No. _____

IN THE

Supreme Court of the United States

MISSOURI,
Petitioner,

v.

PHILLIP DOUGLASS & JENNIFER M. GAULTER,
Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Because the exclusionary rule should be "our last resort, not our first impulse," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), all the Courts of Appeals have held that the valid parts of a warrant may be severed from the invalid parts of a warrant. Many courts favor severance as the default remedy. Some courts, however, impose an additional condition before severance can apply: that the valid portion "make up the greater part of the warrant." *United States v. Sells*, 463 F.3d 1148, 1150 (10th Cir. 2006). This split leads to very different outcomes.

Here, the search of respondents' home was conducted pursuant to a partially defective warrant, and a divided Missouri court upheld the suppression of all the seized evidence after finding that the valid parts did not make up the "greater part" of the warrant. In conducting its analysis, the lower court also committed two additional errors. It extended the "particularity" requirement to the warrant's showing of probable cause. And it did not consider whether the exclusionary rule applied when the police officer checked a box on the warrant form based on a legal mistake, and the issuing judge signed off on it.

I. Is severance the default remedy when part of a warrant is valid, or does the Fourth Amendment also require that the valid sections make up "the greater part of the warrant"?

II. Does the particularity clause apply only to "the place to be search" and "the things to be seized," or does it extend to the "probable cause" requirement?

III. Does the exclusionary rule apply when the issuing judge signs off on the officer's legal mistake in filling out a warrant form?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the appellant below; respondents, Phillip Douglass and Jennifer M. Gaulter, were the respondents.

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JURISDICTION

The Supreme Court of Missouri issued its opinion February 13, 2016, and denied a motion for rehearing on May 1, 2018. On July 26, 2018, this Court granted an application (18A97) and extended the time to file the petition until August 29, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

Constitution of the United States, Amendment XIV:

> … No state shall . . . deprive any person of life, liberty or property without due process of law . . . .

STATEMENT OF THE CASE

Various personal items valued at approximately $10,000 were stolen from the victim's home, and the victim reported the circumstances surrounding the theft. App. A3-A5. After additional investigation, a police officer applied for a search warrant for the respondents' home. App. A4-A5. The application for the search warrant set forth facts showing probable cause to believe that the victim's stolen items "would be found at [the respondents'] residence." App. A18.

But in filling out the pre-printed warrant form (to be signed by a judge), the officer checked a box indicating that "there was probable cause to search and seize any '[d]eceased human fetus or corpse, or part thereof.' " App. A5. The officer also checked boxes indicating that there was probable cause to search for evidence of "a crime" or "an offense." App. A11. The warrant then listed several items believed to have been stolen from the victim, and it directed law enforcement officers to search for and seize those items, along with "[a]ny property readily and easily identifiable as stolen." App. A11-A12, A58.

A judge reviewed the officer's application and the warrant, and, after making handwritten changes to the warrant and the application, the judge signed the warrant. App. A32 n. 1, A56-A58. In part, the issuing judge struck a provision of the warrant that authorized a no-knock entry. App. A32 n.1, A58. The judge did not strike out the probable-cause finding related to a fetus or human corpse (the "corpse clause"). App. A32 n.1, A58. Officers executed the warrant and discovered several of the victim's stolen items. App. A5. The respondents were charged with burglary and stealing. App. A5.

Respondents moved to suppress the evidence found in their home, asserting that the warrant was

invalid because "the police did not have probable cause to search for a deceased human fetus or corpse or part thereof." App. A6. At a suppression hearing, the officer testified that he checked the "corpse clause" box because he thought that "by checking the box, he was just saving the police from having to stop the search to obtain an additional search warrant if a corpse was found." App. A6. He "admitted there was no probable cause a human corpse would be found during the search." App. A6.

The State argued that "the good-faith exception to the exclusionary rule applied because the error was caused by the judge's failure to correct the prepared warrant form." App. A6. The state also asserted that "the good-faith exception applied because the officers conducting the search reasonably relied on the constitutional validity of the warrant and did not expand the search beyond a search for the stolen items." App. A6.

The trial court suppressed the evidence, finding that the good-faith exception did not apply because the officer "intentionally checked the corpse clause box and thereby knowingly gave a false statement to the circuit court." App. A7. The court also concluded that "the warrant was invalid because it allowed officers to knowingly bypass the particularity requirement by checking boxes to search for items for which no probable cause existed, thereby rendering it, in essence, a general search warrant." App. A7; *see* A60-A61.

In a 4–2 decision, the Supreme Court of Missouri upheld the trial court's suppression order.[1] App. A28-

[1] One member of the court recused and did not participate in the case. In an unusual coincidence, the non-participating judge had, in fact, issued the search warrant in this case before being appointed to the Missouri Supreme Court.

A29. In rejecting petitioner's argument that under the "severability doctrine" the trial court should have suppressed only the evidence seized pursuant to any invalid portion of the warrant, the majority of the Missouri court concluded, "When examined in its entirety, the invalid portions of the search warrant in this case so contaminate the whole warrant that they cannot be redacted pursuant to the severance doctrine." App. A3.

The majority found both a lack of probable cause and a lack of particularity as to parts of the warrant. App. A3. The majority found that there was no probable cause to believe that a corpse or any part of a corpse would be found in the home to be searched. App. A3. The majority further found that "[f]our other provisions of the warrant are so lacking in particularity that they permit search of the residence for evidence of any crime or offense." App. A3. The majority concluded, "The complete lack of probable cause and particularity in the invalid portions of the warrant created a general warrant authorizing a broad and invasive search of the residence." App. A3. The majority continued, "The severance doctrine cannot be used to save a general warrant." App. A3.

Finally, in rejecting petitioner's argument that the officer's "purported misconduct in checking a box on the warrant was not the type of serious misconduct that should be deterred by the exclusion of otherwise lawfully seized evidence," the majority stated, "Because this Court finds the search warrant to be a general warrant that violates the Fourth Amendment, it is not necessary for this Court to consider the legal effect or impact of [the officer's] misconduct." App. A28. The majority held that the only remedy for a general warrant was suppression of all evidence obtained thereby. App. A28.

Two dissenting judges agreed that the "corpse clause" portion of the warrant was invalid. App. A31-A32. The dissenters found that, in light of the facts contained in the application for search warrant, the first three probable-cause findings in the warrant were "not general at all." App. A39. The dissenters observed that the warrant listed the specific items to be seized, and they concluded that the warrant's catch-all reference to "[a]ny property readily and easily identifiable as stolen" was, in context, a reference to other "items allegedly taken from [the victim]." App. A34 n. 3, A41. The dissenters concluded that "the valid portions [of the search warrant] are easily distinguishable from the lone invalid portion." App. A43. Accordingly, the dissenters would have severed the invalid portion of the warrant and only required suppression of any evidence seized pursuant to that part of the warrant. App. A45.

The dissenters further observed that "wholesale suppression" was "inconsistent with other case law dealing with officer misconduct in either procuring or executing a search warrant." App. A49. They concluded that "[t]otal suppression should be limited to situations in which 'its remedial objectives are thought most efficaciously served.' " App. A54. In short, they would have reversed the trial court's order. App. A54-A55.[2]

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[2] In an opinion that was rendered non-precedential by the Missouri Supreme Court's action in this case, a majority of the Missouri Court of Appeals held that it would have reversed the trial court's suppression order. *See State v. Douglass*, 2016 WL 1212371, *11 (Mo. Ct. App. 2016). The Court of Appeals was deeply divided. Six judges would have reversed the suppression order, and five judges (for reasons stated in two dissenting opinions) would have affirmed the order. *See id*.

REASONS FOR GRANTING THE PETITION

This case provides a good vehicle for the Court to adopt severability as the appropriate remedy when part of a warrant is valid and part is invalid, while also resolving a widening split among the lower courts regarding the proper standard for it.

All of the federal courts of appeals have adopted severability as an appropriate remedy when part of a search warrant is invalid. *United States v. Sells*, 463 F.3d 1148, 1150 n. 1 (10th Cir. 2006). Although this Court has never formally adopted the doctrine, its cases all but compel it. *See, e.g.*, *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978) (holding that "when material that is the subject of the alleged falsity or reckless disregard [for the truth] is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause," a warrant will not be invalidated for lack of probable cause); *Andresen v. Maryland*, 427 U.S. 463, 480-82 & n. 11 (1976).

But because this Court has never addressed severance, the lower courts disagree on the proper standard. Adopting the minority position, the Missouri Supreme Court below held that "severance is appropriate *only* 'if the valid portions of the warrant . . . make up the greater part of the warrant.' " App. A10. The majority position, however, holds that severance is the *default* remedy when evidence is seized pursuant to the valid part of a warrant. This split leads to significantly different outcomes when, for example, a valid but relatively small portion of the warrant justified the search and seizure at issue, or when a warrant contains a misguided "catch all" provision.

This split raises important and recurring issues that warrant certiorari. A narrow severability

standard directly conflicts with this Court's exclusionary rule cases, which require a careful weighing of deterrence benefits against the "heavy toll" of excluding reliable evidence. An ambiguous severability standard violates this Court's edict that evidence should not be excluded based on a vague or arbitrary standard. And an unreasoned severability standard conflicts with this Court's refusal to apply the exclusionary rule "reflexively." A close look shows that the minority's "greater part" rule was adopted accidentally and without a reasoned explanation.

The Missouri Supreme Court's severance analysis also incorrectly faulted the search warrant for failing to state with particularity each of its probable-cause findings. App. A16. The warrant—as required by the text of the Fourth Amendment—stated with particularity "the place to be searched" and the "things to be seized." No additional particularity was required; a warrant is "general" only when it fails to meet these requirements.

The Missouri court committed a third error when it refused to consider whether application of the exclusionary rule was justified under the particular facts of this case. App. A28. The court declined to consider whether the officer acted in good-faith reliance on the warrant and whether the officer's purported misconduct in filling out the pre-printed warrant form that was signed by the judge justified the "substantial social costs exacted by the exclusionary rule." *United States v. Leon*, 468 U.S. 897, 922-24 (1984). Consequently, the exclusionary rule was imposed in this case due to judicial errors, and such application runs afoul of the Court's clear admonition that "the exclusionary rule is designed to deter *police* misconduct rather than to punish the errors of judges and magistrates." *Id.* at 916 (emphasis added).

I. The majority of lower courts agree that valid parts of a warrant are generally severable, but a minority of courts only apply severability if the valid parts make up "the greater part of the warrant."

The Court should review the Missouri Supreme Court's holding that "severance is appropriate *only* 'if the valid portions of the warrant . . . make up the greater part of the warrant.'" App. A10 (quoting *United States v. Sells*, 463 F.3d 1148, 1151 (10th Cir. 2006)). The lower courts overwhelmingly agree that invalid warrant provisions can be severed from otherwise valid warrants. *See Sells*, 463 F.3d at 1151 n. 1 (noting all circuits have adopted the rule). But the Tenth Circuit, and now the Missouri Supreme Court, add an unnecessary condition—the "greater part of the warrant" rule—that conflicts with the majority of other courts. *See Cassady v. Goering*, 567 F.3d 628, 656-57 (10th Cir. 2009) (McConnell, J., dissenting) (noting the split and urging the Tenth Circuit to change its rule).

A. The majority of lower courts hold that severance is *generally applicable* unless no part of the warrant—or only an insignificant or tangential part—is constitutionally valid. At least the First, Second, Fifth, Sixth, and Ninth Circuits apply this test in some form.

For example, severance is the "normal remedy" in the Ninth Circuit unless the valid portion is " 'a relatively insignificant part of an otherwise invalid search.' " *United States v. Embry*, 625 F. App'x 814, 817 (9th Cir. 2015) (quoting *United States v. SDI Future Health, Inc.*, 568 F.3d 684, 707 (9th Cir. 2009)). The court in *SDI Future Health* reversed a district court that "granted total suppression" even though it found the valid portions of the warrant

were "not . . . insignificant." 568 F.3d at 707.

The Second Circuit follows *Sells*'s methodology but not the "greater part" rule. *See United States v. Galpin*, 720 F.3d 436, 449-50 (2d Cir. 2013). In that circuit, severability applies so long as the valid part of a warrant is not " 'an insignificant or tangential part.' " *Id.* at 449 (quoting *United States v. George*, 975 F.2d 72, 80 (2d Cir. 1992)). In *Galpin*, the court remanded for application of this test, noting that the district court improperly suppressed all evidence without considering "whether it is possible to carve out" the valid portions of the warrant "from the constitutionally infirm remainder." *Id*. at 448.

Other Courts use language similar to the Ninth and Second Circuits' tests. *See United States v. Freeman*, 685 F.2d 942, 952 (5th Cir. 1982) (severing a warrant, but noting severance may not apply if "the warrant is generally invalid but as to some tangential item"); *Aday v. Superior Court*, 362 P.2d 47, 52 (Cal. 1961) (indicating that severance would not be appropriate where a warrant was "general in character but as to minor items").

Still other courts simply uphold any valid part of a warrant without analyzing its relation to the whole. *See United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001) (agreeing that "the appropriate remedy for overbreadth is severing the infirm clause, and not dooming the entire warrant"); *United States v. Walling*, No. 1:16-cr-250, 2017 WL 1313898, *8-9 (W.D. Mich. Apr. 10, 2017) (agreeing with criticisms of *Sells*'s "greater part" test and noting the Sixth Circuit has no such requirement); *United States v. Morris*, 977 F.2d 677, 682 (1st Cir. 1992) ("where a search warrant is valid as to some items but not as to others . . . a court can admit the former while excluding the latter"); *United States v. Diaz*, 841

F.2d 1, 4 (1st Cir. 1988) (holding severance is "especially appropriate" where "the bulk of the warrant and records seized are fully supported by probable cause").

A minority of courts, such as the Tenth Circuit and now the Missouri Supreme Court, hold that severance is *not* generally applicable unless the "greater part of the warrant" is valid. Thus, the Tenth Circuit holds that total suppression may be required "even where a part of the warrant is valid." *Sells*, 463 F.3d at 1158. *Sells* requires a lengthy inquiry before severance. "A warrant's invalid portions, though numerically fewer than the valid portions, may . . . contaminate the whole warrant." *Id.* at 1160. This "holistic test" requires examination of the "qualitative and quantitative aspects" of the warrant to determine if the "greater part" is valid. *Id.* A court may not, however, base its analysis on "the items actually seized during the search." *Id.* at 1159. The Missouri Supreme Court adopted and followed each aspect of *Sells*'s test. App. A20-A22.

When it adopted this test, the Tenth Circuit acknowledged that "[o]ther circuits seem, for the most part" to follow a different standard. *Id*. at 1159. But it suggested that these were only "nuanced differences." *Id.*

B. Subsequent cases show that the different tests lead to very different results. Take two examples where the different tests diverge.

The two tests would produce different results on the facts of this case. By the Missouri Supreme Court's own counting, "the valid portions of the warrant" were "numerically greater than the invalid portions." App. A21. But it still found that the invalid portions "contaminate[d]" the whole warrant. App. A21. The court also conceded that "the items

seized were those for which probable cause existed"—that is, they were the fruits of the *valid* parts of the warrant. App. A22. But this argument, the court decided, had "no relevance under the severance doctrine." App. A22. In other words, the valid parts of the warrant were *significant enough* to justify the seizure and justify severance in most courts, but were not the "greater part" of the warrant under *Sells*.

The two tests also lead to different results on the facts in *Cassidy*. The Tenth Circuit held that the warrant contained "one mostly valid and two invalid sections." 567 F.3d at 640. One of the invalid sections authorized seizure of "all other evidence of criminal activity." *Id.* at 639. The Court explained that this catchall was so "broad and invasive" as to contaminate the entire warrant. *Id.* at 640-41. *Sells*'s test results in a "*per se* rule" that a warrant with a catchall is facially invalid because catchalls "contaminate" the warrant and prevent severance. *Id.* at 641. Courts following the majority rule, however, have upheld searches pursuant to warrants that contain concededly invalid catchalls. *See*, *e.g.*, *Greene*, 250 F.3d at 477 (noting that a "'catch-all clause" was overbroad, but severing the warrant and upholding seizure pursuant to more detailed parts of the warrant).

C. This split in the lower courts raises questions that are important and recurring.

First, the lower court's severability rule conflicts with this Court's understanding of the exclusionary rule. The "sole purpose" of the exclusionary rule, "is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 237 (2011). So this Court has "limited the rule's operation to situations in which this purpose is 'thought most efficaciously

served' " to yield " 'appreciable deterrence' " value. *Id.* (citation omitted). That deterrence value must outweigh the "heavy toll" the exclusionary rule places on "the judicial system and society at large" by tossing out "reliable, trustworthy evidence" and setting the guilty free. *Id.*

When parts of a warrant satisfy the Fourth Amendment, and authorize the seizure of evidence, severance should be the "favored remedy because it best balances the competing interests at stake." *Cassady*, 567 F.3d at 657 (McConnell, J., dissenting). Severance offers "appreciable deterrence" because *no evidence* obtained only through the invalid parts of the warrant will be admissible. Little is gained, and much lost, by further penalizing law enforcement for poor or mistaken drafting in *another* part of the warrant. The added "deterrence benefits" do not outweigh the "heavy costs." *Davis*, 564 U.S. at 237.

Second, the lower court's "greater part" test leads to the exclusion of evidence on unpredictable and subjective grounds. *See Virginia v. Moore*, 553 U.S. 164, 175 (2008) ("In determining what is reasonable under the Fourth Amendment, we have given great weight to the 'essential interest in readily administrable rules.' "). The exclusionary rule is a particularly poor remedy when standards governing its application are "vague" and "not easily applied." *Hudson v. Michigan*, 547 U.S. 586, 589-90 (2006).

Sells's test is complicated and subjective. It first requires courts to divide up a search warrant into "categories," but it offers little guidance on how this is done. For instance, the majority opinion below divided the warrant into thirteen categories: five probable-cause categories, and eight evidentiary categories of items to be seized. App. A12-A13. The dissent, on the other hand, divided the warrant into

the five probable-cause categories. App. A31. This matters, because "the manner in which judges chop up a warrant will often have outcome-determinative effects." *Cassady*, 567 F.3d at 656 (McConnell, J., dissenting). This approach is exactly the kind of "hypertechnical" Fourth Amendment approach that this Court rejects. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

In an attempt to remedy this, *Sells* emphasized a "holistic test" analyzing the "qualitative" and "quantitative aspects" of the warrant. 463 F.3d at 1160. But this makes the test even more subjective and increases the potential for disparate outcomes. The judges below did not agree either on how to conduct this test or on its ultimate outcome. The majority found that the first three probable-cause categories were not stated with sufficient "particularity" and were "general," and that the other two were not supported by facts in the application. App. A16-A18. But the dissent found that the first three probable cause categories were "not general at all" in light of the facts stated in the application. App. A39. The dissent found that the fourth probable cause category was conceded by the respondents in the trial court, and that the fifth probable-cause category (the "corpse clause") was—as all parties agreed—not supported by facts in the application. App. A31-A32, A37 n. 6. The majority found that one of the evidentiary categories—the catch-all item of "[a]ny property readily and easily identifiable as stolen"—was too general, *i.e.*, that it lacked particularity. App. A19. Conversely, the dissent found that, in context, the catch-all phrase was sufficiently particular, in that it referred to other "items allegedly taken from [the victim]." App. A34 n. 3. And, finally, the majority concluded that "the *multiple* invalid portions of the warrant . . . so

contaminate the warrant as to render it a general warrant." App. A21. However, the dissent concluded that "both quantitative and qualitative assessments of the search warrant indicate that, when viewed, in toto, the valid portions make up the greater part of the search warrant and the corpse category was a de minimus aspect of the search warrant." App. A44.

Courts following the majority rule on severability, by contrast, adopt a presumption of severability if any portion of the warrant is valid, leading to a bright-line rule that is easy to apply and predict. *See Embry*, 625 F. App'x at 817 (describing severance as the "normal remedy"); *Greene*, 250 F.3d at 477 ("appropriate remedy").

Third, the "greater part" test was adopted with little analysis or explanation, and likely by mistake. The "greater part of the warrant" test originated in *United States v. Naugle*, 997 F.2d 819, 822-23 (10th Cir. 1993). *See Sells*, 463 F.3d at 1159 (adopting the test because *Naugle* "was the first case to define this element"). *Naugle*, in turn, attributes the "greater part" language to the Second Circuit. 997 F.3d at 822. But the "greater part" language "appears nowhere" in the Second Circuit case. *Cassady*, 567 F.3d at 656-657 (McConnell, J., dissenting). Thus, "it is unclear that the [Tenth Circuit's] departure from the framework followed by other jurisdictions" was even intentional. *Id.* Such unthinking, "reflexive" application of the exclusionary rule is inconsistent of this Court's Fourth Amendment jurisprudence. *Davis*, 564 U.S. at 238.

II. As a result of its confusion about the severability doctrine, the lower court improperly extended the "particularity" requirement to the warrant's showing of probable cause, directly contradicting settled precedent in *United States v. Grubbs*.

The Fourth Amendment has a "strong preference for searches conducted pursuant to a warrant." *Illinois v. Gates*, 462 U.S. at 236. " 'A grudging or negative attitude by reviewing courts toward warrants,' . . . is inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case." *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984) (citation omitted).

Here, the Missouri court exhibited a "grudging or negative attitude" toward the warrant by employing a highly technical and sometimes disparate analysis to the parts of the warrant. The court divided the search warrant into thirteen categories before proceeding to evaluate each category " '. . . to determine whether some portion of the warrant satisfies the probable cause and particularity requirements of the Fourth Amendment.' " App. A13.

The first five categories identified by the Missouri court (the probable-cause categories) appeared in the search warrant as follows:

> Based on information provided in a verified application/ affidavit, *the Court finds probable cause* to warrant a search for and/or seizure of the following:
>
> □ Property, article, material or substance that constitutes evidence of the commission of a crime;

> □ Property that has been stolen or acquired in any manner declared an offense;
>
> □ Property for which possession is an offense under the laws of this state;
>
> □ Any person for whom a valid felony arrest warrant is outstanding;
>
> □ Deceased human fetus or corpse, or part thereof[.]

App. A11 (emphasis added). The officer who applied for the warrant and filled out the pre-printed form checked all five of these boxes. App. A11.

In analyzing these categories, the Missouri court pointed out that the first pre-printed category referred generally to "***a*** crime," and that the second and third pre-printed categories referred generally to "***an*** offense." App. A14. The court observed that these probable-cause categories mirrored language found in a Missouri statute, "which enumerates the broad, generic categories for which a search warrant may be issued." App. A14-A15. The court then observed that these "categories place no limitations on the search and are devoid of any reference to the crimes related to [the victim]." App. A15. The court continued, "No specificity as to the crime or property is provided in these first three categories." App. A15.

The Missouri court then observed, " '[T]he fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized.' " App. A15 (quoting *Sells*, 463 F.3d at 1154). The court then reiterated that "[t]he broad, general statutory language of the first three categories does not include any distinguishing characteristics of the

goods to be seized or provide any guidance to law enforcement as to the identity of the items to be seized." App. A15. The Court concluded that "[]the first three categories . . . lack any particularity for purposes of the Fourth Amendment." App. A15.

However, because the first five categories were findings of "probable cause," they did not need to be stated with "particularity." Rather, in evaluating those categories, the Missouri court should have examined whether they were supported by facts set forth in the supporting application. And, indeed, that is precisely what the Missouri court did in evaluating the fourth and fifth probable-cause categories. App. A16-A18. This disparate treatment of the probable-cause categories highlights how the Missouri court expanded the Fourth Amendment's particularity requirement beyond the reach of its text.

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched, and the persons or things to be seized*." U.S. CONST., amend. IV (emphasis added). The text is clear: the particularity requirement applies only to "the place to be searched, and the persons or things to be seized."

This Court has repeatedly adhered to this dictate. "The Fourth Amendment . . . does not set forth some general 'particularity requirement.' " *United States v. Grubbs*, 547 U.S. 90, 97 (2006). Rather, "[i]t specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.' " *Id.* Indeed, in *Grubbs*, the Court again rejected an effort "to

expand the scope of [the particularity] provision to embrace unenumerated matters." *Id*.

The Court's intervention was necessary in *Grubbs* because the United States Court of Appeals for the Ninth Circuit had invalidated an anticipatory search warrant on the grounds that "the warrant failed to specify the triggering condition" that had to occur before there was probable cause to believe that evidence of a crime would be found in the place to be searched. *Id*. But the Ninth Circuit had failed to follow the dictate of the Fourth Amendment's text when it held that "[t]he Fourth Amendment's particularity requirement . . . 'applies with full force to the conditions precedent to an anticipatory search warrant.' " *Id*. This Court stated, "The language of the Fourth Amendment is . . . decisive here; its particularity requirement does not include the conditions precedent to execution of the warrant." *Id*. at 98. In short, the warrant did not have to outline with particularity the facts that would have to occur before probable cause would spring into existence.

Here, similarly, the Missouri court expanded the particularity requirement beyond the text of the Fourth Amendment. The lack of particularity in the warrant in describing the respondents' "crime" or "offense" could not justify the Missouri court's decision to invalidate the general categories of items for which the issuing judge found "probable cause" to search. Rather, the existence of probable cause should have been determined by looking at the application and the supporting affidavit.

And, significantly, in that regard, the Missouri court expressly concluded that there were facts supporting the first three probable-cause findings of the issuing judge. The Missouri court stated, "Given the facts and circumstances stated in the affidavit

accompanying the warrant, there was a fair probability [the victim's stolen] items would be found at [respondents'] residence." App. A18. Thus, the validity of those three probable-cause findings should have weighed in favor of severing the invalid portions of the warrant and salvaging the valid parts of the warrant dealing with the victim's stolen belongings.

The Missouri court's ultimate conclusion—that the warrant in this case was a "general warrant"—is inconsistent with this Court's precedents. "The Founding generation crafted the Fourth Amendment as a 'response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.' " *Carpenter v. United States*, 138 S.Ct. 2206, 2213 (2018). "Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects.' " *Byrd v. United States*, 138 S.Ct. 1518, 1526 (2018).

The Missouri court concluded that the warrant in this case was a "general warrant" because the first three probable-cause categories "permitted officers to search for any property, article, material, or substance that might constitute evidence of any crime or offense." App. A16. But the plain language of the warrant did not authorize such a search, and there was no evidence that the officers understood the warrant to authorize such a search, or that the officers conducted such a search. Rather, it is apparent from the face of the warrant and the officers' conduct that the first five categories were merely "probable cause" *findings*. *See* App. A11, A50 n. 12, A58. As outlined above, the first five categories

were preceded by a statement that the issuing judge had found "probable cause" to search for items in those five general categories. App. A11, A58.

The issuing judge's subsequent directive to the officers, however, made plain that the officers were limited to seizing certain specific items that had been stolen from the victim. Separate and apart from the check-box, probable-cause findings, the issuing judge "commanded" the officers who were to execute the warrant to search and seize "the person, place, or thing described below." App. A58. The warrant then stated with particularity the respondent's home, and it set forth a list of specific items to seize, namely:

> Coach Purse that is silver with C's on it; a Coach purse with purple beading; Prada purse black in color; larger Louis Vuitton bag; Toshiba Satellite laptop limited edition silver with black swirls on it; Vintage/costume jewelry several items had [M.G.][3] engraved on them; Coach, Lv, Hermes, Bestie Sunglasses; Passport and Social Security card [belonging to M.G.]; Social Security Card/Birth Certificate [belonging to M.G.'s son]; Various bottles of perfume make up brushes and Clinique and Mary Kay make up sets; Keys not belonging to property or vehicle at scene; and Any property readily and easily identifiable as stolen.

App. A13, A30, A58.[4] This list of specific items to

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[3] "M.G." was the victim.

[4] The Missouri court was divided over whether the phrase "Any property readily and easily identifiable as stolen" was sufficiently particular. The dissenting judges concluded that, in context, the phrase—which was the final item in a list of stolen items—was referring to other "items allegedly taken from [the victim]." App. A34 n. 3. This conclusion finds support in

seize was not the sort of "general" directive that characterized the "reviled 'general warrants' and 'writs of assistance' of the colonial era." Rather, it was a limited directive to take specific action and seize specific things.

Petitioner agrees that part of the search warrant was not valid, namely, the issuing judge's finding that "there was probable cause to search and seize any '[d]eceased human fetus or corpse, or part thereof.' " But a lack of facts to support that finding (or even multiple probable-cause findings) cannot invalidate the entire warrant.[5] *See generally Franks v. Delaware*, 438 U.S. at 171-172.

As the Court made plain in *Franks*, even where an officer deliberately lies in an affidavit supporting the warrant, the falsity of those statements does not lead inexorably to the conclusion that the warrant is wholly invalid and that any evidence seized pursuant to it should be suppressed. In *Franks*, the Court held that a defendant could challenge the validity of a

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Andresen v. Maryland, 427 U.S. at 479-82. At the very least, in light of the disagreement among the judges on the Missouri Supreme Court, an officer could have relied in good faith on the issuing judge's determination that the warrant was sufficiently particular.

[5] As outlined above, the Missouri court also found that the fourth probable-cause finding was not supported by facts in the application. App. A17-A18. The dissenting judges pointed out that defense counsel conceded at the suppression hearing that "there may have been probable cause to believe that either of the listed subjects may have had warrants outstanding for them." App. A37 n. 6. Whether only the fifth or both the fourth and fifth probable-cause findings were not supported by probable cause should not weigh heavily in the analysis, because a lack of probable cause to believe that there is a person with warrants or a fetus or human body in the residence did not destroy the probable cause that existed to believe that the victim's stolen belongings were in the residence.

search warrant by alleging that statements made in the supporting affidavit were false or made with reckless disregard for the truth. *Id.* The Court explained, however, that a defendant would not be entitled to a hearing on the issue of whether there was probable cause if, "when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause[.]" *Id.*

Here, the officer did not make false statements in his application or affidavit. App. A49 n. 11. Instead, the officer was mistaken about the procedure that should be followed in the event that the police came upon a fetus or corpse during a search. App. A6. As a result of this mistake, the officer checked a box next to a probable-cause finding that was not supported by facts in his supporting application. App. A6. To the extent that the probable-cause finding can even be attributed to the officer—who did not sign and issue the warrant—the inclusion of a probable-cause finding that was not supported by facts in the officer's application did not destroy the probable cause that existed to believe that the victim's stolen property would be found in respondents' home.

In sum, the warrant was not a "general warrant." As required by the text of the Fourth Amendment, the warrant stated with particularity "the place to be searched" and the "things to be seized." Moreover, three of the judge's probable-cause findings were supported by sufficient facts in the application. Thus, there was not a complete absence of probable cause, and the warrant issued "upon probable cause." As such, the Missouri court should have severed the invalid portions of the warrant and concluded that the evidence seized pursuant to the valid portions of the warrant should not have been suppressed.

III. The police officer's mistake in drafting the warrant—which the issuing judge signed off on—did not justify the "substantial social costs exacted by the exclusionary rule."

As stated above, the Fourth Amendment has a "strong preference for searches conducted pursuant to a warrant." *See Gates*, 462 U.S. at 236. To that end, when search warrants have been found to be invalid, the Court has recognized that the "substantial social costs exacted by the exclusionary rule" are not always justified. *See United States v. Leon*, 468 U.S. at 922-24.

Here, the only purported "misconduct" by the police officer was his "intentional" but erroneous checking of a box next to one of the probable-cause findings on the face of the warrant, namely, the "corpse clause" finding. App. A6. The officer believed that "by checking the box, he was just saving the police from having to stop the search to obtain an additional search warrant if a corpse was found." App. A6. So, although he knew that there was no probable cause at that time to believe they would find a fetus or a corpse, he checked the box believing that he could save the officers the inconvenience of obtaining a second warrant if, by some unforeseen chance, they found a dead body. App. A6. This was certainly misguided, but it was not the sort of "deliberate" and "culpable" police misconduct that justifies the substantial costs of exclusion.[6] *See Herring v. United States*, 555 U.S. 135, 144 (2009). Imposing the rule here will not "meaningfully deter" any misconduct that justifies "the price paid by the

[6] No similar "misconduct" by the officer was found in relation to the officer's checking the box related to individuals with felony arrest warrants.

justice system." *See id*.

Moreover, because the error was on the face of a warrant issued by a neutral judge, the imposition of the exclusionary rule is inconsistent with the aim of the exclusionary rule. To be sure, the officer filled out the pre-printed warrant form; but there was no evidence that the officer was attempting to mislead the issuing judge into believing that a fetus or dead body would be found in respondents' home. Rather, it appears that the issuing judge—who took the time to strike out one provision of the warrant—simply overlooked the unsupported probable-cause finding when he completed and signed the warrant. Such judicial errors should not be encouraged, but such errors also do not warrant the application of the exclusionary rule.

In *Leon*, the Court stated that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." 468 U.S. at 916. The Court also observed that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Id*. Finally, "and most important," the Court found no basis "for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." *Id*. The Court explained:

> Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to

> inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

Id. at 917.

Here, public policy does not support exclusion of the evidence. The record shows that the issuing judge made an erroneous probable-cause finding. While the issuing judge may have been led into that error by the officer who filled out the pre-printed form, "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id*. at 921. Here, the issuing judge failed to correct the erroneous warrant; and, as such, the high cost of exclusion was not warranted. The error committed by the police officer in this case will ordinarily be curtailed by neutral judges who issue the warrants in the first instance.

Finally, because the officer acted in objective good faith in seeking a search warrant for the victim's stolen belongings (which part of the warrant was supported by probable cause), and because the officers acted within the scope of that part of the warrant in searching the home, the officers' good-faith reliance on the warrant should preclude the wholesale application of the exclusionary rule. " '[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness,' . . . for

'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.' " *Id*. at 922.

The officer's good-faith reliance on that aspect of the warrant is not abrogated by the judge's error in finding probable cause to search for other things. The officers here relied on the warrant in good faith because it was objectively reasonable to believe that the warrant properly issued with regard to the victim's stolen belongings. In other words, this is not a case where the officer had "no reasonable grounds for believing that the warrant was properly issued." *See id*. at 922-23; *see also United States v. Breckenridge*, 782 F.2d 1317, 1321-22 (5th Cir. 1986) (where it appeared to the officers that the judge had "fulfilled his duty to act as a 'neutral and detached' magistrate[,]" to suppress evidence on the ground that the judge "did not fully perform his role" "would 'punish [the police for] the errors of judges and magistrates,' in defiance of the command of *Leon*.").

The Missouri court upheld the application of the exclusionary rule without considering whether the costs of exclusion outweighed any deterrence benefits, and without considering whether the officer's good-faith reliance on the valid portions of the warrant provided an exception to the rule. The Missouri court's opinion runs contrary to this Court's frequent refrain that "[s]uppression of evidence . . . has always been our last resort, not our first impulse[,]" and that the exclusionary rule is " 'applicable only . . . where its deterrence benefits outweigh its substantial social costs.' " *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (quoting *Hudson v. Michigan*, 547 U.S. at 591).

By blurring the line between the officer's mistake and the judge's error, and by overlooking the officer's

good-faith reliance on the valid portion of the warrant, the Missouri court wrongly categorized this case as one of the "unusual cases in which exclusion will further the purposes of the exclusionary rule." *See Leon*, 468 S.W.3d at 918. The Court should grant the petition and reaffirm the limited purpose of the rule, namely, that it is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id*. at 916.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 29, 2018

APPENDIX

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May 1, 2018

Mr. Shaun J. Mackelprang via e-filing system
Office of Missouri Attorney General
P.O. Box 899
Jefferson City, MO 65102

In Re: State of Missouri, Appellant, vs. Phillip Douglass, Respondent, and Jennifer M. Gaulter, Resondent.
Missouri Supreme Court No. SC95719

Dear Mr. Mackelprang:

Please be advised Appellant's motion for rehearing was overruled on this cate.

Powell, J., not participating.

Very truly yours,

/s/ *Betsy AuBuchon*
BETSY AUBUCHON

cc:
Mr. John R. Humphrey via e-filing system
Mr. Clayton E. Gillette via e-filing system

[State Seal]
SUPREME COURT OF MISSOURI
en banc

State of Missouri,	)	[File stamped:
	)	Feb 13 2018
Appellant,	)	Clerk, Supreme Court]
	)	
vs.	)	No. SC95719
	)	
Phillip Douglass,	)	
	)	
Respondent,	)	
	)	
Jennifer M. Gaulter,	)	
	)	
Respondent.	)	

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

The state appeals from the circuit court's order sustaining the defendants' motions to suppress all evidence seized pursuant to a warrant authorizing search of a residence for stolen items. The state admits an officer submitted a prepared search warrant form, which was then executed by a circuit judge, authorizing a search for any deceased human fetus or corpse despite the fact the officer knew no probable cause existed for such provision. The state contends that, regardless of the lack of probable cause, the circuit court should have applied the severance doctrine to redact any invalid portion of the warrant and suppress only the evidence seized pursuant to the invalid portion.

[p. 2] When portions of a search warrant fail to satisfy the Fourth Amendment warrant

requirements, the severance doctrine can be applied to redact the invalid portions of the warrant and permit evidence seized pursuant to the valid portions of the warrant to be admitted into evidence. The severance doctrine requires examination of all provisions in the search warrant and determination of the constitutional validity of each provision.

When examined in its entirety, the invalid portions of the search warrant in this case so contaminate the whole warrant that they cannot be redacted pursuant to the severance doctrine. In addition to the corpse clause, another provision of the warrant lacks probable cause in that there are no facts in the search warrant application or affidavit establishing the likelihood that any individuals with outstanding arrest warrants would be found on the premises. Four other provisions of the warrant are so lacking in particularity that they permit search of the residence for evidence of any crime or offense. The complete lack of probable cause and particularity in the invalid portions of the warrant created a general warrant authorizing a broad and invasive search of the residence. The severance doctrine cannot be used to save a general warrant. Accordingly, the circuit court properly applied the exclusionary rule to suppress all evidence seized. The circuit court's order is affirmed.

[p. 3] Factual and Procedural Background[1]

In 2013, M.G. met Jennifer Gaulter and Phillip Douglass at the Argosy Casino, Hotel & Spa. The group went to Mr. Douglass and Ms. Gaulter's hotel room for drinks, but M.G. left after she felt pressured

[1] The facts are taken from the search warrant affidavit and application and the probable cause statement attached to the arrest warrant.

to have sex with the couple. M.G. called her boyfriend, who picked her up and took her back to her apartment.

The next morning, M.G. locked her apartment and went to work. While at work, she received a text message from Ms. Gaulter informing her she had left her handbag with her keys in the hotel room. M.G. agreed that Ms. Gaulter should leave the handbag at the hotel's front desk so M.G. could pick up the handbag after work. She later received another text from Ms. Gaulter inquiring whether she was at home or working. M.G. replied she was still at work and would call Ms. Gaulter after work.

When M.G. returned home around 6:10 p.m., she found her apartment in disarray and several items of property missing. There were no signs of forced entry. She immediately called the hotel to check if her handbag and keys were still there. The hotel staff informed her the handbag was there. At M.G.'s request, the hotel staff looked in the handbag for her keys but did not find them. M.G. sent a text message to Ms. Gaulter about the missing keys and the theft. Ms. Gaulter did not respond. Around 7:30 p.m., M.G. reported the theft to the police. She estimated approximately $10,000 worth of her belongings had been stolen.

[p. 4] When M.G. arrived at the hotel to pick up her handbag, a hotel staff member told her someone had already picked up the bag. Police investigated and found Mr. Douglass and Ms. Gaulter's home address in Blue Springs. M.G. identified the couple from photographs the police found on the Internet.

Subsequent to this investigation, Detective Darold Estes, a 20-year veteran of the Kansas City police department, applied for a search warrant. His

affidavit stated that, based on the above facts, there was probable cause to search Mr. Douglass and Ms. Gaulter's residence and to seize specific items believed to have been stolen.

Along with his application and affidavit, Detective Estes submitted a prepared form for the search warrant to be executed by the judge. On the search warrant form, Detective Estes checked a box stating, based on information provided in the affidavit, there was probable cause to search and seize any "[d]eceased human fetus or corpse, or part thereof." The warrant then went on to list several items believed to be stolen from M.G.

The Kansas City police department conducted a search of the residence that evening.[2] No one was home. The police seized a laptop and laptop case, a red purse containing various small items, a Coach purse, and a bracelet. M.G. confirmed all the property seized from the residence had been stolen from her apartment. Mr. Douglass and Ms. Gaulter were arrested and subsequently charged by indictment with burglary in **[p. 5]** the second degree, section 569.170,[3] and felony stealing, section 570.030, RSMo Supp. 2013.[4]

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[2] Blue Springs police conducted a knock and announce on Mr. Douglass and Ms. Gaulter's residence. Blue Springs police then secured the residence before releasing it to the Kansas City police department.

[3] Unless otherwise noted, all statutory citations are to RSMo 2000.

[4] In light of this Court's decision in *State v. Bazell*, 497 S.W.3d 263, 266-67 (Mo. banc 2016), the felony stealing offenses charged against Mr. Douglass and Ms. Gaulter would be misdemeanor offenses.

Mr. Douglass and Ms. Gaulter each filed a motion to suppress asserting the search warrant was invalid because the police did not have probable cause to search for a deceased human fetus or corpse, or part thereof.[5] At a consolidated suppression hearing on the motions, Detective Estes testified he checked the corpse clause because, if a corpse was found during the search, he would be required to obtain a "piggyback warrant"—by checking the box, he was just saving the police from having to stop the search to obtain an additional search warrant if a corpse was found. On cross-examination, Detective Estes admitted there was no probable cause a human corpse would be found during the search.

Following the hearing, the state submitted additional suggestions in opposition to the motions to suppress arguing the good-faith exception to the exclusionary rule applied because the error was caused by the judge's failure to correct the prepared warrant form. The state further contended the good-faith exception applied because the officers **[p. 6]** conducting the search reasonably relied on the constitutional validity of the warrant and did not expand the search beyond a search for the stolen items.

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[5] In their motions to suppress, Mr. Douglass and Ms. Gaulter also asserted the search warrant was invalid because the police failed to leave a return receipt for the search warrant at the residence as ordered by the circuit court. They withdrew this claim prior to the suppression hearing after the state submitted the return receipt for the search. They further asserted the warrant was improperly executed because the Kansas City police department did not have statutory authority to execute a warrant for a residence located in Blue Springs. Such issue, however, need not be addressed given the Court's disposition of the appeal.

The circuit court sustained the motions to suppress, finding the good-faith exception to the exclusionary rule did not apply because Detective Estes intentionally checked the corpse clause box and thereby knowingly gave a false statement to the circuit court. The circuit court further concluded the warrant was invalid because it allowed officers to knowingly bypass the particularity requirement by checking boxes to search for items for which no probable cause existed, thereby rendering it, in essence, a general search warrant. The circuit court held the exclusionary rule was appropriate to deter intentional police misconduct and ordered the suppression of all evidence seized. Pursuant to section 547.200.1(3),[6] the state appealed the circuit court's order. This Court granted transfer after opinion by the court of appeals. Mo. Const. art. V, sec. 10.

Standard of Review

Any ruling "on a motion to suppress must be supported by substantial evidence." *State v. Johnson*, 354 S.W.3d 627, 631 (Mo. banc 2011). This Court reviews the facts and reasonable inferences therefrom favorably to the circuit court's ruling and disregards contrary evidence and inferences. *Id.* at 631-32. Whether a search is "permissible and whether the exclusionary rule applies to the evidence seized" are questions of law reviewed de novo. *Id.* at 632. This Court is "primarily concerned with the correctness of **[p. 7]** the trial court's result, not the route the trial court took to reach that result, and

[6] Section 547.200.1(3) provides: "An appeal may be taken by the state through the prosecuting or circuit attorney from any order or judgment the substantive effect of which results in ... [s]uppressing evidence[.]"

the trial court's judgment must be affirmed if cognizable under any theory, regardless of whether the trial court's reasoning is wrong or insufficient." *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 736 (Mo. banc 2017) (internal quotation omitted).

The Severance Doctrine

The Fourth Amendment of the United States Constitution ensures against "unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Article I, section 15 of the Missouri Constitution provides coextensive protection against unreasonable searches and seizures. *See Johnson*, 354 S.W.3d at 630.

Missouri's General Assembly recognized these constitutional protections and enacted a statute providing a search warrant is invalid "[i]f it was issued without probable cause." Section 542.276.10(3), RSMo Supp. 2013. Likewise, a search warrant is invalid "[i]f it does not describe the person, place, or thing to be searched or the property, article, material, substance, or person to be seized with sufficient certainty." Section 542.276.10(5), RSMo Supp. 2013.

The circuit court concluded the warrant was invalid and suppressed all evidence seized because the warrant lacked probable cause and particularity in that Detective Estes intentionally checked the corpse clause of the search warrant form he prepared for the judge even though he knew the facts in his affidavit did not establish probable cause that a corpse or deceased fetus would be found. The state

concedes there was no probable **[p. 8]** cause to search for and seize a deceased fetus, corpse, or part thereof. Nevertheless, it asserts the circuit court erred by suppressing all evidence seized because the invalid portion of the warrant—the corpse clause—could be redacted pursuant to the "severance doctrine" and all items were seized under the valid portions of the warrant.

Generally, "all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in state court." *State v. Grayson*, 336 S.W.3d 138, 146 (Mo. banc 2011) (alteration in original) (internal quotation omitted). Suppression, therefore, is the ordinary remedy for searches conducted in violation of the Fourth Amendment. *Id.* at 146-47; *United States v. Sells*, 463 F.3d 1148, 1154 (10th Cir. 2006). To avoid the harsh realities of suppressing evidence under the exclusionary rule, however, most federal and state courts have adopted the "severance doctrine."[7] *See United States v. Riggs*, 690 F.2d 298, 300-01 (1st Cir. 1982); *see also Sells*, 463 F.3d at 1155 (noting that "every federal court to consider the issue has adopted the doctrine of severance").

Under the severance doctrine, any invalid portions of a search warrant are "redacted" or "severed" from the valid portions so long as the invalid portions can be meaningfully severed from the valid portions and have not created an impermissible general warrant. *United States v. Christine*, 687 F.2d 749, 754 (3d Cir. 1982). Evidence

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[7] Various courts have also interchangeably referred to this doctrine as the "severability doctrine" and the "redaction doctrine."

seized pursuant to the valid portions of the search warrant may then be admissible at trial. *Id.*

[p. 9] But the severance doctrine is not appropriate in every case.[8] *Sells*, 463 F.3d at 1155. Severance is appropriate under the doctrine ***only*** "if the valid portions of the warrant [are] sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant." *Id.* (alteration in original) (internal quotation omitted). In *Sells*, the Tenth Circuit established a five-step test for determining whether to sever invalid portions of a search warrant that has since been followed by the majority of jurisdictions. *Id.* at 1151. Applying this five-step test, it becomes apparent that severance is not appropriate under the fact and circumstances of this case.

In applying the severance doctrine, the warrant ***must be considered in its entirety*** and the

---

[8] Mr. Douglass and Ms. Gaulter assert the severance doctrine cannot be applied in this case because Detective Estes acted in bad faith by intentionally checking the corpse clause despite knowing no probable cause existed for this provision. Although no court has so expressly held, several courts have suggested the severance doctrine is not applicable when an officer acts in bad faith in obtaining a search warrant. *See United States v. Pitts*, 173 F.3d 677, 681 n.5 (8th Cir. 1999); *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir. 1983); *United States v. Freeman*, 685 F.2d 942, 952 (5th Cir. 1982). Other courts have warned the severance doctrine should not be applied if the "overall tenor of the warrant or search smacks of ... an abuse of the prospective availability of redaction," *Christine*, 687 F.2d at 759, or if officers "flagrant[ly] disregard the terms or grossly exceed the scope of the search warrant." *Sells*, 463 F.3d at 1162 (alteration in original) (internal quotation omitted). But this Court need not decide whether Detective Estes' misconduct prohibits application of the severance doctrine because, as explained herein, the severance doctrine cannot be used to cure the warrant's deficiencies in this case.

constitutional validity of each portion determined. *Id*. The search warrant, in its entirety, provided:

> Based on information provided in a verified application/affidavit, the Court finds probable cause to warrant a search for and/or seizure of the following:
>
> □ Property, article, material or substance that constitutes evidence of the commission of a crime;
>
> **[p. 10]**
> □ Property that has been stolen or acquired in any manner declared an offense;
>
> □ Property for which possession is an offense under the laws of this state;
>
> □ Any person for whom a valid felony arrest warrant is outstanding;
>
> □ Deceased human fetus or corpse, or part thereof;
>
> □ Other (Specify—See Missouri Revised Statute Section 542.271)[.]

Of the six categories listed, Detective Estes checked the first five boxes.

The warrant also described the "person, place or thing to be searched" as Mr. Douglass and Ms. Gaulter's street address and described the physical appearance of the residence. The warrant then stated:

> The property, article, material, substance or person to be searched for and seized is described as follows:

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

Step One: Divide the Warrant into Categories of Items

The first step of the *Sells* test requires the warrant be divided into "individual phrases, clauses, paragraphs, or categories of items" in a "commonsense and realistic fashion, rather than a hypertechnical manner." *Id*. at 1155-56 (internal quotation **[p. 11]** omitted). "[T]he proper division of any particular warrant must be determined on a case-by-case basis." *Id*. at 1156.

Here, the warrant should be divided into 13 categories:

> (1) property, article, material or substance that constitutes evidence of the commission of a crime;
>
> (2) property that has been stolen or acquired in any manner declared an offense;

(3) property for which possession is an offense under the laws of this state;

(4) any person for whom a valid felony arrest warrant is outstanding;

(5) deceased human fetus or corpse, or part thereof;

(6) Coach, Prada, and Louis Vuitton bags;

(7) Toshiba laptop;

(8) vintage/costume jewelry, some with MG engraved;

(9) Coach, Lv, Hermes, Bestie sunglasses;

(10) passport, social security cards, and birth certificates for M.G. and her son;

(11) perfume and makeup sets;

(12) keys not belonging to property or vehicles at the scene; and

(13) any property readily and easily identifiable as stolen.[9]

Step Two: Evaluate the Constitutional Validity of Each Category

Once the warrant is divided, the reviewing court "evaluate[s] the constitutionality of each individual part to determine whether some portion of the warrant satisfies the **[p. 12]** probable cause and particularity requirements of the Fourth Amendment." *Id*. at 1151. Mr. Douglass' and Ms. Gaulter's motions to suppress did not challenge the probable cause or particularity aspects of categories

[9] The dissenting opinion divides the warrant into only five categories—those set out as 1 through 5 above.

1 through 4. But it is irrelevant whether Mr. Douglass and Ms. Gaulter expressly contested the constitutional validity of such categories. The ***state*** is requesting application of the severance doctrine. And application of the severance doctrine ***requires*** this Court to examine the search warrant ***in its entirety***. At ***the state's request***, the constitutional validity of ***each portion of the warrant*** must be examined by this Court.

The first three categories of the warrant expressly permitted the search for and seizure of: (1) "[p]roperty, article, material or substance that constitutes evidence of the commission of ***a*** crime"; (2) "[p]roperty that has been stolen or acquired in any manner declared ***an*** offense"; and (3) "[p]roperty for which possession is ***an*** offense under the laws of this state." (Emphasis added). Such language essentially mirrors subdivisions (1), (2) and (4) of section 542.271.1,[10] which enumerates the broad,

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[10] Section 542.271 provides:

> 1. A warrant may be issued to search for and seize, or photograph, copy or record any of the following:
> (1) Property, article, material, or substance that constitutes evidence of the commission of a criminal offense; or
> (2) Property which has been stolen or acquired in any other manner declared an offense by chapters 569 and 570; or
> (3) Property owned by any person furnishing public communications services to the general public subject to the regulations of the public service commission if such person has failed to remove the property within a reasonable time after receipt of a written notice from a peace officer stating that such property is being used as an instrumentality in the commission of an offense; or
> (4) Property for which possession is an offense under the law of this state; or
> (5) Property for which seizure is authorized or directed by any statute of this state; or
> (6) Property which has been used by the owner or used with his acquiescence or consent as a raw material or as an

generic categories for **[p. 13]** which a search warrant may be issued. Such categories place no limitations on the search and are devoid of any reference to the crimes related to M.G. No specificity as to the crime or property is provided in these first three categories.

"[T]he fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized." *Sells*, 463 F.3d at 1154 (internal quotation omitted). The particularity "requirement is met if the warrant's description enables the searcher to reasonably ascertain and identify the items to be seized." *State v. Tolen*, 304 S.W.3d 229, 232 (Mo. App. 2009). The broad, general statutory language of the first three categories does not include any distinguishing characteristics of the goods to be seized or provide any guidance to law enforcement as to the identity of the items to be seized. The first three categories, therefore, lack any particularity for purposes of the Fourth Amendment.

[p. 14] The state suggests categories 1 through 3 described M.G.'s stolen property in general terms and then that property was more specifically described in categories 6 through 13. But the warrant authorizes a search for and seizure of property broadly described in categories 1 through 3 that is not limited by referencing any particular criminal offense and certainly not limited by reference to M.G. or her stolen property.

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instrument to manufacture or produce any thing for which possession is an offense under the laws of this state.

In *Sells*, the Tenth Circuit found a category of a warrant providing for "any other *related* fruits, instrumentalities and evidence of the crime" was sufficiently particular. 463 F.3d at 1157 (emphasis added). The Tenth Circuit acknowledged the category "ha[d] some characteristics of both a valid warrant provision and one that is too broad." *Id.* Nevertheless, the Tenth Circuit reasoned that, despite the catch-all nature of the provision referring only to "the crime," the category was valid because "the entire clause is limited by the word 'related,' which refers back to the previously enumerated provisions of the warrant." *Id.* Therefore, because the category expressly stated it related back to the previous provisions, the Tenth Circuit concluded the category was sufficiently particular to constitute a valid portion of the warrant. *Id.* at 1157-58.

Unlike the category in *Sells*, categories 1 through 3 do not include any language that would relate them to the sufficiently particular portions of the warrant listing M.G.'s stolen property items, nor is there anything in the first three categories that limits the search to items related to the alleged theft of M.G.'s property by Mr. Douglass and Ms. Gaulter. By failing to relate these categories to the theft of M.G.'s property, the warrant permitted officers to search for any property, article, material, or substance that **[p. 15]** might constitute evidence of any crime or offense. Such categories are overly broad and, therefore, lack the particularity required under the Fourth Amendment.

The next category provides for the seizure of "[a]ny person for whom a valid felony arrest warrant is outstanding." But a review of the warrant application and supporting affidavit establishes no probable cause exists for this provision. Probable

cause exists if, "given all the circumstances set forth in the affidavit[,] ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Neher*, 213 S.W.3d 44, 49 (Mo. banc 2007) (internal quotation omitted). In reviewing "whether probable cause exists, the appellate court may not look beyond the four corners of the warrant application and the supporting affidavits." *Id.*

There are no facts in the warrant application and supporting affidavit to establish probable cause that any individual with an outstanding felony arrest warrant would be found at Mr. Douglass and Ms. Gaulter's residence. Without such facts, the application and affidavit do not establish a fair probability that any individual with an outstanding felony warrant would be found on the premises. Category 4, therefore, is invalid because it is not supported by probable cause.[11]

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[11] The dissenting opinion suggests this Court should pay deference to the fact that, at the suppression hearing, counsel arguing on behalf of Mr. Douglass and Ms. Gaulter "conceded" probable cause existed for the outstanding arrest warrant provision. First, counsel actually stated: "I can understand that there *may have been* probable cause to believe that either of the listed subjects may have had warrants outstanding for them." (Emphasis added). Second, whether probable cause exists is a question of law that is reviewed *de novo* and cannot be conceded by a party. *State v. Hosier*, 454 S.W.3d 883, 891 (Mo. banc 2015). Again, in determining "whether probable cause exists, the appellate court may not look beyond the four corners of the warrant application and the supporting affidavits." *Neher*, 213 S.W.3d at 49. Looking strictly at the warrant application and supporting affidavit, there is nothing that supports a finding of a fair probability that any individual with an outstanding felony arrest warrant would be found at Mr. Douglass and Ms. Gaulter's residence.

[p. 16] Likewise, category 5, the corpse clause, lacks probable cause. There are no facts in the search warrant application or supporting affidavit establishing a fair probability that a deceased human fetus, corpse, or part thereof would be found in the residence. Category 5, therefore, is also invalid for lack of probable cause.

In contrast, categories 6 through 12 list specific items believed to have been stolen from M.G.'s apartment. Given the facts and circumstances stated in the affidavit accompanying the warrant, there was a fair probability such items would be found at Mr. Douglass and Ms. Gaulter's residence. Additionally, the warrant provides distinguishing characteristics for each item. It follows that those categories satisfy the probable cause and particularity requirements for Fourth Amendment purposes.

Finally, category 13 permits the search for and seizure of "any property readily and easily identifiable as stolen." While there was probable cause to believe property stolen from M.G. would be found at Mr. Douglass and Ms. Gaulter's residence, broad, catch-all provisions like category 13 fail to meet the Fourth Amendment's particularity requirement. As explained in *United States v. LeBron*, 729 F.2d 533 (8th Cir. 1984), such a provision gives officers a general search authorization by failing to limit the search in any fashion to the crime at issue.

In *LeBron*, the Eighth Circuit concluded language authorizing a search of a residence for "other property, description unknown, for which there exists probable cause **[p. 17]** to believe it to be stolen" lacked the particularity required under the Fourth Amendment. *Id.* at 536-37. The Eighth

Circuit acknowledged, "when it is impossible to describe the fruits of a crime, approval has been given to a description of a generic class of items." *Id.* at 536. Nevertheless, the Eighth Circuit reasoned the portion of the warrant allowing for the search of property believed to be stolen "is not descriptive at all" but rather "is simply conclusory language" that provides no guidelines to the officers executing the search warrant. *Id.* at 537. It further concluded such direction was a "general authorization" that "provide[d] no protection against subjecting a person's lawfully held property to a general search and seizure." *Id.*

Similarly, category 13 provides no guidelines for the officers as to what items might be easily or readily identifiable as stolen. Instead, it is merely conclusory language that lacks any specificity and is not limited to offenses related to M.G.'s property. Even under the Tenth Circuit's more liberal holding in *Sells*, there is nothing in category 13 that limits the catch-all nature of the category by relating it "back to the previously enumerated provisions of the warrant." 463 F.3d at 1157. Category 13, therefore, is also invalid for failing to satisfy the particularity requirement.

Step Three: Distinguish the Valid and Invalid Categories

The third step of the *Sells* test requires determination of whether the valid portions of the warrant are distinguishable from the invalid portions. *Id.* at 1158. If "each of the categories of items to be seized describes distinct subject matter in language not linked to language of other categories, and each valid category retains its significance when **[p. 18]** isolated from [the] rest of the warrant, then

the valid portions may be severed from the warrant." *Id*.

The valid portions of the warrant—categories 6 through 12—are not linked to the language in other categories and retain their significance when isolated from the rest of the warrant. The valid portions of the warrant, therefore, are distinguishable from the invalid portions.

Step Four: Determine Whether the Valid or Invalid Portions Make up the Greater Part of the Warrant

Under the fourth step, it must be determined whether the valid portions make up the greater part of the warrant. *Id*. "Total suppression may still be required even where a part of the warrant is valid (and distinguishable) if the invalid portions so predominate the warrant that the warrant in essence authorizes a general exploratory rummaging in a person's belongings." *Id*. (internal quotation omitted). If the invalid portions predominate such as to create a general warrant, "application of the severance doctrine would defeat rather than effectuate the protections of the Fourth Amendment and the purpose of the exclusionary rule." *Id*.

In determining whether the valid portions make up the greater part of the warrant, courts consider "the number of valid versus invalid provisions." *Id*. at 1159. But a mere counting of the provisions is insufficient; rather, courts must also consider "the practical effect of those parts." *Id*. at 1160. Though there may be numerically fewer invalid portions of the warrant, those invalid portions "may be so broad and invasive that they contaminate the whole warrant." *Id*. Courts, therefore, must "employ a holistic test that **[p. 19]** examines the qualitative as

well as the quantitative aspects of the valid portions of the warrant relative to the invalid portions to determine whether the valid portions make up the greater part of the warrant." *Id.* at 1160 (internal quotation omitted).

Here, the valid portions of the warrant—categories 6 through 12—are numerically greater than the invalid portions—categories 1 through 5 and 13. But consideration of the practical effect of the invalid portions of the warrant reveals them to be so broad and invasive that they contaminate the whole warrant.

The lack of probable cause and particularity in the invalid portions of the warrant turned it into the very thing the particularity requirement was created to prevent—a general warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). A general warrant permits "a general, exploratory rummaging in a person's belongings." *Id.* By mirroring the language of section 542.271—the statute enumerating the broad, general categories for which a search warrant can issue without any limitations—categories 1 through 5 effectively gave officers unfettered discretion to search the entire residence and seize any property they believed constituted evidence of the commission of any crime. The warrant, therefore, authorized a broad and invasive search of Mr. Douglass and Ms. Gaulter's residence despite the specificity of the items contained in the valid portions of the warrant.

In sum, it is not just the corpse clause that invalidates this warrant. Rather, it is the ***multiple*** invalid portions of the warrant—specifically categories 1 through 5 and 13—that so contaminate the warrant as to render it a general warrant. The

severance doctrine **[p. 20]** cannot be used to save a general warrant and is, therefore, inappropriate in this case. *Sells*, 463 F.3d at 1158.

The state suggests no harm resulted from the broad parameters of the search warrant because the items contained in the valid portions, such as keys and identification, allowed for an extensive search of Mr. Douglass and Ms. Gaulter's residence and the items seized were those for which probable cause existed. But such argument has no relevance under the severance doctrine. Rather, it is just the opposite. The severance doctrine—which, again, the state requested be applied—rejects any notion that the extent of the actual search or the number of items seized somehow remedies otherwise invalid portions of a warrant. *Id*. at 1159. The severance doctrine focuses exclusively on the search warrant itself, not what items were actually seized pursuant to it. *Id*. Therefore, the fact that the only items seized were those stolen from M.G. has no bearing on whether severance is appropriate in this case.

The dissenting opinion, likewise, reasons Fourth Amendment jurisprudence would authorize the suppression of only evidence that was actually seized in reliance on the corpse clause. It concludes checking the corpse clause created merely the potential for a Fourth Amendment violation and the Supreme Court has "never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *United States v. Karo*, 468 U.S. 705, 712, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984).[12] But there is no

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[12] The statement in *Karo* that the Supreme Court has "never held that the potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth

question **[p. 21]** that an invasion of privacy occurred in this case because there was, in fact, a search of Mr. Douglass and Ms. Gaulter's residence. And although that search was made pursuant to a warrant, by the state's own admission, that warrant violated the Fourth Amendment because at least one provision was not supported by probable cause. It follows that the question in this case is not whether a Fourth Amendment violation occurred—it did. Rather, the issue is what is the appropriate remedy for that Fourth Amendment violation.

The dissenting opinion reasons total suppression is inappropriate because the corpse clause was the only invalid portion of the warrant and could be redacted pursuant to the severance doctrine. In reaching its conclusion, the dissenting opinion divides the warrant into five categories, one of which is the corpse clause, and reasons the other four checked categories do not violate the particularity requirement because the warrant form tracked the language in section 542.271 and the sentence preceding the categories expressly referenced the application for the search warrant.

Amendment" cannot be read as a holding that the search of an individual's residence with a general search warrant is only a potential invasion of privacy. 468 U.S. at 712, 104 S.Ct. 3296. The context of the statement in *Karo* was that there was only a potential invasion of the defendant's privacy by the transfer to the defendant of a can containing an unmonitored beeper. *Id*. at 712-13, 104 S.Ct. 3296. The Supreme Court found such installation and transfer of the beeper did not constitute a search in violation of the Fourth Amendment. *Id*. at 713, 104 S.Ct. 3296. The Supreme Court went on to hold, however, that the monitoring of the beeper by law enforcement officials without a search warrant, when the beeper was inside the defendant's residence, violated the defendant's Fourth Amendment rights. *Id*. at 714-18, 104 S.Ct. 3296.

First, the sentence in the search warrant preceding the list of broad, generic categories states: "Based on information provided in a verified application/affidavit." That statement merely notes the judge has considered the information in the application/affidavit. It does not incorporate the application/affidavit or say it is attached.

[p. 22] Next, the language of the broad, generic categories does not merely "track" the language in section 542.271; it essentially repeats it verbatim. Such categories can hardly be said to be sufficiently particularized to the search and seizure at hand when they simply mirror the language of a statute intended to enumerate the broad, generic categories for which a search warrant may be issued. While the dissenting opinion states invalidating these categories would call into question the constitutional validity of section 542.271, it does nothing of the sort. It is merely a recognition that, under the facts and circumstances of this case, such broad, generic categories without specification as to the crime or items to be seized do not satisfy the particularity requirement.

Furthermore, to the extent the dissenting opinion relies on the search warrant application to cure the lack of the particularity, it overlooks an important detail. As the Supreme Court explains, most courts have held a warrant may be construed "with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, ***and*** if the supporting documentation accompanies the warrant." *Groh v. Ramirez*, 540 U.S. 551, 557-58, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (emphasis added). The requirement that the application or affidavit accompany the warrant is not a perfunctory. "The presence of a search warrant

serves a high function, and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection." *Id.* at 557, 124 S.Ct. 1284 (internal citation omitted). Requiring a warrant to describe items with particularity "also assures the individual whose property is searched or seized of the lawful authority of the executing officer, his **[p. 23]** need to search, and the limits of his power to search." *Id.* at 561, 124 S.Ct. 1284 (internal quotation omitted).

Additionally, there is no evidence in the record that the application was attached to or otherwise accompanied the search warrant when the search warrant was served. It follows the search warrant application cannot cure the warrant's particularity deficiencies in this case.[13]

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[13] The dissenting opinion contends this Court's recognition that most courts have required the affidavit or application to accompany the search warrant to cure a warrant's lack of particularity is inconsistent with Supreme Court precedent. In doing so, the dissenting opinion points out that the Supreme Court in *Groh* did not expressly adopt a rule requiring incorporation and accompaniment of the affidavit or search warrant application; instead, the Supreme Court stated it "need not further explore the matter of incorporation" because "the warrant did not incorporate other documents by reference, nor did either the affidavit or the application ... accompany the warrant." 540 U.S. at 558, 124 S.Ct. 1284. The fact the Supreme Court did not definitively decide the issue in *Groh*, however, does not negate that the majority of jurisdictions addressing the issue of incorporation require the accompaniment of the affidavit or application before the affidavit or application can overcome the warrant's particularity deficiencies. *But see United States v. Hurwitz*, 459 F.3d 463, 471 (4th Cir. 2006); *Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco & Firearms*, 452 F.3d 433,

[p. 24] The dissenting opinion further attempts to validate the first five broad, generic categories by reasoning accompaniment of the search warrant application is irrelevant because the most important thing for purposes of the particularity analysis is that the search warrant included the same list of detailed items included in the search warrant application.[14] Again, this Court does not take issue

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439 (6th Cir. 2006). Moreover, *Groh* is not inconsistent with the incorporation/accompanying approach. In fact, in rejecting the state's argument that no Fourth Amendment violation occurred because the scope of the search did not exceed the limits set forth in the application, the Supreme Court stated:

> But unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), 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.

Groh, 540 U.S. at 560, 124 S.Ct. 1284 (emphasis added). Even one of the sources relied on by the dissenting opinion goes as far as to say "it is clear that the [Supreme] Court in *Groh* has accepted and adopted the incorporation/accompanying approach, without specifically saying so, as the discussion of whether there was a valid with-warrant search is abruptly ended because there was neither incorporation nor accompaniment." 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.6(a) (5th ed. 2012).

[14] In reasoning the accompaniment of the warrant application is of no consequence and the particularity analysis turns on the inclusion in the search warrant of the particularized items from the application, the dissenting opinion takes language from several opinions out of context. First, the dissenting opinion quotes *Groh* for the proposition that the particularity requirement of the Fourth Amendment may be satisfied regardless of whether the warrant application is attached to the search warrant if "the particular items described in the affidavit are also set forth in the warrant itself[.]" 540 U.S. at 560, 124 S.Ct. 1284. But such statement was made in the context of explaining "unless the particular items described in

with the particularity of the detailed **[p. 25]** items listed in categories 6 through 12. But those categories do not cure the lack of particularity in the first five categories and category 13. Accordingly, severance is not appropriate in this case.[15]

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the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search)," then there is no way to ensure the magistrate found probable cause for every item in the affidavit. Id. (emphasis added). The statement in *Groh*, therefore, simply sets forth the general principle that the items to be seized must be set forward in the warrant with particularity or at least by incorporation and accompaniment of the affidavit or application. The dissenting opinion further relies on *Bartholomew v. Pennsylvania*, 221 F.3d 425, 429-30 (3d Cir. 2000), for the proposition that there is no Fourth Amendment violation when "the list of items to be seized ... appear[s] on the face of the warrant." But *Bartholomew* addressed whether a sealed affidavit must accompany the search warrant to cure the warrant's particularity deficiencies, and the Third Circuit held "where the list of items to be seized does not appear on the face of the warrant, sealing that list, even though it is 'incorporated' in the warrant, would violate the Fourth Amendment." *Id*. at 430 (emphasis added). Bartholomew, therefore, is consistent with the requirement that the affidavit or application accompany the search warrant before incorporation can cure any particularity deficiencies in the warrant. Finally, the dissenting opinion quotes extensively from *United States v. Hamilton*, 591 F.3d 1017, 1027-28 (8th Cir. 2010). But much like *Groh*, the *Hamilton* court never reached the incorporation/accompanying issue because it concluded "even if the warrant failed to meet the particularity requirement of the Warrant Clause," the exclusionary rule should not be applied under the good-faith exception. *Id*. at 1027. Accordingly, the cases relied on by the dissenting opinion do not support the conclusion that it is of no consequence to a particularity analysis whether the search warrant application accompanied the search warrant.

[15] Because the invalid portions of the search warrant predominate, it is unnecessary to reach the fifth step of the

The Exclusionary Rule Was Appropriately Applied

In its second point, the state asserts the circuit court erred in suppressing all evidence seized because application of the exclusionary rule was unwarranted in that Detective Estes' purported misconduct in checking a box on the warrant was not the type of serious misconduct that should be deterred by the exclusion of otherwise lawfully seized evidence. Because this Court finds the search warrant to be a general warrant that violates the Fourth Amendment, it is not necessary for this Court to consider the legal effect or impact of Detective Estes' misconduct.

Again, generally "all evidence obtained by searches and seizures in violation of the Constitution ... is inadmissible in state court." *Grayson*, 336 S.W.3d at 146 (alteration in the original) (internal quotation omitted). And "the only remedy for a general warrant is to suppress all evidence obtained thereby." *United States v. Yusuf*, 461 F.3d 374, 393 n.19 (3d Cir. 2006). Accordingly, the circuit court did not err in applying the exclusionary rule.

[p. 26] Conclusion

The circuit court did not err in refusing to apply the severance doctrine. The invalid portions of the warrant predominate the valid portions such that they contaminated the whole warrant and turned it into a general warrant. The severance doctrine cannot be used to save a general warrant. The circuit court, therefore, properly suppressed all evidence seized. The circuit court's order is affirmed.

Sells test—severing the valid portions from the invalid portions and suppressing evidence accordingly. 463 F.3d at 1161.

/s/ *Patricia Breckenridge*
Patricia Breckenridge, Judge

Draper, Russell and Stith, JJ., concur;
Fischer, C.J. dissents in separate opinion
Filed; Wilson, J., concurs in opinion of
Fischer, C.J. Powell, J., not participating.

[State Seal]
SUPREME COURT OF MISSOURI
en banc

State of Missouri,	)	[File stamped:
	)	Feb 13 2018
Appellant,	)	Clerk, Supreme Court]
	)	
v.	)	No. SC95719
	)	
Phillip Douglass,	)	
	)	
Respondent,	)	
	)	
Jennifer M. Gaulter,	)	
	)	
Respondent.	)	

DISSENTING OPINION

Detective Estes sought to search for and seize the following items:

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

These items were expressly listed in both the "AFFIDAVIT/APPLICATION FOR SEARCH WARRANT" (hereinafter, "application for the search warrant"), and the **[p. 2]** "Search Warrant" itself. Nothing in the application for the search warrant referenced a "Deceased human fetus or corpse, or part thereof[.]" The search warrant listed five specific categories, with a box next to each category to check if there was probable cause to search for the category. These five categories are found on every form search warrant. Such forms track the language contained in § 542.271, RSMo 2000. Importantly, preceding the five categories was an express reference to the application for the search warrant, which provided, "Based on information provided in a verified application/affidavit, the Court finds probable cause to warrant a search for and/or seizure of the following[.]" (Emphasis added). Then, the five specific categories were listed as follows:

> □ Property, article, material or substance that constitutes evidence of the commission of a crime;
>
> □ Property that has been stolen or acquired in any manner declared an offense;
>
> □ Property for which possession is an offense under the laws of this state;
>
> □ Any person for whom a valid felony arrest warrant is outstanding;
>
> □ Deceased human fetus or corpse, or part thereof[.]

The boxes next to all five categories were checked, and the search warrant was signed by the issuing judge. The fifth box should not have been checked because there was no information in the application

for the search warrant to support a probable cause **[p. 3]** finding for that category.[1] That then begs the question of whether the circuit court erred in suppressing all evidence seized when there was probable cause to search for most, but not all, of the categories described in the search warrant.

Whether a search is "permissible and whether the exclusionary rule applies to the evidence seized" are questions of law that are reviewed de novo. *State v. Johnson*, 354 S.W.3d 627, 632 (Mo. banc 2011).

"Whether the exclusionary sanction is appropriately imposed in a particular case ... is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (internal quotation marks omitted). To be sure,

> [o]nly the former question is currently before us, and it must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be [partially] defective.

Id. at 906–07.[2]

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[1] It remains unclear why the issuing judge struck through part of the search warrant he did not think was justified by the application for the search warrant but did not strike through the corpse category. See Ex. A ("AFFIDAVIT/APPLICATION FOR SEARCH WARRANT"); Ex. B ("SEARCH WARRANT").

[2] Even "[i]f a court finds a clause to be 'so lacking of indicia of probable cause' that an officer could not reasonably rely on its

The Supreme Court of the United States has "never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *United States v. Karo*, 468 U.S. 705, 712, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). And, "[n]ot every **[p. 4]** Fourth Amendment violation results in exclusion of the evidence obtained pursuant to a defective search warrant." *United States v. Hamilton*, 591 F.3d 1017, 1027 (8th Cir. 2010). Indeed, "[f]rom a policy perspective[,] a rule requiring blanket invalidation of overbroad warrants would seem ill advised." *United States v. Riggs*, 690 F.2d 298, 301 (1st Cir. 1982). A search warrant passes constitutional muster if there is: (1) probable cause to believe that the place to be searched will contain evidence of a crime; and (2) sufficient particularity of the description of the place to be searched and the items to be seized. U.S. Const. amend. IV; Mo. Const. art. I, sec. 15. It is undisputed the "corpse category" on the search warrant lacked probable cause. On the other hand, however, it is also undisputed probable cause did exist to support a search for the other categories identified in the search warrant. The items for those categories were further described in the search warrant as:

> Coach Purse that is silver with C's on it; a Coach purse with purple beading; Prada purse black in color; larger Louis Vuitton bag; Toshiba Satellite laptop limited edition silver

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validity, the clause should be stricken and the remaining portions upheld, provided that the warrant as a whole is not unsupported by probable cause." Rosemarie A. Lynskey, A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Redaction Doctrine with United States v. Leon, 41 Vand. L. Rev. 811, 836 (1988).

> with black swirls on it; Vintage/costume jewelry several items had [M.G.] engraved on them; Coach, Lv, Hermes, Bestie Sunglasses; Passport and Social Security card [belonging to M.G.]; Social Security Card/Birth Certificate [belonging to M.G.'s son]; Various bottles of perfume make up brushes and Clinique and Mary Kay make up sets; Keys not belonging to property or vehicle at scene; and Any property readily and easily identifiable as stolen.

It is also undisputed the description of these items satisfied the particularity requirement.[3] Therefore, only **part** of the search warrant—rather than **all** of it—was invalid.[4] When **[p. 5]** that is the case, a

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[3] The principal opinion, however, concludes the last item—"Any property readily and easily identifiable as stolen"—does not satisfy the particularity requirement of the Fourth Amendment because it is "merely conclusory language that lacks any specificity and is not limited to the offenses related to M.G.'s property" and because nothing in this item "limits the catch-all nature of the category by relating it back to the previously enumerated provisions of the warrant." Op. at 194 (internal quotation marks omitted). But what the principal opinion overlooks is the fact that this item came immediately after all of the specific items that were allegedly taken from M.G. Moreover, as discussed infra, under particularity analysis, the application for the search warrant was a part of the search warrant so the items "identifiable as stolen" were those in relation to the investigation of items allegedly taken from M.G.

[4] It is important to emphasize this appeal does not involve evidence seized pursuant to the search warrant's corpse category. Instead, this appeal concerns the suppression of evidence seized under the lawful authority of the other, valid categories of the search warrant.

circuit court faced with a motion to suppress must consider the severability doctrine.[5]

Under this doctrine,

> [t]he infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain view grounds, for example—during ... execution [of the valid portions]).

Sells, 463 F.3d at 1150 (internal quotation marks omitted). Courts "apply a multiple-step analysis to determine whether severability is applicable." *Id*. at 1151. First, the search warrant is divided "in a commonsense, practical manner into individual clauses, portions, paragraphs, or categories." *Id*. Then, "the constitutionality of each individual part [is evaluated] to determine whether some portion of the warrant satisfies the probable cause and particularity requirements of the Fourth Amendment." *Id*. "If no part of the warrant **[p. 6]** particularly describes items to be seized for which

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[5] Indeed, "the interests safeguarded by the Fourth Amendment have been adequately served by the suppression of only that evidence seized by overreaching the warrant's [lawful] authorization." *United States v. Christine*, 687 F.2d 749, 757 (3d Cir. 1982) (emphasis added). "[This] practice ... is fully consistent with the Fourth Amendment and should be utilized to salvage partially invalid warrants." *Id*. at 750–51. "The cost of suppressing all the evidence seized, including that seized pursuant to the valid portions of the warrant, is so great that the lesser benefits accruing to the interests served by the Fourth Amendment cannot justify complete suppression." *Id*. at 758 (emphasis added). Federal circuit courts synonymously refer to the doctrine as "severability," "severance," "redaction," or "partial suppression." *United States v. Sells*, 463 F.3d 1148, 1151 n.1 (10th Cir. 2006) (listing cases).

there is probable cause, then severance does not apply, and all items seized by such a warrant should be suppressed." *Id*.

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

> [i]f the valid portions make up "the greater part of the warrant," then we sever those portions, suppress the evidence seized pursuant to the portions that fail to meet the Fourth Amendment's warrant requirement, and admit all evidence seized pursuant to the valid portions or lawfully seized during execution of the valid portions.

Id.

The search warrant in this case can be easily divided into the following categories of evidence: (1) "Property, article, material or substance that constitutes evidence of the commission of a crime;" (2) "Property that has been stolen or acquired in any manner declared an offense;" (3) "Property for which possession is an offense under the laws of this state;" (4) "Any person for whom a valid felony arrest

warrant is outstanding;"[6] and (5) "Deceased human fetus or corpse, or part thereof[.]"

[p. 7] Next, each part of the search warrant is examined for both probable cause and particularity. There has been no challenge to either the probable cause or particularity aspects of the specific items that fall within categories 1 through 4, but the principal opinion suggests otherwise.

The other four checked categories, which are found on every form search warrant, do not violate the particularity requirement of the Fourth Amendment because the search warrant expressly referred back to the application for the search warrant, a fair reading of which indicates the investigation arose from M.G.'s reporting of property

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[6] The principal opinion asserts this category lacked probable cause. A probable cause determination "should be paid great deference by reviewing courts." *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (internal quotation marks omitted). But at the suppression hearing the defendants' counsel conceded there was probable cause for this category:

> [T]he fact that the check box is available on a form for human remains is somewhat frightening. There was no probable cause to believe that there had been any dead bodies or parts thereof at their house.
>
> I can understand that there may have been probable cause to believe that either of the listed subjects may have had warrants outstanding for them. I'm sure the officers did their due diligence and did a background check, records check before they went to execute this, **and that would justify perhaps the other check boxes on the search warrant.**

(Emphasis added).

allegedly taken from her residence.[7] The form search warrant at issue tracked the language contained in § 542.271. Moreover, the preceding sentence to these five categories expressly referenced the specific items listed in the application for the search warrant. The express reference provided, "**Based on information provided in a verified application/affidavit**, the Court finds probable cause to warrant a search for and/or **[p. 8]** seizure of the following[.]" (Emphasis added). The application for the search warrant provided the description for the categories along with the description on the face of the search warrant.

The Fourth Amendment does not "prohibit[ ] a warrant from cross-referencing other documents." *Groh v. Ramirez*, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). Indeed, "sufficient particularity to validate a warrant inadquately [sic] limited upon its face may be supplied by the attachment or incorporation by reference of the application for the warrant and the supporting affidavits." *State v. Holland*, 781 S.W.2d 808, 814 (Mo. App. 1989). Even the Tenth Circuit in Sells noted the affidavit there could not remedy the "warrant's lack of particularity because it was **neither incorporated by express reference in**

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[7] "It is universally recognized that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable **if it is as specific as the circumstances and nature of activity under investigation permit**." *United States v. Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982) (emphasis added). "The particularity requirement ensures that a search is confined in scope to particularly described **evidence relating to a specific crime for which there is demonstrated probable cause**." *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985) (emphasis added).

the warrant nor attached to the warrant." 463 F.3d at 1157 n.6 (emphasis added).

With these considerations in mind, if the search warrant and its supporting document—the application for the search warrant—are viewed in a "commonsens[ical, consistent,] and realistic fashion[,]" *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), the search warrant's express reference to the application for the search warrant demonstrates that the nature of the warrant was not general at all. *See Doe v. Groody*, 361 F.3d 232, 248 (3d Cir. 2004) (Alito, J., dissenting) ("[T]he appropriateness of 'words of incorporation' is to be judged by the 'commonsense and realistic' standard that is generally to be used in interpreting warrants.").

To invalidate these four checked categories for lack of particularity would be to completely eliminate form warrants in general. This form search warrant tracked the language of § 542.271. Indeed, to invalidate these categories on that basis would be to **[p. 9]** call into question the constitutional validity of § 542.271, which this Court prefers to avoid completely. *See*, *e.g.*, *State v. Wade*, 421 S.W.3d 429, 432 (Mo. banc 2013) ("Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision."). It is difficult to imagine what a compliant search warrant even looks like under the principal opinion's view.

The principal opinion's view is also inconsistent with Supreme Court precedent. The Supreme Court in *Groh* explained that the particularity requirement of the Fourth Amendment may be satisfied if "the particular items described in the affidavit are also

set forth in the warrant itself[.]" 540 U.S. at 560, 124 S.Ct. 1284. "What doomed the warrant in *Groh* was not the existence of a supporting affidavit that particularly described the items to be seized, but the failure of the warrant to cross-reference the affidavit at all." *Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco & Firearms*, 452 F.3d 433, 439 (6th Cir. 2006) (en banc). See also 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.6(a) (5th ed. 2012) (noting that *Groh* "covers ... only" the situation in which the search warrant " 'did not describe the items to be seized at all' ") (quoting *Groh*, 540 U.S. at 558, 124 S.Ct. 1284).

The preceding sentence to the five categories on the face of the search warrant adequately cross-references the application for the search warrant because "the particular items described in the [application for the search warrant] are also set forth in the warrant itself[.]" *Groh*, 540 U.S. at 560, 124 S.Ct. 1284. *See also Bartholomew v. Pennsylvania*, 221 F.3d 425, 429–30 (3d Cir. 2000) (suggesting there is no Fourth Amendment violation when "the list of items to be seized ... appear[s] on the face of the warrant").

[p. 10] Furthermore, to the extent the principal opinion "reads *Groh* as establishing a definitive two-part rule for validating a warrant by incorporation of a separate document[,]" *Groh* "establishes no such rule. Instead, *Groh* simply acknowledges the approach generally followed by the Courts of Appeals. Because neither requirement was satisfied in *Groh*, the Supreme Court declined to further consider the question of incorporation by reference." *United States v. Hurwitz*, 459 F.3d 463, 471 (4th Cir. 2006). *See also Groh*, 540 U.S. at 558, 124 S.Ct. 1284

("But in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant. Hence, we need not further explore the matter of incorporation.").

What is most important in this case for purposes of particularity analysis is that the face of the search warrant had, verbatim, the same list of detailed items the application for the search warrant provided. The fact that the record does not definitively indicate the application for the search warrant was either physically attached to the search warrant[8] or accompanied the search warrant at the time of the search, is of no consequence. Indeed, there is "nothing in the Constitution requiring that an officer possess or exhibit, at the time of the search, documents incorporated into a warrant as an additional safeguard for the particularity requirement." *Hurwitz*, 459 F.3d at 472–73. "The salient point is that *Groh* did not establish a one-size-fits-all requirement that affidavits must accompany all searches to prevent a lawfully authorized search from becoming a warrantless one." **[p. 11]** *Baranski*, 452 F.3d at 444. *See also Hamilton*, 591 F.3d at 1027 ("If the warrant in this case referred to the attached affidavit **for the explicit purpose of delineating the items to be seized** ... we would be inclined to follow the reasoning of the Sixth Circuit in *Baranski* and conclude that **an affidavit incorporated into a warrant need not accompany the warrant to the search** for purposes of meeting the particularity requirement of the Warrant Clause.") (emphasis added).

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[8] Notably, both the application for the search warrant and the search warrant were signed and dated August 29, 2013, at 3:04 P.M. Compare Ex. A, with Ex. B.

> In any event, I reject the principal opinion's
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> reliance on *Groh*. The warrant in this case included a clear incorporation of the [application for the search warrant], which itself included an explicit list of items to be seized. The issuing judge signed both the warrant and the [application for the search warrant], demonstrating both that the circuit judge approved the search with reference to the affidavit and that the judge had the opportunity to limit the scope of the search.

Id. at 1028. It was also "objectively reasonable for an officer with [Detective Estes]'s knowledge and involvement in the warrant application process to rely on the warrant as incorporating the list of items to be seized from the [application for the search warrant]," even if the principal opinion concludes the "magic words" of incorporation were less than clear. *Id*. at 1029.

Accordingly, that leaves the validity of category 5, the corpse category. As noted above, there is no probable cause supporting category 5. Because most of the categories are supported by both probable cause and particularity, the next question is whether the valid portions—categories 1 through 4—are sufficiently distinguishable from the invalid portion—category 5.

[p. 12] Virtually all categories and items are clearly related to the theft crimes the defendants were accused of committing and eventually charged with. Likewise, the corpse category is clearly unrelated to any of the crimes the defendants allegedly committed. Nor have the defendants been charged with any homicide offense. "Where, as here,

each of the categories of items to be seized describes distinct subject matter in language not linked to language of other categories, and each valid category retains its significance when isolated from rest of the warrant, then the valid portions may be severed from the warrant." *Sells*, 463 F.3d at 1158. Accordingly, the valid portions are easily distinguishable from the lone invalid portion.

The next question is whether the valid portions make up "the greater part of the warrant." If the invalid portions make up the greater part of the search warrant such that the warrant is, in essence, a general warrant, then severance is inapplicable. A general warrant is one that authorizes "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). A search warrant "cannot be invalidated as a general warrant [if] it does not vest the executing officers with unbridled discretion to conduct an exploratory rummaging ... in search of criminal evidence." *Christine*, 687 F.2d at 753.

In conducting this analysis, courts focus "on the warrant itself rather than upon an analysis of the items actually seized during the search." *Sells*, 463 F.3d at 1159. "Certainly, the number of valid versus invalid provisions is one element in the analysis of which portion makes up the greater part of the warrant." *Id*. (internal quotation marks omitted). "However, merely counting parts, without any evaluation of the practical effect **[p. 13]** of those parts, is an improperly 'hypertechnical' interpretation of the search authorized by the warrant." *Id*. at 1160; *see also Gates*, 462 U.S. at 236, 103 S.Ct. 2317. "A warrant's invalid portions, though numerically fewer than the valid portions, may be so

broad and invasive that they contaminate the whole warrant." *Sells*, 463 F.3d at 1160. "Common sense indicates that we must also evaluate the relative scope and invasiveness of the valid and invalid parts of the warrant." *Id.*

Here, both quantitative and qualitative assessments of the search warrant indicate that, when viewed, in toto, the valid portions make up the greater part of the search warrant and the corpse category was a de minimis aspect of the search warrant. In conducting the qualitative assessment,

> the court must assess the relative importance on the face of the warrant of the valid and invalid provisions, weigh the body of evidence that could have been seized pursuant to the invalid portions of the warrant against the body of evidence that could properly have been seized pursuant to the clauses that were sufficiently particularized, and consider such other factors as it deems appropriate in reaching a conclusion as to whether the valid portions comprise more than an insignificant or tangential part of the warrant.

United States v. Galpin, 720 F.3d 436, 450 (2d Cir. 2013). Moreover,

> Where a warrant authorizes the search of a residence, the physical dimensions of the evidence sought will naturally impose limitations on where an officer may pry: an officer could not properly look for a stolen flat-screen television by rummaging through the suspect's medicine cabinet, nor search for false tax documents by viewing the suspect's home video collection.

Id. at 447.

Here, the valid portions of the search warrant authorized a rather broad search in light of the nature of the items listed (e.g., jewelry, keys, identification). Though **[p. 14]** certainly parts of a corpse might be small, a search for small parts of a corpse is unlikely to be broader than a search for small personal items like jewelry, keys, or identification. Accordingly, the corpse category neither constituted the greater part of the search warrant nor transformed the warrant into a general one. At most, its inclusion in the search warrant was de minimis compared to the valid portions of the warrant. *See*, *e.g.*, *Sells*, 463 F.3d at 1160–61. The valid portions make up the greater part of the search warrant. *Id*. at 1160.

This analysis demonstrates the circuit court misapplied the law and should have severed the valid portions of the search warrant from the sole invalid portion—i.e., the corpse category—and not suppressed evidence seized pursuant to the valid portions.[9] "[I]t would be harsh medicine indeed if a

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[9] "The proponent of [a] motion [to suppress evidence] has the burden of establishing that his constitutional rights were violated by the challenged search or seizure[.]" *State v. Burkhardt*, 795 S.W.2d 399, 404 (Mo. banc 1990). "At a motion to suppress hearing, the State bears the burden of proving that the seizure was constitutionally proper." *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005). Here, because the search was pursuant to a warrant, the defendants bore the burden of proving the search warrant invalid. And, they met their burden with respect to the corpse category. They failed, however, to demonstrate that the entire search warrant was invalid. Had the circuit court properly severed the search warrant, the defendants might have argued evidence was seized pursuant to the invalid portion of the search warrant, in which case the State would have borne the burden of demonstrating that the

warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and the magistrate erred in seeking and permitting a search for other items as well." *United States v. Cook*, 657 F.2d 730, 735 (5th Cir. 1981) (internal quotation marks omitted).

[p. 15] The general tenor of the circuit court's order suppressing all of the evidence from the search, and the crux of the defendants' argument on appeal, is that Detective Estes's alleged misconduct in presenting the issuing judge with a proposed search warrant—authorizing a search warrant with the corpse category even though there was no probable cause to support it—required invalidation of the entire warrant. There are two problems with this determination: (1) the severance or redaction cases are not concerned with the officer's motivation in procuring the search warrant; and (2) invalidation of the entire search warrant under these circumstances would be inconsistent with well-established approaches to dealing with officer misconduct in other warrant cases.

To begin, none of the severability doctrine cases discuss what role, if any, officer misconduct plays in the analysis. Instead, the courts have examined only the search warrant and accompanying affidavit—in this case, the application for the search warrant—to discern whether the search warrant met the constitutional requirements of probable cause and

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evidence sought to be admitted was seized pursuant to only the valid portion of the search warrant. However, because the circuit court erroneously found the search warrant invalid in its entirety, no such argument was made. Indeed, it is undisputed that none of the evidence sought to be suppressed had been seized under the invalid portion of the search warrant.

particularity or whether it appeared to be a general warrant. *See*, *e.g.*, *Sells*, 463 F.3d at 1159 ("The 'greater part of the warrant' analysis focuses on the warrant itself rather than upon an analysis of the items actually seized during the search."); *Christine*, 687 F.2d at 759–60 (noting that redaction was available to the court based solely upon a review of the search warrant and affidavit); see also LaFave, supra, § 3.7(d) ("If severability is proper ... it would seem the rule would be more sensible if expressed not in terms of what was seized, but rather in terms of what search and seizure would have been permissible if the warrant had only named those items as to which probable cause was established.").

[p. 16] Despite some courts using the terms "pretext" and "bad faith," in describing when severance is inapplicable,[10] the courts were doing nothing more than employing the "greater part of the warrant" analysis. "[A]lthough articulated in varying forms, every court to adopt the severance doctrine has further limited its application to prohibit severance from saving a warrant that has been rendered a general warrant by nature of its invalid portions despite containing some valid portion." *Sells*, 463 F.3d at 1158. In deciding whether to apply the severance doctrine, courts are generally not concerned with why parts of a search warrant are invalid, only if they are. And to the extent that officer misconduct is relevant at all in the severance

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[10] *See*, *e.g.*, *United States v. Fitzgerald*, 724 F.2d 633, 636–37 (8th Cir. 1983) (en banc) ("[A]bsent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution."); *Cook*, 657 F.2d at 735 n.6 (noting the absence of pretext to negate application of the severance doctrine).

doctrine cases, the issue is subsumed within the "greater part of the warrant" analysis. If the invalid portions make up a "greater part of the warrant," resulting in a broader search than would otherwise have been authorized, the severability doctrine is inapplicable because the warrant has then been transformed into a prohibited general warrant. *See id*. at 1159 (characterizing language from *Aday v. Superior Court*, 55 Cal.2d 789, 13 Cal.Rptr. 415, 362 P.2d 47, 52 (1961), wherein the California Supreme Court "recognize[d] the danger that warrants might be obtained which are essentially general in character but as to minor items meet the requirements of particularity" and condemned "[s]uch an abuse of the warrant procedure" as an articulation of the "greater part of the warrant" analysis).

[p. 17] While the severance doctrine presents the danger that

> [t]he police might be tempted to frame warrants in general terms, adding a few specific clauses in the hope that under the protection of those clauses they could engage in general rummaging through the premises and then contend that any incriminating evidence they recovered was found in plain view during the search for the particularly-described items[,] ... careful administration of the rule will afford full protection to individual rights. First, magistrates must exercise vigilance to detect pretext and bad faith on the part of law enforcement officials. Second, courts should rigorously apply the exclusionary rule to evidence seized pursuant to the invalid portions of the warrant. Third, items not described in the sufficiently

> particular portions of the warrant will not be admissible unless it appears that (a) the police found the item in a place where one would reasonably have expected them to look in the process of searching for the objects described in the sufficiently particular portions of the warrant, (b) the police found the item before they found all the objects described in the sufficiently particular portions of the warrant (that is, before their lawful authority to search expired), and (c) the other requirements of the plain view rule—inadvertent discovery and probable cause to associate the item with criminal activity—are met.

Fitzgerald, 724 F.2d at 637. In short, the courts have not been concerned with why the invalid portions might have been included because, simply put, if the invalid portions rendered the search warrant, as a whole, a general warrant, the entire warrant will be deemed invalid, and the severance doctrine will be inapplicable.

The second problem with wholesale suppression in this context is that it would be inconsistent with other case law dealing with officer misconduct in either procuring or executing a search warrant.[11] In *Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court addressed the remedy for officer misconduct in the procurement of a search warrant, either through intentional misrepresentation or intentional omissions in **[p. 18]** the supporting affidavit. But

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[11] To reiterate, Detective Estes made no misrepresentation in his sworn application for the search warrant. Indeed, that document had no reference at all to the corpse category.

even when an officer intentionally makes factual misrepresentations to the warrant-issuing judge, the remedy is not automatic, wholesale suppression. Rather, a court must "set to one side" the "material that is the subject of the alleged falsity or reckless disregard" and determine whether "there remains sufficient content in the warrant affidavit to support a finding of probable cause[.]" *Franks*, 438 U.S. at 171–72, 98 S.Ct. 2674. In other words, upon a finding that the affiant officer lied to the warrant-issuing judge, the remedy the court must apply is to redact the misrepresentation and then reevaluate whether the search warrant is still supported by probable cause.

Similarly, if officers engage in misconduct when executing a search warrant by exceeding its lawful scope, the remedy is not wholesale suppression of all evidence seized.[12] Rather, when

> law enforcement officers, acting pursuant to a valid warrant, seize an article whose seizure was not authorized and which does not fall within an exception to the warrant requirement[,] ... [w]ithout exception[,] federal appellate courts have held that only that evidence which was seized illegally must be suppressed; the evidence seized pursuant to the warrant has always been admitted.

Christine, 687 F.2d at 757 (footnote omitted). In other words, courts exclude only that evidence seized as a result of misconduct and not any evidence seized under lawful authority.

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[12] Nothing in the record suggests the officers exceeded the scope of the authorized search.

In my view, wholesale suppression is not the appropriate remedy in this case when there was not a single misrepresentation made on the application for the search warrant—but rather, an inappropriate box checked on the proposed search warrant—when such a **[p. 19]** remedy has been rejected when addressing intentional misrepresentations in the supporting application for the search warrant, or a search that intentionally exceeds the lawful scope of the warrant. *See Lynskey*, supra, at 837 ("[E]ven if the court were to find that the officer recklessly or intentionally included falsehoods in the affidavit, redaction still would be appropriate to excise only those clauses authorized pursuant to the misinformation, provided that the warrant generally is based on truth.").

This is not to say Detective Estes' conduct—in presenting the issuing judge with a proposed search warrant with the corpse category checked even though it lacked probable cause—was excusable or justifiable. To be sure, there is no "law enforcement convenience" exception to the warrant requirement, and the issuing judge should have stricken the corpse category just like he did for the "no knock" category. Indeed, "[t]he Fourth Amendment dictates that a magistrate may not issue a warrant authorizing a search and seizure which exceeds the ambit of the probable cause showing made to him." *Christine*, 687 F.2d at 753. In short, there is simply no good reason to check a box on a proposed search warrant when the applicant knows there is no probable cause to support that category. And, in doing so, law enforcement gains nothing because even if the search warrant is severed, any evidence seized pursuant to the invalid portion of the warrant will be suppressed.

In my view, Fourth Amendment jurisprudence would only authorize suppressing evidence that was actually seized in reliance on the corpse category. Unless the officers conducting the search actually relied on the invalid portion of the search warrant in doing so, the search warrant—in the absence of redaction—created merely the potential for a **[p. 20]** Fourth Amendment violation.[13] To reiterate, the Supreme Court has "never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *Karo*, 468 U.S. at 712, 104 S.Ct. 3296.

"If at the time of seizure, the executing officers were not intruding upon the individual's expectation of privacy more than was necessary to execute the valid portion of the warrant, the Fourth Amendment does not require suppression" of evidence obtained in reliance on the valid portions of the search warrant. *People v. Brown*, 96 N.Y.2d 80, 725 N.Y.S.2d 601, 749 N.E.2d 170, 176 (2001). Because only actual invasions of privacy constitute a Fourth Amendment violation, if the officers' search was limited to only those items identified in the search warrant that were supported by probable cause—and the officers

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[13] The "facial invalidity of [a search] warrant" is a separate question from the "manner in which the officers conducted the search." *Baranski*, 452 F.3d at 443. *See also Hamilton*, 591 F.3d at 1025 ("Whether a warrant is properly issued, however, is a separate question from whether it is reasonably executed, which is governed by the Reasonableness Clause of the Fourth Amendment[.]"); *United States v. Basham*, 268 F.3d 1199, 1204 (10th Cir. 2001) (noting the reasonableness of the execution of a warrant "is an entirely different matter than the question of whether the warrant itself is valid"). "To say that a warrant satisfies the Warrant Clause upon issuance, however, by no means establishes that a search satisfies the Reasonableness Clause upon execution[.]" *Baranski*, 452 F.3d at 445.

did not rely upon the authority granted by the improperly checked box—then the defendants' privacy was not invaded and no Fourth Amendment violation occurred.

Suppression of only evidence obtained pursuant to the invalid portion of the search warrant would not offend the Fourth Amendment. *See United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("[E]vidence obtained in violation of the Fourth Amendment **cannot be used in a criminal proceeding against the victim of the illegal search and seizure**.") (emphasis added). Yet, in this case, it is difficult to imagine what evidence, if **[p. 21]** any, the State could use against the defendants if the circuit court had overruled the motions to suppress when no evidence was obtained pursuant to the invalid portion of the search warrant.

Furthermore, if the evidence seized in reliance on the valid portions of the search warrant is not suppressed, all parties will receive a fair trial.

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place.... [T]here is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct.

Nix v. Williams, 467 U.S. 431, 447, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

In conclusion, the overall tenor of the circuit court's judgment suggests total suppression was its first impulse, not its last resort. *Cf. Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). Total suppression should be limited to situations in which "its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348, 94 S.Ct. 613. Indeed,

> Real deterrent value is a necessary condition for exclusion, but it is not a sufficient one. The analysis must also account for the substantial social costs generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a last resort. For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Davis v. United States, 564 U.S. 229, 237, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (internal citations and quotation marks omitted). The principal opinion would have M.G. (and her son) swallow the bitter pill of **[p. 22]** total suppression even though checking the box on the corpse category on the search warrant was de minimis.

Because the warrant issued was not a general warrant and no evidence whatsoever was discovered

or seized based on the corpse category, the circuit court misapplied the law in suppressing all evidence seized, and its order should be reversed.

/s/ Zel M. Fischer
Zel. M. Fischer, Chief Justice

EXHIBIT A

AFFIDAVIT / APPLICATION FOR SEARCH WARRANT PP CRN 13-60372 P28

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Det. Darold Estes affiant and applicant herein, being duly sworn, appears now before the undersigned Judge authorized to issue Warrants in criminal cases and makes this Affidavit and Application in support of the issuance of a Search Warrant, to seize and Search the following described person, place or thing:

The residence at 1003 NW B Street, Blue Springs, Jackson County, Missouri is a single-family dwelling that is painted yellow and has brown trim, as well as, a brown composite shingle roof. The address numbers of "1003" are cleared marked in brown numbering on the east side of the front door of the residence. The address of 1003 NW B Street, Blue Springs, Jackson County, Missouri is the second residence west of NW 10th Street, and on the north side of NW B Street. To include: any garage/storage/out buildings on the property.

And to there seize and search, photograph or copy, and make return thereof, according to law, the following property or things:

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

Affiant and Applicant being duly sworn deposes and states that he has Probable Cause to believe that the above listed property to be seized and searched, photographed or copied, is now located upon said described person place or thing based upon the following facts, to-wit: (and additional sheet(s) if needed)

On 8-21-2013 the victim Melissa Garris responded to 777 Argosy Casino Parkway #426 in Riverside Missouri to meet a friend named Jen (later identified as Jennifer Gaulter, W/F, 11-17-1977). She said she went to the hotel room #426 with Jen and her husband Phil (later identified to be Phillip Douglass, W/M, 7-19-1982). The victim stated they had drinks and things became uncomfortable when she felt she was being pressured into a three way sex act and she called her boyfriend to pick her up. The victim left with her boyfriend and went to her residence located at 500 E. 3rd Street #332 in Kansas City, Jackson County, Missouri.

On 8-22-2013 at 09:50 AM, she left for work leaving her house locked and secured. The victim stated while at work she received a text from Jen saying that she had left a bag in the hotel room and that she would leave it for her at the front desk. The victim said she would pick up the bag after she got

off from work. The victim said she received another text from Jen asking her if she was at home or working. She replied to the tex. ying she was still at work and wou .all her when she gets off. The victim said when she got off of work at 6:10 PM she observed that her apartment had been broken into and approximately $10,000,00 worth of her belongings listed above had been stolen. The door had no damage and she immediately called the Argosy Hotel, and asked if her bag which contained her house keys was still at the front desk. The victim said the front desk told her the bag was still there. She had them look in her bag for her keys, which they did, and she was told the keys were not in the bag. The victim began texting Jen about the theft and the missing keys. Jen stopped replying to her.

The victim called Police and made a report about the incident. She then drove to the Argosy to retrieve her bag. The victim said the Hotel staff told her the purse had been picked up. The victim said she can't get a response from Jen anymore. The victim said the phone number she had been texting Jen was 816-287-0420. The phone number responded on an internet search to Phillip Douglass and Jennifer Gaulter at 1003 NW B Street in Blue Springs, Jackson County, Missouri. The detective pulled pictures associated with the phone number from the internet. A picture of Jennifer Gaulter and Phillip Douglass was found on an entry on Craigslist and the pictures were shown to the victim who said it was Jenn and Phil. She stated that Jenn and Phil had possession of her keys and no one else had access to enter and remove her property.

Hotel Staff at the Argosy Casino confirmed to Det. Estes that room #426 had been rented to Phillip Douglass and Jennifer Gaulter and they were aware that a bag had been left at the front desk for the victim.

A search of Jackson County Tax records shows that 1003 NW B Street, Blue Springs, Jackson County, Missouri 64015 responds to both Jennifer Gaulter and Phillip Douglass.

In the Affiants experience as a law enforcement officer, it is typical for stolen items like those reported stolen by the victim to be taken to the offender(s)' home or residence.

45429
Assistant Prosecutor

Det. [illegible] #4477
Affiant and Applicant

Subscribed and Sworn to me this 29th Day of August, 2013.

at the hour of 7:24 (AM/PM)

JUDGE

EXHIBIT A

EXHIBIT B

IN THE CIRCUIT C^RT OF COUNTY, MISSOUP^

P24

Judge or Division:	Case Number: 13-60372
Name and Title of Person Making Application: Det. Darold Estes #4077	

CRIMINAL RECORDS RECEIVED SEP 0 4 2013

Search Warrant

State of Missouri to any Peace Officer in Missouri:

Based on information provided in a verified application/affidavit, the Court finds probable cause to warrant a search for and/or seizure of the following:

- ☒ Property, article, material or substance that constitutes evidence of the commission of a crime;
- ☒ Property that has been stolen or acquired in any manner declared an offense;
- ☒ Property for which possession is an offense under the laws of this state;
- ☒ Any person for whom a valid felony arrest warrant is outstanding;
- ☒ Deceased human fetus or corpse, or part thereof;
- ☐ Other (Specify – See Missouri Revised Statute Section 542.271)

You are commanded to search, seize, and photograph or copy, as applicable, the person, place, or thing described below. Photographs or copies of the seized property, article, materials, substance, or person shall be filed with the Court within 10 days.

~~Furthermore, entry into the residence may be made without knocking and announcing the presence of law enforcement and their purpose due to safety concerns enumerated in the affidavit of the search warrant. (Not authorized unless initialed by a judge.)~~ MSP 8/29/13

The person, place or thing to be searched is described as follows:

The residence at 1003 NW B Street, Blue Springs, Jackson County, Missouri is a single-family dwelling that is painted yellow and has brown trim, as well as, a brown composite shingle roof. The address numbers of "1003" are cleared marked in brown numbering on the east side of the front door of the residence. The address of 1003 NW B Street, Blue Springs, Jackson County, Missouri is the second residence west of NW 10th Street, and on the north side of NW B Street. To include: any garage/storage/out buildings on the property.

The property, article, material, substance or person to be searched for and seized is described as follows:

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

8/29/13 at 7:04 pm
Date and Time

Judge

This warrant is issued by: ☒ hard-copy ☐ facsimile ☐ other electronic means:

Directions to Officer: Make a complete and accurate written inventory of any property seized pursuant to this warrant. When possible, complete the inventory in the presence of the person from whose possession this property is taken, and give a receipt for the property, as well as copy of this warrant to that person. If no person is found in possession of the property, leave the receipt and warrant copy in the premises searched. Immediately deliver photographs or copies of the seized property, article, materials, substance, or person, the written inventory, and the warrant return to this Court.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

STATE OF MISSOURI,	)	
	)	
Plaintiff.	)	
	)	Division No. 15
v.	)	Case No.
	)	1316-CR03008-01
PHILLIP DOUGLASS,	)	
	)	
Defendants.	)	

ORDER

NOW the Court takes up Defendant's Motion To Suppress, filed on October 16, 2014, along with the State's Response and Defendant's Reply. On November 21, 2014, the Court heard evidence in this matter as well as arguments of counsel relating thereto. After careful consideration and being duly advised of the premises, said motion is **GRANTED**.

As enumerated in *U.S. v. Leon*, "the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of judges and magistrates." U.S. v. Leon, 468 U.S. 897 (1984) at 916. *Leon* goes on to say that "applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or 'magistrate shopping' and thus promotes the ends of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely". *Id*. At 918.

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

The U.S. Constitution and the Missouri Constitution both enumerate the particularity requirement of a warrant, and a voluminous amount of both state and federal case law is devoted to upholding those provisions. Pursuant to RSMo. 542.276(4), a search warrant shall identify items to be seized in sufficient detail and with sufficient particularity that the officer executing the warrant can readily ascertain the items. Section 542.276.10(5) states a warrant will be deemed invalid if it fails to sufficiently describe the items to be seized. "The purpose of the particularity requirement is to avoid the general exploration of an individual's belongings." *State v. Tolen*, 304 S.W.3d

229 (Mo. App. 2009). Finally, and perhaps most importantly, Article I Section 15 of the Missouri State Constitution states: "**no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.**" There is no "police convenience" exception to the particularity requirement in a warrant. In fact, as described in *Tolen*, the purpose of the particularly requirement is to prevent exactly the kind of police abuse that Officer Estes propounded in this case. It would be a miscarriage of justice to permit an officer to knowingly bypass the particularity requirement of a warrant by checking boxes that allow officers to search for items where no probable cause exists, thus, in essence, rendering the search warrant a general search warrant, simply because it is an inconvenience to the officer to follow the U.S. Constitution, the Missouri Constitution and the laws in the state of Missouri.

The evidence seized as a result of this invalid warrant will be suppressed.

IT IS SO ORDERED.

1/23/15 /s/ RM Schieber
Date Robert M. Schieber, Circuit Judge

Certificate of Service

Copies mailed/faxed/sent through the efiling system this 1-23-15 to the attorneys of record.

/s/ Karen Lee Rigney
~~Kate Millington, Baliff/Law Clerk~~