal from Shawnee District Court; RACHEL L. PICKERING, judge. Opinion filed March 3, 2023. Affirmed.

Jodi Litfin, deputy district attorney, *Steven J. Obermeier*, assistant solicitor general, and *Derek Schmidt*, attorney general for appellant.

Reid T. Nelson and *Laura Stratton*, of Capital and Conflicts Appeals Office, for appellee.

Before MALONE, P.J., HILL and HURST, JJ.

MALONE, J.: A Kansas Highway Patrol (KHP) trooper tried to pull over Jeremy A. Cline for a broken windshield, but Cline did not stop. The trooper pursued Cline through residential streets of north Topeka and, after a few minutes of chasing, decided to perform a tactical intervention maneuver to immobilize Cline's vehicle. The maneuver caused Cline's car to spin, and it ran off the road into a utility pole, causing the death of Cline's passenger. As a result, the State charged Cline with felony murder and several other crimes. The district court granted Cline's motion to suppress all evidence recovered after the maneuver to force his car off the road, finding the trooper's actions were an objectively unreasonable use of excessive force to carry out the seizure.

The State appeals the district court's suppression order and raises two related issues. First, the State claims the district court erred in finding the seizure was objectively unreasonable in violation of the Fourth Amendment to the United State Constitution. Second, the State claims the district court erred in applying the exclusionary rule to suppress all evidence following the

seizure. For the reasons we will carefully explain in this opinion, we disagree with the State's claims and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In the late afternoon of March 6, 2021, Trooper Justin Dobler of the KHP was working with a task force called Operation Frontier Justice, a combined operation between federal and local law enforcement agencies intended "to enforce and help crack down [on] the rise of criminal activity in the City of Topeka." Dobler had just come on shift and decided to check out a neighborhood where a suspected drug house was located. Despite the stated goal of Operation Frontier Justice, participating law enforcement officers were instructed to avoid any vehicle pursuits; the operation plan specifically stated: "'Any pursuits that [do] occur should be constantly reevaluated and may be discontinued at any time'" and that "'[p]aramount consideration and prioritizing will be given to the safety of the public and the risk of pursuing individuals[.]'" Dobler had been discouraged from engaging in vehicle pursuits, unless necessary, and had received warnings for violating KHP's pursuit policies.

Dobler was sitting at the intersection of Northwest Taylor and Northwest Lower Silver Lake Road, near the suspected drug house and in the same area he had often patrolled, when he noticed a white sedan with a smashed windshield. Dobler believed the broken windshield obstructed the driver's view and was both a safety issue and a traffic infraction. He also thought the car possibly matched the description of one that had been reported stolen. As the car turned and drove

past him, Dobler believed the people in the car—a male driver and female passenger—seemed suspicious because they "were locked up, nervous, as they were completely looking away from me. As if, I don't see you, you don't see me type mentality." At that point, Dobler was "starting to develop a case."

Based solely on the broken windshield infraction, Dobler flicked on his emergency lights, pulled a U-turn, and started to follow the car. Dobler would later recall that he had no suspicion that the occupants of the car were felons, nor that they were engaged in any felonious activity, except for the possible car theft. As he began to follow, Dobler could make out the car's license plate, and he reported it to dispatch. He also immediately determined that the driver was not going to stop—the car turned right and began trying to evade him. In response, Dobler turned on his siren and informed dispatch of his pursuit, but the car still made no signs of pulling over.

As Dobler continued the pursuit, the fleeing car made many turns, often using its turn signals, and slowing—but not stopping—at several stop signs. Dobler later reported that he was concerned for his safety and for pedestrians along the road. But the dashcam footage recovered from his patrol car showed that the streets were almost empty—Dobler later agreed that he saw no pedestrians on the road at that point in the chase. Around this time, Dobler was informed that the car was not stolen, first over the radio from another officer and later from dispatch. Even so, Dobler continued the chase.

Dobler followed the car as it pulled into a trailer court. At that point, he thought about trying to perform a tactical vehicle intervention (TVI) "[d]ue to the high risk and how dangerous" the pursuit was, but he was unable to do so because of the cramped roadway. A TVI is a maneuver intended to end a car chase by forcing a fleeing vehicle off the road—in Dobler's words, the goal of a TVI is to cause the other car to do a "controlled spin . . . with the intention of disabling [the] vehicle to end a pursuit safely." Dobler was taught the maneuver by the KHP and had employed it "an abundance of times"—he recalled at least 15 times, including 10 times in that specific neighborhood. Because he could not accomplish a TVI in the trailer court, Dobler backed off and continued his pursuit. As he trailed the car around the trailer court, Dobler noticed children playing close to the roadway. The fleeing car continued to use its brakes and turn signals as it passed through the trailer court, driving around 20-30 miles per hour, and it eventually left the trailer court and back out onto the street.

The car made a wide turn onto Tyler Street, a two-lane road, and Dobler decided to try a TVI. Dobler later testified that his main concern at the time was a car down the road that he believed was driving towards them. Dobler explained that he chose to perform the TVI "[b]ecause the individual fleeing placed an innocent bystander in immediate harm with his vehicle by going head on in the opposite direction with him." But the dashcam footage and photographs introduced into evidence showed that the approaching car was already pulled off to the side of the road. Dobler also acknowledged that the many obstructions on the side

of the roadway made the location he performed the TVI less than ideal. In any event, Dobler accelerated to pull alongside the fleeing car, matched its speed, and then nudged the back right bumper of the car to begin the TVI.

Dobler's TVI succeeded; after nudging the bumper, the fleeing car spun around the front of his patrol vehicle, and then off the road. By the time Dobler turned around to see the result of the TVI, the car "was sideways and up against a utility pole." Dashcam footage from another officer's patrol car confirmed Dobler's recollection, showing the car spinning off the road and slamming into a telephone pole on its passenger side. In all, the pursuit lasted about 3 minutes and 35 seconds.

Dobler and another officer removed the driver, later identified as Cline, from the driver's side window of the car and placed him in handcuffs. Officers eventually found a knife, a bag of methamphetamine, and drug paraphernalia in Cline's possession. The passenger, Anita Benz, was incoherent and slouched back in her seat. Both Cline and Benz were promptly transported to the hospital. Once at the hospital, Cline was interviewed by a KHP trooper and gave several explanations about his decision to flee from Dobler. Benz' injuries were severe, and four days later, she died from the blunt force head and pelvic injuries she sustained in the crash.

The State charged Cline with felony murder for Benz' death, fleeing or attempting to elude, possession of methamphetamine, possession of drug paraphernalia, interference with a law enforcement

officer, and several traffic violations. After conducting a preliminary hearing, the district court bound Cline over for trial.

Cline later moved to dismiss the felony murder charge, arguing his actions were not the proximate cause of Benz' death. He also moved to suppress "any and all evidence flowing from the use of excessive force to seize his person." The suppression motion argued that Dobler violated KHP policies and Kansas law by beginning and continuing the car chase and using excessive force to carry out the seizure in violation of the Fourth Amendment. Cline requested that all evidence obtained after the TVI be suppressed including the medical evidence and reports establishing Benz' death. The State responded that Dobler's decision to use the TVI was not excessive, that he had reasonable grounds to stop Cline by such means, and that Cline's own criminal actions justified the use of deadly force. The State agreed that a seizure occurred when Dobler performed the TVI.

Evidence at the suppression hearing

At the suppression hearing, Dobler testified about his decision to pursue Cline as well as his rationale for performing the TVI. Dobler explained that he decided to execute the TVI because he believed Cline presented an "immediate threat," and that he executed the maneuver in accordance with his training. Dobler identified the immediate threat as "the endangerment of the innocent bystander motorist . . . in the opposite lane." Dobler also testified that he knew that he had "a lot more resources available, just because of the other agencies involved, . . . So I knew I had immediate help

somewhere." But when he did not hear back from other officers about setting up spike strips, Dobler decided to perform a TVI. Dobler conceded that the area he decided to perform the TVI was less than ideal because of the many telephone poles and ditches along the roadway.

On cross-examination, Dobler agreed that an officer is not supposed to perform a TVI and should instead disengage a pursuit if the danger of performing the maneuver is greater than the danger of letting the suspect escape. Dobler admitted that before the car chase with Cline, he had been discouraged from engaging in vehicle pursuits, unless necessary, and had received written warnings for violating KHP's pursuit policy. The dashcam video from Dobler's patrol car and the dashcam video from another patrol car involved in the incident with Cline were admitted into evidence at the hearing. The evidence showed that speed of the cars during the chase was usually within the 35-mph speed limit except for a few stretches that Cline drove up to 55 mph.

The State also called KHP Master Trooper Scott Moses who testified that he interviewed Cline in the hospital after giving him his *Miranda* warnings, while Cline was being guarded and handcuffed to a hospital bed. The State introduced into evidence an audio recording of that interview.

Cline called some of Dobler's superiors from the KHP to testify. Lieutenant Bryce Whelpley testified that he had sent an email informing Dobler and other troopers that "'[g]iven the legal stance on pursuits, I would discourage pursuing anything less than a person

felony.'" It also stated that "'[e]ven then I would think very hard about pursuing inside the city limits, probably wouldn't do it, unless someone's life is in danger.'"

Captain Joseph Witham of the KHP similarly explained that Dobler had been instructed in directives delivered to the whole troop "not to pursue in the City of Topeka unless he's chasing a violent felon." And this instruction had been echoed to Dobler in both personal conversations and emails. After analyzing Dobler's dashcam footage, Witham described that the area where Dobler executed the TVI was not ideal because it was residential and there were many obstacles around the road. As for the testimony about the presence of children in the trailer court, Witham stated this fact would be a reason not to continue the pursuit. He explained that KHP troopers should, but are not required, to get authorization before performing a TVI and Dobler did not have approval to perform the TVI. He testified that Dobler's "entire pursuit should have been avoided [and] should not have occurred. . . . He was chasing, ultimately, a windshield violation."

Major Eric Sauer, who also reviewed Dobler's dashcam video and report, testified that Dobler failed to follow KHP directives about pursuing vehicles within Topeka. Sauer believed that the chase created a greater risk than giving up the pursuit of Cline. He testified that all five of the KHP's majors concluded that Dobler's pursuit—in its initiation, continuation, and conclusion—was against KHP policy. Sauer stated that the KHP's executive command review board unanimously recommended that Dobler be dismissed

for his actions. Cline introduced letters from Colonel Herman Jones, superintendent of the KHP, without objection by the State, showing that Dobler was fired from the KHP on July 19, 2021, because he had been warned several times not to begin and pursue car chases like the one with Cline.

After both parties presented their evidence, Cline asked the district court to suppress "everything from—that follows from the moment of contact, which we see is the seizure. So that would be the evidence of the crash, the death of Miss Benz, and any item recovered from the vehicle." Cline contended that he was seized the moment that Dobler's patrol car contacted the bumper of his car while performing the TVI and that Dobler's decision was objectively unreasonable. The State countered that Dobler faced a split-second decision and reasonably believed that he needed to perform the TVI to protect the driver of the car approaching them in the opposite lane.

The district court's ruling

One week later, the district court orally announced its ruling from the bench. The district court denied Cline's motion to dismiss the felony murder charge "at this time," explaining that the motion raised both a factual and a legal question and the court did not find "substantial support of case law" to support the motion to dismiss. But the district court granted Cline's motion to suppress the evidence, finding that "the Fourth Amendment [was] violated due to the unreasonableness in the seizure, resulting in the death of the passenger." The district court elaborated:

"The Motion to Suppress will be granted. I must point out that this is a very rare case, very rare case, that this court is indeed granting the Motion to Suppress. I base this on the argument that the Fourth Amendment was violated by unreasonable seizure.

"Recently, in March of 2021, United States Supreme Court reaffirmed that a defendant is seized when touched. Here that is in *Torres v. Madrid*[, 592 U.S. ___, 141 S. Ct. 989, 998, 209 L. Ed. 2d 190 (2021)]. And this Court does find indeed that Mr. Cline was seized when the trooper did hit his car.

"So the question of him being seized is not the issue. The issue is whether that was an unreasonable seizure.

"This Court does find, in looking at the totality of the circumstances, under the objective reasonableness, that—balancing the nature and quality of the intrusion against the countervailing government interest at stake.

"The interest at stake here was a cracked windshield. The seizure taken was one that I believe is rare for law enforcement to do, and why it did indeed result in his release from Kansas Highway Patrol, and that is the TVI action which resulted in the fatality of the passenger.

"This Court does find that this indeed was excessive force. I've looked at all the circumstances including the—we all watched the

videos, heard all the testimony presented. By no means am I seeing this as anything but a Fourth Amendment violation. I do not comment on the Kansas Highway Patrol's own policies. That is their policies. But the actions taken here by the trooper, this Court does find were unreasonable.

"This Court does recognize that it did violate the Kansas Highway Patrol policy, did violate direct orders to prevent vehicle pursuit within the City of Topeka. And that's done for cases just like this one. This Court does understand that this excessive force violated the Fourth Amendment.

"The trooper used deadly force to apprehend a suspect fleeing. And that prior to that, the officer had learned that the car was not stolen. That was advised to him. This Court finds that the chase put the public in danger, but certainly not necessary for the amount of force used. And so—because there was no suspicion of a dangerous or violent crime.

"Again, even his supervisors stated it was a windshield crack. This is a traffic infraction that reasonable course would have been to decline pursuit, especially when there was oncoming cars. And so therefore this Court adopting the arguments made by the defense, does grant the Motion to Suppress.

"I have to note this is very rare for this Court to make such a ruling. But I think the parties can agree this is a rare case where the officer

> used quite excessive force and therefore the Motion to Suppress is granted. This Court will grant their request to have the—all evidence from the fruit of the poisonous tree theory resulting in that being suppressed."

The district court clarified that it was suppressing everything from after the point of vehicle contact between Dobler and Cline, including the drugs and drug paraphernalia in Cline's possession and Cline's statements to law enforcement at the hospital. The order still allowed the State to prosecute Cline for fleeing or attempting to elude and the various traffic violations, but it suppressed the evidence supporting the felony murder charge and the drug-related charges. The State timely filed an interlocutory appeal.

DID THE DISTRICT COURT ERR IN FINDING THE SEIZURE VIOLATED THE FOURTH AMENDMENT?

The State first claims the district court erred in finding the seizure was objectively unreasonable in violation of the Fourth Amendment. More specifically, the State asserts that the district court (1) inappropriately focused on Dobler's initial reason for the pursuit and conflated the pursuit with the eventual seizure in its analysis; (2) improperly relied on KHP policies and procedures and the opinions of Dobler's superiors in evaluating the reasonableness of his decision to execute the TVI; and (3) wrongly concluded that Dobler's use of force to carry out the seizure was excessive and unreasonable.

Cline contends that the district court's factual findings were supported by substantial competent

evidence. He asserts that the district court correctly concluded that Dobler's decision to deploy the fatal TVI was objectively unreasonable under the circumstances, and the seizure violated the Fourth Amendment.

"On a motion to suppress, an appellate court generally reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and reviews the ultimate legal conclusion de novo." *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). In reviewing the factual findings, an appellate court does not reweigh the evidence or assess the credibility of witnesses. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). The State carries the burden to prove that the search and seizure were lawful. K.S.A. 22-3216(2); *Cash*, 313 Kan. at 126.

In granting Cline's motion to suppress, the district court ruled from the bench and did not clearly delineate its factual findings in making its ruling. But the State did not object to the adequacy of the district court's factual findings. Thus, this court may presume that the court made findings necessary to support its judgment. *State v. Jones*, 306 Kan. 948, 959, 398 P.3d 856 (2017). Likewise, "[i]n determining whether substantial competent evidence supports the district court findings, appellate courts disregard any conflicting evidence or other inferences that might be drawn from the evidence." *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014).

We begin by examining the text of the applicable constitutional provisions. Both the United States and Kansas Constitutions protect against unreasonable

searches and seizures. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. Similarly, section 15 of the Kansas Constitution Bill of Rights states, "[t]he right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate." Kan. Const. Bill of Rights, § 15. The Kansas Supreme Court has held that these two constitutional provisions provide the same rights and protections. *State v. Neighbors*, 299 Kan. 234, 239, 328 P.3d 1081 (2014).

Kansas law is clear that "[a] seizure of a person occurs if there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave and the person submits to the show of authority." *State v. Morris*, 276 Kan. 11, Syl. ¶5, 72 P.3d 570 (2003). The parties agree that terminating a car chase by striking a fleeing vehicle—that is, performing a TVI—constitutes a seizure. See *Brower v. County of Inyo*, 489 U.S. 593, 597, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). Recently, the United State Supreme Court has clarified: "A seizure requires the use of force *with intent to restrain.* Accidental force will not qualify. Nor will force intentionally applied for some other purpose satisfy this rule. [Citation omitted.]" *Torres v. Madrid*, 592 U.S. ___, 141 S. Ct. 989, 998, 209 L. Ed. 2d 190 (2021). There is no debate about whether Dobler intentionally applied physical force by performing the TVI, nor whether he objectively

manifested an intent to stop Cline from driving away. Thus, a seizure occurred when Dobler performed the TVI maneuver.

Because a seizure unquestionably occurred, the relevant issue is whether that seizure was reasonable under the circumstances in which it was made. In *Graham v. Connor*, 490 U.S. 386, 392-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), the United States Supreme Court held that all claims that law enforcement used excessive force during a seizure should be analyzed under the Fourth Amendment's "objective reasonableness" standard. See also *Torres*, 592 U.S. at ___, 141 S. Ct. at 998 ("Only an objective test 'allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.'"). Here too, the parties agree that the ultimate question this court must resolve is whether Dobler's decision to execute a TVI on Cline's car was objectively reasonable under the circumstances.

The *Graham* Court explained that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of '"the nature and quality of the intrusion on the individual's Fourth Amendment interests"' against the countervailing governmental interests at stake." 490 U.S. at 396. The *Graham* Court also cautioned:

> "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular

> case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. [Citation omitted.]" 490 U.S. at 396.

The district court applied the correct test in analyzing the evidence presented at the suppression hearing about Dobler's use of force to carry out the seizure: "This Court does find, in looking at the totality of the circumstances, under the objective reasonableness, that—balancing the nature and quality of the intrusion against the countervailing government interest at stake. . . . This Court does find that this indeed was excessive force." The State asserts that "[a]lthough the district court mentions the objective reasonableness of the officer, it does not truly analyze the issue using this standard."

The State first asserts that the district court inappropriately focused only on the cracked windshield as the reason Dobler began the pursuit and erroneously conflated Dobler's pursuit of Cline with the seizure of Cline. Although the pursuit began over a cracked windshield, the State argues that it led to a fleeing and eluding situation that endangered the public, so it was reasonable for Dobler to execute the TVI under the circumstances. The State contends that a court must focus only on the moment the seizure occurred—the moment Dobler decided to execute the TVI—to decide whether the seizure was objectively reasonable under the circumstances.

We find that the severity of the reason for an officer to initiate a vehicle pursuit is one factor to consider under all the circumstances in deciding whether the officer's use of force to carry out a seizure is objectively reasonable. *Graham*, 490 U.S. at 396. But even if we focus only on the moment the seizure occurred, as the State suggests, Dobler's decision to execute a TVI was problematic based on the evidence. Dobler executed the TVI after Cline had exited the trailer court, so the fact that Dobler said he saw children playing close to the roadway in the trailer court did not factor into the decision. Dobler stated the immediate threat that caused him to execute the TVI was the innocent bystander in the approaching car on the two-lane road. But the dashcam footage and photographs introduced into evidence showed that the car had pulled off to the side of the road before Dobler executed the TVI on Cline's car. If the reason for Dobler to execute the TVI was to protect the driver of the car that had pulled off to the side of the road, this reason does not appear to outweigh the danger involved in performing the maneuver.

One fact that is strikingly absent from Dobler's testimony is any concern he should have had for the safety of Cline's passenger, Benz. She, too, was a member of the public that Dobler should have been trying to protect. There is no evidence in the record that Benz was linked to Cline's criminal activity or that she was encouraging him to evade law enforcement. Dobler testified that the location he performed the TVI was less than ideal because of the telephone poles and other obstructions on the side of the roadway. Witham confirmed that the area where Dobler executed the TVI

was not ideal because it was residential and there were obstacles around the road. Dobler could foresee that Cline's car might crash into a utility pole if he performed the TVI at the location he chose, but he performed the maneuver despite the risk—an action that contributed to Benz' death.

The State also argues the district court improperly relied on KHP policies and procedures and the opinions of Dobler's superiors in evaluating the reasonableness of his decision to execute the TVI—not on what a reasonable officer would have done under the circumstances. But the district court made clear it was basing its decision on the Fourth Amendment rather than KHP policies: "By no means am I seeing this as anything but a Fourth Amendment violation. I do not comment on the Kansas Highway Patrol's own policies. That is their policies." In any event, the fact that Dobler violated KHP policies and had been discouraged from engaging in vehicle pursuits like the one with Cline was relevant as one of many circumstances for the district court to consider in deciding whether his actions were objectively reasonable. Dobler's disciplinary proceedings and the fact that he was fired because of repeated violations was possibly less relevant to this issue, but this evidence was admitted without objection by the State and was not the focus of the district court's decision to suppress the evidence.

The State argues that the district court wrongly concluded that Dobler's use of force to carry out the seizure was excessive and unreasonable. The State relies mainly on *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), a 42 U.S.C.

§ 1983 civil rights case, in which the United States Supreme Court held that a police officer may use force—even deadly force—to terminate a dangerous high-speed chase. Harris claimed that law enforcement used excessive force resulting in an unreasonable seizure when an officer used his cruiser to ram his car off the highway and into a ditch, rendering Harris a quadriplegic. The Supreme Court disagreed, stressing the importance of a fact-specific inquiry in making its decision and explaining that Harris had led the officers on "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." 550 U.S. at 380.

In finding the officer's actions were reasonable, the Court observed that (1) Harris posed an imminent threat to the public; (2) Harris was driving well over the speed limit, mostly on two-lane roads; (3) the officers had to perform hazardous maneuvers to keep up with Harris in a chase that covered ten miles; (4) Harris smashed his way through an attempted trap by the police; (5) Harris swerved around more than a dozen cars on the road, forcing other drivers to swerve out of the way; and (6) the officer requested and received permission to force Harris off the road before doing so. Although the Court noted that excessive force by law enforcement could render a seizure unreasonable, it held: "[A] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." 550 U.S. at 386.

The *Harris* Court refused to make any bright-line rule forbidding law enforcement officers from trying to terminate dangerous vehicle pursuits, and instead stressed the importance of analyzing whether a seizure is objectively reasonable under the circumstances presented. The facts in *Harris* involved a vehicle pursuit much more dangerous to the public than the facts here, and the case offers little support for the State's position that Dobler's actions in seizing Cline were objectively reasonable.

As we observed earlier, the district court did not clearly delineate its factual findings in making its ruling. But without an objection to the adequacy of the district court's findings, we can presume the district court made all the necessary findings from the evidence to support its judgment. *Jones*, 306 Kan. at 959. Here, the evidence showed that the encounter started over a cracked windshield. Dobler had no reason to believe that Cline was a dangerous felon. He also knew there was a passenger in the front seat of Cline's car. For the most part, the pursuit did not involve high speeds, and the traffic was light with few pedestrians near the roadway. Dobler had Cline's license plate number and he knew the car was not stolen, so he could have later tracked down the registered owner. He also knew that other officers were nearby and available to help stop Cline. As for the approaching driver, the evidence showed that he had pulled off to the side of the road. Dobler knew he was performing the TVI in a risky area. Dobler knew his actions violated KHP policy, and he had been warned before not to pursue car chases and run vehicles off the road under the exact circumstances he was facing with Cline. These

circumstances raise serious doubts about the reasonableness of Dobler's decision to execute the TVI, a maneuver that he readily conceded was a dangerous tactic.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The district court heard the evidence and was tasked with the responsibility of balancing the nature and quality of the intrusion on Cline's Fourth Amendment rights against the countervailing governmental interests at stake. The Fourth Amendment does not require law enforcement officers to simply let fleeing suspects go on their merry way. And courts recognize that officers must often make split-second decisions to protect the public safety. But based on the evidence offered at the suppression hearing and considering all the facts and circumstances, the district court found that Dobler used excessive force to seize Cline. The record presented for our review reflects that the district court's findings were supported by substantial competent evidence and supported the district court's legal conclusion that Dobler's seizure of Cline was objectively unreasonable in violation of the Fourth Amendment.

DID THE DISTRICT COURT ERR IN APPLYING THE EXCLUSIONARY RULE TO SUPPRESS THE EVIDENCE?

The State next claims the district court erred in applying the exclusionary rule to suppress all evidence following the seizure. The State asserts that suppression of evidence is proper only when necessary

to deter police misconduct, and it was an inappropriate remedy for the district court to apply in this case. Cline argues that suppression of the evidence was an appropriate remedy for Dobler's constitutional violations and that nothing else has deterred his misconduct until this case. As we stated in the last section of this opinion, an appellate court exercises unlimited review over the district court's ultimate legal conclusion to suppress evidence. *Cash*, 313 Kan. at 125-26.

Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. See *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (recognizing exclusionary rule in criminal prosecutions in federal court); see also *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (applying exclusionary rule in state court prosecution through the Fourteenth Amendment).

"[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called '"fruit of the poisonous tree."' [Citation omitted.]" *Utah v. Strieff*, 579 U.S. 232, 237, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016). "[T]he exclusionary rule

is not an individual right and applies only where it 'results in appreciable deterrence.' [Citation omitted.]" *Herring v. United States*, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

The State cites one Kansas case to support its claim that the district court erred in applying the exclusionary rule to suppress the evidence. In *State v. McCloud*, 257 Kan. 1, 12, 891 P.2d 324 (1995), the Kansas Supreme Court addressed the defendant's argument that the district court should have suppressed evidence as a result of law enforcement's unnecessary and unreasonable use of force in executing a search warrant. In that case, the police executed a search warrant at McCloud's residence just after midnight by throwing a "flash bang" device through a side window as a diversionary tactic and entering the residence through the front door. An officer testified at trial that the police chose this manner of executing the search warrant because of the serious nature of McCloud's crimes, because McCloud had used a firearm in the commission of robberies, and for the safety of the officers executing the search warrant and the surrounding neighborhood. McCloud was not injured by the device, and he was arrested without incident.

In finding no constitutional violation, the *McCloud* court explained that "[a]n officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest or to defend the officer's self from bodily harm while making the arrest." 257 Kan. at 12. The court also found that an "officer is justified in using force likely to cause death or great bodily harm if the officer reasonably believes that such

force is necessary to prevent the arrest from being defeated by resistance, or the suspect is attempting to escape by use of a deadly weapon." 257 Kan. at 12.

Even though the *McCloud* court found no constitutional violation, it also addressed whether the exclusionary rule would have been an appropriate remedy to suppress the evidence seized under the search warrant. The court explained that whether it is necessary to apply the exclusionary rule is determined by "weighing the extent to which its application will deter law enforcement officials from using excessive force in executing a valid search warrant against the extent to which its application will deflect the truth-finding process, free the guilty, and generate disrespect for the law and the administration of justice." 257 Kan. at 14. Under the facts, the court found that the exclusionary rule should not apply to the defendant's claim. 257 Kan. at 14. In doing so, the court found that "the right to bring a civil action against an officer is usually a sufficient deterrent to an officer's use of unreasonable force." 257 Kan. at 14.

The facts here are distinguishable from the facts in *McCloud*. As a result, the case offers little support for the State's claim that the district court erred in applying the exclusionary rule to suppress the evidence following Cline's seizure. Moreover, because the Kansas Supreme Court found no constitutional violation in *McCloud*, the court's analysis of whether the exclusionary rule would have been an appropriate remedy to suppress the evidence was unnecessary dicta in that case.

Although not cited by the State, we observe that federal courts have come down on either side of whether the exclusionary rule is the appropriate remedy in cases involving the unreasonable and excessive use of force by law enforcement officers, or if such a violation should instead be addressed in a civil action under 42 U.S.C. § 1983. Some courts have suggested that exclusion of evidence is an inappropriate remedy when a defendant alleges that officers used excessive force during a stop because the appropriate avenue for relief is a lawsuit under 42 U.S.C. § 1983. See, e.g., *United States v. Watson*, 558 F.3d 702, 705 (7th Cir. 2009) ("Application of the exclusionary rule would be particularly gratuitous in this case because the defendant has an adequate remedy by way of a civil action—a remedy better calibrated to the actual harm done the defendant than the exclusionary rule would be."). Other circuits have stated that the exclusionary rule may be invoked to suppress evidence in an excessive force case if the officer's actions are objectively unreasonable and a sufficient causal nexus exists between the excessive use of force and the evidence the defendant seeks to suppress. See, e.g., *United States v. Ankeny*, 502 F.3d 829, 836-37 (9th Cir. 2007).

The facts and circumstances of this case demonstrate that the exclusion of evidence because of Dobler's conduct falls within the purpose of the exclusionary rule. Based on Dobler's own testimony, his actions were not an isolated incident; he had used TVI maneuvers "an abundance of times" and had received reprimands for violating policies about pursuits. As Cline notes, these policies and reprimands did nothing

to influence Dobler's actions. While the fact that Dobler was fired from the KHP makes it unlikely that he will cause this situation to recur as a KHP trooper, the record reflects that Dobler has simply moved on to a different law enforcement agency and was employed by the Jackson County Sheriff's Office at the time of the suppression hearing. Dobler's actions were part of a pattern of intentional conduct—as such, exclusion of the evidence derived from his unreasonable seizure would serve its intended remedial purpose.

More importantly, law enforcement officers from all agencies frequently deal with vehicle pursuits in which they may need to apprehend fleeing suspects. Encounters like the one between Dobler and Cline will likely happen again. Law enforcement officers need to know the parameters for properly using a TVI maneuver and the consequences of engaging in improper and highly dangerous car chases. Suppression of the evidence removes the incentive for officers such as Dobler to disregard policies and perform dangerous maneuvers simply to bring a hastier end to an ill-advised pursuit. The exclusion of evidence in circumstances like this one—although a drastic remedy—will likely deter future unconstitutional misconduct during car chases.

Perhaps most importantly, we have a direct causal connection between Dobler's use of excessive force and the evidence Cline seeks to suppress supporting the felony murder charge. While it is plainly true that Cline is not without fault in these unfortunate events, Dobler's use of the TVI maneuver caused the car crash and directly led to Benz' death. For all these reasons,

we conclude the district court did not err in applying the exclusionary rule to suppress all evidence following the seizure.

Before concluding, we note that in one paragraph of its appellate brief, the State argues that the district court erred in applying the exclusionary rule because the evidence suppressed by the district court would have been inevitably discovered by law enforcement. The State made this argument in response to Cline's motion to suppress, but the district court did not address the issue. The inevitable discovery exception to the exclusionary rule allows the admission of otherwise unconstitutionally obtained evidence if law enforcement eventually would have found the evidence by lawful means. *State v. Baker*, 306 Kan. 585, 590-91, 395 P.3d 422 (2017). The State must prove by a preponderance of the evidence that the unlawfully seized evidence *would* have been found by lawful means; not just that it *may* have been found by lawful means. *State v. Salazar*, 56 Kan. App. 2d 410, 420, 431 P.3d 312 (2018). The inevitable discovery rule would not apply here because there is no showing that the evidence suppressed by the court would have been found by lawful means. Without the TVI, there would have been no evidence of the crash that contributed to Benz' death, and it is unclear whether Cline would have been arrested and searched leading to the discovery of the drug evidence.

The State also argues in one paragraph of its appellate brief that Cline's statement to Trooper Moses at the hospital should have been admissible because Cline received *Miranda* warnings before making the

statement. The State's argument refers to what is known as the attenuation doctrine, although it fails to use this term. The State made this argument in response to Cline's motion to suppress, but the district court did not address the issue. Under an attenuation analysis, courts generally consider (1) the time that elapsed between the illegal police misconduct and the acquisition of the evidence sought to be suppressed, (2) the presence of any intervening circumstance, and (3) the purpose and flagrancy of the official misconduct. *State v. Moralez*, 297 Kan. 397, 410, 300 P.3d 1090 (2013). The State has offered insufficient evidence and analysis for this court to decide whether Cline's statement to Moses made while he was being guarded and handcuffed to a hospital bed would be admissible under the attenuation doctrine. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (finding that a point raised incidentally in a brief and not adequately argued is considered waived or abandoned).

Affirmed.

APPENDIX C

DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

Case No. 2021-CR-504

[Filed July 14, 2022]

STATE OF KANSAS,	)
	)
vs.	)
	)
JEREMY A. CLINE,	)
	)

TRANSCRIPT OF DISTRICT COURT'S SUPPRESSION RULING

* * *

[pp. 4:24 - 9:22]

The Motion to Suppress will be granted. I must point out that this is a very rare case, very rare case, that this Court is indeed granting the Motion to Suppress. I base this on the argument that the Fourth Amendment was violated by unreasonable seizure.

Recently, in March of 2021, United States Supreme Court reaffirmed that a defendant is seized when touched. Here that is in Torres v. Madrid. And this Court does find indeed that Mr. Cline was seized when the trooper did hit his car.

So the question of him being seized is not the issue. The issue is whether that was an unreasonable seizure.

This Court does find, in looking at the totality of the circumstances, under the objective reasonableness, that -- balancing the nature and quality of the intrusion against the countervailing government interest at stake.

The interest at stake here was a cracked windshield. The seizure taken was one that I believe is rare for law enforcement to do, and why it did indeed result in his release from Kansas Highway Patrol, and that is the TVI action which resulted in the fatality of the passenger.

This Court does find that this indeed was excessive force. I've looked at all the circumstances including the -- we all watched the videos, heard all the testimony presented. By no means am I seeing this as anything but a Fourth Amendment violation. I do not comment on the Kansas Highway Patrol's own policies. That is their policies. But the actions taken here by the trooper, this Court does find were unreasonable.

This Court does recognize that it did violate the Kansas Highway Patrol policy, did violate direct orders to prevent vehicle pursuit within the City of Topeka. And that's done for cases just like this one. This Court does understand that this excessive force violated the Fourth Amendment.

The trooper used deadly force to apprehend a suspect fleeing. And that prior to that, the officer had learned that the car was not stolen. That was advised to him. This Court finds that the chase put the public

in danger, but certainly not necessary for the amount of force used. And so -- because there was no suspicion of a dangerous or violent crime.

Again, even his supervisors stated it was a windshield crack. This is a traffic infraction that reasonable course would have been to decline pursuit, especially when there was oncoming cars. And so therefore this Court adopting the arguments made by the defense, does grant the Motion to Suppress.

I have to note this is very rare for this Court to make such a ruling. But I think the parties can agree this is a rare case where the officer used quite excessive force and therefore the Motion to Suppress is granted. This Court will grant their request to have the -- all evidence from the fruit of the poisonous tree theory resulting in that being suppressed.

This Court understands that limits the State's ability to pursue this case. I am granting -- I don't know how pertinent it is, but I am going to grant their Motion for Leave to Amend the Complaint. That does not prejudice the defendant. He was aware of these charges, of the ability to amend. But again, with the suppression, I don't know where that certainly places the State's amount of evidence.

So with that, that will be the Court's ruling.

Mr. Iverson, did the suppression motion include the defendant's statements? 'Cause that I believe was Miss Wright's argument that the defendant's statements made -- or everything from that seizure going forward was suppressed. Is there a clarification?

MR. IVERSON: Let me review the motion briefly, Your Honor, but I believe the defense would be willing to accept that line of reasoning, that everything stemming from the point after the contact with the vehicle, which would include defendant's statements, should be suppressed.

THE COURT: Yeah. I believe that was Miss Wright's argument.

Mr. Manly, am I incorrect in that?

MR. MANLY: I think that's what she was requesting, yes.

THE COURT: Okay. All right.

That really -- I don't know if that nullifies the Motion in Limine or the Motion to Suppress the defendant's statements. Would the State wish to assess the case further and then get back to me?

MR. MANLY: Yes. And I need to make sure I understand the Court's ruling clearly.

Are you suppressing -- I think you said you're suppressing everything after the point of contact with the car?

THE COURT: Correct.

MR. MANLY: So officers observations of items inside the car, the interview, medical examiner testimony, all that?

THE COURT: Right. And that's why at the motion hearing I asked about "does this exclude for the eluding?" It does not.

MR. MANLY: It does not. I don't know that I have evidence without -- I don't know that I have evidence to prove who the driver was, but.

THE COURT: Well, the officer testified who the driver was because they did the -- oh, I see what you're saying.

MR. MANLY: I may. I just don't know. Off the top of my head, setting here, I'm not sure. I'm going to have to assess the case and this is a situation where we will have to make a decision on whether to file an interlocutory appeal.

THE COURT: Absolutely, because I am suppressing.

MR. MANLY: Sure.

THE COURT: Okay. That will be the Court's order. And like I said, this is a rare decision on my part to do so. But this case is one that this Court did find the Fourth Amendment has been violated due to the unreasonableness in the seizure, resulting in the death of the passenger.

* * *

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 22-125,410-AS

[Filed March 30, 2023]

STATE OF KANSAS	)
Plaintiff-Appellant,	)
	)
v.	)
	)
JEREMY A. CLINE	)
Defendant-Appellee.	)
	)

PETITION FOR REVIEW OF APPELLANT

Petition for Review
from the Kansas Court of Appeals
Memorandum Opinion No. 125410
District Court of Shawnee County, Kansas
Honorable Rachel L. Pickering, Judge
District Court Case No. 21CR504

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[****Table of Contents Has Been Omitted for Printing Purposes****]

Prayer For Review

The State of Kansas respectfully petitions this Court to review and reverse the opinion of the Court of Appeals finding that Jeremy Cline's Fourth Amendment rights were violated as a result of excessive force, warranting the suppression of evidence.

Date Of The Decision Of The Court Of Appeals

The Court of Appeals' published opinion was released on March 3, 2023.

Statement Of The Issues For Review

I. The district court and the Court of Appeals erred in finding a Fourth Amendment violation based on the law enforcement officer's purported use of excessive force, when the defendant fled from police in a motor vehicle through city streets.

II. The district court and the Court of Appeals erred in applying the exclusionary rule to

the defendant's claim of excessive force, contrary to this Court's decision in *State v. McCloud*.

III. The Court of Appeals erred in rejecting the State's arguments regarding inevitable discovery and attenuation.

Statement Of The Facts

A detailed statement of the facts is set forth in the Court of Appeals' opinion, slip op. at 2-10. Highly summarized, this case involves a police pursuit of a defendant through residential streets that ended when a Highway Patrol Trooper (Dobler) initiated a tactical intervention maneuver that caused the car the defendant was driving to spin, go off the road, and strike a utility pole. The passenger in the defendant's car died as a result of the crash.

The defendant was charged with felony murder, felony fleeing and eluding, reckless driving, possession of methamphetamine, and several other crimes. Prior to trial, he filed a motion to suppress the evidence seized subsequent to the crash, including the evidence related to the death of his passenger, on the grounds that law enforcement used excessive force in effectuating his seizure.

The district court agreed with the defendant and granted his motion to suppress. The State appealed, and the Court of Appeals affirmed the district court.

Why Review Should Be Granted

Review of this case is warranted because:

- The Court of Appeals' decision is directly contrary to United States Supreme Court precedent set forth in *Scott v. Harris*, 550 U.S. 372 (2007).
- This case presents a matter of first impression. There are no Kansas Supreme Court cases, or Court of Appeals cases prior to this one, applying *Harris*.
- There is a split among courts in the United States regarding whether the exclusionary rule should apply to claims of excessive force, and the Court of Appeals' decision to apply it in this case is contrary to the only Kansas case dealing with the issue, *State v. McCloud*, 257 Kan. 1 (1995).
- The case raises an issue of public importance because the Court of Appeals' decision allows a wrongdoer to escape punishment as a result of his further commission of wrongful acts. As the United States Supreme Court noted in *Harris*, such an "impunity-earned-by-recklessness" rule runs contrary to the public interest and public safety.
- Even if a Fourth Amendment violation did occur, and the exclusionary rule applies, the Court of Appeals unreasonably and incorrectly rejected the State's arguments regarding inevitable discovery and attenuation to exclude all post-crash evidence.

In *Scott v. Harris*, 550 U.S. 372, 386 (2007), the United States Supreme Court laid down what it called a "sensible rule": "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." And

yet the Court of Appeals in this case ruled the exact opposite, finding a Fourth Amendment violation based on a Kansas Highway Patrol Trooper's use of a vehicular maneuver to end a high speed car chase. Using a dubious factual assessment, the Court of Appeals determined that *Harris* "involved a vehicle pursuit much more dangerous to the public than the facts here." Slip op. at 16.

The fact that the Court of Appeals addressed a constitutional question involving a factual situation very similar to one addressed by the United States Supreme Court and arrived at a contrary constitutional decision, in and of itself, is grounds for this Court's review. But the need for this Court to weigh in is further underscored by the fact that this Court has never applied or interpreted *Harris*, and thus, this case presents an issue of first impression.

Further, this case presents a novel constitutional issue: whether the exclusionary rule applies to claims of excessive force. Courts have come down on either side of this issue, and the Court of Appeals' decision to apply the exclusionary rule in this case is contrary to the only Kansas case addressing it, *State v. McCloud*, 257 Kan. 1 (1995) (holding that the exclusionary rule does not apply in a case involving the alleged use of excessive force in executing a search warrant), dismissing *McCloud's* analysis as mere dicta. Slip op. 18-19. This presents another reason justifying this Court's review.

Further, this case raises an issue of public importance. The Court of Appeals decision allows a wrongdoer to escape punishment as a result of his

further commission of wrongful acts. Just as the United States Supreme Court noted in *Harris*, the Court of Appeals' decision here creates a perverse incentive for someone to flee from the police, putting the general public at risk in the future because of it. *See Harris*, 550 U.S. at 385-86. Such an "impunity-earned-by-recklessness" rule runs contrary to the public interest and public safety. And yet that is the logical effect of the Court of Appeals' decision, as law enforcement agencies around the state will likely alter their pursuit and intervention polices as a result.

Finally, even if a Fourth Amendment violation did occur, and the exclusionary rule applies, the State offered additional arguments below regarding inevitable discovery and attenuation, that were summarily rejected by the Court of Appeals. The court below gave these arguments short shrift because they were, apparently, not sufficiently verbose enough. Slip op. 21-22. Given the importance of the larger issues and the overall public safety issues at stake, this was unreasonable and incorrect—even if there was a Fourth Amendment violation, the court should not have excluded ALL post-crash evidence, including the medical evidence and autopsy report.

Issues for Review

I. The district court and the Court of Appeals erred in finding a Fourth Amendment violation based on the law enforcement officer's purported use of excessive force, when the defendant fled from police in a motor vehicle through city streets.

Standard of Review

When reviewing a suppression decision, an appellate court "reviews the factual underpinnings of a district court's decision by a substantial competent evidence standard and the ultimate legal conclusion drawn from those facts by a de novo standard." *State v. Alvidrez*, 271 Kan. 143, 145 (2001).

Argument

In *Scott v. Harris*, 550 U.S. 372 (2007), the United States Supreme Court considered "whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car." *Id*. at 374. The case was presented in the context of a suit brought under 42 U.S.C. § 1983, alleging a use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. *Id.* at 375-76. The Court ultimately refused "to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger." *Id*. at 385. Instead, the court laid down what it called "a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the

lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id*. at 386.

Yet here, in spite of the Supreme Court's very clear and unambiguous holding in *Harris*, the Court of Appeals held that a police officer's use of vehicular maneuver to spin the car Defendant was driving in order to stop a high-speed car chase DID violate the Fourth Amendment. In arriving at this conclusion, the Court of Appeals' both misinterpreted *Harris*, and relied on specious logic and a rather dubious view of the facts presented.

The Court of Appeals took the view that the *Harris* Court did not lay down a bright line rule, but rather stressed a fact-specific inquiry. Slip op. at 15. But the language of *Harris's* holding is not couched in those terms. And in fact, the two separate concurring opinions of Justice Ginsburg and Breyer, as well as the dissent of Justice Stevens, indicated their disagreement with the Court's laying down of a *per se* rule. 550 U.S. at 386 (Ginsburg, J., concurring) ("First, I do not read today's decision as articulating a mechanical, *per se* rule.); 550 U.S. at 389 (Breyer, J., concurring) ("I disagree with the Court insofar as it articulates a *per se* rule.); 550 U.S. at 389 (Stevens, J., dissenting) (observing that the answer to the question presented depends on the circumstances.). One must ask, if the majority opinion in *Harris* did not lay down a bright line rule, why did the separate opinions of a minority of justices feel the need to voice their disagreement with the laying down of a bright line rule? Ultimately, one has to recognize that the views of

these three justices did not carry the day—the majority opinion made no qualifications on its "more sensible rule," that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment." 550 U.S. at 386.

But whether one reads *Harris* as establishing a bright line rule or a more generalized rule, the Court of Appeals' decision here was off the mark regardless, and its holding is contrary to *Harris*. The facts presented here are similar enough in character to *Harris* as to fall with the ambit of its rule. The Court of Appeals erred because it seemed to adopt the *Harris* Court's use of descriptive dicta of "a Hollywood-style car chase" as establishing a factual standard for measuring car chases and then proceeded to determine that *Harris* "involved a vehicle pursuit much more dangerous to the public than the facts here." Slip op. at 16. But the *Harris* Court's description of its own facts was not intended to establish a dividing line between dangerous and non-dangerous car chases, and the Court of Appeals' minimization of the dangers posed by Defendant's actions in fleeing from the police in this case to distinguish it from *Harris* was misguided and unreasonable in light of the facts in the record. Simply put, *Harris's* ruling applies to high-speed car chases and this case involved such a chase.

The Court of Appeals' first error was in its focus on the initial reason the officer attempted to stop

Defendant: a cracked windshield.[1] But this focus on the original reason for the stop ignores Defendant's subsequent commission of felony fleeing and eluding. And it presupposes some kind of omniscience from the officer. The officer is somehow supposed to know that the person fleeing from him has only committed a minor infraction and is not fleeing because he is afraid of being caught for a more serious crime. Simply put, when someone flees from a police officer the way Defendant did here, the officer has no way of knowing why the person is fleeing. Further, it would be rather illogical—to the point of nonsensical—for the officer to assume that he person is fleeing for no particular serious reason. The reality is, most people who are only guilty of a minor traffic infraction pull over for police; they do not immediately speed away. Fleeing, in and of itself is suspicious—not to mention a crime—and suggests the person fleeing has something more serious to hide. For all the officer knew at the time, Defendant could have just committed a serious violent crime. To judge the officer's conduct based solely on the initial cause for the stop is unreasonable when one considers the highly suspicious nature of someone fleeing, not to mention that doing so in the reckless manner in which Defendant did is, itself, an inherently dangerous felony. *See* K.S.A. 21-5402(c)(1)(R).

The Court of Appeals' next error was in its downplaying of the facts as a way to distinguish this case from *Harris*. Having already noted that it deemed

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[1] Trooper Dobler also testified that he initially suspected the car might be stolen, although during the chase, he was informed by dispatch that it was not.

Harris to apply to "Hollywood-style" car chases, the Court of Appeals then opined that in this case, "For the most part, the pursuit did not involve high speeds." Slip op. at 16. But there was evidence presented that Defendant exceeded 55 mile per hour on a two-lane, undivided, residential road with no shoulders. While 55 miles per hour would not be considered "high speed" on I-70, it is certainly excessive and dangerous on a residential street. Indeed, the speed limit was 35 miles per hour, so Defendant exceeded that by at least 20 miles per hour. In *Harris*, the defendant exceeded 85 miles per hour in a 55 zone—30 miles per hour over the speed limit. The United States Supreme Court considered that high speed. But the Court of Appeals distinguished this case from *Harris* by apparently concluding that 20 miles over the speed limit is not high speed. The State submits this distinction was unreasonable. While the *Harris* Court did not define "high speed," the State submits that driving 55 miles per hour—what was, at a time within memory, the maximum allowed *highway speed* in the United States—on a two-lane residential road where the speed limit is 35, reasonably constitutes "high speed" and falls within the ambit of *Harris's* rule.

The Court of Appeals compounded its error by relying on its assessment that "the traffic was light with few pedestrians near the roadway." Slip op. at 16. This language is almost verbatim in its similarity to the language of the Eleventh Circuit that the Supreme Court criticized in *Harris*. The Eleventh Circuit said, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 550

U.S. at 378. The Supreme Court, somewhat sarcastically, noted, "reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test." *Id*. at 378-79. The Supreme Court not only found the lower court's characterization of the facts to be flawed, to say the least, it also rejected the premise that the fleeing suspect posed no threat to the community because no one was in the immediate vicinity. 550 U.S. at 379-81, n.7; *see also Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 580-81 (5th Cir. 2009) (observing that the holding of *Scott v. Harris* "was not dependent on the actual existence of bystanders—rather, the Court was also concerned about the safety of those who could have been harmed if the chase continued.").

Indeed the *Harris* Court acknowledged that at the time the officer rammed the suspect's car, it was not threatening any other cars or pedestrians and pointed out the rather obvious, common sense conclusion that the officer *appropriately chose* that moment to execute his maneuver. 550 U.S. at 380 n.7. It was apparently lost on the Court of Appeals in this case, but it seems rather obvious that the appropriate time to execute a vehicular maneuver to terminate a car chase is NOT when pedestrians or other vehicles are in immediate risk, but rather, just as the trooper did here, when "the traffic was light with few pedestrians near the roadway." *See* Slip op. at 16.

The Court of Appeals also made *another* mistake that the *Harris* Court criticized and rejected. The Court of Appeals here suggested that because Trooper Dobler

had the fleeing car's license plate number, law enforcement could have simply stopped pursuing and tracked him down later. Slip op. at 16.[2] But the Supreme Court rejected this type of argument, noting that "there would have been no way to convey convincingly to [the fleeing suspect] that the chase was off" and thus, no certainty that he would not simply continue to drive recklessly and put the public at risk. 550 U.S. at 385. Given such uncertainty, the Court rejected the "call-off-the- chase-and-catch-him-later" argument that the Court of Appeals partially relied on here.

Finally, the Court of Appeals factored in that "Dobler knew his actions violated KHP policy, and he had been warned before not to pursue car chases and run vehicles off the road under the exact circumstances he was facing." Slip op. at 16-17. Under *Harris*, this is absolutely and inarguably error. The *Harris* Court noted, "It is irrelevant to our analysis whether [the police officer] had permission to take the precise actions he took." 550 U.S. at 375 n.1. *See also Christiansen v. Eral*, 52 F.4th 377, 379 (8th Cir. 2022) (noting "the constitution doesn't rise and fall with the whims of each police department's policies" and "[j]ust because [the officer] chose to violate department policy doesn't mean that he acted unreasonably from a constitutional perspective."); *Pasco*, 566 F.3d at 579 ("[T]he fact that [the police officer] acted contrary to his

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[2] And the Court of Appeals assumed too much. The car did not actually belong to Defendant, so tracking down the registered owner through the license plate number may not have actually led them to Defendant.

supervisor's order is constitutionally irrelevant."). It was thus contrary to United States Supreme Court precedent, and unquestionably error, for the Court of Appeals to rely on Dobler's purported violation of KHP policies as part of its determination that he acted unreasonably.

In sum, the Court of Appeals here erred in a myriad of compounding ways that led it to a constitutional decision contrary to United States Supreme Court precedent. Faced with a set of facts generally similar to those faced by the Supreme Court in *Harris*, the Court of Appeals nevertheless attempted to distinguish the present case from *Harris* using dubious logic and a questionable interpretation of the facts. Moreover, in its analysis, the Court of Appeals either adopted arguments or relied on factors that the United States Supreme Court, and other federal courts, have specifically rejected. Such an erroneous analysis and ruling on a constitutional matter calls for this Court's review.

Further, it should also be recognized that this Court has never addressed the particular Fourth Amendment issue posed by this case, and has never applied *Scott v. Harris* in a decision. Thus, this matter is a case of first impression which also weighs in favor of this Court granting review.

II. The district court and the Court of Appeals erred in applying the exclusionary rule to the defendant's claim of excessive force, contrary to this Court's decision in *State v. McCloud*.

Even if one was to agree that a Fourth Amendment violation occurred here, this case presents another compelling issue warranting this Court's review: whether, in a case involving a claim of excessive force, the exclusionary rule should apply. While acknowledging that federal courts are split on this question, and this Court previously indicated that the exclusionary rule does not apply in such a situation, the Court of Appeals nevertheless held that the exclusionary rule should apply in this case and the evidence discovered following the crash, suppressed. Slip op. at 19-21.

In *State v. McCloud*, 257 Kan. 1, 11-14 (1995), a case involving a claim of excessive force in the execution of a warrant, this Court noted the deterrent purpose of the exclusionary rule and said that "the exclusionary rule should not apply" because "the right to bring a civil action against an officer is usually a sufficient deterrent to an officer's use of unreasonable force." The Court of Appeals in this case, however, declined to follow *McCloud* because it deemed the facts distinguishable and this Court's analysis of the exclusionary rule in that case to be "unnecessary dicta." Slip op. 19.

So, depending on how one views the Court of Appeals' take on *McCloud*, this case either presents this Court with a constitutional issue of first impression, or an instance of the Court of Appeals

rendering a decision contrary to this Court's precedent. Either way, it is a matter warranting this Court's review. *See* Kan. Sup. Ct. R. 8.03(b)(6)(E).

The State submits that the latter occurred in this case. This Court in *McCloud* clearly found that the deterrent purpose of the exclusionary rule would not be furthered by applying it in a situation like this where another form of deterrent was already in place and sufficient. 257 Kan. at 14. The Court specifically noted that rather than exclusion of evidence, the right to bring a civil action is a sufficient deterrent to the use of unreasonable force. *Id*. This reasoning is consistent with several federal court decisions. *See e.g. United States v. Watson*, 558 F.3d 702, 704 (7th Cir. 2009) (observing, "had [the police] used excessive force [the defendant's] remedy would be a suit for damages under 42 § 1983 (or state law) rather than the exclusion from his criminal trial of the evidence that had been seized."); *United States v. Garcia-Hernandez*, 659 F.3d 108, 114 (1st Cir. 2011) (noting that even if the police use excessive force, "the fruits of th[at] search are not subject to suppression.").

Nevertheless, the Court of Appeals dismissed the language in *McCloud* as dicta, and suggested there is a split of opinion among U.S. courts, citing *United States v. Ankeny*, 502 F.3d 829, 836-37 (9th Cir. 2007), as supporting the proposition that the exclusionary rule may apply in certain instance where excessive force is used. Both of these aspects of the Court of Appeals' decision are somewhat dubious. This Court, as the state's highest court, should weigh in on this matter in order to correct any misunderstanding

around its decision in *McCloud*, and to clarify the circumstances under which the exclusionary rule applies.

III. The Court of Appeals erred in rejecting the State's arguments regarding inevitable discovery and attenuation.

In its brief below, the State raised two alternative arguments as to why some or all of the evidence should not have been suppressed: inevitable discovery and attenuation (with respect to Defendant's later confession). The Court of Appeals, however, rejected both of these arguments as either not supported by evidence or as inadequately briefed. Slip op. at 21-22. The State submits that the Court of Appeals erred with respect to both arguments, and includes them in this petition for this Court's review. As set forth in the State's brief below, even if the manner of arrest was excessive, the police would have inevitably discovered the evidence in the car and the evidence of the passenger's death. Further, Defendant's statements made later at the hospital, following *Miranda* warnings, were voluntary and were sufficiently attenuated from the arrest to be admissible.

Conclusion

Clearly, this case raises important and novel (at least in the State of Kansas) issues regarding the Fourth Amendment and the application of the exclusionary rule. As set forth above, the Court of Appeals ruled in a manner that conflicts with both United States Supreme Court and Kansas Supreme

Court precedent. Those reasons alone justify this Court's review.

But also of significant concern is how the lower court's opinion will impact law enforcement agencies around the state and public safety. As the Court of Appeals noted, "law enforcement officers from all agencies frequently deal with vehicle pursuits in which they need to apprehend fleeing suspects." Slip op. at 21. The policy parameters of when to pursue and when not to pursue, and the tactics, techniques, and procedures employed during those pursuits differ among law enforcement agencies, often depend on particular local circumstances, and have occasionally been issues of discussion and debate among the public and government policymakers. Here, the Court of Appeals decided that it would enter into that policy debate and set public policy regarding police vehicle pursuits. Slip op. at 21.

The State submits that it was not only improper for the court to impose its own policy views, but that in doing so, the court did exactly what the United States Supreme Court warned against in *Harris*: it created a perverse incentive for a fleeing suspect to engage in reckless conduct, putting the general public at risk in the future because of it. *See Harris*, 550 U.S. at 385-86. Such an "impunity-earned-by-recklessness" rule runs contrary to the public interest and public safety, and thus is a matter of public importance warranting this Court's review.

WHEREFORE, the State respectfully asks that this Court grant this Petition, review, and reverse the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Review was sent by e-mail to Reid Nelson, at rnelson@sbids.org on 30th day of March, 2023, and was simultaneously electronically filed with the Clerk of the Appellate Courts through the eFlex efiling system.

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