No. 18-285

IN THE
SUPREME COURT OF THE UNITED STATES

MISSOURI,

Petitioner,

v.

PHILLIP DOUGLASS and JENNIFER M. GAULTER,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should overrule centuries of case law holding that the Fourth Amendment, as incorporated through the Fourteenth Amendment, prohibits "general warrants" or "general searches." **Petitioner asks this Court to hold that under the "redaction doctrine"** (sometimes referred to as the "severance doctrine" or "severability doctrine"), **a "general warrant" or "general search" is valid**, so long as there is some "not insignificant" portion of the warrant which particularly describes something to be seized.

Respondents do not believe there is any other question before this Court; however, the remaining two "questions presented" by Petitioners are more aptly described as follows:

Whether a finding that *items to be searched for and seized* were imparticularly-described and therefore violated the Fourth Amendment's particularity requirement *actually* improperly required *probable cause* to be particularly-described.

Whether this Court should be the first appellate court to ascertain whether Petitioner's conduct was sufficiently egregious to require suppression of items seized pursuant to a warrant – if and only if this Court finds that the "redaction doctrine" can save a "general warrant."

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STATEMENT OF THE CASE

Initially, Respondents Jennifer Gaulter and Philip Douglass would like to remind this Court that this is an *interlocutory* appeal of the pre-trial suppression of evidence, under Missouri Revised Statute Section 547.200.1(3). Pet. App. A7. As expected as it may be, it is inappropriate for Petitioner to refer *from the very beginning* to the complaining witness ("M.G.") as "victim" and the suppressed evidence as "stolen items." *E.g.*, Pet. 2.

With no trial occurring, App. 1 A1-A7; App. 2 A8-A14 (Docket Sheets), and knowing that very little pre-trial activity occurred prior to this appeal, Respondents insist their continued right to object to "probable cause" and "facts" asserted in the lower court. However, for purposes of this BIO, Respondents recite facts and introductory comments from the Missouri Supreme Court Opinion. Pet. App. A3-A7.

After an evening of revelry at a local hotel, M.G. called her boyfriend to pick her up. Pet. App. A3-A4. The next morning, M.G. received a text from Gaulter that M.G. left her handbag and keys at the hotel. *Id*. at A4. Another text from Gaulter inquired as to whether M.G. was at home or work and, when M.G. returned home around 6:10 p.m., she found her apartment in disarray with some property missing. *Id*. M.G. called the hotel, which responded that her handbag was still there, but that there were no keys in it. *Id*. When M.G. returned to the hotel, she was informed that the handbag had been picked up. *Id*. M.G. reported a theft. *Id*.

A 20-year veteran of the Kansas City, Missouri, Police Department, Darold Estes, sought a warrant to search Respondents' Blue Springs, Missouri, home. *Id*.

He applied for a search warrant which specifically listed the items which M.G. represented were missing, but *also* authorized KCPD to search for and seize:

- "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 "Corpse Clause"); and
- "[A]ny property readily and easily identifiable as stolen."

Id. at A4-A5, A11-A12. Estes would later admit that the Corpse Clause was checked because the Fourth Amendment is an inconvenience that would have required Estes to obtain another warrant to investigate a death (referred to as a "piggyback warrant"), if KCPD found a corpse. *See id*. at A6.

Blue Springs police conducted a knock and announce at Respondents' home, secured the residence, and then released the property to KCPD to execute Estes' general search warrant. *See id*. at A5, n.2. KCPD seized several items from the residence and charged Respondents with burglary in the second degree, pursuant to Missouri Revised Statute Section 569.170 (RSMo Supp. 2000), and felony stealing, pursuant to Missouri Revised Statute Section 570.030 (RSMo Supp. 2013). Pet. App. A5. The stealing charge is now a misdemeanor under *State v. Bazell*, 497 S.W.3d 263, 266-67 (Mo. banc 2016). Pet. App. A5, n.4.

Respondents moved to suppress the evidence seized for three reasons: (1) KCPD executed the search warrant outside its jurisdiction; (2) Fourth Amendment violations; and (3) KCPD's failure to leave a receipt. *Id*. at A6. The State's Response set forth substantial legal argument that the evidence should not be suppressed, because checking the Corpse Clause was a "typographical error" and failure to leave a receipt is a "ministerial act" which does not require suppression. At the hearing, the State revealed that a receipt had been left and Estes testified that he checked the Corpse Clause, because with the Fourth Amendment was a hassle. *See id*. at A6.

The trial court suppressed the evidence. *Id*. at A7. In an opinion rendered non-precedential by the Missouri Supreme Court's action in this case, the Missouri Court of Appeals would have reversed the trial court's order. *State v. Douglass*, 2016 WL 1213271, *11 (Mo. App. W.D. 2016). The Missouri Supreme Court affirmed the trial court's order, finding that several of the sweeping categories transformed the warrant into an invalid "general warrant." Pet. App. A28. The State focuses on the Missouri Supreme Court's "redaction doctrine" analysis, but the Court avoided that issue and held that the warrant was a "general warrant" which cannot be saved via any exception to the Fourth Amendment. *See id*. at A8-A29 (performing the analysis under the redaction doctrine, but deciding it was a "general warrant.").

The Missouri Supreme Court started the redaction doctrine analysis, *id*. at A8-A12, but once the categories of the search warrant were divided, *id*. at A12-A13, it became clear that it was a *general warrant*:

> 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 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.

Id. at A14-A15. The Court also reasoned that the two sections authorizing a search for and seizure of "any person for whom a valid felony arrest warrant is outstanding" and "deceased human fetus or corpse, or part thereof" *at least* lacked probable cause. *Id*. at A16-A18. The Court found that "categories 6 through 12" listed specific items for which there was probable cause. *Id*. at A18. Finally, the thirteenth category, authorizing a search for and seizure of "any property readily and easily identifiable as stolen" failed to meet the Fourth Amendment's particularity requirement. *Id*. The Court reasoned that "such a provision gives officers a general search authorization by failing to limit the search in any fashion to the crime at issue." *Id*. (citing *U.S. v. LeBron*, 729 F.2d 533 (8th Cir. 1984)).

While the Court completed the redaction doctrine analysis, it reached the conclusion that the warrant was a "general warrant," which ***cannot*** be salvaged:

> 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) … 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 cannot be used to save a general warrant and is, therefore, inappropriate in this case.

Id. at A21-22 (emphasis in original); *see also id*. at A28.

As if this weren't satisfactory to find the State's strategy sufficiently serious to suppress the seized stuff (supposing the search hadn't been a "general search"), let's not forget that *this saga survives the Missouri Supreme Court's Opinion date*. App. 1 A1-A7; App. 2 A8-A14. In what must've been an attempt to veto the Missouri Supreme Court (hoping the Opinion wouldn't be published), the Jackson County Prosecutor dismissed each underlying case. App. 3 A15; App. 4 A16. Presumably, the Prosecutor realized she shouldn't've done that, and appellate opinions don't work that way, because the Prosecutor moved to revoke the dismissals. App. 1 A1; App. 2 A8. Given that the Prosecutor could've refiled the charges at any time, Respondents didn't object and the trial court granted the motions. App. 1 A1; App. 2 A8. Now we're here; we shouldn't be.

REASONS FOR DENYING THE WRIT

I. This is a bad vehicle to resolve the State's "Questions Presented."

A. There is no live, Article III "case" or "controversy."

There is no "case" or "controversy," because the Prosecutor dismissed all charges and the statute of limitations has run on at least one charge. App. 3 A15; App. 4 A16. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.* 568 U.S. 85, 91 (2013).

The thefts allegedly occurred on August 22, 2013. Pet. App. A56. The indictments against Respondents were filed on January 31, 2014. App. 1 A7; App. 2 A14. On February 13, 2018, the Missouri Supreme Court Opinion was "handed

down." Pet. App. A2. On February 21, 2018, the State entered its *nolle prosequi*. App. 1 A1; App. 2 A8. Missouri's *nolle prosequi* statute, Section 56.087 vests the prosecutor with broad and limitless discretion to dismiss a case for any reason:

> 1. The prosecuting or circuit attorney has the power, in his or her discretion, to dismiss a complaint, information, or indictment, or any count or counts thereof, and in order to exercise that power it is not necessary for the prosecutor or circuit attorney to obtain the consent of the court. The dismissal may be made orally by the prosecuting or circuit attorney in open court, or by a written statement of the dismissal signed by the prosecuting or circuit attorney and filed with the clerk of court.
> 2. A dismissal filed by the prosecuting or circuit attorney prior to the time double jeopardy has attached is without prejudice. A dismissal filed by the prosecuting or circuit attorney after double jeopardy has attached is with prejudice, unless the criminal defendant has consented to having the case dismissed without prejudice.
> 3. A dismissal without prejudice means that the prosecutor or circuit attorney has complete discretion to refile the case, as long as it is refiled within the time specified by the applicable statute of limitations. A dismissal with prejudice means that the prosecutor or circuit attorney cannot refile the case.
> 4. For the purposes of this section, double jeopardy attaches in a jury trial when the jury has been impaneled and sworn. It attaches in a court-tried case when the court begins to hear evidence.

This *presumes* that the dismissal is *without prejudice* and that the State can refile the case *at any time* within the statute of limitations. *Id*. Given that Missouri's Legislature and Supreme Court have vested the Prosecutor with limitless authority to dismiss and refile cases, *at the time of the dismissal*, there was still a live controversy between the Parties. *State v. Sisco*, 458 S.W.3d 304 (Mo. banc 2015).

Additionally, under Missouri law, once an opinion is handed down, the opinion publishes and a party cannot "escape" a ruling by dismissing a case. *E.g.*, *State ex rel. St. Charles County v. Cunningham*, 401 S.W.3d 493 (Mo. banc 2013); *also* discussions with the Missouri Supreme Court General Counsel. Federal law is

in accord, holding that opinions will still be issued if a party attempts to dismiss their case. *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1095); *U.S. v. Payton*, 593 F.3d 881, 884-86 (9th Cir. 2010); *see also In Re: Grand Jury Investigation*, 399 F.3d 527, 528 n.1 (2d Cir. 2005); *Bastien v. Office of Senator Ben Nighthorse Campbell*, 409 F.3d 1234, 1235-36 (10th Cir. 2005); *IAL Aircraft Holding, Inc. v. Federal Aviation Administration*, 216 F.3d 1304, 1306 (11th Cir. 2000).

The burglary charge is a class D felony under Section 569.170 (RSMo Supp. 2000), and the stealing charge is a misdemeanor under Section 570.030 (RSMo Supp. 2013) and *Bazell*, 497 S.W.3d at 266-67; Pet. App. A5, n.4. Under Section 556.036 (RSMo Supp. 2017), the felony charge has a statute of limitations of three years and the misdemeanor charge has a statute of limitations of one year:

> 1. A prosecution for murder, forcible rape, attempted forcible rape, forcible sodomy, attempted forcible sodomy, or any class A felony may be commenced at any time.
>
> 2. Except as otherwise provided in this section, prosecutions for other offenses must be commenced within the following periods of limitation:
>
> (1) For any felony, three years;
> (2) For any misdemeanor, one year…
>
> 5. A prosecution is commenced either when an indictment is found or an information filed.
>
> 6. The period of limitation does not run: …
>
> (3) During any time when a prosecution against the accused for the offense is pending in this state…

Missouri Revised Statute Section 556.036. Faced with the above, Respondents were looking at a situation in which the State could *nolle prosequi* the underlying case

and refile it immediately such that they would somehow have a Missouri Supreme Court Opinion suppressing the evidence in their previous case, but still have to move to suppress the evidence in the ***new*** case:

> [Appellant] has cited no authority to support his contention that the broad discretion granted to prosecutors to *nolle prosequi* charges, codified by statute as explained *supra*, is limited or can be limited … ***[Appellant] has not identified any authority in which this Court has found that the prosecutor's broad discretion to dismiss and refile charges prior to trial is limited by anything other than double jeopardy or the applicable statute of limitations***. As explained in *Sisco*, the prosecutor has "complete discretion" to dismiss the charges without the court's consent, and the trial court does not have the power to force the state to trial. 458 S.W.3d at 310; *see also State v. Honeycutt*, 96 S.W.3d 85, 88–89 (Mo. banc 2003) (reaffirming the broad discretion vested in the prosecutor and stating that her decision on how to enforce the criminal laws are "seldom subject to judicial review"); *State v. Clinch*, 335 S.W.3d 579, 583–584 (Mo. App. W.D. 2011) (holding that this Court does not have the authority to require the trial court to approve a *nolle prosequi* due to "numerous precedents of this state, including from our supreme court," which grants the prosecutor broad discretion); *accord Doyle v. Crane*, 200 S.W.3d 581, 587–88 (Mo. App. W.D. 2006).

State v. Elliott, 502 S.W.3d 59, 65 (Mo. App. W.D. 2016) (emphasis added). As such, when the State sought to revoke the *nolle prosequi*, Respondents consented, hoping that the Opinion in the underlying case would bind the retrial of their action such that the evidence would be suppressed.

However, under Missouri law, any judicial action taken after a *nolle prosequi* is a nullity. *Elliott*, 502 S.W.3d at 65; *State v. Dozler*, 455 S.W.3d 471, 473 (Mo. App. W.D. 2015) ("Any orders entered after a trial court loses jurisdiction in a case are nullities."); *see also State v. Montgomery*, 276 S.W.2d 166, 168 (Mo. 1955). As such, since February 21, 2018, there has not been "a prosecution against the accused for

the offense … pending in this state." The statute of limitations expired on the stealing charge and the burglary charge is no longer pending. There is no longer a live "case" or "controversy."

B. The State's interest is speculative and may become moot.

As noted above, this is an *interlocutory* appeal. Pet. App. A7.

> 1. **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**:
>
> (1) Quashing an arrest warrant;
> (2) A determination by the court that the accused lacks the mental capacity or fitness to proceed to trial, pursuant to section 552.020, RSMo;
> (3) **Suppressing evidence**; or
> (4) Suppressing a confession or admission.
>
> 2. The state, in any criminal prosecution, shall be allowed an appeal in the cases and under the circumstances mentioned in section 547.210 and in all other criminal cases except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant. The supreme court shall issue rules governing such appeals.
>
> 3. **The appeal provided in subsection 1 of this section shall be an interlocutory appeal**, filed in the appropriate district of the Missouri court of appeals, unless the proceedings involve a charge of capital murder or murder in the first degree, pursuant to the provisions of section 565.001 or 565.003, RSMo, in which case notices of appeal shall be filed in the supreme court of Missouri….

Missouri Revised Statute Section 547.200.1-3 (emphasis added). Just because Missouri authorizes interlocutory appeals of the pre-trial suppression of evidence, does not mean *this Court* is required to permit such appeals.

If the State refiles the burglary charge *and the State loses that case*, because of the suppression of evidence, the state *might* suffer an injury. Otherwise, the

State never suffers an injury. Avoiding needless intervention is why this Court does "not issue a writ of certiorari to review" an interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Contr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893). This case is no exception, *especially* because permitting the case to run its course in state court would resolve the remaining state court issues.

C. The State waived the alleged "conflict" issues.

This Court will not consider or address an issue raised, in the first instance, in a Writ of Certiorari. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) ("It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts."). "The [lower court] did not previously address that issue, and we decline to decide it in the first instance." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 1178, 1190 (2017) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not of first view")). Respondents were shocked to see two imagined conflicts regarding the "redaction doctrine" (**Section I**) and "particularity" (**Section II**) argued for the first time, as the main reasons Petitioner sought this Writ.

*1. Petitioner waived any "redaction doctrine conflict" in **Section I.***

Even if there is a split or conflict regarding the language used in the "redaction doctrine" test, Petitioner raised such "conflict" for the ***first time*** in its Writ. *E.g.*, App. 5 A36, A38-A39 (Petitioner's Opening Brief below); App. 6 A63 (Petitioner's Reply Brief below); *see also*, Pet. App. A36, A43-A45. The State asserts that the Missouri Supreme Court incorrectly relied on *U.S. v. Sells*, 463 F.3d 1148

(10th Cir. 2006), and argues that "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." Pet. 8. This is fairly shocking, given that Petitioner cited to *Sells* and argued "the greater part of the warrant" rule in its Briefs at the Missouri Supreme Court. *E.g.*, App. 5 A36 (multiple quotes to the "greater part of the warrant" rule and *Sells*), A38-A39 (arguing that "the valid portions of the warrant made up the greater part of the warrant."); App. 6 A63 (summarizing the State's argument that the invalid portions of the warrant did not make up the "greater part of the warrant.").

Nowhere in the State's Substitute Opening Brief or the State's Substitute Reply Brief is there any mention that "the greater part of the warrant" rule is legally "incorrect" or a "minority view." *See generally* App. 5; App. 6. The Dissenting Opinion at the Missouri Supreme Court also relied on *Sells* and the "greater part of the warrant" rule. Pet. App. A36 (quoting *Sells* extensively); A43-A45 (arguing that "[t]he next question is whether the valid portions make up 'the greater part of the warrant'" and ultimately concluding that "[t]he valid portions make up the greater part of the search warrant," citing *Sells*, 463 F.3d 1160-61.). Even if there is a split, which there is not, Petitioners waived any such argument by failing to raise it in the lower court. *Nelson*, 529 U.S. at 469.

2. Petitioner waived any "particularity conflict" in ***Section II***.

Section II of Petitioner's Writ asserts that there is a "conflict" regarding the Missouri Supreme Court's Opinion and other cases regarding the "particularity"

requirement. Pet. 15. The State asserts that the Court extended the "particularity" requirement to "probable cause" through its holding that the first five "checkbox" categories were not sufficiently particular for the Fourth Amendment. *Id*. at 15-22. As discussed more, below, the Missouri Supreme Court did no such thing; it found that the "checkbox" categories "permitted the search for and seizure of" the imparticularly-described items. *E.g.*, Pet. App. A14. However, Petitioner waived any argument that the "checkbox" section applies only to "probable cause" by relying on the argument that "[the 'checkbox' categories] described M.G.'s stolen property in general terms and then that property was more specifically described in categories 6 through 13." *Id*. at A15; *see also* App. 5 A37, n.8; App. 6 A56.

D. At least two independent and adequate state law arguments support the Missouri Supreme Court Opinion.

1. The warrant was executed without jurisdiction.

Kansas City, Missouri, police executed the search warrant in Blue Springs, Missouri. Pet. App. A5, n.2. The search warrant was not "executed… within the territorial jurisdiction of the officer executing the warrant," as required by Missouri Revised Statute Section 542.286.2. The Court did not decide this issue. Pet. App. A6, n.5. This state court issue must be decided, if this Court decides the warrant is valid. This Court generally declines to decide such state court issues. *Michigan v. Long*, 463 U.S. 1032, 1038-41 (1983).

2. The Missouri Constitution supports the Opinion.

"Missouri's constitutional 'search and seizure' guarantee … is co-extensive with the Fourth Amendment." *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999).

However, Respondents argued below that if the Fourth Amendment permitted a search and seizure under these circumstances, Missouri should break from federal Fourth Amendment jurisprudence. The Missouri Supreme Court did not reach this issue. If this Court *does* decide the underlying warrant is valid, this possible state court reason should be addressed.

E. To squarely decide the redaction doctrine issue, this Court would likely need to overrule facts decided below or decide facts in the first instance.

1. Petitioner argues that the warrant authorized a narrower search than the Missouri Supreme Court found.

The warrant at issue is divided into two sections: a "checkbox" section and a section wherein additional specific items could be "listed." Pet. App. A58. The Missouri Supreme Court found that, factually, the "checkbox" portion of the warrant authorized KCPD to search for and seize:

> (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;" and (5) "Deceased human fetus or corpse, or part thereof."

Id. at A4-A5, A11-A12. The Court also found that the "listing" portion of the warrant authorized a search for and seizure of several listed items and "any property readily and easily identifiable as stolen." *Id*.

Despite the fact that the Missouri Supreme Court specifically held that the "checkbox" portions "of the warrant expressly permitted the search for and seizure of" each of the vague items listed therein, **Section II** of Petitioner's Writ argues that *actually* the "checkbox" portions of the warrant impermissibly extend the

"particularity" requirement to the showing of probable cause. *Compare* Pet. App. A14 *to* Pet. 15-22. This ties into Petitioner's argument in **Section I** (decreasing the invalid portion of the warrant, if excluded) and forms the entire basis of **Section II**. Petitioner's second section is without merit for at least two reasons: First, it asks this Court to reverse a factual decision of the lower court, which this Court will not do absent "a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Second, *even if* this decision of the Missouri Court is an incorrect issue of law, this Court does not accept cases to address a mistake in application of law or facts. *Id.*; S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

2. This Court would need to either revisit, or decide in the first instance, whether the State's conduct was sufficiently heinous to require suppression of evidence.

> [Respondents] 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**.

Pet. App. A10, n.8 (emphasis added). The trial court found that Estes acted in bad faith and "knowingly gave a false statement to the circuit court." *Id*. at A7. In **Section III**, Petitioner asserts that "[Estes'] mistake in drafting the warrant" does not justify the "'substantial social costs exacted by the exclusionary rule.'" Pet. 23-27. Petitioner seeks one of two improper types of review: Petitioner asks this Court to "correct" the trial court's holding that Estes' conduct was "*intentional*" and find that it was a "*mistake*." This Court does not "correct" factual findings. S. Ct. R. 10. Alternatively, Petitioner asks that this Court be the first to consider, on appeal, whether an officer's bad faith prohibits bars use of the redaction doctrine. This Court will not be the first to pass on a legal issue. *Cutter*, 544 U.S. at 718, n. 7.

II. There is no "conflict."

A. The Opinion does not conflict with redaction doctrine cases.

Section I of Petitioner's Writ asserts that the Missouri Supreme Court Opinion is in conflict with a "majority" of cases which do not require that the "greater part of the warrant" be valid to use the redaction doctrine. In addition to already waiving this argument, it fails for numerous other reasons.

1. The Opinion was not decided under the redaction doctrine.

The Missouri Supreme Court did not decide this case under the redaction doctrine. *E.g.*, Pet. App. A10, n.8. The Court found that "[t]he severance doctrine cannot be used to save a general warrant." *Id*. at A3. "And 'the only remedy for a general warrant is to suppress all evidence obtained thereby.'" *Id*. at A28 (quoting *U.S. v. Yusuf*, 461 F.3d 374, 393 n.19 (3d Cir. 2006)). The Fourth Amendment, applicable to the States by the Fourteenth Amendment, provides:

> 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. 4 AMEND. Respondents have searched for even the most literal and strict of interpretations of the Fourth Amendment and seemingly *everyone* agrees that *at least* the Fourth Amendment prohibits "general warrants." *E.g.*, *The Framers' Intent: John Adams, His Era, And The Fourth Amendment*, Thomas K. Clancy, 86 IND. L.J. 979 (Summer 2011); *Recovering The Original Fourth Amendment*, Thomas Y Davies, 98 Mich. L. Rev. 547 (December 1999).

> These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant.

Stanford v. State of Tex., 379 U.S. 476, 481 (1965); *see also Marron v. U.S.*, 275 U.S. 192, 195 (1927) ("General searches have long been deemed to violate fundamental rights."). Scouring this Court's precedent to cite a case holding that the Fourth Amendment prohibits "general warrants" is as absurd as attempting to cite to the existence of the United States. It is a "pre-existing condition" of our Independence:

> In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the

> liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.
>
> 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'.

Boyd v. U.S., 116 U.S. 616, 625 (1886) (disagreed with on other grounds by *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967)). Counsel for Respondents cannot locate any case holding that general warrants *are* enforceable. There is no conflict.

2. No matter what language is used in describing the redaction doctrine, the result would have been the same in this case.

The language of the redaction doctrine test is irrelevant in this case. *See Cassady v. Goering*, 567 F.3d 628 (10th Cir. 2009). If any court decides that a warrant is a "general warrant," the "redaction" analysis should end: "[B]ecause the warrant authorizes a general search, it is overbroad and invalid." *Id.* at 636.

> There is an important distinction to be made between warrants that have been interpreted to have an overbroad clause because they contain language permitting search and seizure of any evidence of the specified crime for which there was probable cause, as in *Brown* and *LeBron*, and the warrant here, which permitted search and seizure of any evidence of *any* crime.

Id. at 643 (emphasis in original). The *Cassady* analysis mirrors the reasoning of the Missouri Supreme Court, noting that the general categories "place no limitations on the search and are devoid of any reference to the crimes related to M.G." Pet. App. A15. Both cases concluded that the warrant was an invalid "general warrant."

> In short, the dissent's interpretation swallows the rule against general warrants. The limiting language of the warrant's first paragraph is entirely subsumed by the catchall sentence, providing unlimited

> authorization for search and seizure of all evidence of any criminal activity.

Cassady, 567 F.3d at 643.

There is no case upholding a general search, thus, regardless of the language used in the redaction doctrine test, the warrant is unenforceable. Petitioner seeks reversal of the *conclusion* that this was a "general warrant" which is, at most, an incorrect legal conclusion (Respondents assert that it is the correct legal conclusion). This Court does not correct such *mistakes*. *See* S. Ct. R. 10.

Petitioner's reliance on the *Cassady* dissent is misplaced; the majority opinion addressed and rejected the perceived "conflict." *Cassady*, 567 F.3d at 637-38. The majority opinion also noted that the test was irrelevant for a general warrant. *Id*. at 642 ("Moreover, the facts of this case still would not justify application of the severability doctrine even under the test urged by the dissent because under the long-established rule general warrants cannot be saved.").

3. To the extent that the cases use different language in the redaction doctrine test, it makes no difference here.

Even if the redaction doctrine can apply to a "general warrant," Petitioners split hairs by asserting that the difference between a requirement that "the greater part of the warrant" is a *split of authority* from cases asserting that redaction is permissible "unless the valid portion is "'a relatively insignificant part of an otherwise invalid search.'"" Pet. 8-9 (also positing that the redaction doctrine applies "so long as the valid part of a warrant is not "'an insignificant or tangential part.'""). Petitioners assert a *split of authority* between the following courts:

- Courts requiring that "the greater part of the warrant" is valid; and
- Court requiring that the valid part of the warrant is "not insignificant."

While this *could* be a split between requiring "more than half" of the warrant be valid ***or*** requiring that the valid portion be "not insignificant," *in some hypothetical case*, that difference is not present here. This search warrant authorized a search for and seizure of:

> (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;" and … (6) "[A]ny property readily and easily identifiable as stolen."

Pet. App. A4-A5, A11-A12. The Missouri Supreme Court found that these broad and limitless search categories "contaminate[d] the whole warrant" creating a "general warrant." *Id*. at A21. Even if the redaction doctrine can save a general warrant, these six sweeping categories rendered the seven specific categories listed an "insignificant" portion of the warrant. Thus, the result would be the same.

B. The Opinion does not extend particularity to probable cause.

As discussed above, the Missouri Supreme Court held that the "checkbox" portions "of the warrant ***expressly permitted the search for and seizure of"*** the vague categories listed therein. *E.g.*, Pet. App. A14 (emphasis added). **Section II** of Petitioner's Writ argues that *actually* the "checkbox" portions of the warrant impermissibly extended the "particularity" requirement to the warrant's showing of probable cause. Pet. 15-22.

The form warrant at issue was prepared and promulgated by the Missouri Supreme Court, through the Office of State Courts Administrator. If any court should interpret whether the "checkbox" portions of the warrant authorized a search, it should be the Missouri Supreme Court. There is no conflict with *U.S. v. Grubbs*, 547 U.S. 90, 97 (2006), or any other case regarding particularity, as the Missouri Supreme Court required *only* particularity as to the items to be searched for and seized. Pet. App. A14-A28. Finally, to the extent that the Court's holding that the "checkboxes" authorized a "search/seizure" is "wrong," this is, *at most*, a factual or legal error, which this Court will not generally address. S. Ct. R. 10.

C. There is no conflict regarding Estes' conduct.

The Missouri Supreme Court did not consider Estes' conduct. Pet. App. A10, n.8 ("But this Court need not decide whether Detective Estes' misconduct prohibits application of the severance doctrine…"). **Section III** of Petitioner's Writ argues that Estes' creation of an "inconvenience exception" to the Fourth Amendment is not sufficiently egregious to require suppression, inciting a "conflict" of case law:

> Here, the only purported "misconduct" by the police officer was his "intentional" but erroneous checking of a box … The office 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." … 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 circumstance, they found a dead body.

Pet. 23 (emphasis added). Since the Missouri Supreme Court did not reach this issue, there is no "conflict."

III. The Missouri Supreme Court Opinion is correct.

The Missouri Supreme Court concluded that the warrant is an invalid "general warrant." Pet App. A28. Respondents can find no case law holding that "general warrants" are enforceable, so the Court did not announce any incorrect legal standards. At best, Petitioners ask this Court to correct an erroneous factual basis or legal conclusion. This Court is not generally concerned with correcting factual or legal errors. S. Ct. R. 10. Further, the Court's Opinion is correct:

A. The underlying warrant is a "general warrant."

The Missouri Supreme Court found that the warrant authorized a search for and seizure of items related to "***a*** crime" or "***an*** offense" in "checkboxes" one through three. Pet. App. A14 (emphasis in original). These "checkboxes" placed "no limitations on the search and are devoid of any reference to the crimes related to M.G." *Id*. at A15. The Court did not explicitly address the particularity of the fourth and fifth "checkboxes," dealing with "any person" with an outstanding warrant and a deceased human, but did find that there was no probable cause regarding those "checkboxes." *Id*. at A16-A18. Finally, the Court found the "listing" authorizing a search for and seizure of "any property readily and easily identifiable as stolen," lacked any specificity and "provid[ed] no guidelines for the officers as to what items might be easily or readily identifiable as stolen." *Id*. at A18-A19. The Court relied heavily on *U.S. v. LeBron*, 729 F.2d 533, 536-37 (8th Cir. 1984), which held that this kind of vague, conclusory language was a "general authorization" that "provide[d] no protection against subjecting a person's lawfully held property to a general search and seizure." Pet. App. A18-A19 (edits in original).

While the warrant *did* specifically list *some* items to be seized, it *also* authorized the police to embark on a general rummaging through Respondents' home looking for ***any*** evidence of ***any*** crime. "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." *Id*. at A21 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)).

B. Even if the redaction doctrine can save general warrants, it cannot save <u>this</u> warrant.

If this Court finds that the redaction doctrine can save general warrants, Respondents will continue to argue that the redaction doctrine is ***inapplicable here*** by asserting and expanding upon the following issues (among other issues):

<u>1. This Court should invalidate the redaction doctrine.</u>

The Parties agree that "[t]he exclusionary rule is a particularly poor remedy when standards governing its application are 'vague' and 'not easily applied.'" Pet. 12. Petitioner's answer is to erode the Fourth Amendment. Respondents counter that the most "easily applied" standard would be to enforce the Fourth Amendment *as written* and *invalidate* warrants that violate the Fourth Amendment. U.S. CONST. 4 AMEND. If this Court accepts this Writ, Respondents will argue that the redaction doctrine violates the Fourth Amendment. *See Boyd*, 116 U.S. at 625.

<u>2. The invalid portions of the warrant consume any valid portions.</u>

The Missouri Supreme Court divided the warrant 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.

Pet. App. A12-A13. The Court found categories 1-5 and 13 invalid for lack of particularity or probable cause (or both). *Id*. at A13-A20. These invalid categories so contaminate the warrant in a "qualitative and quantitative" analysis, that they cannot be redacted (even if they do not render the warrant a "general warrant"). *Id*. at A20-A21, A28 (quoting *Sells* 463 F.3d at 1157-60).

3. Petitioner's conduct in this matter shocks the conscience.

As undersigned counsel adroitly observed at oral argument in this matter, this case is embarrassing. Respondents filed a Motion to Suppress because, among other reasons, the warrant was invalid due to checking of the Corpse Clause "checkbox" and the failure to leave a receipt. The State's Response to the Motion to Suppress argued that Estes checked the Corpse Clause as a "typographical error" and that the failure to conduct a ministerial act (*leaving a receipt*) does not invalidate a search. At the suppression, Petitioner called Estes to testify. Estes' testified that he left a receipt and that the Corpse Clause "checkbox" was checked because of the hassle involved in obtaining a piggyback warrant. Pet. App. A6.

Petitioners argue that the underlying conduct does not require suppression. Pet. 23-27. However, even before the Missouri Supreme Court's Opinion, the State (1) intentionally lied to a judge to obtain a warrant; (2) filed a Motion "explaining"

that lie as a "typographical error;" and (3) once the lie was revealed, took the position that the Fourth Amendment is not a big deal. Pet. App. A2-A6. Then, when the Missouri Supreme Court Opinion informed the State that this kind of behavior cannot support a search and seizure *the State tried to veto that decision*. App. 3 A15; App. 4 A16. If this fact pattern does not demonstrate that the underlying conduct must be "meaningfully deterred," Respondents wonder *what* conduct could reach that level. To the extent that the redaction doctrine can even apply to this warrant, the misconduct in obtaining the warrant – informed by Petitioner's behavior *after* the warrant was executed – demonstrates sufficient misconduct to require suppression.

IV. Conclusion.

Petitioner's Writ should be denied.

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Respectfully submitted,

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