No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ELMER WAYNE ZAHN - PETITIONER

VS.

UNITED STATES - RESPONDENT

APPENDIX FOR

WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE EIGHTH CIRCUIT

No. 22-1408

Elmer Wayne Zahn
Reg No. 28693-509
PRO SE REPRESENTATION
USP Florence High
US Penitentiary
P.O. Box 7000
Florence, Colorado 81226-7000

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United States Court of Appeals
For the Eighth Circuit

No. 22-1408

United States of America

Plaintiff - Appellee

v.

Elmer Wayne Zahn

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Northern

Submitted: October 21, 2022
Filed: March 23, 2023

Before KELLY, WOLLMAN, and KOBES, Circuit Judges.

WOLLMAN, Circuit Judge.

Elmer Wayne Zahn entered a conditional guilty plea to possessing with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). He appeals the district court's[1] denial of his motion to suppress evidence. We affirm.

[1]The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota, adopting the Report and Recommendation of the Honorable Mark A. Moreno, United States Magistrate Judge for the District of South Dakota.

Zahn was released on bond after being charged with state-law violations in Brown County, South Dakota. A July 18, 2019, magistrate-judge-issued warrant for Zahn's arrest was delivered to the sheriff's office for service. After Zahn pleaded guilty to a misdemeanor on July 29, 2019, the remaining charges were dismissed. The deputy clerk sent an email to two sheriff's office employees the next day, asking that the warrant be returned to the clerk's office. The warrant was not returned, however, and remained in the sheriff's office's computer system and on file.

Office Manager Kathy Neitzel, who had worked in the sheriff's office for more than thirty years, was responsible for handling warrants throughout her tenure there. Neitzel explained how the sheriff's office handled warrants upon their receipt. She or a co-worker entered the warrant into the computer system, placed it into a folder, and filed it with the other recently issued warrants. If a warrant was recalled, Neitzel or a co-worker would pull the warrant from the file, remove it from the computer system, and send it to the office that had recalled it. Although she had received the email recalling Zahn's warrant, Neitzel could not explain why it had not been removed from the computer system or returned to the clerk's office.

Deputy Sheriff Scott Kolb had also worked in the sheriff's office for more than thirty years. He spent most of his time working warrants and thus regularly reviewed the file containing the recently issued warrants. Kolb had seen the June 18 warrant for Zahn's arrest and had tried to serve it on him. On November 7, 2019, Kolb drove past Zahn's Aberdeen apartment and spotted a man he believed to be Zahn. Kolb pulled up Zahn's information on his in-car computer, which displayed a photo of Zahn, as well as a red bar indicating an active warrant.

Kolb exited his patrol car and approached Zahn. After a brief struggle, Kolb took Zahn to the ground, where he was eventually handcuffed. A pat-down search revealed, among other things, drug paraphernalia and a chewing-tobacco container that held five plastic baggies of methamphetamine.

After delivering Zahn to jail staff, Kolb retrieved the warrant from the sheriff's office's file, signed it, gave it to jail staff, and gave a copy to Zahn. Kolb thereafter obtained a warrant authorizing a search of Zahn's apartment, during which the execution thereof resulted in the discovery of additional methamphetamine and other evidence of drug distribution. Zahn was eventually released, and a warrant was later issued relating to the November 7 incident.

Investigator Wes Graff and other law enforcement officers were dispatched to an Aberdeen hotel on November 23, 2020. After officers resolved the issue, hotel staff requested further assistance with an unrelated commotion in one of the hotel's rooms. Graff went to the room and saw Zahn and three other occupants therein. Knowing that Zahn and two of the other occupants had active arrest warrants, Graff entered the room, handcuffed Zahn, and saw drug paraphernalia lying on the floor. During the subsequent warrant-authorized search of the room, officers discovered methamphetamine, heroin, and other evidence of drug distribution.

A federal grand jury returned an indictment that charged Zahn with drug offenses stemming from the November 7, 2019, and the November 23, 2020, arrests and related searches. Zahn moved to suppress the evidence, arguing that it should be excluded as fruits of his unconstitutional November 7 arrest. Neitzel, Kolb, and Graff testified during the suppression hearing, following which the district court denied the motion after declining to apply the exclusionary rule.

"The Fourth Amendment forbids 'unreasonable searches and seizures,' and this usually requires the police to have probable cause or a warrant before making an arrest." Herring v. United States, 555 U.S. 135, 136 (2009). Kolb had neither when he arrested Zahn. Accepting the parties' assumption that the November 7, 2019, arrest violated Zahn's Fourth Amendment rights, we must determine whether the district court should have applied the exclusionary rule. In doing so, we review for clear error the court's findings and *de novo* its conclusions of law. United States v. Szczerba, 897 F.3d 929, 936 (8th Cir. 2018).

In Herring, the Supreme Court considered circumstances similar to those presented here. An officer arrested the defendant after being told that there was an active warrant. A search incident to arrest revealed contraband. The warrant had been recalled five months earlier, however. "For whatever reason, the information about the recall of the warrant . . . did not appear in the database." 555 U.S. at 138. The county warrant clerk soon realized the error, but by the time the officer was alerted, the defendant had already been arrested and searched.

The Court held that the exclusionary rule does not apply when "an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee." Id. at 137. The Court explained that "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some cases recurring or systemic negligence." Id. at 144. The error in Herring was the result of mere negligence, and thus any marginal benefit of suppressing evidence "obtained in objectively reasonable reliance on a subsequently recalled warrant" did not "justify the substantial costs of exclusion." Id. at 146 (second quotation from United States v. Leon, 468 U.S. 897, 922 (1984)).

Zahn argues that his unconstitutional arrest stemmed from the Brown County Sheriff's Office's reckless conduct, *i.e.*, its failure to establish any procedure to handle recalled warrants. Zahn contends that the office should have implemented a review system, suggesting that "[a] simple, routine process of a weekly review would have caught the error." Appellant's Br. 9.

Neitzel's and Kolb's testimony regarding the sheriff's office's procedure for handling warrants revealed "no evidence that errors in [Brown County's] system are routine or widespread." See Herring, 555 U.S. at 147. As recounted above, Neitzel explained that after receiving phone or email notification of a warrant's recall, she or a co-worker would remove the warrant from the file and the computer system and return it to the appropriate office. When asked how often she or her co-workers had

failed to remove a recalled warrant, Neitzel replied, "Very rarely." Similarly, Deputy Kolb testified that he had no doubt that Zahn's warrant was valid when he saw it in his in-car computer system. Both Neitzel and Kolb testified that there likely had been occasions during their decades-long careers with the sheriff's office when a warrant was not removed after it was recalled. Neither could point to any specific incidents, however, in which a recalled warrant was not removed or in which a defendant had been arrested on a recalled warrant. On this record, then, we conclude that it was employee negligence—not reckless disregard of constitutional requirements—that resulted in the failure to remove Zahn's recalled warrant from the file and the computer system.

Like the officer in Herring, Kolb wrongly but reasonably believed that there was an outstanding warrant for Zahn's arrest. Neitzel's and her co-worker's negligent conduct "was not so objectively culpable as to require exclusion" of the evidence garnered after Zahn's arrests. See Herring, 555 U.S. at 146; id at 147–48 ("[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'" (quoting Leon, 468 U.S. at 907–08 n.6)).

In light of our conclusion that the exclusionary rule does not apply, we need not consider the government's alternate ground for admission of the evidence, *i.e.*, that Zahn's resistance to his illegal arrest furnished grounds for a second, legitimate arrest. See United States v. Schmidt, 403 F.3d 1009, 1016 (8th Cir. 2005).

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1408

United States of America

Plaintiff - Appellee

v.

Elmer Wayne Zahn

Defendant - Appellant

Appeal from U.S. District Court for the District of South Dakota - Northern
(1:21-cr-10005-CBK-1)

JUDGMENT

Before KELLY, WOLLMAN and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 23, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX -B-

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APPENDIX -B-

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. Elmer Wayne Zahn, Defendant.	1:21-CR-10005-CBK ORDER

Defendant Elmer W. Zahn filed a motion to suppress evidence found as a result of two separate confrontations with law enforcement officers.

First, defendant Zahn seeks to suppress evidence obtained from an encounter in front of his apartment between Zahn and the Brown County Sheriff's Office on November 7, 2019. Deputy Sheriff Scott Kolb incorrectly, but in good faith, believed defendant Zahn had an outstanding arrest warrant for him from Brown County, which was confirmed by looking up defendant Zahn's file with his in-car computer's search of open warrants. In the resulting encounter, defendant Zahn provided an independent ground for his arrest separate from the initial false outstanding arrest warrant when he resisted arrest by Deputy Kolb. In this first confrontation, the Brown County Sherriff's Office found 17 grams of a white substance that tested presumptively positive for methamphetamine on defendant Zahn's person, in addition to a glass pipe, straw, $256 in cash, a stun flashlight, and a knife. Because of what was found on defendant Zahn's person, law enforcement acquired a search warrant for defendant's apartment, resulting in a further 235 grams of methamphetamine, drug paraphernalia, baggies, three scales, and $2,500 in cash.

Second, on November 23, 2020, officers were called to the Best Western Ramkota Hotel in Aberdeen for an unrelated tip concerning another individual with an active arrest warrant. Due to commotion surrounding Room 177, law enforcement approached the room upon the request of hotel staff, where Brown County Sheriff's Investigator Wes Graff identified defendant

Zahn. At this point Zahn had an outstanding warrant for his arrest relating back to the November 7, 2019, incident. Because of sufficient attenuation between the November 23, 2020, incident and November 7, 2019, incident, the link between the two incidents is too remote to require exclusion under the Fourth Amendment to the United States Constitution, regardless of whether the November 7 arrest warranted suppression.

United States Magistrate Judge Mark A. Moreno conducted an evidentiary hearing on July 13, 2021, and issued a report and recommendation to deny the motion. See REPORT AND RECOMMENDATION FOR DISPOSITION OF MOTION TO SUPPRESS EVIDENCE, doc. 50. Copies of such report and recommendation were served upon the parties as required by 28 U.S.C. § 636 and defendant Zahn filed objections to the report and recommendation. I have conducted a *de novo* review of the record as required by 28 U.S.C. § 636(b)(1)(C). I find that the report and recommendation of the magistrate judge should be adopted.

Now, therefore,

IT IS ORDERED:

1. The objections of defendant Zahn, doc. 54, are rejected.
2. The report and recommendation of U.S. Magistrate Judge Mark A. Moreno filed August 25, 2021, doc. 50, shall be and is hereby adopted.
3. The motion to suppress, doc. 26, is denied.

DATED this 23rd day of September, 2021.

BY THE COURT:

Charles B. Kornmann

CHARLES B. KORNMANN
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ELMER WAYNE ZAHN, Defendant.	1:21-CR-10005-CBK ORDER

Defendant entered a conditional plea of guilty to possession of methamphetamine with intent to distribute and was sentenced on February 15, 2022, to 175 months imprisonment. He appealed the denial of his motion to suppress evidence and the United States Court of Appeals for the Eighth Circuit affirmed. United States v. Zahn, 63 F.4th 699 (8th Cir. March 23, 2023). Defendant has filed a motion for the appointment of counsel to assist him in filing a petition for a writ of *certiorari* to the United States Supreme Court. He filed a nearly identical motion in the Eighth Circuit.

Pursuant to the Amendment to Part V of the Plan to Implement The Criminal Justice Act [CJA] of 1964 - Effective August 1, 2015:

> Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing *en banc* in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (*per curiam*); 8th Cir. R. 35A.
>
> If counsel declines to file a petition for panel rehearing or rehearing *en banc* requested by the defendant based upon counsel's determination that there

> are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing pro se a timely petition for rehearing, and must request an extension of time of 28 days within which to file pro se a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing pro se a timely petition for writ of certiorari.
>
> If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing pro se a timely petition for writ of certiorari.
>
> A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.
>
> Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing pro se a timely petition for panel rehearing, a timely petition for rehearing *en banc*, and a timely petition for writ of certiorari.

Following the entry of judgment in the Eighth Circuit, counsel for defendant fully complied with the Amendment to Part V of the CJA set forth above. Counsel determined that there were no reasonable grounds to file a petition for a writ of *certiorari*, advised the defendant and the Eighth Circuit in conformity with the above rule, and requested leave to withdraw as counsel for the defendant. The Eighth Circuit granted the request.

An appeal pursuant to a writ of *certiorari* to the Supreme Court of the United States from a United States Court of Appeals decision affirming the federal district court is only authorized, as applicable to this case, where (1) the decision of the Court of Appeals is in conflict with the decision of another United States Court of Appeals on the same important matter or (2) the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court, or has decided

an important federal question in a way that conflicts with relevant decisions of the Supreme Court. Rule 10 of the Rules of the United States Supreme Court. Defendant has not identified any basis for the issuance of a writ of *certiorari* and counsel certified that, after a diligent and conscientious review of the record, there is no reasonable likelihood that a petition for a writ of *certiorari* would be granted.

"There is no constitutional right to counsel for discretionary appeals." Ahumada v. United States, 994 F.3d 958, 960 (8th Cir. 2021). Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, review on a writ of *certiorari* is discretionary. In the Eighth Circuit, there is no statutory right under the CJA to the appointment of counsel to pursue discretionary review to the United States Supreme Court where counsel has certified that no appeal to the United States Supreme Court is authorized. Amendment to Part V of the Plan to Implement The Criminal Justice Act [CJA] of 1964.

Now, therefore,

IT IS ORDERED that defendant's motion, Doc. 92, for the appointment of counsel is denied.

DATED this 20th day of April, 2023.

BY THE COURT:

Charles B. Kornmann

CHARLES B. KORNMANN
United States District Judge

APPENDIX -C-

APPENDIX -C-

APPENDIX -C-

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ELMER WAYNE ZAHN, Defendant.	1:21-CR-10005-CBK REPORT AND RECOMMENDATION FOR DISPOSITION OF MOTION TO SUPPRESS EVIDENCE

In this possession with intent to distribute methamphetamine case, Elmer Wayne Zahn seeks to suppress evidence obtained during two confrontations he had with law enforcement officers. The first involved an encounter on the street and the second occurred in a hotel room. Because officers did not overstep their bounds, on either occasion, Zahn's suppression motion should be denied.

BACKGROUND

The day after Zahn plead guilty to one of his pending charges in Brown County, South Dakota, the clerk's office there retracted Zahn's bond violation warrant. A deputy clerk notified the Brown County Sheriff's Office of the retraction. But, for some unknown reason, that Office failed to remove the warrant from its system. Normally the Sheriff's Office pulls a warrant from its records when the clerk calls or emails that the warrant is no longer in effect.

On November 7, 2019, Brown County Deputy Sheriff Scott Kolb, mindful that there as a warrant for Zahn's arrest in the Sheriff's system and having tried to serve the warrant previously, spotted Zahn near his Aberdeen apartment. Kolb drove by and on his in-car computer, looked up Zahn's file and picture to verify Zahn's identity. Upon doing so, Kolb approached Zahn on foot, calling his name and informing him that he had an arrest warrant. Zahn began to walk away. When Kolb caught up with Zahn to arrest him, Zahn tried to pull away, insisting on returning to his apartment to lock the door.

Deputy Kolb attempted to handcuff a struggling Zahn for about twenty seconds before taking Zahn to the ground. The scuffle continued there, with Kolb repeatedly telling Zahn to put his hands behind his back. Kolb eventually managed to handcuff Zahn and hold him down until another deputy arrived. The two deputies then stood Zahn up, loosened the handcuffs, and searched him. On Zahn's person, they found a glass pipe, straw, a small chew container with five plastic bags of white crystal substance in it, a separate plastic bag containing white crystal substance, $256 in cash, a flashlight/ stun gun, and a knife, wallet, and phone. The white substances tested presumptively positive for methamphetamine and, all together, weighed 17 grams.

While transporting Zahn in the patrol car after the arrest, Deputy Kolb accessed Zahn's warrant and informed Zahn that there was apparently an active warrant in the Brown County system for a bond violation. Zahn replied that he was not on bond. During Zahn's booking, Kolb provided a hard copy of the warrant to Zahn and jail staff.

That same day, Deputy Kolb prepared an affidavit and applied for a search warrant for Zahn's apartment, mainly based on the drugs found on Zahn's person. A state judge issued the warrant and officers searched Zahn's apartment. Inside, they found 235 grams of methamphetamine, drug paraphernalia, baggies, three scales, and $2,500 in cash.

About a year later, on November 23, 2020, Brown County Sheriff's Investigator Wes Graff and other officers went to the Best Western Ramkota Hotel in Aberdeen in response to a tip that Allison Hill, who had an active arrest warrant, was in the Hotel. At some point, after officers were unable to locate Hill, staff at the front desk informed officers that there was a commotion in Room 177 and asked for assistance with the room occupants.

As the officers approached the room, they could hear three staff members talking to the occupants about not paying for the room and having to leave. In the hallway, outside the room, Investigator Graff recognized Zahn, Amy Anderson, Yvette Anderson, and Melanie Anderson, all of whom had active arrest warrants (Amy and Yvette for being allege parole and probation violators, respectively). Zahn's warrant related back to the November 7 incident.

Once the conversation with hotel staff ended, Investigator Graff ordered Zahn to come out of the room. Zahn tried to shut the door and retreat, but officers stopped him and entered the room. Zahn resisted and tussled with them before being handcuffed

and placed in the hallway. Officers observed a "one hitter" pipe on the floor of the room and a snort tube on the desk.

One of the officers contacted, and received permission from, Amy's parole officer to search her person and belongings. In the two bags Amy said were hers, officers discovered a meth pipe and more drug paraphernalia. Officers arrested Amy for possession of a controlled substance, violating her parole, and for an earlier domestic assault in the room against Melanie.

Investigator Graff talked with Yvette and asked if she was aware of any illegal drugs in the room. Yvette thought there was either marijuana or methamphetamine in the room, belonging to Zahn, and told Graff that Zahn knew a warrant had been issued for him and was hiding from it. Officers arrested Yvette as well on her active warrant.

Afterward, Investigator Graff left to go apply for a warrant to search the room. Before departing, Graff instructed two Aberdeen Police Department detectives, Chris Gross, and Zack Krage, to secure the room's two entrances and to "hold tight" until a search warrant was obtained. Although officers removed Yvette from the room a short time later, Melanie stayed in the room with the two detectives and her dog.

Detective Krage testified that no search occurred during the wait, with each detective taking up a position on either side of the room and remaining there. Melanie though maintained that Detective Gross was shuffling through items on a bed while she and Yvette were with him in the room. Eventually, Investigator Graff returned with a signed warrant and officers searched the room, seizing 345.72 grams of

methamphetamine, a small baggie of heroin, bulk Ziplock bags, $2,200 in cash, and meth pipes.

A federal grand jury ultimately indicted Zahn on one count of possession with intent to sell methamphetamine related to the apartment search and one count each of possession with intent to sell methamphetamine and heroin in connection with the hotel search. Zahn now moves to suppress the evidence seized during, and as a result of, his two run-ins with law enforcement.[1] The government opposes the motion.[2]

DISCUSSION

A. Good Faith Reliance on Arrest Warrant

Zahn claims that the arrest on November 7, was executed without a warrant, that the good-faith exception to the exclusionary rule does not apply, and that he did not resist arrest.[3] As a result, Zahn argues, the evidence discovered during the arrest, in his home following the arrest, as well as evidence obtained during the November 23 hotel room search is fruit of the poisonous tree and subject to suppression.[4]

The Fourth Amendment protects against "unreasonable searches and seizures," usually requiring police to have a warrant or probable cause before carrying out an

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[1] Docket No. 26.

[2] Docket No. 33.

[3] *See* Docket Nos. 27 at 4-6, 48 at 2.

[4] *Id.*

arrest.[5] Evidence obtained during an unreasonable search and seizure may be subject to the exclusionary rule, but exclusion is not an automatic consequence of a violating the Amendment.[6] The rule does not, for example, apply when police have a reasonable, but incorrect, belief that there is an outstanding arrest warrant because of a police record-keeping error.[7] *Herring v. United States* held as much in a case very similar to Zahn's.

In *Herring*, an investigator learned that Herring had driven to the sheriff's department to retrieve items from an impounded truck, and the investigator inquired into whether there were any warrants out for Herring.[8] A clerk from a neighboring county confirmed an active arrest warrant in the sheriff's database, which the investigator relied on arrest Herring, finding contraband in a search incident to the arrest of him.[9] Minutes later, the neighboring county clerk realized that the warrant had been recalled five months earlier but was mistakenly left in the system.[10] Herring moved to exclude the evidence seized from the search.[11]

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[5] *Herring v. United States*, 555 U.S. 135, 136 (2009).

[6] *Id.* at 139-41.

[7] *Id.* at 137.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 138.

[11] *Id.*

The Supreme Court refused to suppress the evidence, relying on the good-faith exception to the exclusionary rule.[12] In doing so, the Court explained that the rule is designed to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence," and is used as a last resort, not as a first impulse.[13] According to the Court, the police misconduct must be "sufficiently deliberate that exclusion can meaningfully deter it," and the deterrent effect of the exclusion "must be substantial and outweigh any harm to the justice system."[14] This is an objective analysis, the Court emphasized, "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal" given "all of the circumstances."[15]

Looking specifically at warrant database scenarios, the Court found that the good-faith exception may not apply, and exclusion may be justified, when police are shown to be reckless in maintaining the system or knowingly make false entries to justify future false arrests.[16] The Court also noted that it may be reckless for an officer to rely on reports from a warrant system when the system produces widespread errors

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[12] *Id.* at 139.

[13] *Id.* at 141-44.

[14] *Id.* at 144-47.

[15] *Id.* at 145 (quoting *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984)).

[16] *Id.* at 146.

routinely leading to false arrests.[17] But because the police error in *Herring* was merely negligent and not systemic, whatever deterrence from exclusion was not enough to justify letting Herring "go free."[18]

Here, in carrying out the arrest, Deputy Kolb acted in objectively reasonable reliance on a warrant in a system maintained by the Brown County Sheriff's Office. And the misconduct does not appear to be sufficiently deliberate so that exclusion is necessary to deter future wrongdoing. The Sheriff's Office still had a copy of the warrant in house and showed the warrant as active in its computer system.[19] Before the arrest, and with no knowledge of any prior arrests based on cancelled warrants negligently left in the system, Kolb pulled up Zahn's profile which disclosed a warrant.[20] After the arrest, Kolb located Zahn's warrant during the car ride to the jail, informed Zahn that it was for a bond issue, and handed a hard copy from a box of recent warrants to Zahn and staff at the jail.[21]

While the Brown County Sheriff's Office should have removed the warrant from its system, no evidence demonstrates that Deputy Kolb's reliance on the Office's

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[17] *Id.* at 146-47.

[18] *Id.* at 146-48.

[19] *See* Mot. Hr'g Tr. 29-32 (July 13, 2021).

[20] *See* Mot. Hr'g Tr. 6-9.

[21] *See* Mot. Hr'g Tr. 15.

warrant system was reckless. Despite several decades of combined service, neither Kolb[22] nor office manager Kathy Neitzel[23] could recall any previous arrests premised on a warrant that was erroneously left in the system. Just as in *Herring*, because the misconduct here is not systemic, reckless, or "sufficiently deliberate that exclusion can meaningfully deter it," application of the exclusionary rule would produce little deterrent value and is uncalled for.[24]

B. Resistance to Illegal Arrest

Regardless of any constitutional violation that may have taken place during his initial arrest, Zahn provided an independent ground for the arrest, and a search incident to it, when he resisted Deputy Kolb.[25] In the Eighth Circuit, "resistance to an illegal arrest can furnish grounds for a second, legitimate arrest."[26] "A contrary rule

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[22] *See* Mot. Hr'g Tr. 20-21, 39.

[23] *See* Mot. Hr'g Tr. 49-50.

[24] *See Herring*, 555 U.S. at 147-48 ("[T]he deterrent effect of suppression must be substantial and outweigh any harm to the justice system .... [W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'").

[25] *See United States v. Redbird*, 3:20-30026-RAL, 2020 WL 6129634, at *3 (D.S.D. Oct. 19, 2020) (holding that upon committing the new and distinct crime of resisting arrest, the exclusionary rule would not require evidence to be suppressed despite the unlawful entry into a home).

[26] *United States v. Schmidt*, 403 F.3d 1009, 1016 (8th Cir. 2005).

would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct."[27]

Under state law, a person who "intentionally prevents or attempts to prevent a law enforcement officer, acting under color of authority, from effecting an arrest of the actor, by: [u]sing or threatening to use physical force or violence against the [ ] officer ... is guilty of resisting arrest[.]"[28] The elements of this offense, that must be proven, are: "(1) a law enforcement officer was acting under color of authority and was attempting to effect the arrest" and "(2) the defendant intentionally [attempted to prevent] [the officer] from effecting the arrest of [the person] by [using physical force or violence] against the officer."[29] An officer "acts 'under color of authority' when, in the regular course of assigned duties, the officer is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made."[30]

With respect to the first element, Deputy Kolb tried to arrest Zahn in good faith and in the regular course of Kolb's assigned duties. As part of his duties,[31] Kolb noticed

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[27] *Id.*

[28] SDCL § 22-11-4.

[29] S.D. Pattern Jury Instructions (Criminal) 3-9-10 (2019).

[30] S.D. Pattern Jury Instructions (Criminal) 3-9-11 (2019).

[31] *See* Mot. Hr'g Tr. 5 ("Most of my time was spent on warrants unless there was a call to be answered.").

a man he believed to have an active arrest warrant based on prior knowledge of a warrant in the Sheriff's Office system.[32] He pulled up Zahn's name on his computer which displayed, via a red indicator light, that Zahn had an active warrant and headed toward Zahn to arrest him.[33]

As for the second element, Zahn attempted to prevent Deputy Kolb from effecting the arrest by physically pulling away from Kolb, leading to a struggle on the ground that ultimately required help from second deputy before handcuffs could be properly secured.[34] Recording from Kolb's body camera confirms the struggle, with roughly the first minute and twenty seconds showing Zahn physically obstructing the arrest while also refusing to cooperate after repeated commands to place his hands behind his back and "quit fighting."[35] The requirements of resisting arrest are easily satisfied under these circumstances.

Zahn argues that Deputy Kolb did not comply with South Dakota Codified Laws (SDCL) § 23A-2-9, and thus was not acting under the color of authority when he took Zahn into custody.[36] § 23A-2-9 provides that "[a] law enforcement officer need not have

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[32] *See* Mot. Hr'g Tr. 7.

[33] *See* Mot. Hr'g Tr. 8-9.

[34] *See* Mot. Hr'g Tr. 9-10; Mot. Hr'g Ex. 1 at 00:00-01:20 (July 13, 2021).

[35] *See* Mot. Hr'g Ex. 1 at 00:00-01:20.

[36] *See* Docket No. 48 at 4.

the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible."[37] The statute then says that "If the [ ] officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued."[38]

Deputy Kolb complied with SDCL § 23A-2-9. He did not have the warrant in his possession when he confronted Zahn, but he advised Zahn there was a warrant out for his arrest.[39] After the struggle and once Zahn was secured, Kolb informed Zahn that the warrant stemmed from a failure to comply with bond conditions.[40] And Kolb retrieved the warrant and provided Zahn and jail staff with a physical copy of it upon arriving at the jail.[41]

Zahn's resistance to the initial arrest (made under what turned out to be a warrant that no longer existed) constituted a new and distinct crime and provided an independent justification for the arrest and search of him. The Fourth Amendment

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[37] SDCL § 23A-2-9.

[38] *Id.*

[39] *See* Mot. Hr'g Tr. 7 ("I told him there was a warrant"); Mot. Hr'g Ex. 1 at 00:14 ("What's the warrant for?").

[40] *See* Mot. Hr'g Tr. 15; Mot. Hr'g Ex. 1 at 11:15 ("Bond condition, violated bond conditions, that's all it tells me. I'll give you a copy of it.").

[41] *See* Mot. Hr'g Tr. 7.

therefore does not bar the evidence garnered from Zahn and his apartment after he committed the resisting offense.

C. Attenuation

As part of his primary claim, Zahn contends that the sole reason for entry into the hotel room on November 23 was his 2019 warrant.[42] Because, he says, the warrant related back to charges derived from his November 7 arrest, any evidence derived from the room search is fruit of the poisonous tree.[43] But under the attenuation doctrine (an exception to the exclusionary rule), the link between the two incidents is too distant to require exclusion, even if the initial arrest warranted suppression.

This doctrine provides that "evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'"[44] Whether an intervening act breaks the casual chain between the conduct and evidence requires consideration of three factors: (1) temporal proximity, (2) the presence of intervening circumstances, and (3) the purpose and

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[42] *See* Docket No. 27 at 6.

[43] *Id.*

[44] *United States v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (quoting *Hudson v. Michigan*, 547 U.S. 586, 593 (2006)).

flagrancy of the misconduct.[45] Here, all three factors support application of the doctrine.

The first factor, temporal proximity, will not favor attenuation unless there is a "substantial time" lapse between the incidents.[46] With over a year between the two incidents, this factor strongly backs attenuation.[47]

And given the presence of intervening circumstances, so does the second factor.[48] "The existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is 'sufficiently attenuated to dissipate the taint.'"[49] This principle applies here. Officers were at the hotel in response to an incident unrelated to Zahn; even if Zahn's warrant were deficient, officers identified two other individuals with active warrants unrelated to his that would have justified entry for arrest; and hotel staff asked officers to assist with dealing with the occupants who failed to pay for their stay.[50]

Finally, the third factor, purpose, and flagrancy of the misconduct, likewise falls in the attenuation camp. This factor "reflects the rationale by favoring exclusion only

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[45] *Id.* at 2061-62.

[46] *Id.* at 2062.

[47] *See* Docket No. 47.

[48] *Strieff*, 136 S.Ct. at 2062.

[49] *Id.* (quoting *Segura v. United States*, 468 U.S. 796, 815 (1984)).

[50] *See* Docket No. 47; Mot. Hr'g Tr. 61-63.

when the police misconduct is most in need of deterrence ... when it is purposeful or flagrant."[51] Deputy Kolb arrested Zahn based on good-faith reliance of a warrant in his own office's system and then had that arrest legitimized when Zahn resisted and committed a new offense.

As already discussed, any misconduct in the initial arrest was negligent at the most, not purposeful or flagrant. And there was no "systemic or recurrent police misconduct" that might otherwise provide an avenue for the intended deterrent effect of exclusion.[52] With all three factors on the side of attenuation, even if there were a colorable basis to suppress evidence from the initial arrest, the connection between that arrest and the hotel search a year later is sufficiently attenuated to preclude exclusion of the evidence gained during the latter search.

D. Basis for Government's Entry and Search

As an alternate stand-alone argument, Zahn asserts that the November 23 arrest, search, and seizure violated his Fourth Amendment rights.[53] Yet "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is

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[51] *Strieff*, 136 S.Ct. at 2063.

[52] *Id.*

[53] Docket No. 48 at 5-7.

reason to believe the suspect is within."[54] Since officers knew Zahn, Amy, and Yvette all had active warrants and were occupying the room, officers could enter and arrest the trio and did not violate the Fourth Amendment by doing so.[55]

Even if law enforcement had not seen Zahn, Amy, or Yvette before entering, hotel room occupants lose their reasonable expectation to privacy in the room when they are justifiably evicted by the hotel with requested assistance by police.[56] In *United States v. Molsbarger*, hotel management asked for police assistance in the legitimate eviction of occupants of a room that was creating a public disturbance.[57] Officers entered the room and recognized a sleeping occupant, Molsbarger, who had an outstanding arrest warrant.[58] An officer arrested Molsbarger and conducted a search

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[54] *Payton v. New York*, 445 U.S. 573, 603 (1980); *see also United States v. Glover*, 746 F.3d 369, 373 (8th Cir. 2014) (noting that even if officers are unsure if the subject resides in the home, they may still enter a third person's home with "a reasonable belief that the suspect resides at the place to be entered and have reason to believe the suspect is present").

[55] *See* Docket No. 47; Mot. Hr'g Tr. 61-64.

[56] *United States v. Molsbarger*, 551 F.3d 809, 811 (8th Cir. 2009); *see also Young v. Harrison*, 284 F.3d 863, 869 (8th Cir. 2002) ("The great weight of authority leads us to conclude that the better view is that ... hotel guests do not have all the rights afforded tenants under South Dakota's Forcible Entry and Detainer statute.").

[57] *Id.* at 810.

[58] *Id.*

incident to arrest, looking inside a nightstand next to the bed that Molsbarger was sleeping on and in a box at the foot of the bed.[59]

Although Molsbarger sought to suppress evidence obtained during the search, the Eighth Circuit held that his rights to be free of government intrusion "ended when the hotel manager, properly exercising his authority, decided to evict the unruly guests and asked the police to help him do so."[60] Because the officers were within their rights to enter the room and because there was an outstanding warrant for Molsbarger, the arrest, and search of him was valid and the evidence admissible.[61]

Here, as in *Molsbarger*, hotel staff asked officers for assistance with a room disturbance.[62] Although permission to enter the room was less explicit than in *Molsbarger*, such permission was readily implied from the circumstances surrounding the direct request for assistance with the disruptive room and what officers saw and heard hotel staff expressed to the occupants: to leave because they had not paid for the

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[59] *Id.* at 811.

[60] *Id.* at 812.

[61] *Id.*

[62] Docket No. 47; Mot. Hr'g Tr. 61-62.

room.[63] What's more, officers eyed three individuals with active warrants in the room before entering, rather than after as in *Molsbarger*.[64]

Upon entry, officers subdued Zahn, found a one hitter pipe in plain view[65] on the floor, and seized another pipe and paraphernalia from Amy's bags in a parole consent search.[66] Based on these items, Yvette's statements, and the behavior of the occupants, officers obtained a warrant to search the room.[67] Detective Krage testified that no search occurred in the room while he and Detective Gross waited for the warrant.[68] Melanie's testimony to the contrary was not credible as she was thoroughly impeached while on the witness stand.[69] Besides, there is no evidence that the search exceeded the scope of the warrant. In the end, the room search on November 23 was valid and comported with Fourth Amendment strictures.

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[63] *Id.*

[64] *Id.*

[65] *See United States v. Hastings*, 685 F.3d 724, 729 (8th Cir. 2012) ("That doctrine permits an officer to 'seize an object in plain view provided the officer is lawfully in the position from which he or she views the object, the object's incriminating nature is immediately apparent, and the officer has a lawful right of access to the object.'").

[66] *See* Docket No. 47.

[67] *Id.*

[68] *See* Mot. Hr'g Tr. 81-83.

[69] *See* Mot. Hr'g Tr. 95-96.

CONCLUSION

Deputy Kolb's conduct was not so objectively culpable as to require suppression of evidence. And he could separately arrest and search Zahn after Zahn resisted. So the evidence officers acquired from Zahn and his apartment on November 7 is fully admissible. Any link between the November 7 and November 23 incidents is broken by attenuation. Officers had independent grounds to enter the hotel room and did not flout the Fourth Amendment. Zahn thus has no viable basis to exclude the evidence seized on November 23 either.

RECOMMENDATION

For all of these reasons, and based on the authorities cited in this report and the record now before the Court, it is

RECOMMENDED that Zahn's Motion to Suppress Evidence[70] be denied.

NOTICE

The parties have 14 calendar days after service of this report and recommendation to file their objections to the same.[71] Unless an extension of time for cause is later obtained,[72] failure to file timely objections will result in the waiver of the

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[70]*See* Docket No. 26.

[71]*See* 28 U.S.C. §636(b)(1); Fed. R. Crim. P. 59(b).

[72]*See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990); *Nash v. Black*, 781 F.2d 665, 667 & n.3 (8th Cir. 1986) (*citing Thomas v. Arn*, 474 U.S. 140, 155 (1985)).

right to appeal questions of fact.[73] Objections must "identify[] those issues on which further review is desired[.]"[74]

Dated this 25th day of August 2021, at Pierre, South Dakota.

BY THE COURT:

MARK A. MORENO
UNITED STATES MAGISTRATE JUDGE

[73]*See Thompson*, 897 F.2d at 357; *Nash*, 781 at 667.

[74]*Arn*, 474 U.S. at 155.

Additional material from this filing is available in the Clerk's Office.