REDACTED VERSION

IN THE SUPREME COURT OF WISCONSIN
Case Nos. 2013AP2504 - 2508-W
Case No. 2014AP296-OA
Case Nos. 2014AP417 - 421-W

Case Nos. 2013AP2504 - 2508-W

STATE OF WISCONSIN ex rel. THREE UNNAMED PETITIONERS,
Petitioner,
v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
THE HONORABLE GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor
Respondents,

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

REPLY BRIEF OF UNNAMED MOVANT NO. 3

SCHMITZ V. PETERSON ET AL.
CASE NOS. 2014AP417 – 421-W

(ADDRESSING ISSUE 14)

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Case No. 2014AP296-OA

STATE OF WISCONSIN ex rel. TWO UNNAMED PETITIONERS,
Petitioner,

v.

THE Honorable GREGORY A. PETERSON, John Doe Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor
Respondents,

L.C. Nos. 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

Case Nos. 2014AP417 - 421-W

STATE OF WISCONSIN ex rel. FRANCIS D. SCHMITZ, Special Prosecutor,
Petitioner,

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
Respondent,

and

EIGHT UNNAMED MOVANTS,
Interested Parties.

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

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ARGUMENT

Affording John Doe judges the unilateral power to issue search warrants in the criminal inquests they oversee violates the Fourth Amendment's neutral and detached magistrate requirement. Accordingly, [redacted] (collectively, Unnamed Movant No. 3) asserted that this Court's decision in *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996), which conferred this authority on John Doe judges, was erroneously decided.

In response, Respondent Judges contend that *Cummings* is good law because judges are supposed to act neutral. (Br. of Respondent Judges ("RJ Br."), 8-10 n.4.) Such circular reasoning is insufficient to refute the serious Fourth Amendment concerns raised here and likewise fails to address the practical manner in which John Doe investigations are conducted. Endorsing this argument also elevates flexible, convenient methods of law enforcement over unwavering, bedrock principles of the Fourth Amendment.

Both parties also assert that notwithstanding the importance of this issue, the Court should simply pass on it because it was not raised below; yet this ignores a long line of precedent in which this Court exercises its power to address

significant constitutional issues, especially in criminal proceedings. For his part, the Special Prosecutor chose not to address the merits of *Cummings*, instead claiming that [redacted] Unnamed Movant No. 3) lacked standing to raise it. (Br. of Special Prosecutor ("SP Br."), 254-55.) This spurious argument merits little consideration and is addressed last. (*See* Section III, *infra.*)

Cummings was wrongly decided because it granted John Doe judges authority to issue warrants in violation of the Fourth Amendment. Given the important constitutional issues at stake, which directly impact the integrity of John Doe proceedings, this Court should exercise its discretion and reconsider *Cummings* as it is the only Court in this state that can do so.[1]

I. GRANTING JOHN DOE JUDGES THE AUTHORITY TO UNILATERALLY ISSUE SEARCH WARRANTS IN THE CRIMINAL INQUESTS THEY OVERSEE VIOLATES THE NEUTRAL AND DETACHED MAGISTRATE REQUIREMENT OF THE FOURTH AMENDMENT.

"Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297,

[1] Unnamed Movant No. 3 adopts the reply briefs of the other Unnamed Movants.

318 (1972). The purpose of this rule "is to interpose the impartial judgment of a judicial officer between the citizen and the police and also between the citizen and the prosecutor, so that any individual may be secure from an improper search." *State ex rel. White v. Simpson*, 28 Wis. 2d 590, 598, 137 N.W.2d 391 (1965).

Respondent Judges do not refute the purpose of the neutral and detached magistrate requirement. (RJ Br. 9 n.4.) They tacitly concede, as they must, that Judge Kluka's recusal *may have* compromised the validity of the warrants, but submit that because the record is undeveloped, the Court should not consider this issue now. (*Id.*) Respondent Judges then attempt to distinguish two decisions of the Supreme Court, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), contending that the magistrates in those cases were not judges and served in different capacities than the John Doe judges who preside over the unique criminal inquests relevant here. (RJ Br. 9 n.4.)

Respondent Judges contend that because John Doe judges serve "an essentially judicial function" and are *supposed to act* in a neutral and detached manner, they can properly issue search warrants under *Cummings*. (RJ Br. 9-10 n.4.) But this

circular argument merely asserts the premise (judges are supposed to be neutral) to justify the conclusion (*Cummings* was correctly decided because judges are supposed to be neutral).

A judge's ability to remain neutral and detached is not immutable. Cases subsequent to *Cummings*—including this very case—underscore that admonitions to act in a given manner cannot guarantee procedural fairness. Accordingly, *Cummings* sanctioned a practice that cannot stand constitutional muster and it must be overruled.

A. Whether a Warrant Issuing Magistrate is Neutral and Detached under the Fourth Amendment is Determined By Analyzing the Issuing Magistrate's Role in the Criminal Investigation.

"The substance of the Constitution's warrant requirements does not turn on the labeling of the issuing party." *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972). The inquiry must focus on the substantive role that the issuing magistrate plays in the investigation to determine whether there exists a "connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires." *Id.*

In *Coolidge*, for example, the Supreme Court held that the attorney general who coordinated a murder investigation could

not unilaterally issue a search warrant directed towards the accused. 403 U.S. at 450. The Court did not consider whether the attorney general subjectively believed he could remain neutral and detached when issuing the warrant. *See id.* at 449-453. Nor did the Court consider that the evidence establishing probable cause was substantial. *Id.* Rather, the Court held "that *there could hardly be a more appropriate setting than this* for a *per se* rule of disqualification" because "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality *with regard to their own investigations*. . . ." *Id.* at 450 (emphasis added).

Similarly, in *Lo-Ji Sales*, the Supreme Court deemed unconstitutional a warrant issued by a town justice who then participated with law enforcement in the search and review of material seized pursuant to the warrant. 442 U.S. at 322. The *Lo-Ji* Court stated that the town justice failed to "manifest that neutrality and detachment demanded of a judicial officer[,]" because he "allowed himself to become a member" of the investigative team. *Id.* at 326-27. It therefore invalidated the warrant because "[i]t was difficult to discern when [the town justice] was acting as a 'neutral and detached' judicial officer and when he was one with the police and prosecutors in the executive seizure. . . ." *Id.* at 328.

Respondent Judges attempt to distinguish these cases by resting on a false premise; they assert that because John Doe judges are judges (as opposed to other persons with authority to issue warrants), they can effectively quarantine their ability to make an independent determination of probable cause and issue valid warrants in their own John Doe investigations. Respondent Judges take a myopic view of the extraordinary, quasi-executive role that a John Doe judge plays in the investigation and ignore the practical realities of a John Doe, which make it "difficult to discern" if, how, and when a judge's neutrality becomes compromised.

The label afforded to the issuing magistrate is irrelevant. *Shadwick*, 407 U.S. at 350. Merely because the issuing magistrate is a judge—as opposed to the attorney general in *Coolidge* or the town justice in *Lo-Ji*—does not render him any less susceptible to having his or her neutrality compromised when that judge is also tasked with "ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Accordingly, the Fourth Amendment mandates that "those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. at 318.

Thus, the proper inquiry is not whether a John Doe judge is *supposed* to act neutral and detached, it is whether the John Doe judge's investigative authority can compromise his or her neutrality, thereby rendering it *difficult to discern* whether the judge *is* neutral and detached. As demonstrated below, the quasi-executive investigative authority conferred on John Doe judges necessarily compromises their neutrality, which consequently prevents them from issuing valid warrants in the criminal inquests they oversee.

B. The Quasi-Executive Authority Granted to John Doe Judges Sufficiently Compromises Their Ability to Remain Neutral and Detached Under the Fourth Amendment.

"The John Doe is, at its inception, not so much a procedure for the determination of probable cause as it is an inquest for the discovery of crime in which the judge has significant powers." *State v. Washington*, 83 Wis. 2d 808, 822, 266 N.W.2d 597 (1978). In the context of this "primarily investigative device," both the district attorney and the John Doe judge use "their offices in furtherance of the investigation." *Id.* (quoted source omitted).

Indeed, "[b]y invoking the formal John Doe investigative proceeding, law enforcement officers are able to obtain the benefit of powers not otherwise available to them. . . ."

Washington, 83 Wis. 2d at 822-23; *see also In re John Doe Petition*, 2008 WI 67, ¶ 36, 310 Wis. 2d 342, 750 N.W.2d 873 (stating that "John Doe proceedings are advantageous to law enforcement insofar as they gain access to authority via the judge that is otherwise unavailable.") (citation omitted).

As such, the John Doe Statute "grants the John Doe judge extraordinary authority to convene John Doe proceedings, to order the proceedings secret, and to issue a complaint or complaints as a result of the proceeding." *In re John Doe Proceeding*, 2003 WI 30, ¶ 53, 260 Wis. 2d 653, 660 N.W.2d 260. The John Doe judge likewise possesses the ability to "issue subpoenas, examine witnesses, adjourn the proceedings, take possession of subpoenaed records, adjudicate probable cause, and [according to *Cummings*] issue and seal search warrants." *Id.*, at ¶ 54 (citations omitted). This Court has acknowledged that these powers, when coupled together, are quasi-executive in nature. *Washington*, 83 Wis. 2d at 828.

Respondent Judges cannot credibly contend that these investigatory powers may compromise a judge's neutrality in violation of the Fourth Amendment; instead they assert that "persons accused can be protected by appellate review of John Doe proceedings." (RJ Br. 9 n.4.) But this ignores the inherently

problematic nature of reviewing John Doe proceedings, which are often conducted in secret. Wis. Stat. § 968.26(3); *In re John Doe Proceeding*, 2003 WI 30 at ¶ 5 (acknowledging the "sparse" record before the Court "[b]y virtue of the secret nature of the underlying John Doe proceedings."); *see also id.* at ¶ 56 (stating that the Court's ability to address certain contentions of the parties "would be greatly hampered by the absence of any record for our review.")

The John Doe Statute's secrecy provision provides in pertinent part that:

> the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.

Wis. Stat. § 968.26(3). Thus, a party seeking to challenge the validity of a warrant—contending that the John Doe judge who issued it lacked neutrality—is effectively hampered from raising this issue on appeal because the record establishing the judge's lack of neutrality is not available for judicial review. *Id.*; *see also In re John Doe Proceeding*, 2003 WI 30 at ¶¶ 5, 56-57.

The following hypothetical demonstrates this problem. Unbeknownst to the target of a warrant, the John Doe judge invokes his broad investigatory powers to undertake substantial

involvement in the investigation, thereby compromising that judge's ability to issue a valid warrant. The John Doe judge also orders the proceedings secret. The face of the warrant sets forth probable cause, but as *Coolidge* dictates, the warrant is nonetheless invalid because the judge is not neutral and detached. 403 U.S. at 450-51 (rejecting the state's contention that "the existence of probable cause renders noncompliance with the warrant procedure an irrelevance.")

Pursuant to the secrecy order, however, the target of the warrant would only have access to the warrant itself—not the entire record establishing the judge's increased investigatory role, which renders invalid the objectively reasonable warrant. As a result, neither the target of the warrant nor the reviewing court could ever sufficiently analyze the judge's neutrality and detachment—the evidence of which remains cloaked by the secrecy order implemented by the John Doe judge.[2]

This hypothetical also demonstrates the thorny issues presented by wading into a case-by-case analysis to address whether a particular judge's involvement in a particular John Doe compromised that judge's ability to issue a valid warrant.

[2] In fact, this hypothetical further assumes that an appropriate record even exists to prove (or disprove) this lack of neutrality—one of the problems in this case.

How many witnesses must a John Doe judge question before his neutrality is tainted? How many subpoenas must be issued? How many documents must be reviewed? How many search warrants must be issued? How close must a judge work with the State? Is there an adequate record to review? The problems in conducting this analysis are myriad.[3]

The neutral and detached magistrate requirement is clear: a judge must make an independent determination of probable cause, "considering only the facts set forth in supporting affidavits accompanying the warrant application." *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517; *see also* Wis. Stat. § 968.12 (describing the manner in which stenographically recorded testimony can supplement a warrant application). "The subjective experiences of the magistrate are not part of the probable cause determination." *Ward*, *supra*. By presiding over a John Doe, however, that judge loses the ability to divorce his or her subjective experiences gleaned from the investigation

[3] These problems underscore why the warrant issuing magistrate cannot also be a "one-judge grand jury" who presides over the criminal inquest. *Wis. Family Counseling Servs., Inc. v. State*, 95 Wis. 2d 670, 676, 291 N.W.2d 631 (Ct. App. 1980). Of course, reviewing courts could avoid these problems if John Doe judges were precluded from issuing warrants and a separate neutral and detached magistrate—unaffiliated with the John Doe investigation—was used to independently make probable cause determinations.

when called upon to independently make a probable cause determination necessary to issue a valid warrant.

Unnamed Movant No. 3 appreciates that John Doe proceedings are supposed to be conducted as an "independent, investigative proceeding overseen by a neutral judicial officer." *Cummings*, 199 Wis. 2d at 744. Many times this will be the case. Nonetheless, the investigatory powers conferred upon the judge compromise that judge's ability to remain neutral and detached. Just as in *Lo-Ji* Sales, it becomes "difficult to discern" when a John Doe judge is acting neutrally given the investigatory powers conferred by the John Doe Statute.

Moreover, decisions subsequent to *Cummings* make clear that despite this Court's admonitions concerning how a John Doe judge *should act*, mere admonitions do not ensure procedural fairness. *See, e.g., In re John Doe Petition*, 2008 WI 67 at ¶ 48 n.7 (expressing "concern" over the John Doe Judge's *ex parte* communications with the prosecutor); *see also id.* at ¶ 10 (citing a portion of the John Doe transcript in which the judge described his role as follows: "I'm just a police officer trying to do an investigation here.")

This case is also indicative of this problem for the State now claims that the undeveloped record precludes judicial

review of the warrants. Yet the undeveloped record resulted from Judge Kluka's failure to explain the basis for her recusal, Wis. Stat. § 757.19(5), and also place such evidence into the record. *Washington*, 83 Wis. 2d at 824-25. Moreover, the appearance of impropriety is raised in this case because the Special Prosecutor and Judge Kluka shared the same mailing address. (*Compare* Joint App. 95 *with e.g.*, SP Resp. Br. 268) (identifying the same P.O. Box for Judge Kluka and the Special Prosecutor).[4]

No one disputes that judges will attempt to preside over a John Doe investigation evenhandedly. But judges do not possess some unique ability to remain neutral and detached from the criminal inquests they oversee. To the contrary, the Supreme Court has decreed that "[a] single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror [and] [h]aving been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *In re Murchison*, 349 U.S. 133, 137 (1955).

[4] "Joint App." refers to the unnamed movants' joint appendix filed on February 2, 2015.

In this vein, a John Doe judge's proclivity to zealously undertake his or her investigative responsibilities is functionally no different than the officials discussed in *Coolidge*:

> Without disrespect to the state law enforcement agents here involved, the whole point of the basic rule so well expressed by Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the competitive enterprise that must rightly engage their single-minded attention.

403 U.S. at 450; *see also Simpson*, 28 Wis. 2d at 597-599 (discussing that while "the district attorney holds an office of great dignity," and serves as a "sworn minister of justice," the Fourth Amendment does not permit him to issue a valid warrant).

Just like judges, prosecutors strive to administer their duties in good faith. *See id.* They are officers of the court who are bound by professional ethics. SCR 20:3.8. They have an equal interest in bringing those to justice as they do in protecting the innocent from groundless prosecutions. *Id.* They are attorneys uniquely equipped with an understanding of probable cause and Fourth Amendment jurisprudence. *Id.* Nonetheless, the Fourth Amendment categorically prevents them from issuing valid warrants in the criminal investigations they oversee. *Coolidge*, 403 U.S. at 450; *Simpson*, 28 Wis. 2d at

597-599. These principles apply with equal force to a John Doe judge when he or she is tasked with undertaking a criminal inquest.

It follows that given the "quasi-executive" powers conferred upon a John Doe judge to carry out this criminal inquest, *Washington*, 83 Wis. 2d at 828, constitutional safeguards are necessary. The Fourth Amendment therefore mandates that warrants be issued by an *independent* neutral and detached magistrate. The investigative authority conferred upon a John Doe judge blurs this line, which necessarily compromises that judge's neutrality. *Shadwick*, 407 U.S. at 350.

As the Supreme Court recognized in *United States v. Boyd,* "[i]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." 116 U.S. 616, 635 (1886). Yet this is precisely what *Cummings* endorsed; a slight deviation from procedure (not set forth in the statute) to enhance a John Doe judge's *investigative* authority. *Cummings*, 199 Wis. 2d at 733-35. But "workable rules . . . to meet the practical demands of [an] effective criminal investigation" cannot eviscerate core protections enshrined in the Constitution. *Coolidge*, 403 U.S. at 452-53.

Thus, this Court's decision in *Cummings* was wrongly decided because it failed to address the limitations that the Fourth Amendment places on a John Doe judge's ability to issue search warrants. As the only Court in this state that can reexamine its prior precedent, a good faith basis exists to do so here. Accordingly, this Court should overrule *Cummings* and hold that John Doe judges lack the ability to issue search warrants in the same criminal inquests they oversee.

II. THERE ARE NO IMPEDIMENTS PREVENTING THIS COURT FROM REANALYZING ITS DECISION IN *STATE V. CUMMINGS*.

Despite these serious constitutional implications, both Respondents assert that the Court should not reconsider *Cummings* because the validity of the warrants was not challenged below. (*See* SP Br. 254-55; RJ Br. 8-9 n.4.) This contention is misguided and nothing restricts the Court from addressing how the Fourth Amendment affects the ongoing viability of *Cummings*.

On [redacted] (Movants 6 and 7 App. 34-38.)[5] Following the execution of that warrant, and in

[5] Movant Nos. 6 and 7 Appendix was filed with the Court on February 2, 2015.

response to the issuance of corollary subpoenas, Unnamed Movant No. 3 [redacted] (*See* Dane R. 80, 103, 168.) [redacted] (*Id.*) Judge Peterson [redacted] (Movants 6 and 7 App. 13-18.)

Unnamed Movant No. 3 acknowledges, however, that it did not address below the specific issue concerning how the neutral and detached magistrate requirement affects the validity of the subject warrants. Nonetheless, this Court has discretion to entertain a constitutional issue first raised on appeal when that issue implicates the "fairness, integrity, or public reputation of judicial proceedings." *Maclin v. State*, 92 Wis. 2d 323, 328-29, 284 N.W.2d 661 (1979) (citing *State v. Bradley*, 36 Wis. 2d 345, 153 N.W.2d 58 (1967) and explaining the Court's willingness to entertain important, albeit newly-raised constitutional issues in the context of criminal proceedings).

"The court will consider such an issue if it is in the interests of justice to do so, if both parties have had an opportunity to brief the issue, and if there are no factual issues that need resolution." *Laufenberg v. Cosmetology Examining Bd. of*

Wis. Dep't of Regulation & Licensing, 87 Wis. 2d 175, 187, 274 N.W.2d 618 (1979) (citations omitted). These elements are satisfied here and the Court should appropriately exercise its discretion in this case.

A. The Court Should Address this Issue in the Interests of Justice.

The Court's decision to address issues first raised on appeal is grounded on principles of "judicial administration and policy." *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Of importance here, this Court's "primary function is that of law defining and law development." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Thus, when important constitutional issues implicate the integrity of criminal proceedings, this Court strives "to oversee and implement statewide development of the law." *State v. Mosley*, 102 Wis. 2d 636, 665, 307 N.W.2d 200 (1981). As this Court has often explained:

> [I]t is hardly in the interest of the law-declaring function of this court if matters of serious public concern which are likely to cause judicial disputes in the future are not resolved when a factual basis on which a judicial declaration may be made to guide future conduct is presently before the court.

State v. Wilks, 121 Wis. 2d 93, 117, 358 N.W.2d 273 (1984) (Abrahamson, J., dissenting) (quoting *State ex rel. La Crosse*

Tribune v. Circuit Court, 115 Wis. 2d 220, 228-29, 340 N.W.2d 460 (1983)).

This Court has consistently adhered to the rule enunciated in *Bradley* and addressed important constitutional issues in the area of criminal law, even if not raised below. *Maclin*, 92 Wis. 2d at 328-29 (collecting cases). Additional considerations governing the Court's decision include whether the issue will be raised by other litigants in the future and whether there is a "paucity of precedent" on the subject matter. *State v. Copening*, 103 Wis. 2d 564, 571-72, 309 N.W.2d 850 (Ct. App. 1981).

Applying these factors here, it is in the interest of justice to reexamine *Cummings* and address whether the Fourth Amendment precludes John Doe judges from unilaterally issuing search warrants in the criminal inquests they oversee.

First, affording John Doe judges the unilateral ability to issue search warrants in their own investigations directly implicates the "fairness, integrity, [and] public reputation of [John Doe] proceedings." *Maclin*, 92 Wis. 2d at 328-29. Granting this power runs afoul of the Fourth Amendment and the shroud of secrecy over these proceedings effectively inhibits judicial review to police this practice. (*See* Section I, *supra.*)

Second, there is a "paucity of precedent" addressing the Fourth Amendment's limitation on this practice. The Court's decision in *Cummings* never addressed this issue; it merely concluded that John Doe judges have this power because "denying John Doe judges the ability to issue search warrants would seriously reduce the investigatory power of the John Doe proceeding." *Cummings*, 199 Wis. 2d at 733-35.

Since *Cummings*, courts have simply reiterated that John Doe judges have this inherent authority without addressing how this authority is tempered by the Fourth Amendment. Lower courts have also misconstrued the neutral and detached magistrate requirement in the context of John Doe proceedings. *See, e.g., State v. Rindfleisch*, 2014 WI App 121, ¶ 25 n.4, 359 Wis. 2d 147, 857 N.W.2d 456 (concluding that the John Doe judge who issued the search warrant was neutral and detached because of his distinguished career on the court of appeals, without analyzing whether his involvement with the investigation compromised his neutrality).

Third, declining to address this issue now also presents additional concern because lower courts must adhere to *stare decisis* and follow *Cummings* notwithstanding the questionable

viability of this precedent.[6] *See Cook*, 208 Wis. 2d at 189 (stating that this Court is "the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

Thus, any hesitation about addressing this issue now should be of no concern to this Court. This is the only Court in the state that can reconsider *Cummings*, *id.*, and it has not hesitated to revisit its prior precedent when a past decision fails to address important constitutional dimensions that have gone previously unaddressed. *See, e.g.*, *State v. Harris*, 206 Wis. 2d 243, 257-58, 557 N.W.2d 245 (1996) (overruling prior precedent concerning automobile seizures when it "failed to adequately address the constitutional implications of a vehicle stop on a

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[6] Unnamed Movant No. 3 acknowledges the importance of *stare decisis*, but this doctrine is a "principle of policy, not an inexorable command" and "the power of the court to repudiate its prior rulings is unquestioned...." *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶¶ 93-94, 264 Wis. 2d 60, 665 N.W.2d 257 (citations omitted). Indeed, failing to consider prior precedent does "more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." *Id.* at ¶ 100. This Court is more likely to overturn a prior decision when one or more of the following circumstances is present: (1) changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is "unsound in principle;" or (5) the prior decision is "unworkable in practice." *Bartholomew v. Wis. Patients Comp. Fund and Compcare Health Servs.*, 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 717 N.W.2d 216 (quoted source omitted). Many of these factors are present here. *Cummings* established a rule that is unsound, defies practical workability, lacks sufficient justification, and undercuts a bedrock principle of the Fourth Amendment.

passenger's right to freedom of movement. . . ."). The interests of justice therefore weigh heavily in favor of reanalyzing *Cummings* to address whether it was erroneously decided.

B. Respondents Were Provided the Opportunity to Brief this Issue.

In determining whether to address a newly raised constitutional issue, the Court will also look to whether the parties have had an opportunity to brief the issue. *Laufenberg*, 87 Wis. 2d at 187. This element is also satisfied here.

Unnamed Movant No. 3's Opening Brief acknowledged that while the neutral and detached magistrate requirement was not completely framed by the Court's December 16, 2014 Order, it was a threshold consideration to Issue 14 that needed to be addressed.[7] (*See* Op. Br. 1.) Respondents were then given the opportunity to respond to this point in their respective briefs, and Respondent Judges specifically addressed the merits

[7] Respondent Judges also assert that the Court should decline to consider this issue because it was not specifically enumerated in the Court's Order. Yet portions of the Order expressly contemplate that the parties should raise any concern with the manner in which the issues were posed. *See* Court's 12/16/14 Order (Abrahamson, J., concurring) at ¶ 9 (stating that "the phrasing of some issues rests on unproven assumptions . . . [and] [t]he parties should point out in their briefs any problems with the questions posed and any assumptions with which the party disagrees.") Accordingly, Respondent Judges' contention lacks merit and the Court should consider this threshold issue.

of Unnamed Movant No. 3's argument.[8] (RJ Br. 9 n.4.) Accordingly, the Court can appropriately consider this issue now.

C. The Current Record Allows the Court to Reanalyze Its Decision in *State v. Cummings*.

Finally, the Court will address an important constitutional issue first raised on appeal if the record is fully developed. *Laufenberg*, 87 Wis. 2d at 187. Respondent Judges claim that the Court should decline to consider Unnamed Movant No. 3's argument because the record is undeveloped. (RJ Br. 8-9 n.4.) Whether *Cummings* was correctly decided, however, presents a pure legal issue that the Court can easily address on this record.

Moreover, any unresolved factual issues are the result of Judge Kluka's failure to state the basis for recusal as required by Section 757.19(5) of the Wisconsin Statutes. In effect, Respondent Judges tacitly ask this Court to endorse Judge Kluka's failure to adhere to her recusal obligations, which

[8] The Special Prosecutor's failure to fully address this issue is irrelevant. The question is whether there was an "opportunity" to brief the issue; if this provision required every party to fully brief the issue, a responding party could evade review of important constitutional issues by claiming waiver and not addressing the merits of the argument. As Unnamed Movant No. 3 stated in its opening brief, however, it is amenable to submit supplemental briefing on this issue if needed.

thereby created the undeveloped record that they now claim prevents review. (*See* RJ Br. 8-9 n.4.)

It is hardly within the interest of justice to decline consideration of a serious constitutional issue based on the State's failure to create an adequate record. If anything, Judge Kluka's unexplained recusal underscores why the Court should reconsider *Cummings*. John Doe proceedings are frequently conducted in secret, *see* Wis. Stat. § 968.26(3), thereby inhibiting meaningful review.

Thus, even if the Court cannot consider whether Judge Kluka's *specific* recusal tainted the validity of the warrants, no undeveloped facts prevent the Court from reconsidering *Cummings* to determine whether granting John Doe judges the authority to unilaterally issue warrants violates the Fourth Amendment. The Court should exercise its discretion and do so here.

III. UNNAMED MOVANT NO. 3 HAS STANDING TO CHALLENGE THE VALIDITY OF THE WARRANT.

Finally, the Special Prosecutor's asserts in passing that [redacted] Unnamed Movant No. 3, lacks standing to challenge the search and resulting seizure of its property. (*See* SP Br. 255) (questioning "whether [redacted]

[redacted] This undeveloped argument lacks merit. [redacted] each have standing to raise their Fourth Amendment challenges.

A Fourth Amendment standing claim considers "whether the disputed search and seizure has infringed on an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1981); *accord State v. Bruski*, 2007 WI 25, ¶ 22 n.2, 299 Wis. 2d 177, 727 N.W.2d 503. Applied here, [redacted] easily meet this standard.

"[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ." *State v. Douglas*, 123 Wis. 2d 13, 17-18, 365 N.W.2d 580 (1985) (quoting *U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. at 313). [redacted] therefore has a reasonable expectation of privacy in [redacted], were stored. *Id*; *see also United States v. Karo*, 468 U.S. 705, 712 (1984) (explaining the "obvious" expectation of privacy that one enjoys in one's home); *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) (stating that it "need not decide whether the officers' investigation of [defendant's] home violated his expectation of privacy under

Katz [because] [o]ne benefit of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy.").

Accordingly, the Fourth Amendment required a valid warrant to search [redacted] standing to challenge its validity. *See id.* Indeed, Judge Peterson agreed that the seizure was improper and ordered the State to return [redacted] (*See* Movant Nos. 6 and 7 App. 13-18.)

[redacted] likewise has Fourth Amendment rights against unreasonable searches and seizures. *See, e.g., Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (concluding that corporations enjoy Fourth Amendment protections); *see also State v. Leary*, 846 F.2d 592, 596 (10th Cir. 1998) (stating that "a corporate defendant has standing with respect to searches of corporate offices and seizure of corporate records. . . .").

A party's freedom from unreasonable searches is distinct from a party's freedom from unreasonable seizures. *Horton v. California*, 496 U.S. 128, 133 (1990) ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property."); *accord State v. Brereton*, 2013 WI 17, ¶ 23, 345 Wis. 2d 563, 826 N.W.2d 369; *Arizona v. Hicks*, 480 U.S. 321, 328 (1987). Thus, "[a] seizure

conducted without a valid warrant is [also] presumptively unreasonable." *Brereton*, 2013 WI 17 at ¶ 24.

[redacted] can therefore challenge the validity of the warrant, [redacted] (*see* Movant Nos. 6 and 7 App. 31-32, ¶ 1(e)), because "the owner of property seized pursuant to a warrant expressly describing that property has standing to challenge [it]."[9] *United States v. Lisk*, 522 F.2d 228, 230 n.3 (7th Cir. 1975) *cert. denied*, 423 U.S. 1078 (1976); *see also United States v. Salvucci*, 448 U.S. 83, 91 n.6 (1980) (citing *Lisk* with approval but "not explor[ing] this issue since respondents did not challenge the constitutionality of the seizure of evidence.").

Accordingly, the Special Prosecutor's contention that [redacted] lacks standing to challenge the warrant that resulted in the seizure of its property is specious. *Lisk*, 522 F.2d at 230 n.3; *Leary*, 846 F.2d at 596; *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977) (concluding the seizure of corporate records was improper where the records were "situated on a

[9] The use of any information improperly seized is not ripe for consideration and would be considered at a separate suppression hearing should this John Doe investigation proceed. *See, e.g., G.M. Leasing Corp.*, 429 U.S. 338, 359 (1977) ("The suppression issue, as to the [corporate] books and records, is obviously premature and may be considered if and when proceedings arise in which the Government seeks to use the documents or information obtained from them.")

private premises to which access is not otherwise available to the seizing officer."); *see also United States v. Brodie*, 250 F. Supp. 2d 462, 464-65 (E.D. Pa. 2002) (holding that a corporation had standing to challenge the seizure of its property when the government involuntarily obtained it from a corporation's former employee) (citing *Soldad v. Cook Cnty.*, 506 U.S. 56, 61 (1992)); *cf. Harris*, 206 Wis. 2d at 251 (analyzing a seizure and framing when a party has standing).

[redacted] succeeded in quashing the subpoenas and challenging the seizure of its records below, which led Judge Peterson to order the return of its property. (*See* Movants 6 and 7 App. 13-18.) Accordingly, Unnamed Movant No. 3–[redacted] has standing to challenge the validity of the warrant.

CONCLUSION

FOR THE FOREGOING REASONS, the Court should affirm Judge Peterson's order directing the seized items to be returned to their owners and reconsider its decision in *Cummings* to address whether affording John Doe judges the unilateral ability to issue search warrants runs afoul of the Fourth Amendment.

Dated: March 19th, 2015.

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CERTIFICATION FOR FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font, as modified by this Court's December 16, 2014 Order in the above-captioned matters. The length of the portions of this brief described in Wis. Stat. § 809.19(1)(d), (e), and (f) is 5,945 words.

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CERTIFICATION UNDER RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding an appendix, which complies with the requirements of Wis. Stat. § 809.19(12). Electronic filing of a searchable PDF file here is pursuant to this Court' specific January 13, 2015 order governing filing in this case.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on opposing parties.

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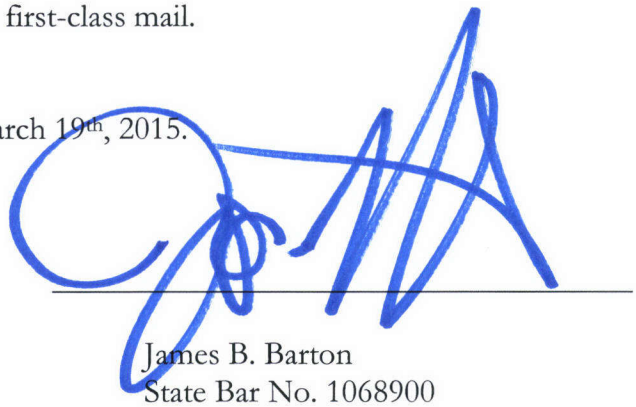
CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2015, pursuant to Wis. Stat. § 809.80(3)(b) and (4) and the Court's December 16, 2014 Order, the original and twenty-two (22) copies of the Brief of Unnamed Movant No. 3, as well as seventeen (17) redacted copies of the brief, were filed in the Wisconsin Supreme Court under seal, pending further order of the Court. Three (3) copies of the non-redacted brief and two copies of the redacted brief were swerved upon counsel of record via first-class mail.

Dated: March 19th, 2015.



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