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Reconsidering Missouri's Warrant Suppression Standard

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NOTE

Reconsidering Missouri's Warrant Suppression Standard

State v. Douglass, 544 S.W.3d 182 (Mo. 2018) (en banc), *cert. denied*, 2019 WL 1231946 (U.S. Mar. 18, 2019) (mem.)

*James Sanders**

I. INTRODUCTION

The search warrant is a foundational component of the American criminal justice process. Designed to limit and prevent overreach by police and other law enforcement entities, the framers of the Fourth Amendment of the United States Constitution sought to use warrants as a tool to control the scope and breadth of searches and seizures of private property.¹ The Fourth Amendment's warrant requirements are a vital check on the proactive and ever-growing² police efforts of state and federal authorities.

Law enforcement at the federal, state, and local levels carry out thousands of search warrants every day across the United States.³ Police or other law enforcement personnel submit a warrant application to a judge who then reviews the application to ensure it is supported by probable cause.⁴ If a warrant

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1. See Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1391–92 (1989).

2. In the aftermath of revelations about the National Security Agency's surveillance programs and government collection of American citizens' metadata in the name of national security, it is an open question if – or to what extent – people are ever free of government scrutiny. See, e.g., Thomas P. Crocker, *Dystopian Constitutionalism*, 18 U. PA. J. CONST. L. 593, 594–95 (2015). American surveillance and policing are often compared unfavorably to totalitarian or “Orwellian” regimes. *Id.*

3. Missouri circuit courts alone issued 216,579 warrants in fiscal year 2017, an average of nearly 600 warrants per day. SUPREME COURT OF MO., MISSOURI JUDICIAL REPORT SUPPLEMENT 233 (2017), <https://www.courts.mo.gov/file.jsp?id=122404>.

4. See generally *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Warrants must be reviewed by a neutral and detached magistrate. *Id.* at 449.

application is defective, the reviewing judge may deny the application entirely or strike individual portions that lack probable cause.⁵

Despite the best efforts of judges who oversee the criminal investigation process, not every warrant perfectly conforms to the parameters of the Constitution. Considering the massive scale on which the correctional system operates,⁶ it is hardly surprising that errors – malicious or inadvertent – happen at every stage of the criminal justice process. This fact raises important policy questions about what should happen when a warrant contains statements unsupported by probable cause or extends a search beyond its permitted scope. These questions become particularly relevant when defective warrants are executed and lead to evidence vital to a prosecution.

What should courts do when evidence is recovered under a partially invalid warrant? Typically, the solution is to apply the severance doctrine.⁷ The severance doctrine permits a court to strike invalid parts of a warrant and illegally seized evidence while preserving the valid portions of the warrant and evidence seized pursuant to it.⁸ In theory, severance places the prosecution and defendant in the positions they would have been in had the search warrant not been defective. While an imperfect solution, severance attempts to balance the conflicting policy goals of allowing the prosecution to use its otherwise legitimate evidence at trial while mitigating the harmful effects of the warrant on the defendant's case.

Most federal and state courts approach severance decisions in a generally uniform manner under a test developed by the U.S. Court of Appeals for the Tenth Circuit in *United States v. Sells*.⁹ The so-called “*Sells* test” consists of five steps:

- (1) Divide the warrant into categories of items;
- (2) Evaluate the constitutional validity of each category;
- (3) Distinguish the valid and invalid categories;
- (4) Determine whether the valid or invalid portions make up the greater part of the warrant; and
- (5) Sever the invalid portions of the warrant if severance is appropriate.¹⁰

A circuit split has emerged over the application of the *Sells* test because some jurisdictions have removed the greater part requirement – step four of the

5. H. MORLEY SWINGLE, SEARCH & SEIZURE LAW IN MISSOURI 84–85 (Jan. 2019 ed.), https://semo.edu/pdf/old/LEA_SearchAndSeizureBook_2013.pdf.

6. See DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUST. STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 1 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>. In 2016, the incarceration rate of adults in the United States was 860 per 100,000. *Id.* at 4.

7. See *United States v. Sells*, 463 F.3d 1148, 1150–51 (10th Cir. 2006).

8. See *id.*

9. *Id.* at 1151.

10. *Id.*

test – from their analyses while others have not.¹¹ The greater part requirement calls for a quantitative and qualitative balancing of the warrant: Courts add up the number of valid versus invalid categories and then apply qualitative weight to each category to determine whether the invalid categories outweigh the valid categories.¹² If the invalid categories outweigh the valid categories, the entire warrant is deemed defective, and all evidence found during its execution must be suppressed.¹³ However, if the valid categories outweigh the invalid categories, the court may sever the invalid categories and preserve the rest.¹⁴

Jurisdictions that rejected the greater part requirement of the *Sells* test have observed that the test forces judges to divide a challenged warrant into subjective categories first and then assign subjective qualitative values to each category.¹⁵ The subjectivity-on-subjectivity requirement of the *Sells* test elevates courts' qualitative analyses to outcome-determinative levels in warrant-suppression cases because judges can essentially "balance" a warrant any way that is necessary to reach a desired result. This framework unnecessarily introduces uncertainty into the warrant suppression process and can lead to wildly disparate outcomes depending on the judge or jurisdiction. *State v. Douglass*¹⁶ was a case that should have been straightforward. A victim reported stolen property and told the police who she suspected of stealing the property.¹⁷ The police searched the home of the defendants and recovered the stolen property.¹⁸ Fortunately for the defendants, the story does not end here. The police made unnecessary and unforced errors by misstating probable cause on the warrant application form for the defendants' home, leading the defendants to successfully move to suppress all evidence recovered pursuant to the warrant.¹⁹ Over a six-year period, this case was heard at all three levels of the Missouri courts and was unsuccessfully appealed to the Supreme Court of the United States.²⁰

Part II of this Note will explore the facts of *State v. Douglass* and briefly discuss the Supreme Court of Missouri's holding. Next, Part III will provide an overview of leading case law on the issue of partially defective warrants and their treatment by courts in various jurisdictions. Part III will then contextualize *Douglass*' transfer to the Supreme Court of Missouri by reviewing the

11. Compare *Sells*, 463 F.3d 1148 and *United States v. Galpin*, 720 F.3d 436 (2d Cir. 2013) (applying the *Sells* test), with *United States v. Blakeney*, 942 F.2d 100, 1021 (6th Cir. 1991) (“[Courts may] sever the infirm portion of the search warrant from the remainder which passes constitutional muster.”).

12. *Sells*, 463 F.3d at 1151.

13. *Id.* at 1159.

14. *Id.* at 1151.

15. See *infra* notes 85–101.

16. 544 S.W.3d 182 (Mo. 2018) (en banc), cert. denied, 2019 WL 1231946 (U.S. Mar. 18, 2019) (mem.).

17. *Id.* at 187.

18. *Id.* at 188.

19. *Id.* at 188–99.

20. See Petition for Writ of Certiorari, *Douglass*, 544 S.W.3d 182 (No. 18-285), 2018 WL 4275880.

case's procedural history, particularly the Missouri Court of Appeals for the Western District's six-to-five reversal of the circuit court's suppression of the warrant. Part IV will examine the *Douglass* majority opinion's analysis of the warrant involved in this case under the *Sells* test. A discussion of Chief Justice Zel M. Fischer's dissent, which was joined by Judge Paul C. Wilson, will follow.

Part V will suggest that criminal defendants' rights and the policy goals of law enforcement would be most effectively preserved by adopting a modification of the *Sells* test that removes the greater part requirement's qualitative analysis may reduce uncertainty in the warrant suppression process. Additionally, Part V will suggest that the greater part requirement of the *Sells* test benefits neither prosecutors nor defendants because the open-ended subjectivity of the qualitative analysis test promotes a system where suppression motions can reach wildly disparate outcomes in favor of either side depending on which judge hears the motion. Finally, Part V will address the impact of *Douglass* on the future of fillable form search warrants and suggest some possible adjustments to police policies and officer training that may prevent the kind of problems that arose in *Douglass* from becoming an issue in the future. This Note's ultimate conclusion is that the greater part requirement of the *Sells* test should be eliminated from future courts' analyses.

II. FACTS AND HOLDING

State v. Douglass involved the criminal prosecution of Jennifer Gault and Phillip Douglass by the State of Missouri.²¹ Gault and Douglass were arrested and charged under Missouri's burglary²² and felony stealing²³ statutes in connection with their break-in and property thefts of Melissa Garris' home.²⁴ Before trial, Gault and Douglass moved to suppress the contents of the search warrant that ultimately led to their arrests because the police misrepresented probable cause on the warrant application.²⁵ The circuit court granted the motion to suppress.²⁶ The Missouri Court of Appeals for the Western District reversed the circuit court²⁷ but was subsequently reversed by the Supreme

21. *Douglass*, 544 S.W.3d at 187.

22. See MO. REV. STAT. § 569.170 (2016).

23. See *id.* § 570.030.

24. *Douglass*, 544 S.W.3d at 188; Motion to Suppress, *Douglass*, 544 S.W.3d 182 (No. 1316-CR03008), 2014 WL 12539453.

25. *Douglass*, 544 S.W.3d at 188.

26. *Id.*

27. *State v. Douglass*, No. WD 78328, 2016 WL 1212371, at *11 (Mo. Ct. App. Mar. 29, 2016), *rev'd by* 544 S.W.3d 182, *cert. denied*, 2019 WL 1231946 (U.S. Mar. 18, 2019) (mem.).

Court of Missouri in favor of Gaulter and Douglass.²⁸ The State appealed to the Supreme Court of the United States, but the Court denied certiorari.²⁹

On August 21, 2013, Melissa Garris visited her acquaintances Jennifer Gaulter and Phillip Douglass in their room at the Argosy Casino Hotel and Spa in Kansas City, Missouri.³⁰ That evening, Garris had drinks with Gaulter and Douglass before going home early after Gaulter and Douglass attempted to pressure Garris into joining them in a sex act.³¹ The following day, Gaulter texted Garris that Garris left her handbag and apartment keys behind in the hotel room.³² Gaulter agreed to leave the handbag and keys with the hotel's front desk staff so Garris could collect them.³³ Later in the day, Gaulter texted Garris again, asking if she was at home or working.³⁴ Garris replied that she was at work.³⁵

When Garris arrived home from work around 6:10 p.m., she discovered her home in "disarray and several items of property missing."³⁶ Garris "immediately" called the Argosy Casino to inquire about the status of her handbag and keys and was told the handbag was present but her keys were not.³⁷ Garris sent text messages to Gaulter asking about the missing keys and break-in, but Gaulter did not respond.³⁸ Garris then reported the break-in to the police and estimated the value of the property stolen from her home at approximately \$10,000.³⁹ Garris then traveled back to Argosy Casino to recover her handbag but was informed that someone else had already come to collect it.⁴⁰ She added the missing handbag and keys to her police report and identified Gaulter and Douglass as the probable thieves.⁴¹

Detective Darold Estes of the Kansas City Police Department subsequently applied for a warrant to search Douglass and Gaulter's Blue Springs, Missouri, home.⁴² Detective Estes submitted a corresponding affidavit to the

28. *Douglass*, 544 S.W.3d at 199.

29. *See* Petition for Writ of Certiorari, *Douglass*, 544 S.W.3d 182 (No. 18-285), 2018 WL 4275880.

30. *Douglass*, 2016 WL 1212371, at *2.

31. *Douglass*, 544 S.W.3d at 187.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* Among the stolen items were one Prada and two Coach purses; a Louis Vuitton bag; a limited-edition Toshiba laptop; custom engraved jewelry; Coach, LV, Hermes, and Bestie brand sunglasses; Garris' social security card and passport; Garris' son's social security card and birth certificate; and Clinique and Mary Kay brand perfume and makeup. *Id.* at 191.

40. *Id.* at 187.

41. *See id.*

42. *Id.*

circuit judge in which he stated there was probable cause to search the home and seize specific items believed to be Garris' stolen property.⁴³ The Kansas City Police Department used a warrant application form that included six "check boxes" denoting categories of items and people that Missouri law authorizes the police to search for.⁴⁴ The categories are:

- 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.⁴⁵

Detective Estes checked each of the first five boxes, leaving the box marked "Other" unchecked.⁴⁶ Following the check boxes on the warrant application, Detective Estes wrote the address and physical description of Douglass and Gaulter's house as the "person, place or thing to be searched."⁴⁷ The final segment of the warrant form presented the following prompt to Detective Estes:

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.])

43. *Id.* at 187–88.

44. *See id.*; *see* MO. REV. STAT. § 542.271 (2016).

45. *Douglass*, 544 S.W.3d at 190.

46. *Id.*

47. *Id.* at 190–91.

Social Security Card/Birth Certificate in son's name ([N.L.])

Various bottles of perfume makeup brushes and Clinique and Mary Kay makeup sets

Keys not belonging to property or vehicle at scene

Any property readily and easily identifiable as stolen⁴⁸

A circuit judge approved the warrant application and Kansas City police executed a search on Douglass and Gaulter's home that evening.⁴⁹ The search recovered a laptop and case, a red purse and its contents, a Coach purse, and a bracelet.⁵⁰ Garris identified each item as property stolen from her home.⁵¹

Douglass and Gaulter were arrested and charged with second-degree burglary and felony stealing.⁵² They each filed motions to suppress, challenging the warrant's validity because police did not have probable cause to search for a "deceased human fetus or corpse, or part thereof."⁵³ Douglass and Gaulter claimed that the exclusionary rule⁵⁴ completely barred all evidence seized pursuant to a constitutionally defective warrant.⁵⁵

In a consolidated hearing on Douglass' and Gaulter's motions to suppress, Detective Estes conceded the police did not have probable cause to search for human remains.⁵⁶ He explained he checked the corpse clause of the search warrant because he believed the police would have been required to secure a second, "piggyback" warrant if human remains were recovered during the search.⁵⁷ Additionally, Detective Estes stated he believed checking the box on the initial warrant form would save time in the event human remains were recovered at the scene.⁵⁸ The State opposed Douglass' and Gaulter's motions to suppress, arguing the warrant's errors fell within the good faith exception⁵⁹ to the exclusionary rule because the searching officers reasonably relied on the

48. *Id.* at 191 (alteration in original).

49. *Id.* at 188.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. "The normal rule is that 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. 2011) (citation omitted).

55. *Douglass*, 544 S.W.3d at 188.

56. *Id.*

57. *Id.*

58. *Id.*

59. *United States v. Hamilton*, 591 F.3d 1017, 1030 (8th Cir. 2010) (holding that a detective's good faith reliance on a defective warrant does not violate the Fourth Amendment).

warrant's constitutional validity and did not unlawfully expand their search beyond the stolen property.⁶⁰

The circuit court granted the suppression motion, holding that by checking the corpse clause, Detective Estes knowingly made a false statement to the court.⁶¹ Further, the court held the warrant invalid as an unconstitutional general warrant because the check boxes allowed the police to bypass the particularity requirement⁶² and search for items for which they had no probable cause.⁶³ Following a reversal of the suppression order by Missouri's Court of Appeals for the Western District,⁶⁴ the Supreme Court of Missouri granted transfer.⁶⁵ Holding that the instant warrant violated the Fourth Amendment as a general warrant, the Supreme Court of Missouri affirmed the circuit court's suppression of all evidence seized while executing the warrant.⁶⁶

III. LEGAL BACKGROUND

In *Mapp v. Ohio*,⁶⁷ the Supreme Court of the United States established complete exclusion of evidence seized in the course of unconstitutional searches as the default rule at the state level. The *Mapp* Court held "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court."⁶⁸ Since *Mapp*, this holding, known as the exclusionary rule, has softened to accommodate the need for exceptions and nuance in the doctrine. Today, suppression of evidence is a "last resort, not a first impulse."⁶⁹ As an alternative to total exclusion, courts have widely adopted the severance doctrine in an effort to preserve legally obtained

60. *Douglass*, 544 S.W.3d at 188.

61. *Id.*

62. See U.S. CONST. amend. IV; see also *Groh v. Ramirez*, 540 U.S. 551, 557–60 (2004). Search warrants must describe with particularity the evidence to be seized; if a warrant fails to meet this requirement, it is unconstitutional as a general warrant. *Ramirez*, 540 U.S. at 557.

63. *Douglass*, 544 S.W.3d at 188.

64. *State v. Douglass*, No. WD 78328, 2016 WL 1212371, at *11 (Mo. Ct. App. Mar. 29, 2016), *rev'd by* 544 S.W.3d 182, *cert. denied*, 2019 WL 1231946 (U.S. Mar. 18, 2019) (mem.). The Western District's decision is discussed in greater detail *infra* Section III.C.

65. *Douglass*, 544 S.W.3d at 189.

66. *Id.* at 199.

67. 367 U.S. 643, 655–56 (1961). Police searched Mapp's home without producing any evidence of a search warrant. *Id.* at 644–45. The Supreme Court of the United States held that evidence obtained by an unconstitutional search was inadmissible. *Id.* at 655.

68. *Mapp*, 367 U.S. at 655.

69. See *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

evidence in cases where warrants were defective in part due to errors or misconduct but were not entirely without merit.⁷⁰

In the past two decades, the Court has indicated that it prefers to reserve total exclusion for cases involving only the most serious police misconduct. In *Hudson v. Michigan*,⁷¹ the Court held a “knock and announce” warrant violation insufficient to require suppression of evidence recovered under the warrant. Refusing to invalidate the warrant, the Court noted that even if the preliminary knock and announce “misstep” had not occurred, the police still would have been able to execute a warrant on the defendant’s home and would have recovered the contraband.⁷² The Court drew a notable distinction between the harm that occurs when errors or misconduct happen during the process of securing or executing a warrant as opposed to the harm that occurs when law enforcement conduct entirely warrantless searches and seizures.⁷³

The Court has also refused to suppress evidence recovered under an expired warrant. In *Herring v. United States*, police searched Herring’s vehicle and his person in reliance on a search warrant that had been recalled but was not properly recorded several months prior to the search.⁷⁴ Due to a clerical error, the rescinded warrant remained on file with the county sheriff’s office beyond its expiration date and police relied upon its validity, finding methamphetamine and a gun in Herring’s possession.⁷⁵ The Court noted that while exclusion may be appropriate where police misconduct flagrantly or deliberately violated Fourth Amendment rights, the violations in *Herring* were not sufficiently reckless or intentional to justify exclusion.⁷⁶ While the Court did not exclude the evidence recovered in *Herring*, its opinion indicated that more serious violations arising out of flaws in the warrant-keeping system, such as repeated violations leading to a “widespread pattern” of constitutional missteps, could be cause for total exclusion.⁷⁷

70. See *United States v. Sells*, 463 F.3d 1148, 1154–55 (10th Cir. 2006) (noting every federal court has “adopted the doctrine of severance, whereby valid portions of a warrant are severed from the invalid portions and only materials seized under the authority of the valid portions, or lawfully seized while executing the valid portions, are admissible.”).

71. *Hudson*, 547 U.S. at 586. Here, the Court held suppression of evidence recovered while executing a warrant may not be appropriate even if police misconduct was the but-for cause of obtaining evidence. *Id.* at 592.

72. *Id.* at 592.

73. *Id.* at 593. Warrantless searches are the type of severe constitutional violation that require total exclusion because they violate citizens’ rights to shield their persons, houses, papers, and effects from government scrutiny until a valid warrant is issued. *Id.* (citing U.S. CONST. amend. IV).

74. 555 U.S. 135, 137–38 (2009).

75. *Id.*

76. *Id.* at 146.

77. *Id.* at 146–47; see, e.g., *Arizona v. Evans*, 514 U.S. 1, 17 (1995) (O’Connor, J., concurring) (noting it would not be reasonable for the police to rely on a recordkeeping system “that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests”).

A. Severability as an Alternative to Total Exclusion

In cases involving partially defective warrants, many jurisdictions, including Missouri, use some form of the severability test developed first by the U.S. Court of Appeals for the Tenth Circuit in *United States v. Naugle*⁷⁸ and more recently articulated in *United States v. Sells*.⁷⁹ What is today known as the “*Sells* test” limits the availability of severance to cases in which “the valid portions of the warrant [are] sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant.”⁸⁰ The greater part requirement involves courts employing a “holistic test”⁸¹ that considers 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.’”⁸² In other words, the greater part requirement obliges courts to not only divide the warrant between its valid and invalid categories but also assign subjective weight to each category according to its scope and invasiveness relative to the warrant as a whole.⁸³

There does not seem to be a universal rule quantifying how much valid content in a warrant is required for courts to apply the severance doctrine as opposed to total exclusion. As a result, courts have devised standards of varying rigor to determine when severance should be used to preserve categories of a partially defective warrant.⁸⁴ Consequently, courts have split over the issue of whether severance should be applied as a default rule or only an exceptional remedy when an otherwise valid warrant contains only minor or superficial defects.

B. Inconsistent Application of the Greater Part Requirement of the Sells Test

While the *Sells* test has been generally met with approval in jurisdictions beyond the Tenth Circuit, courts have modified and customized the *Sells* test in their own severability analyses. The U.S. Court of Appeals for the Fourth Circuit may have implicitly adopted the greater part requirement of the severability test in its analysis by holding the analysis of a warrant’s contents to be

78. 997 F.2d 819, 822 (10th Cir. 1993).

79. 463 F.3d 1148 (10th Cir. 2006).

80. *Sells*, 463 F.3d at 1151 (alteration in original).

81. *Id.* at 1160.

82. *Id.* (quoting *United States v. Naugle*, 997 F.2d 819, 822 (10th Cir. 1993)).

83. *Id.*

84. *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978) (approving severance of a partially defective warrant without a hearing when there is sufficient content to support a finding of probable cause after any false information is set to one side and not considered).

“both qualitative and quantitative.”⁸⁵ In *United States v. Jones*,⁸⁶ the Fourth Circuit cited the *Sells* greater part requirement as the standard in its review of the defendant’s motion to suppress evidence seized under a search warrant. However, the greater part requirement was ultimately not incorporated into the court’s analysis because all of the evidence found in the course of the search would have been admissible even if the allegedly defective categories of the warrant were severed.⁸⁷

Rather than apply the greater part requirement, other courts have taken an alternative approach to severance that examines each “valid part of a warrant without analyzing its relation to the whole.”⁸⁸ In 2017, the U.S. District Court for the Western District of Michigan explicitly rejected the greater part requirement of the *Sells* test.⁸⁹ Suggesting the greater part requirement of the *Sells* test may be “unsound,”⁹⁰ the court reiterated its support for the severance doctrine as a default remedy by holding that “the appropriate remedy for overbreadth is severing the infirm clause, and not dooming the entire warrant.”⁹¹ Similarly, the U.S. Court of Appeals for the Second Circuit adopted the *Sells* severance test but rejected the greater part requirement.⁹²

The *Sells* opinion itself acknowledged that courts outside of the Tenth Circuit have generally incorporated the majority of the *Naugle* severability test into their analyses while modifying or rejecting the greater part requirement.⁹³ For example, the U.S. Court of Appeals for the Ninth Circuit has held severance is “the normal remedy” for overbroad portions of a warrant unless the invalid portions “are not inseparable from or predominate over” the valid parts of a warrant.⁹⁴ It is not clear whether courts will reach qualitatively different results on the basis of a greater part requirement versus a predominance requirement. The distinction may be merely semantic. However, the *Sells* greater part requirement implies courts should determine whether the valid parts of a warrant comprise more than fifty percent of the entire warrant. In contrast, the question of whether invalid parts of a warrant “predominate” over

85. *United States v. Jones*, No. 3:17cr71, 2018 WL 935396, at *16 (E.D. Va. Feb. 16, 2018).

86. *Id.* at *16.

87. *Id.* at *18.

88. Brief for Petitioner at 9, *State v. Douglass*, 544 S.W.3d 182 (Mo. 2018) (No. 18-285), 2018 WL 4275880.

89. *United States v. Walling*, No. 1:16-cr-250, 2017 WL 1313898, at *8–9 (W.D. Mich. Apr. 10, 2017).

90. *United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001).

91. *Walling*, 2017 WL 1313898, at *6 (citing *Greene*, 250 F.3d at 477).

92. See *United States v. Galpin*, 720 F.3d 436, 448–49 (2d Cir. 2013) (holding severance to be the remedy for a partially defective warrant unless the valid portion of the warrant in question is merely an insignificant or tangential part).

93. *United States v. Sells*, 463 F.3d 1148, 1159 (10th Cir. 2006).

94. *United States v. Embry*, 625 Fed. App’x 814, 817 (holding severability only would not apply where the “valid portion of the warrant is a relatively insignificant portion of an otherwise invalid search.”).

the whole seems to offer courts even more latitude to reach a preferred outcome than the greater part requirement of *Sells*.

Perhaps the clearest criticism of the greater part requirement of the *Sells* test appeared in *Cassady v. Goering*,⁹⁵ a case decided in 2009 by the Tenth Circuit. In *Cassady*, Judge Michael W. McConnell wrote a dissent that noted the circuit split over the use of the greater part requirement and questioned whether the *Naugle* court intended to create the greater part requirement in the first place.⁹⁶ In Judge McConnell's view, the greater part requirement

[d]eparts unnecessarily, and arguably accidentally, from the test employed in the vast majority of other jurisdictions . . . [T]he subjectivity inherent in applying "the greater part of the warrant" test leads to unpredictable results . . . [T]he manner in which judges chop up a warrant will often have outcome-determinative effects.⁹⁷

According to the *Cassady* dissent, the greater part requirement appears to stem from an inaccurate citation in *Sells*' predecessor *Naugle* to a Second Circuit case named *United States v. George*.⁹⁸ The *Naugle* court cited *George* as authority for the following test: "[T]he valid portions of the warrant must be sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant."⁹⁹ However, "the words, 'greater part of the warrant' appear nowhere in *George*."¹⁰⁰ Rather, *George* employed the majority rule that severance is unavailable where "sufficiently particularized portions make up only an insignificant or tangential portion of the warrant."¹⁰¹ Similar to the tension between a greater part requirement and the Ninth Circuit's "pre-dominance" requirement, there may be a qualitative difference between how courts rule on suppression of a warrant under a greater part approach as opposed to an approach that requires the valid part of a warrant be more than "insignificant or tangential."

C. The Procedural History of *Douglass*

Before *Douglass* reached the Supreme Court of Missouri, the circuit court's total suppression of the warrant was reversed in favor of the prosecution at the appellate level. The Missouri Court of Appeals for the Western District reviewed the appeal under an abuse of discretion standard to determine whether

95. 567 F.3d 628 (10th Cir. 2009).

96. *Id.* at 657–58 (McConnell, J., dissenting).

97. *Id.*

98. *Id.* at 657.

99. *Id.* at 637 (majority opinion) (quoting *United States v. Naugle*, 997 F.2d 819, 822 (10th Cir. 1993)).

100. *Id.* at 657 (McConnell, J., dissenting).

101. *Id.* (italics omitted) (quoting *United States v. George*, 975 F.2d 72, 80 (2d Cir. 1992)).

severance should have been applied to the warrant.¹⁰² Writing for the majority in a six-to-five decision, Judge Karen King Mitchell overruled the circuit court's exclusion of the *Douglass* warrant.¹⁰³ Judge Mitchell wrote that "the circuit court was authorized to suppress only evidence that was actually seized in reliance on the corpse provision."¹⁰⁴ The majority stated it would not exclude the valid parts of the warrant unless it could be determined on remand that the searching officers relied on the corpse clause.¹⁰⁵ The majority opinion ultimately sparked two dissents, laying the groundwork for the Supreme Court of Missouri's reversal.¹⁰⁶

Judge Mitchell began her *Sells* analysis by dividing the warrant into ten categories:

(1) bags and purses; (2) Toshiba laptop; (3) costume jewelry; (4) sunglasses; (5) identification for Melissa Garris; (6) identification for Garris' son; (7) perfume and makeup related items; (8) keys unrelated to the scene; (9) other property readily and easily identifiable as stolen; and (10) deceased human fetus or corpse, or part thereof.¹⁰⁷

Douglass and *Gaulter* did not contest the validity of categories one through nine; the majority found only category ten invalid.¹⁰⁸ Because each item in categories one through nine was "clearly related to the theft crimes the defendants were accused of committing," the court found categories one through nine distinguishable from category ten.¹⁰⁹

In the next step of its analysis, the majority conducted its "greater part of the warrant" calculation.¹¹⁰ Comparing the valid versus invalid categories of the warrant, the court found categories one through nine to quantitatively and qualitatively outweigh category ten.¹¹¹

Finally, the court addressed the issue of officer misconduct in checking the corpse clause on the warrant form.¹¹² For purposes of the severance doctrine, the court glossed over the issue of officer misconduct, stating that the relevant inquiry is *if* each part of a warrant is invalid, not *why* part of a warrant

102. *State v. Douglass*, No. WD 78328, 2016 WL 1212371, at *3 (Mo. Ct. App. Mar. 29, 2016), *rev'd by State v. Douglass*, 544 S.W.3d 182 (Mo. 2018) (en banc), *cert. denied*, 2019 WL 1231946 (U.S. Mar. 18, 2019) (mem.). The abuse of discretion standard only permits reversal if the circuit court's decision was clearly erroneous. *Id.* at *4.

103. *Id.* at *11.

104. *Id.*

105. *Id.*

106. *See id.* at *11, *19.

107. *Id.* at *7.

108. *Id.*

109. *Id.*

110. *Id.* at *8.

111. *Id.*

112. *Id.* at *9.

might be invalid.¹¹³ To the extent officer misconduct was relevant to invalid content appearing in a warrant, the greater part requirement permitted courts to factor misconduct into their qualitative analyses.¹¹⁴ The court noted that where officer misconduct was relevant to the warrant's content, it could only "exclude . . . evidence seized as a result of misconduct and not any evidence seized under lawful authority."¹¹⁵ Essentially, Judge Mitchell concluded the court could not exclude evidence seized under categories one through nine because categories one through nine were not impacted by misconduct.¹¹⁶ While Detective Estes' conduct in securing the warrant was not excusable or justifiable, the majority concluded it could not invalidate the entire warrant without evidence that the searching officers relied on the invalid part of the warrant in conducting their search.¹¹⁷

The first dissent, written by Judge Gary D. Witt, argued severability is unavailable in cases of bad-faith police misconduct.¹¹⁸ Judge Witt contested the majority's contention that officer misconduct plays no independent role in determining whether severance can apply to a warrant.¹¹⁹ Under Judge Witt's interpretation of the severance doctrine, severance becomes automatically unavailable in cases where the police acted in bad faith.¹²⁰ He stated, "The absence of bad faith or pretext is necessary before redaction may be considered, as ignoring bad faith by the police or prosecution would undermine many of the purposes of the Warrant Clause . . ." ¹²¹ In Judge Witt's view, deliberate deception in a warrant application fatally undermines the ability of judges to make informed decisions; in such circumstances, redaction cannot be an option.¹²²

Judge Witt was not convinced that total exclusion would be too harsh a remedy in *Douglass*.¹²³ He believed the deterrent value of total exclusion would prevent future misconduct by police of the kind that took place in this case.¹²⁴ Here, the police conduct was "sufficiently deliberate" that exclusion could meaningfully deter similar misconduct.¹²⁵ Judge Witt supported his conclusion by opining that Detective Estes' testimony suggested it is the regular practice of the Kansas City Police Department to unlawfully check inapplicable probable cause boxes on their warrant forms.¹²⁶ Because Detective Estes

113. *Id.*

114. *Id.*

115. *Id.* at *10.

116. *Id.*

117. *Id.* at *11.

118. *Id.* (Witt, J., dissenting).

119. *Id.* at *14.

120. *Id.* at *15.

121. *Id.*

122. *Id.*

123. *Id.* at *17.

124. *Id.*

125. *Id.* at *18 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)).

126. *Id.*

knew there was not probable cause to search for evidence of human corpses, Judge Witt concluded that the warrant was not executed in good faith and was a “deliberate circumvention of the . . . Fourth Amendment” such that evidence found pursuant to it was worthy of exclusion.¹²⁷

In a separate dissent, Judge Mark D. Pfeiffer articulated his belief that the authority to search provided by the corpse clause of the warrant was so broad that it “swallow[ed] everything else in the subject warrant.”¹²⁸ Judge Pfeiffer reasoned that the corpse clause could have implicitly authorized police to conduct their search at the microscopic level, investigating fibers and conducting DNA tests on Douglass and Glauter’s home.¹²⁹ In Judge Pfeiffer’s view, checking the corpse clause fundamentally changed the nature of the investigation from a property crime to a potential homicide.¹³⁰ As such, the practical effect of the corpse clause was to create an unconstitutional general warrant for which exclusion is not possible.¹³¹

IV. INSTANT DECISION

The Supreme Court of Missouri decided *Douglass* by a four-to-two vote.¹³² The reasoning of the majority and dissent most clearly diverges in two places. First, the judges were unable to agree on the most logical way to divide the warrant.¹³³ The *Sells* severance test grants broad discretion to courts to divide warrants as they see fit. The majority divided the warrant into thirteen categories, while the dissent divided it into five categories.¹³⁴ Second, the majority’s application of a holistic test found the warrant’s unsupported categories to be so broad that an unconstitutional general warrant was formed.¹³⁵ In contrast, the dissenting judges believed the warrant’s valid categories could have been preserved by severing any parts not supported by probable cause.¹³⁶ The judges were in agreement that *Sells* provides the correct severability test, although they were unable to agree as to how it should be applied.¹³⁷

127. *Id.* at *19.

128. *Id.* (Pfeiffer, J., dissenting).

129. *Id.*

130. *Id.* at *20.

131. *Id.*

132. Judge W. Brent Powell did not participate in the deciding of this case. *State v. Douglass*, 544 S.W.3d 182, 199 (Mo. 2018) (en banc), *cert. denied*, 2019 WL 1231946 (U.S. Mar. 18, 2019) (mem.).

133. *Id.* at 191 (majority opinion) (stating the majority’s view on how the warrant should be divided); *see also id.* at 202 (Fischer, J., dissenting) (stating the dissent’s view on how the warrant should be divided).

134. *Id.* at 191 (majority opinion); *id.* at 202 (Fischer, J., dissenting).

135. *Id.* at 195 (majority opinion).

136. *Id.* at 208 (Fischer, J., dissenting).

137. *Id.* at 190 (majority opinion) (stating the majority’s explanation of the *Sells* test); *id.* at 201 (Fischer, J., dissenting) (stating the dissent’s use of the *Sells* test).

A. *The Majority*

In *Douglass*, the Supreme Court of Missouri first considered the State's argument that the severance doctrine permits courts to sever invalid categories of warrants while retaining their constitutionally-sound categories "so long as the invalid portions can be meaningfully severed from the valid portions and have not created an impermissible general warrant."¹³⁸ Writing for the majority, Judge Patricia Breckenridge employed the Tenth Circuit's five-step *Sells* test to determine whether the severance doctrine applied to the instant warrant.¹³⁹

1. Step One

In step one, the majority divided Detective Estes' warrant into the following thirteen 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

138. *Id.* at 190 (majority opinion).

139. *Id.*

13. any property readily and easily identifiable as stolen.¹⁴⁰

2. Step Two

In step two of its analysis, the court identified categories one through three as reproductions of the language of Missouri's probable cause statute.¹⁴¹ The court noted the statute's language described "broad, generic categories for which a search warrant may be issued."¹⁴² The court found categories one through three defective because the statutory language "place[d] no limitations on the search and [was] devoid of any reference to the crimes related to [the victims]. No specificity as to the crime or property was provided in these first three categories."¹⁴³ Because the "statutory language of the first three categories d[id] not include any distinguishing characteristics of the goods to be seized," they were found to "lack any particularity for the purposes of the Fourth Amendment."¹⁴⁴

The State argued categories one through three of the warrant application were included for purposes of describing Garris' stolen property using the statute's general terms before specifically describing the stolen goods in categories six through thirteen.¹⁴⁵ The majority rejected this argument, holding that categories one through three were not "limited by referencing any particular criminal offense and certainly not limited by any reference to [Garris] or her stolen property."¹⁴⁶ In *Sells*, the use of a comparable "catch-all" category on a warrant form that permitted seizure of "'any other related fruits, instrumentalities, and evidence of the crime' was sufficiently particular" for purposes of the Fourth Amendment.¹⁴⁷ In the majority's view, the inclusion of the word "related" sufficiently narrowed the search to "enumerated provisions of the warrant" for which probable cause existed.¹⁴⁸

Next, the court rejected category four of the warrant. Category four asserted there was probable cause to believe a person with an outstanding felony arrest warrant would be present at Douglass and Gaulters' home at the time of

140. *Id.* at 191.

141. *Id.* at 192; *see also* MO. REV. STAT. § 542.271 (2016).

142. *Douglass*, 544 S.W.3d at 192.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 192.

147. *Id.* at 192–93 (quoting *United States v. Sells*, 463 F.3d 1148, 1157 (10th Cir. 2006)); *see also* *Andresen v. Maryland*, 427 U.S. 463, 479 (1976). So-called "catchall" phrases have been challenged as creating unconstitutional general warrants when they were affixed to the end of sentences detailing evidence police anticipated finding during their searches. *Andresen*, 427 U.S. at 479. However, *Andresen* held valid catchall phrases are limited in scope to the specific, relevant, crime for which the warrant was authorized. *Id.* at 480–81.

148. *Douglass*, 544 S.W.3d at 193.

the search.¹⁴⁹ The court found the warrant's supporting affidavit failed to adequately support the statements in category four.¹⁵⁰ The State conceded that "category five, the corpse clause, lack[ed] probable cause."¹⁵¹

The court agreed categories six through twelve were sufficiently specific to satisfy the probable cause and particularity requirements of the Fourth Amendment.¹⁵² Based on the list of stolen items provided in Detective Estes' affidavit, "there was a fair probability such items would be found at Mr. Douglass and Ms. Gaulter's residence."¹⁵³

Finally, the majority deemed category thirteen an impermissible "catch-all" provision that gave police broad authorization to search property without limitation to the suspected crime.¹⁵⁴ The court held that where a catch-all category failed to "limit the search in any fashion to the crime at issue," it was improper.¹⁵⁵ Further, if the catch-all category failed to limit a search beyond "items believed to be stolen," the category was conclusory and "not descriptive at all."¹⁵⁶

3. Step Three

In step three, the majority determined that categories six through twelve were distinguishable from categories one through five and thirteen because each valid category "retain[ed] its significance when isolated from [the] rest of the warrant."¹⁵⁷ As a result, the court decided categories six through twelve could be eligible for severance.¹⁵⁸

4. Step Four

In step four, the majority balanced the parts of the warrant to determine whether the valid categories outweighed the invalid categories.¹⁵⁹ This step required the court to consider the number of valid versus invalid categories while weighing the "practical effect" of each provision.¹⁶⁰ The court attempted to "employ a holistic test that examine[d] the qualitative as well as the quantitative aspects of the valid portions of the warrant relative to the invalid portions

149. *Id.*

150. *Id.*

151. *Id.* at 193–94.

152. *Id.* at 194.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (second alteration in original).

158. *Id.*

159. *Id.* at 194–95.

160. *Id.* at 195.

to determine whether the valid portions ma[d]e up the greater part of the warrant."¹⁶¹ In performing its "holistic test," the majority concluded that, while the valid categories of the warrant were greater in number than the invalid categories, the invalid categories were sufficiently defective to turn the warrant into an unconstitutional general warrant for which severance was inapplicable.¹⁶²

Judge Breckenridge stated the applicability of the severance doctrine did not turn on what items were actually seized in the search.¹⁶³ In fact, the severance doctrine focused only on the merits of the warrant, "not what items were actually seized pursuant to it."¹⁶⁴ Finally, Judge Breckenridge noted that Detective Estes' affidavit in support of the warrant could not cure its defects because there was no evidence the affidavit accompanied the warrant at the time of the search.¹⁶⁵

5. Step Five

The court held the warrant was a general warrant in violation of the Fourth Amendment.¹⁶⁶ As a result, severance could not be applied and "all evidence obtained by searches and seizures in violation of the Constitution . . . [was] inadmissible in state court."¹⁶⁷

B. The Dissent

Chief Justice Fischer authored the dissent in *Dougllass* and was joined by Judge Wilson.¹⁶⁸ Chief Justice Fischer began his analysis by comparing the language in the search warrant to Detective Estes' supporting affidavit.¹⁶⁹ Fischer noted that every warrant application form has check boxes for five categories of evidence that may be searched for in a warrant.¹⁷⁰ Those categories "track the language contained in [section] 542.271" of the Missouri Revised Statutes.¹⁷¹

Judge Fischer stated that

preceding the five categories was an express reference to the application for the search warrant, which provided, "*Based on information provided*

161. *Id.* (quoting *United States v. Sells*, 463 F.3d 1148, 1160 (2006)).

162. *Id.*

163. *Id.* at 195–96.

164. *Id.*

165. *Id.* at 196.

166. *Id.* at 198.

167. *Id.* (alteration in original) (quoting *State v. Grayson*, 336 S.W.3d 138, 146 (Mo. 2011)).

168. *Id.* at 199 (Fischer, C.J., dissenting).

169. *See id.*

170. *Id.*

171. *Id.*

in a verified application/affidavit, the Court finds probable cause to warrant a search for and/or seizure of the following[.]” 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.¹⁷²

Chief Justice Fischer agreed with the majority that the circuit judge erred in permitting the warrant’s check box for “deceased human fetus or corpse, or part thereof” to be checked.¹⁷³ However, he found the improperly checked box not to be fatal to the warrant because the Supreme Court of the United States ruled the exclusionary rule’s application was “an issue separate from the question [of] whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.”¹⁷⁴

Chief Justice Fischer noted that

the Supreme Court of the United States has “never held that potential, as opposed to actual invasions of privacy constitute searches for the purpose of the Fourth Amendment” And, “[n]ot every Fourth Amendment violation results in the exclusion of the evidence obtained pursuant to a defective search warrant.”¹⁷⁵

He echoed the First Circuit’s concern in *United States v. Riggs* that “a rule requiring blanket invalidation of overbroad warrants would seem ill advised.”¹⁷⁶ Before invalidating a warrant, Chief Justice Fischer argued courts must “weigh[] 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 . . . that is ultimately found to be [partially] defective.”¹⁷⁷

172. *Id.* (alteration in original).

173. *Id.*

174. *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)).

175. *Id.* (quoting *United States v. Karo*, 468 U.S. 705, 712 (1984) and *United States v. Hamilton*, 591 F.3d 1017, 1027 (8th Cir. 2010)).

176. *Id.* at 200 (quoting *United States v. Riggs*, 690 F.2d 298, 301 (1st Cir. 1982)).

177. *Id.* (third alteration in original) (quoting *Leon*, 468 U.S. at 906).

In this case, it was undisputed that probable cause existed to search for the items specifically identified in the warrant, and it was undisputed that their description met the particularity requirement.¹⁷⁸ Applying the *Sells* severance test,

[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]).¹⁷⁹

While the majority broke the warrant into thirteen categories, Chief Justice Fischer divided it into five categories of evidence listed on the warrant:

(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.”¹⁸⁰

Under Chief Justice Fischer’s method of subdivision, the only category of evidence properly challenged by Gault and Douglass was category five.¹⁸¹ According to Chief Justice Fischer, “The other four checked categories, which are found on every form search warrant, d[id] not violate the particularity requirement of the Fourth Amendment because the search warrant expressly referred back to the application for the search warrant”¹⁸²

Chief Justice Fischer found that the warrant’s particularity requirement was met through Detective Estes’ supporting affidavit because the warrant form incorporated the affidavit in the following clause: “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.”¹⁸³ Chief Justice Fischer stated that because warrants are permitted to meet the Fourth Amendment particularity requirement through the incorporation of other documents, the generality expressed in the check boxes were not fatal to the warrant.¹⁸⁴

Chief Justice Fischer suggested if warrants could not incorporate other documents by reference, the effect would be to “completely eliminate form

178. *Id.* at 200–01.

179. *Id.* (alterations in original) (quoting *United States v. Sells*, 463 F.3d 1148, 1150 (10th Cir. 1994)).

180. *Id.* at 202 (footnotes omitted).

181. *Id.*

182. *Id.*

183. *Id.* (alteration in original).

184. *Id.* at 203.

warrants in general.”¹⁸⁵ Because the language of the warrant tracked the language provided by statute,¹⁸⁶ Chief Justice Fischer believed invalidating the warrant on the basis of the language in the check boxes would “call into question the constitutional validity of [section] 542.271, which this court prefers to avoid completely.”¹⁸⁷ Instead, Chief Justice Fischer suggested that the warrant’s particularity requirement was met by the “explicit list of items to be seized” provided in Detective Estes’ affidavit, which the issuing judge signed at the same time as the warrant itself.¹⁸⁸

Based on Chief Justice Fischer’s conclusion that the check boxes did not constitute a constitutional violation, he found the only defective category of the warrant to be the corpse clause.¹⁸⁹ Because severance was available “[w]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 the rest of the warrant . . . ,”¹⁹⁰ Chief Justice Fischer found the corpse clause distinct and isolated from every other category of the warrant.¹⁹¹

Applying the *Sells* test’s “qualitative and quantitative assessments”¹⁹² of the warrant’s fitness for severability, Chief Justice Fischer found the corpse clause distinguishable from the remainder of the warrant.¹⁹³ Quantitatively, the corpse clause was outweighed four-to-one by categories supported by probable cause.¹⁹⁴ Qualitatively, Chief Justice Fischer considered the corpse clause a “de minimis aspect of the warrant.”¹⁹⁵ While “an officer could not properly look for a stolen flat-screen television by rummaging through a suspect’s medicine cabinet,”¹⁹⁶ the corpse clause did not impact the scope of the officers’ search because “a search for small parts of a corpse is unlikely to be broader than a search for small items like jewelry, keys, or identification.”¹⁹⁷

Chief Justice Fischer next addressed possible remedies for warrants containing categories unsupported by probable cause. He noted the Supreme Court of the United States’ decision in *Franks v. Delaware* that if an officer makes factual misrepresentations in a warrant, the court must “redact the misrepresentation and then reevaluate whether the search warrant is still supported by

185. *Id.*

186. MO. REV. STAT. § 542.271.1 (2016).

187. *Douglass*, 544 S.W.3d at 203; see *State v. Wade*, 421 S.W.3d 429, 432 (Mo. 2013) (en banc) (holding statutes are presumed constitutional and will only be held unconstitutional if they clearly contravene a constitutional provision).

188. *Douglass*, 544 S.W.3d at 204.

189. *Id.*

190. *United States v. Sells*, 463 F.3d 1148, 1158 (10th Cir. 1994).

191. *Douglass*, 544 S.W.3d at 204.

192. *Sells*, 463 F.3d at 1160.

193. *Douglass*, 544 S.W.3d at 205.

194. *Id.*

195. *Id.* at 205–06.

196. *Id.* at 205 (quoting *United States v. Galpin*, 720 F.3d 436, 450 (2d Cir. 2013)).

197. *Id.*

probable cause.”¹⁹⁸ Citing *United States v. Christine*, Chief Justice Fischer noted that even where police expand their searches beyond the valid scope of their warrants, “only that evidence which was seized illegally must be suppressed; the evidence seized pursuant to the warrant has always been admitted.”¹⁹⁹ Essentially, “courts exclude only that evidence seized as a result of misconduct and not any evidence seized under lawful authority.”²⁰⁰

In Chief Justice Fischer's view, the inappropriately checked corpse clause on Detective Estes' warrant form more closely resembled an inadvertent error than an intentional misrepresentation.²⁰¹ According to Chief Justice Fischer, Detective Estes' improperly checked box on the warrant form did not justify invalidating the entire warrant because courts have rejected complete exclusion even in cases where police relied on their own intentional misrepresentations to secure search warrants.²⁰² He suggested the goals of the Fourth Amendment could be met by only suppressing evidence seized in reliance on the invalid corpse clause because “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.’”²⁰³

Chief Justice Fischer reasoned that if the officers did not rely on the corpse of the warrant, then it did not expand the warrant's intrusion on Douglass and Gault's privacy.²⁰⁴ If the corpse clause did not expand the warrant's intrusion on Douglass and Gault's privacy, then no Fourth Amendment violation took place.²⁰⁵ Therefore, because none of the evidence seized was taken in reliance on the invalid portion of the warrant, severing only the corpse clause would allow Douglass and Gault to receive a fair trial without damaging the state's ability to present its case.²⁰⁶ Partial severance would, in Chief Justice Fischer's view, “plac[e] the State and the accused in the same positions they would have been had the impermissible conduct not taken place.”²⁰⁷

198. *Id.* at 208 (citing *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978)).

199. *Id.* (quoting *United States v. Christine*, 687 F.2d 749, 757 (3d Cir. 1982)).

200. *Id.*

201. *Id.*

202. *Id.* See generally 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 (1988). Lynskey noted, “[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.” *Id.* at 837.

203. *Douglas*, 544 S.W.3d at 209 (quoting *United States v. Karo*, 468 U.S. 705, 712 (1984)).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* (quoting *Nix v. Williams*, 467 U.S. 431, 447 (1984)).

Chief Justice Fischer concluded that the circuit court improperly applied total suppression of the search warrant as its “first impulse, not its last resort.”²⁰⁸ He stated that total suppression’s role as a remedy should be limited as an option of last resort because “suppress[ing] the truth and set[ting] the criminal loose in the community without punishment” carries a heavy cost, particularly for victims.²⁰⁹

V. COMMENT

The turning point of *Douglass* may have been step four of the *Sells* test, where the Supreme Court of Missouri was tasked with “[d]etermin[ing] [w]hether the [v]alid or [i]nvalid [p]ortions [m]ake up the [g]reater [p]art of the [w]arrant.”²¹⁰ In *Sells*, the Tenth Circuit considered the “practical effect” of each category of a search warrant as it related to other categories.²¹¹ The court found that counting the number of valid versus invalid categories of warrants was an unhelpful “hypertechnical” approach because some “invalid portions . . . may be so broad and invasive that they contaminate the whole warrant.”²¹² Instead, applying a “holistic test” allowed the court to assess the relative value and influence of each category of a warrant relative to the whole.²¹³

The *Sells* approach to severance analysis offers a level of judicial discretion that can lead to inconsistent results from jurisdiction to jurisdiction, case to case, and judge to judge.²¹⁴ Holistic tests offer cover for courts to effectively disregard the “quantitative” portion of the greater part requirement when it yields a result contradictory to the result of the holistic test.²¹⁵ In effect, if the valid categories of a warrant outnumber the invalid categories, courts have considerable leeway in deciding whether or not to apply severance. For instance, a court may assign higher qualitative values to each invalid category, erasing the numerical advantage held by the valid categories. Conversely, courts can just as easily reach the opposite result and apply severance by holding the numerically greater invalid portions of a warrant de minimis. As *Douglass* demonstrates, the objectivity of the greater part requirement contributes little, if anything, to courts’ decisions in light of the subjective nature of the test.

208. *Id.* at 210.

209. *Id.* at 210 (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011)).

210. *Id.* at 194–95 (majority opinion).

211. *United States v. Sells*, 463 F.3d 1148, 1160 (10th Cir. 1994).

212. *Id.*

213. *Id.*

214. *See, e.g., Cassady v. Goering*, 567 F.3d 628, 656–57 (10th Cir. 2009).

215. *Douglass*, 544 S.W.3d at 195.

Because the greater part requirement contributes to inconsistency in Fourth Amendment search warrant cases, the First Circuit,²¹⁶ Second Circuit,²¹⁷ Third Circuit,²¹⁸ Fifth Circuit,²¹⁹ Sixth Circuit,²²⁰ and Ninth Circuit²²¹ do not apply a holistic test in their severance decisions. Instead, the courts prefer to “carve out”²²² any constitutionally defective parts of warrants while allowing the case to be decided on its merits.

The most effective way to resolve the conflict over how much of a warrant constitutes the greater part may be for courts to adopt the test as it exists in several circuits already by rejecting the holistic component of the test entirely. If courts can avoid conflict over the qualitative value of each category of a warrant relative to other categories, the question of whether the valid portion can stand alone becomes not only easier to resolve but also more consistent in the application of severance.

The problems that the *Cassady* dissent predicted would be caused by the *Sells* holistic test were on full display in *Douglass*. In this case, the Missouri courts could not even agree on how many categories the search warrant should be divided into. At the appellate level, the court divided the warrant into ten categories. At the Supreme Court of Missouri, the majority and dissent found common ground by rejecting the ten-category division; however, the majority divided the warrant into thirteen categories while the dissent opted for five.

The court's repeated “chopping” of the *Douglass* warrant rendered the greater part requirement of the *Sells* test virtually useless because the judges could not agree on how they should group categories of the warrant. There were essentially three separate and distinguishable holistic tests of the same warrant between the Western District and the Supreme Court of Missouri's majority and dissent. Under the Western District's quantitative analysis, ninety percent of the warrant was valid. In contrast, according to the Supreme Court of Missouri's majority's quantitative analysis, only fifty-four percent of that same warrant was valid. Finding a middle ground, Chief Justice Fischer's

216. *United States v. Morris*, 977 F.2d 677, 682 (1st Cir. 1992) (“[A] warrant is valid as to some items but not as to others, we have established that a court can admit the former while excluding the latter.”).

217. *United States v. Galpin*, 720 F.3d 436, 449 (2d Cir. 2013) (declining to use severance only when the valid part of a warrant is “insignificant or tangential.”).

218. *United States v. Christine*, 687 F.2d 749, 758 (3d Cir. 1982) (holding courts should salvage partially invalid warrants by redacting categories unsupported by probable cause).

219. *United States v. Freeman*, 685 F.2d 942, 952 (5th Cir. 1982) (declining to sever where the warrant was generally invalid except for a tangentially related category).

220. *United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001) (“[I]nfirmary due to overbreadth does not doom the entire warrant; rather it requires suppression of evidence seized pursuant to that part of the warrant . . . , but does not require suppression of anything described in the valid portions of the warrant” (quotation omitted)).

221. *United States v. Embry*, 625 F. App'x 814, 817 (9th Cir. 2015) (permitting severance unless the valid portion of a warrant “is a relatively insignificant part of an otherwise invalid search”).

222. *Galpin*, 720 F.2d at 448.

quantitative analysis found the warrant eighty percent valid. This disconnect is key because the quantitative step of the test influences the judges' perspectives for the qualitative step: It seems plausible that a quantitatively fifty-four percent valid warrant is in more danger of invalidation than one that is eighty or ninety percent quantitatively valid. Judge McConnell was prescient in his prediction that permitting courts to "chop up"²²³ warrants as they please and apply a subjective holistic test to the result would be an outcome-determinative endeavor.

If the Supreme Court of Missouri had approached the warrant in *Douglass* with the goal of redacting invalid categories and keeping the rest, *Douglass* could have been decided on its merits. Neither the majority nor dissent disputed whether categories six through twelve of the majority's division method were supported by probable cause. Similarly, the court was in consensus that the category of the warrant referring to human corpses was not supported by probable cause. To resolve any debate about the validity of the statutory language or whether probable cause existed for the arrest of "[a]ny person for whom a valid felony arrest warrant [wa]s outstanding,"²²⁴ the court could have simply redacted the disputed language without prejudicing the case for the State or *Douglass* and *Glauter*. Instead, total suppression effectively foreclosed *Douglass* and *Glauter* from being prosecuted for their crimes.

The impact of *Douglass* may be directly felt by law enforcement agencies. In *Douglass*, the investigating detective used a fillable warrant form with check boxes that echoed Missouri's probable cause statute.²²⁵ Specific details about the crimes to be investigated were provided in a supplemental affidavit.²²⁶ The majority's decision to include the statute's language in its quantitative analysis of the warrant and subsequent conclusion that the language was insufficiently particular may signal the court's disapproval of warrant forms with check boxes or even fillable warrant forms in general.

In light of the fact that there is no law enforcement convenience exception to constitutional warrant requirements, police departments should consider reevaluating whether their forms are *too* convenient to withstand scrutiny. Some appropriate corrective steps may be for police departments to (1) consider removing check boxes from essential categories of warrant applications and (2) allocate additional police training, time, and resources to ensuring police understand the importance of proper warrant application procedures.

Removing check boxes and requiring police to write out their probable cause statements may deter officers from inaccurately asserting or overstating the existence of probable cause in the future. Additionally, the perception that

223. *Cassady v. Goering*, 567 F.3d 628, 657 (10th Cir. 2009) (McConnell, C.J., dissenting). See *supra* notes 99–101 and accompanying text.

224. *State v. Douglass*, 544 S.W.3d 182, 190 (Mo. 2018) (en banc), *cert. denied*, 2019 WL 1231946 (U.S. Mar. 18, 2019) (mem.).

225. See *id.*

226. *Id.* at 187–88.

police can secure warrants by simply checking a few boxes may erode public confidence in the warrant application process.

Here, Detective Estes testified he was unaware an additional warrant would not have been necessary if the police found human remains in the course of their search. As a twenty-year police force veteran, Detective Estes' statements suggest the Kansas City Police Department may not have properly trained its officers on the purpose and necessary components of valid search warrants.²²⁷ To reduce the risk of future warrants being found unconstitutional, law enforcement agencies may consider supplementing their officers' training and removing check boxes from warrant forms.

VI. CONCLUSION

The inherent subjectivity of the *Sells* test contributes to unpredictable and arguably inconsistent results from case to case. The root of the problem is the test's failure to place clear boundaries on its holistic, greater part requirement. It is unsurprising that a test requiring courts to divide warrants into subjective categories and then apply holistic weight to those categories contributes to highly variable outcomes. The fact that the majority and the dissent in both the Western District's and the Supreme Court of Missouri's opinions divided the *Douglass* warrant differently indicates that the test is fundamentally too imprecise to work properly.

The present iteration of the *Sells* test needs revision because its application yields wildly dissimilar results from judge to judge. In *Douglass*, one set of facts led to (1) total suppression of the warrant at the circuit court level; (2) a six-to-five reversal of the suppression by the Western District with two separate dissents; and (3) a four-to-two reversal of the Western District by the Supreme Court of Missouri accompanied by Chief Justice Fischer's dissent.

Beyond the issues with the *Sells* test in Missouri, the *Sells* test is inconsistently applied in federal and state courts across the country. Some courts apply the greater part requirement. Other courts apply their own variations, opting for the predominance requirement. Yet another subset of courts opt to redact any invalid parts of a warrant while leaving the rest intact.

While *Sells*' flexibility can be a valuable tool for courts to hold law enforcement to a high standard of quality in their warrant applications, that flexibility impairs the consistent application of severance principles from judge to judge and case to case. The Supreme Court of the United States' denial of certiorari leaves the severance question unresolved and solidifies the validity of the greater part requirement of the *Sells* test in Missouri cases.

227. *Id.* at 187.

