But What of Wisconsin's Exclusionary Rule? The Wisconsin Supreme Court Accepts Apparent Authority to Consent as Grounds for Warrantless Searches

Charles David Schmidt
BUT WHAT OF WISCONSIN'S EXCLUSIONARY RULE? THE WISCONSIN SUPREME COURT ACCEPTS APPARENT AUTHORITY TO CONSENT AS GROUNDS FOR WARRANTLESS SEARCHES

I. INTRODUCTION AND OVERVIEW

As a general rule, warrantless searches violate the Fourth Amendment of the United States Constitution, and evidence obtained thereby must be excluded at trial. However, the United States Supreme Court has delineated a narrow set of exceptions to this general exclusionary rule. One of the most important exceptions is "good-faith" reliance: if police perform a search based on an objectively reasonable good-faith belief in a particular mistake of fact, evidence seized in the search need not be excluded at trial.

The good-faith exception has appeared in many manifestations. For example, if police reasonably rely in good faith on a warrant that is later found to be defective, evidence obtained by means of the warrant will not be excluded at trial. Likewise, if police perform a warrantless search based on a statute that is later held to be unconstitutional, evidence obtained in the search will not be subject to the exclusionary rule. Thus, in limited circumstances, good faith can act as an exception to the general federal exclusionary rule.

Warrantless searches are also generally proscribed by independent Wisconsin state grounds under Article I, section 11 of the Wisconsin

1. See U.S. CONST. amend. IV.
4. See Krull, 480 U.S. at 358-60.
State Constitution, and evidence obtained thereby must be excluded at trial. But unlike the United States Supreme Court, the Wisconsin Supreme Court does not officially recognize a good-faith exception to its exclusionary rule. Therefore, good-faith reliance should not permit the state to introduce at trial evidence obtained by means of an unconstitutional search.

Nevertheless, in State v. Kieffer, the Wisconsin Supreme Court effectively breached its own exclusionary rule by accepting that apparent authority can provide a valid basis for a warrantless search. The court unanimously agreed that police may conduct a warrantless search based on the consent of a third party, even if that third party has no actual authority to consent to the search. Such a search will be held legal so long as at the time of the search, the police have a reasonable good-faith belief that the consenting party has actual authority to consent. As a result, despite the fact that the evidence was obtained by means of a warrantless search and without actual consent, it will not be suppressed at trial.

The Kieffer court thus framed its apparent authority doctrine as an exception to the warrant requirement rather than as an exception to the state exclusionary rule. In doing so, the court legalized a category of otherwise unconstitutional searches, preventing evidence obtained thereby from being excluded at trial. Regardless of the labeling of its apparent authority doctrine, the court effectively smuggled an exception into the state exclusionary rule.

5. See WIS. CONST. art I, § 11.
8. 577 N.W.2d 352 (Wis. 1998).
9. See id. at 359-60. Kieffer marks the first time a majority of the court premised an opinion on the basis that apparent authority is a legitimate Wisconsin legal doctrine. However, the Kieffer court ultimately held that there was no apparent authority in this case. See id. at 362. Thus, the court effectively adopted a new legal doctrine—apparent authority—into Wisconsin law by means of dicta.
10. The Kieffer majority and dissent both based their respective analyses on the premise that apparent authority is an acceptable ground for a warrantless search. See generally id. Their opinions differ only in how they applied the doctrine: the majority found no apparent authority, whereas the dissent found apparent authority and, thus, would have held the ensuing search constitutional. See id. at 362-63.
11. See id. at 359.
12. See id.
13. See id. at 359-61 (applying apparent authority analysis to decide whether state circuit court wrongly denied defendant's motion to suppress evidence).
This Comment examines the *Kieffer* holding and the effect that Wisconsin's resultant apparent authority doctrine has on the state exclusionary rule. Part II provides background and historical context for the *Kieffer* case: first through explanation of relevant federal precedent; then through explanation of relevant Wisconsin precedent. Part III details the facts, holding, and reasoning of *Kieffer*. Part IV analyzes Wisconsin's apparent authority doctrine in light of federal and state search and seizure precedent.

II. BACKGROUND AND HISTORICAL CONTEXT

To understand the Wisconsin Supreme Court holding in *Kieffer*, it is important to understand the background and history behind search and seizure law generally. Therefore, this Part outlines some key concepts and landmark cases in search and seizure jurisprudence. Section A describes federal search and seizure law. Section B describes Wisconsin search and seizure law, and briefly examines how it compares with its federal counterpart.

A. Federal Search and Seizure Law

1. The Constitutional Basis

Federal search and seizure law is rooted in the Fourth Amendment of the United States Constitution. The plain text of the Fourth Amendment indicates that searches generally should not occur unless a court issues a warrant for which it believes there is probable cause:

> 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.\(^\text{14}\)

Through countless cases, the United States Supreme Court has explained that one of the primary goals of the constitutional warrant requirement is to protect the sanctity of people's homes from unreasonable intrusion by overzealous police officers. This may have been explained best in *Johnson v. United States*:

\(^{14}\) U.S. CONST. amend. IV.
The point of the Fourth Amendment... is not that it denies law enforcement the support of the usual inferences which reasonable [people] draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.\(^{15}\)

This policy concern is so strong that warrantless searches are deemed per se unreasonable.\(^{16}\) Thus, absent one of the few specifically established exceptions to the general constitutional warrant requirement,\(^{17}\) a warrantless search is unconstitutional.\(^{18}\)

2. The Exclusionary Rule

Since 1914, the exclusionary rule has provided the primary procedural safeguard by which the mandates of the Fourth Amendment are enforced. The federal exclusionary rule was introduced in *Weeks v. United States*.\(^{19}\) The defendant in *Weeks* was arrested at work.\(^{20}\) Shortly thereafter, several police officers went to the defendant's home and performed a warrantless search in violation of the Fourth Amendment.\(^{21}\) The search revealed several incriminating items, which the district

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15. 333 U.S. 10, 13-14 (1948); *see also* McDonald v. United States, 335 U.S. 451, 455-56 (1948).
16. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (explaining that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment").
20. *See id.* at 387.
attorney later sought to use at trial. 22

On review, the Supreme Court held that the evidence obtained by the police in violation of the defendant's Fourth Amendment rights could not be used at trial. 23 The Court reasoned:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring [that person's] right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. 24

The Court further reasoned that exclusion of illegally gathered evidence is not simply a judicial remedy, but rather is a constitutionally mandated corollary to the Fourth Amendment. 25 Thus the federal exclusionary rule was established.

Since Weeks, the Supreme Court has made two fundamental changes to the exclusionary rule. First, in 1961, Mapp v. Ohio expanded the exclusionary rule by means of the Fourteenth Amendment Due Process Clause to make it applicable to the states. 26

Second, in 1974, the Court reversed its opinion about exclusion being a constitutionally mandated corollary to the Fourth Amendment. In United States v. Calandra, 27 the Court held that the exclusionary rule is "a judicially created remedy . . . rather than a personal constitutional right . . . ." 28 As the Court later explained in United States v. Leon, citing Calandra: "The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" 29

The Calandra decision was significant in that it opened the door for subsequent exceptions to the federal exclusionary rule. Once the

22. See id. at 388.
23. See id. at 398.
24. Id. at 393.
25. See id. at 393-94.
28. Id. at 348.
exclusionary rule was no longer deemed a fundamental constitutional right, but instead was considered a judicial creation, it became subject to judicially-created exceptions.

3. The Good-Faith Exception to the Federal Exclusionary Rule

In the wake of *Calandra*, the exclusionary rule has become a balancing test. On one hand, courts must consider the purpose of the exclusionary rule: deterrence of intrusive and unconstitutional police activity. On the other hand, courts must now also consider the "truth-finding functions of judge and jury." Hence, courts must now weigh the gravity of the unconstitutional police activity against the need for a "correct" trial verdict.

In *United States v. Leon*, this balancing test gave rise to the good-faith exception to the federal exclusionary rule. *Leon* involved an appeal by several respondents who had been indicted by a grand jury for drug-trafficking. On the basis of a confidential informant's averments, the police conducted an extensive investigation of the respondents. After gathering information by means of surveillance, the police obtained a facially valid search warrant. Under authority of the warrant, the police searched the respondents' homes and found a variety of incriminating evidence. The respondents subsequently filed motions to suppress all of the evidence obtained by means of the warrant. However, the trial court later held that the affidavit upon which the warrant was based was "insufficient to establish probable cause." Thus, the warrant was defective, and the search had been performed without following constitutionally mandated procedure.

On review, the Supreme Court held that regardless of the constitutional error, the evidence gathered under the warrant should not have been suppressed by the exclusionary rule because the police had reasonably relied in good faith on a facially valid warrant. The Court

33. *See id.* at 902-03.
34. *See id.* at 901.
35. *See id.* at 902.
36. *See id.*
37. *See id.* at 903.
38. *Id.*
39. *See id.* at 926.
noted that the exclusionary rule is a "remedial device." It functions as an "incentive[] for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment" by eliminating the incentive to avoid constitutionally mandated procedure. But if the police have not purposefully or negligently violated the Fourth Amendment, the deterrence value of the exclusionary rule is gone—the rule then only serves to remove valuable evidence from the factfinder's consideration. In this circumstance, under the balancing test set out in Calandra, "the truth-finding functions of judge and jury" greatly outweigh the deterrent effect of the exclusionary rule. Thus, the Court ruled that the police's reasonable good-faith reliance was sufficient grounds for avoiding the exclusionary rule and the evidence should not have been excluded at trial.

Additionally, the Leon Court was very resolute about the good-faith test employing an objective standard:

We emphasize that the standard . . . we adopt is an objective one. Many objections to a good-faith exception [to the exclusionary rule] assume that the exception will turn on the subjective good faith of individual officers. 'Grounding the [exception] in objective reasonableness, however, retains the value of the exclusionary rule as an incentive . . . to . . . [act] in accord with the Fourth Amendment.'

In sum, the good-faith exception to the exclusionary rule dictates that so long as a reasonable person—with the same knowledge as the police who are conducting the search—would believe that the factual grounds on which the police are acting permit a legal search pursuant to the Fourth Amendment, then the exclusionary rule will not apply. That is, if the police reasonably rely on a mistake of fact to perform a search, evidence obtained in that search will not be suppressed at trial.

40. Id. at 908 (citing United States v. Calandra, 414 U.S. 338, 348).
41. See id. at 919.
42. See id.
43. See supra notes 27-31 and accompanying text.
44. Leon, 468 U.S. at 907 (citing United States v. Payner, 447 U.S. 727, 734 (1980)).
45. See id. at 907-08.
46. See id. at 926.
47. Id. at 919-20 (quoting Illinois v. Gates, 462 U.S. 213, 261 n.15 (1983) (White, J. concurring in judgment)).
4. Apparent Authority to Consent to Warrantless Searches

The Supreme Court extended the good-faith exception in 1990 in *Illinois v. Rodriguez*. In *Rodriguez*, the police searched the respondent's apartment based on the consent of a woman who they believed had common authority over the residence. Thus, the police performed what they thought was a valid consensual search of the respondent's apartment. They did not obtain a search warrant, nor did they deem one necessary.

During the search, the police found a bevy of drugs and drug paraphernalia. The respondent therefore was arrested and charged with possession of a controlled substance with intent to deliver.

At trial, the court learned that the woman who consented to the search had vacated the apartment several weeks prior to the search. Hence, she did not have actual authority to consent to the search. The respondent thus moved to suppress the evidence obtained in the search. The court granted this motion.

On review, the Supreme Court held that although the woman did not have actual authority to consent to the search, she may have possessed apparent authority to consent, and if so, the search was constitutional. The Court reasoned that objective reasonableness is the touchstone of the Fourth Amendment: "what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct,

49. *Id.* at 180. *United States v. Matlock*, 415 U.S. 164 (1974), established that people with "common authority" over property have equal rights to consent to police searches. The Court explained:

Common authority . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the cohabitants has the right to permit the inspection in his [or her] own right and that the others have assumed the risk that one of their numbers might permit the common area to be searched.

*Id.* at 171 n.7.
50. See *Rodriguez*, 497 U.S. at 180.
51. See *id.*
52. See *id.*
53. See *id.*
54. See *id.*
55. See *id.*
56. See *id.*
57. See *id.* at 188-89.
but that they always be reasonable. So long as the police could have reasonably relied upon the woman's apparent authority to consent to the search, evidence obtained in the search should not have been subject to the exclusionary rule.

In sum, the apparent authority doctrine announced in Rodriguez is a logical off-shoot of the basic good-faith doctrine established in Leon. Both doctrines allow prosecutors to introduce at trial evidence obtained in violation of the Fourth Amendment, which therefore typically would be subject to the exclusionary rule. Likewise, both doctrines are based on objectively reasonable reliance. Finally, both doctrines involve mistakes of fact.

B. Wisconsin Search and Seizure Law

1. The Constitutional Basis

Wisconsin search and seizure law stems from Article I, section 11 of

58. Id. at 185-86. The Court "ma[de] clear that the apparent authority doctrine is based on good faith and reasonable mistakes of fact, not law." Petersen v. Colorado, 939 P.2d 824, 831 (Colo. 1997) (en banc) (discussing Rodriguez); see also United States v. Elliot, 50 F.3d 180, 186 (2d Cir. 1995) ("Rodriguez . . . validates only searches that are based on a reasonable mistake as to the facts, not those based on an erroneous legal conclusion drawn from the known facts."); United States v. Salinas-Cano, 959 F.2d 861, 865 (10th Cir. 1992) (stating that the Rodriguez Court "held only that the Fourth Amendment does not invalidate warrantless searches based on a reasonable mistake of fact, as distinguished from a mistake of law." (quoting United States v. Whitfield, 939 F.2d 1071, 1073 (D.C. Cir. 1991)).

59. See Rodriguez, 497 U.S. at 188-89.

60. See State v. Lopez, 896 P.2d 889, 902-903 (Haw. 1995) (rejecting apparent authority doctrine on independent state grounds as a good-faith exception to Hawaii's exclusionary rule); State v. Wright, 893 P.2d 455, 460 (N.M. Ct. App. 1995) (rejecting apparent authority on independent state grounds: "[A]n individual's right to be free from unreasonable searches and seizures under . . . our state constitution precludes the erosion of such right by recognition of a 'good faith' exception as articulated by the United States Supreme Court in United States v. Leon."); Kathleen M. Wilson, State Constitutional Law—New Mexico Rejects Apparent Authority to Consent as a Valid Basis for Warrantless Searches: State v. Wright, 26 N.M. L. REV. 571, 582-83 (1996) (analyzing New Mexico's rejection of apparent authority doctrine); Gary L. Wimbish, The U.S. Supreme Court Adopts "Apparent Authority" Test to Validate Unauthorized Third Party Consent to Warrantless Search of Private Premises in Illinois v. Rodriguez, 20 CAP. U. L. REV. 301, 315 (1991) ("By adopting the apparent authority doctrine [the Rodriguez Court has, in essence, extended the good faith exception to the exclusionary rule to include warrantless entries."). But see 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.3, at 63 n.98.3 (1993 Supp.) (concluding that apparent authority doctrine announced in Rodriguez is not an extension of good-faith doctrine announced in Leon); Colorado v. McKinstrey, 852 P.2d 467, 472 (Colo. 1993) (en banc) (noting LaFave's conclusion: "Professor LaFave has concluded that the reference to good faith [in Rodriguez] is not intended to suggest any relationship between the apparent authority doctrine that was established in Rodriguez and the Leon good-faith rule.").
the Wisconsin Constitution. Section 11 states in full:

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 warrant 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.\(^{61}\)

This provision is modeled on the Fourth Amendment of the United States Constitution. Other than "punctuation, capitalization and the use of the singular or plural form of a word," the provisions are identical.\(^{62}\)

They are so similar in fact that although the Wisconsin Supreme Court has expressly reserved its right to interpret Article I, section 11 differently than the Supreme Court interprets the Fourth Amendment,\(^{63}\) the court asserts that it routinely interprets the state search and seizure provision in conformity with the Fourth Amendment.\(^{64}\) Thus, Wisconsin has the same general warrant requirements and policy reasons behind those requirements as the federal government.\(^{65}\) Accordingly, Wisconsin courts, like their federal counterparts, hold that warrantless searches are per se unreasonable.\(^{66}\)

2. The Exclusionary Rule

Like the federal courts, Wisconsin's courts have enforced their constitutional warrant requirement primarily through use of an exclusionary rule. However, Wisconsin's exclusionary rule is not based on federal precedent.

Wisconsin's exclusionary rule was announced in 1923 in *Hoyer v. State*.\(^ {67}\) In that case, Sophus Hoyer left his automobile vacant on a city street for about one-half hour after it had been involved in a traffic accident.\(^ {68}\) During that time, the police performed a warrantless search

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61. WIS. CONST. art. I, § 11.
63. See State v. Guy, 492 N.W.2d 311, 313 (Wis. 1992) ("We may interpret art. I, sec. 11 of the Wisconsin Constitution differently than the United States Supreme Court interprets the Fourth Amendment to the United States Constitution.").
64. See id.; Fry, 388 N.W.2d at 573-74; State v. Paszek, 184 N.W.2d 836, 839 (Wis. 1971).
65. See supra Part II.A.1.
67. 193 N.W. 89 (Wis. 1923).
68. See id. at 89-90.
The search revealed five bottles of gin wrapped in newspaper. Hoyer was subsequently arrested for unlawfully transporting intoxicating liquors. Prior to trial, Hoyer moved to suppress the evidence obtained in the search of his car, claiming in part that the search violated Article I, section 11 of the Wisconsin Constitution. The trial court denied his motion.

On review, the Wisconsin Supreme Court ruled that the evidence obtained in violation of Article I, section 11 should have been suppressed. First, the court held that the search was unconstitutional under the Wisconsin Constitution. Second, and more important, the court held that to use the illegally seized evidence at trial would violate the defendant's right against self-incrimination. The court reasoned:

[Article I, section 11] is a pledge of the faith of the state government that the people of the state... shall be secure in their persons, houses, papers, and effects against unreasonable search and seizure. This security has vanished, and the pledge is violated by the state that guarantees it, when officers of the state, acting under color of state given authority, search and seize unlawfully. The pledge of this provision and of [Article I] section 8 are each violated when use is made of such evidence in one of its own courts by other of its officers.... Such a cynical indifference to the state's obligations should not be judicial policy.

With these words, Wisconsin's exclusionary rule was brought to life.

It must be emphasized that Wisconsin's exclusionary rule is not based on federal precedent, but rather on independent state grounds. First, it predates the Fourteenth Amendment extension of the federal

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69. See id. at 90.
70. See id.
71. See id. at 89-90. Hoyer was arrested for a violation of Wis. Stat. § 1543(3) (1921). See id.
72. See id. at 90. It is important to note that Hoyer never asserted that the search violated the Fourth Amendment of the United States Constitution. See id. at 91. The court decided this case based entirely on independent state grounds. See id.
73. See id. at 90.
74. See id. at 92.
75. See id.
76. See id. The right against self-incrimination is embodied in the Wisconsin Constitution in Article I, section 8.
77. Id. at 93.
exclusionary rule. As noted above, *Hoyer* was announced in 1923. However, the federal exclusionary rule was not made applicable to the states by means of the Fourteenth Amendment until 1961 in *Mapp v. Ohio*. Thus, Wisconsin's rule has a thirty-eight year seniority over the federal rule.

Second, the Wisconsin exclusionary rule is based in part on the state constitutional right against self-incrimination, whereas the federal rule has no such supplemental grounding. Wisconsin thus enforces its search and seizure provision as a textual constitutional guarantee; the federal courts enforce their exclusionary rule as "a judicially created remedy." Because Wisconsin's exclusionary rule is based on independent state grounds, it cannot be altered or overruled by the United States Supreme Court. The states are free under their individual constitutions to give their citizens more protection than exists under the federal Constitution. And so long as that protection is accorded through means based on adequate and independent state grounds, the United States Supreme Court cannot affect a reduction therein. Therefore, because Wisconsin's exclusionary rule is based on independent state grounds, and because it provides more protection against unlawful searches and seizures than the federal rule, none of the alterations and exceptions that the United States Supreme Court has grafted on the federal exclusionary rule necessarily apply to the Wisconsin exclusionary rule.

Only if the Wisconsin Supreme Court sees fit to limit or overrule *Hoyer* should any exceptions be made to the Wisconsin exclusionary rule. To date, the court has not acknowledged such an action.

81. *See State v. Fry*, 388 N.W.2d 565, 574 (Wis. 1986). Note, however, that the ability of the states to alter the amount of freedom given under their respective constitutions is a one-way ratchet. *See Arizona v. Evans*, 514 U.S. 1, 8 (1995) (discussing *Michigan v. Long*, 463 U.S. 1032 (1983)). States are free to accord their citizens more freedom than is granted by the United States Constitution. *See id.* But the states can in no circumstance use their constitutions to reduce the amount of freedom given to their citizens to a level below that guaranteed by the United States Constitution. *See id.*
85. *See id.* Because *Hoyer* is a Wisconsin Supreme Court decision, only the Wisconsin Supreme Court can overrule or limit *Hoyer*. Despite this fact, the Wisconsin Court of Appeals has mistakenly attempted on rare occasions to adopt a good-faith exception. *See*
However, the court has accepted apparent authority to consent as grounds for warrantless searches. As explained below, although the court does not frame it as such, apparent authority doctrine is a good-faith exception to the exclusionary rule. Thus, the Wisconsin Supreme Court has smuggled into state constitutional law an exception to the exclusionary rule without acknowledging the consequences of its action: the state exclusionary rule in *Hoyer* has been breached. The next Part examines the case in which Wisconsin's apparent authority doctrine was accepted.

III. *State v. Kieffer*: The Introduction of Wisconsin's Apparent Authority Doctrine

A. Statement of the Case

On the morning of May 9, 1995, the Whitewater police acted on a tip from a person arrested earlier that day, and began looking for John Zattera. The police had been told that Zattera possessed psilocybin mushrooms and was currently staying at the address of an acquaintance, Robert Garlock's. Without first procuring a search warrant, three officers went to Garlock's residence.

Upon arriving at Garlock's residence, the police spoke with Garlock. Garlock identified himself as the owner of the property, which included a house, a garage, and a loft above the garage. The police then told Garlock that they had reason to believe Zattera was possessing controlled substances. Upset that there might be drugs on his property, Garlock consented to let the officers search anywhere on his property.

Garlock also told the officers that Zattera was in the loft above his garage with Garlock's daughter and son-in-law, Dawn and John

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*e.g.,* State v. Williams, No. 96-2593-CR, 1998 WL 248839 (Wis. Ct. App. May 19, 1998) (unpublished disposition); State v. Collins, 363 N.W.2d 229, 232 (Wis. 1984). However, most Wisconsin Court of Appeals cases and all Wisconsin Supreme Court cases on the issue agree that *Hoyer* has not been limited or overruled, and no good-faith exception to the state exclusionary rule yet exists.

86. See *State v. Kieffer*, 577 N.W.2d 352, 354 (Wis. 1998).
87. See *id*.
88. See *id*.
89. See *id*.
90. See *id*.
91. See *id*.
92. See *id*.
Kieffer. In response to further police inquiry, Garlock explained that the Kieffers lived in the loft, but did not have a written lease with him to occupy the loft and that the loft did not have a telephone or plumbing. Garlock additionally informed the police that the Kieffers did occasionally help pay electric bills.

The police then followed Garlock to the detached garage, located about fifteen to twenty feet from the house. They asked Garlock how he generally entered the loft. Garlock responded that he usually knocked "out of respect" before entering.

Next, Garlock took the police through the interior of the garage to the stairs that led to the loft. The group climbed the stairs. At the entrance to the loft, there was a door with a lock. The door was not locked, so Garlock and the police officers proceeded through the door.

Inside the loft, the police found Zattera asleep on a couch in the living room area. They also found a pipe and rolling papers on a nearby coffee table. Garlock walked to a door which led to the Kieffers' bedroom and said "come on out." The police repeated the demand. Shortly thereafter, the Kieffers emerged through the door.

Dawn Kieffer then asked the officers to show her a search warrant. One of the officers replied to Ms. Kieffer that they did not need a

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93. See id.
94. See id.
95. See id.
96. See id.
97. See id.
98. Id.
99. See id.
100. See id. at 354-55.
101. See id. at 355.
102. See id. At the suppression hearing, there were three different accounts of the actual entry into the loft. See id. Garlock testified that he did not knock on the loft door, but rather just walked into the loft. See id. One police officer testified that Garlock "poked his head in the door, and yelled to the Kieffers that the police were there and wanted to talk to them." Id. Finally, another police officer testified that Garlock knocked on the loft door, to which someone inside the loft responded "come in." Id. The court seems to have accepted Garlock's account of the entry. See id.
103. See id.
104. See id.
105. Id.
106. See id.
107. See id.
108. See id. Because the initial entry by Garlock and the police was held unconstitutional, the court never ruled on whether Ms. Kieffer's demand negated any prior implied consent to the search. See id. at 356 n.8.
warrant because Garlock’s consent was sufficient to authorize a search. Consequently, the police never asked the Kieffers for their consent to search the loft, nor did the Kieffers consent to the search. 

After being questioned about the mushrooms, John Kieffer led an officer into the bedroom. The officer searched the room and found several bags containing the suspected drugs. John Kieffer subsequently was taken into police custody and charged with one count of possession with intent to deliver psilocybin mushrooms, one violation of the controlled substance tax stamp statute, and one count of possession of drug paraphernalia.

Prior to trial, Kieffer filed motions to suppress the evidence obtained in the search. He claimed the search violated the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution.

At the June, 1995 hearings for the motions, new evidence was brought to the attention of the court. First, one of the officers testified that he understood the fact that the loft had no telephone or plumbing to mean that the Kieffers shared the main house with Garlock—that they entered the house to bathe or use the toilet whenever necessary.

Likewise, the court learned that the Kieffers had converted the loft into a suitable living and sleeping area with their own money. This conversion was done with Garlock's permission.

Finally, the Kieffers testified that they considered Garlock to be their landlord. They said that they believed they had the right to exclude anyone, including Garlock, from the loft. Similarly, they said they lived by Garlock's rules in exchange for the consideration that Garlock would not enter the loft without first obtaining their

109. See id. at 355.
110. See id.
111. See id.
112. See id.
113. See id. at 356.
114. See id.
116. See Kieffer, 577 N.W.2d at 354-55.
117. See id. at 354.
118. See id. at 355.
119. See id.
120. See id.
121. See id.
permission. This testimony was bolstered by evidence that the Kieffers had the only keys to the loft.

Despite Kieffer's arguments, the circuit court denied his motions to suppress the evidence obtained in the search. It ruled that although Garlock did not have actual authority to consent to the warrantless search of the loft, he did have apparent authority to do so. Kieffer then pleaded guilty to the charge of possession with intent to deliver psilocybin mushrooms.

On appeal, the court of appeals held that the circuit court erred when it denied the motion to suppress the evidence obtained in the search. The court of appeals concluded that Garlock did not have actual or apparent authority to consent to the search of the loft. Thus, the search was unconstitutional, and the evidence obtained thereby should not have been admitted at trial.

On further review, the Wisconsin Supreme Court analyzed Garlock's consent under two distinct doctrines. First, it examined whether Garlock had actual authority to consent to the search. If Garlock had actual authority, his consent would have waived both the state and federal warrant requirements, and the search would have been entirely legal. But because Garlock did not have general access to the loft, and because Kieffer had not "assumed the risk that his father-in-law and landlord might permit the loft area to be searched," the court held that Garlock did not have actual authority to consent to the search.

Second, the court examined whether Garlock had apparent authority to consent to the search. After culling its rule of law entirely from federal precedent, the court held that the police did not have adequate information on which to base a reasonable belief in Garlock's

122. See id.
123. See id.
124. See id. at 356.
125. See id.
126. See id. The other two charges—violation of the controlled substance tax stamp statute and possession of drug paraphernalia—were dropped as a result of Kieffer's guilty plea. See id. at 356 n.7.
127. See id.
128. See id.
129. See id.
130. See id. at 357-59.
131. Id. at 359.
132. See id. at 359-61.
133. Id. at 359-60.
actual authority to consent to the search: "[t]o establish a reasonable belief in Garlock's authority to consent, the police should have made further inquiry into the sufficiency of Garlock's relationship to the loft premises." Because the police did not have adequate information on which to base a reasonable good-faith belief in Garlock's actual authority to consent, Garlock could not have had apparent authority to consent.

Thus, the court affirmed the court of appeals decision: the search was unconstitutional. More importantly, this holding marked the first time that the Wisconsin Supreme Court analyzed apparent authority to consent as a valid basis for a warrantless searches.

B. The Kieffer Court's Rationale Behind Its Acceptance of Apparent Authority Doctrine

There are two important concepts in the Kieffer holding. First, the court analyzed apparent authority doctrine as an exception to the constitutional warrant requirement—not as an exception to the exclusionary rule. That is, the court held that apparent consent is sufficient to negate the need for actual consent so long as that apparent consent reasonably appears to be actual consent. And if the apparent consent does indeed reasonably appear to be actual consent, it eliminates the need for a warrant.

Second, the court based its decision almost entirely on federal law. Although Kieffer claimed in his suppression motions that both his federal and state constitutional rights had been violated, both the Wisconsin Court of Appeals and the Wisconsin Supreme Court analyzed his motions almost exclusively on federal constitutional grounds. Thus, Wisconsin's acceptance of apparent authority doctrine involved only recognizing the federal precedent set out in Rodriguez the court provided no independent Wisconsin state grounds.

134. See id. at 361.
135. See id. at 362.
136. See id.
137. See id. at 360-62.
138. See id. at 359-60.
139. See id.
141. See generally id.; State v. Kieffer, 577 N.W.2d 352, 359-60 (Wis. 1998).
142. See supra Part II.A.4 for a discussion of Rodriguez.
IV. ANALYSIS: WHERE DID THE KIEFFER COURT GO AWRY?

Wisconsin's apparent authority doctrine, as explained in Kieffer, is logically flawed. First, the Kieffer court examined apparent authority merely as a means to circumnavigate the constitutional warrant requirement. However, apparent authority more logically stands as an extension of good-faith doctrine, and thus as an exception to the exclusionary rule.

Second, the Kieffer court used the wrong law in its analysis. Because apparent authority is an exception to the exclusionary rule, and because the Wisconsin exclusionary rule rests on independent state grounds, the court should have analyzed apparent authority under Wisconsin law. If the court still was compelled to introduce apparent authority doctrine under Wisconsin law, it should have done so by expressly limiting or overruling Hoyer.

A. Apparent Authority: An Extension Of Good-Faith Doctrine

Contrary to the Kieffer court's view, apparent authority doctrine is not merely an exception to the warrant requirement. Rather, it is an extension of the good-faith exception to the exclusionary rule.143 This concept is much easier to understand if one compares the nature of warrant exceptions with that of exclusionary rule exceptions.

1. The Nature of Exceptions to the General Warrant Requirement

Exceptions to the general constitutional warrant requirement are based on law. These exceptions are carved out by statute and judicial formulation.144 They are limited in number and scope, and "are 'jealously and carefully drawn'" so as to prevent any infringement on constitutionally protected rights.145 And if a warrant exception is mistakenly inferred by a police officer, the result is a mistake of law.

A particularly relevant example of an exception to the warrant requirement is consent.146 If the police obtain consent to perform a search, they need not procure a warrant.147 Consent acts as a warrant: it gives the police authority to perform the search. However, if the police are mistaken about what constitutes valid consent—just as if they are

143. See supra note 60.
144. See supra note 17.
147. See id.
mistaken about what constitutes a valid warrant—then they are mistaken about a point of law.

Because it is reasonable to assume that police are familiar with basic points of law such as what constitutes a valid warrant or what is required to have valid consent, it is illogical to argue that the police could reasonably believe a search based on a mistake of law is conducted in accordance with the law. Thus, a search based on a mistake of law cannot be reasonable. And as set out in both the federal and state constitutions, unreasonable searches are unconstitutional. Evidence gathered thereby must be suppressed at trial in order to deter future unreasonable police conduct.

2. The Nature of Good-Faith Exceptions to the Exclusionary Rule

Good-faith exclusionary rule exceptions are based on facts. More precisely, these exceptions are based on reasonable factual error. Because they are fact-specific in any given case, they are not limited in scope or number. Thus if police make a reasonable good-faith mistake of fact, the evidence gathered based on the mistake is not necessarily subject to the exclusionary rule.

_Arizona v. Evans_ provides an excellent example of a good-faith exception to the exclusionary rule. In _Evans_, a police computer mistakenly reported an outstanding warrant for the respondent. Based on this mistaken information, the respondent was arrested. Then, while being handcuffed, he dropped a marijuana cigarette. As a result, police officers searched the respondent's automobile and discovered a bag of marijuana under the driver's seat. The respondent subsequently was charged with possession of marijuana.

Prior to trial, the respondent moved to suppress the evidence obtained in the search of his automobile. He argued that because the computer record which reported an outstanding warrant for his arrest was mistaken, the subsequent arrest and search of his automobile was unconstitutional. Therefore, he argued, the evidence from the search

149. _Id. at 4._
150. _See id._
151. _See id._
152. _See id._
153. _See id._
154. _See id._
155. _See id._
should be subject to the exclusionary rule.\textsuperscript{156}

On review, the Supreme Court held that because the police obtained the evidence in a good-faith search, it should be excepted from the exclusionary rule.\textsuperscript{157} Quoting Leon, the Court reasoned:

[W]here the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.\textsuperscript{158}

In short, because the officers relied on a reasonable mistake of fact—a computer error—and not a mistake of law, the search was held reasonable, and the evidence obtained thereby was not excluded at trial.\textsuperscript{159}

Evans illustrates that a search based on a mistake of fact can be reasonable. And because reasonable searches are within constitutional bounds, suppressing evidence gathered by means of a reasonable search does not serve to deter future unreasonable police conduct.\textsuperscript{160} Thus, evidence seized in searches based on reasonable mistakes of fact is not generally subject to the exclusionary rule.

3. The Nature of Apparent Authority Doctrine

Apparent authority doctrine, like the broader good-faith doctrine, is based on facts.\textsuperscript{161} When an officer believes that a person consenting to a search has actual authority to do so, that officer believes a fact. If the officer later turns out to have been mistaken about the consenting person's actual authority to consent, the officer has made a mistake of fact. So long as the officer's original belief in the consenting person's authority to consent was reasonable, excluding evidence gathered by

\begin{itemize}
  \item \textsuperscript{156} See id.
  \item \textsuperscript{157} See id. at 16.
  \item \textsuperscript{158} Id. at 11-12 (citing United States v. Leon, 468 U.S. 897, 919-20 (1984)) (quotations omitted).
  \item \textsuperscript{159} See id. at 16.
  \item \textsuperscript{160} See id. at 11-12.
  \item \textsuperscript{161} See Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990) (discussing the factual basis for apparent authority doctrine); State v. Kieffer, 577 N.W.2d 352, 360-62 (citing Rodriguez's discussion about the factual basis for apparent authority doctrine); supra note 58.
\end{itemize}
means of such a mistake of fact does not serve to deter further police misconduct. Rather, the mistake properly falls under the rubric of good-faith exceptions to the exclusionary rule. Therefore, apparent authority doctrine is not merely an exception to the constitutional warrant requirement. Apparent authority doctrine is more logically an extension of good-faith doctrine.

The Kieffer court thus incorrectly analyzed apparent authority. The court improperly framed apparent authority as an exception to the constitutional warrant requirement. Instead, it should have recognized that to introduce apparent authority, it would need to create an exception to the exclusionary rule.

B. Overrule Hoyer?

The Kieffer court improperly based its apparent authority doctrine on federal law. Apparent authority doctrine is a good-faith exception to the exclusionary rule. Wisconsin's exclusionary rule is not based on federal law; it is based on independent state grounds—that is, Hoyer. Furthermore, the Wisconsin Supreme Court had not yet acknowledged an exception to its exclusionary rule.

Thus, to introduce apparent authority doctrine to Wisconsin, the Kieffer court should have added several steps to its analysis. First, the court should have acknowledged that apparent authority doctrine is a good-faith exception to the exclusionary rule. Second, it should have noted that the Wisconsin exclusionary rule is based on independent state grounds. As such, it should have analyzed the doctrine under Article I, section 11 of the Wisconsin Constitution. Third, the court should have recognized that Hoyer is the basis for Wisconsin's exclusionary rule. Fourth, it should have noted that there is not yet a good-faith exception to the Wisconsin exclusionary rule. And fifth, the court should have recognized that in to create a good-faith exception to the Wisconsin exclusionary rule, Hoyer would have to be limited or overruled.

The Kieffer court did not undertake any of this analysis. Instead, the court slipped apparent authority into Wisconsin law under the guise of an exception to the warrant requirement. In doing so, the court improperly accepted apparent authority, and created a good deal of doubt regarding the continuing integrity and vitality of Wisconsin's

162. See supra Part IV.A.3.
163. See supra Part II.B.2.
164. See supra notes 84-85 and accompanying text.
exclusionary rule.

V. CONCLUSION

In State v. Kieffer, the Wisconsin Supreme Court accepted apparent authority as a valid basis for warrantless searches. That is, the court accepted that if police rely on a reasonable good-faith belief in a party's apparent authority to consent to a warrantless search, even if the party does not have actual authority to consent, evidence obtained in the search will not be excluded at trial. Thus, a reasonable good-faith mistake of fact can in limited circumstances act as an exception to the general rule that unconstitutionally seized evidence must be excluded at trial.

However, rather than introducing apparent authority doctrine as a good-faith exception to the state's general exclusionary rule, the Wisconsin Supreme Court smuggled the exception into state law by framing it as an exception to the general constitutional warrant requirement. The court simply recognized that a formerly unconstitutional type of warrantless search is now legal. Accordingly, there is no reason that evidence obtained thereby should be excluded at trial.

By doing so, the court avoided officially tampering with the state exclusionary rule, which, until Kieffer, had remained intact for seventy-five years. However, in the wake of Kieffer and the introduction of apparent authority doctrine into Wisconsin law, serious doubts have arisen about the vitality and integrity of Wisconsin's exclusionary rule.

CHARLES DAVID SCHMIDT