STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP2455-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CHRISTOPHER JOHN KERR,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING THE SUPPRESSION OF EVIDENCE, ENTERED IN THE BAYFIELD COUNTY CIRCUIT COURT, THE HONORABLE JOHN P. ANDERSON, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Was the Ashland County commitment order for the nonpayment of a city ordinance fine void *ab initio*?

   The Bayfield County court concluded that the Ashland County court had authority to issue the order, but did so in disregard of the statutory requirements.

   This Court should conclude that the order was void *ab initio* because the citation, which included the summons, was mailed to Christopher John Kerr, and a commitment order cannot issue under that circumstance.

2. Does the good-faith exception to the exclusionary rule apply when there is no misconduct by an officer in arresting an individual on an active commitment order that is later revealed to be void *ab initio*?

   The circuit court concluded that the good-faith exception to the exclusionary rule does not apply and suppressed the evidence pursuant to *State v. Hess,* 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568.

   This Court should conclude that the court was bound by *Hess*, but should certify this case to the supreme court to modify or overrule *Hess* in light of subsequent Wisconsin and Supreme Court good-faith jurisprudence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument as the need for certification can adequately be addressed by briefing. If this Court reaches a decision on the merits, as opposed to

certification, publication may be appropriate to clarify the limits of *Hess*.

INTRODUCTION

The Bayfield County Circuit Court excluded evidence discovered when Christopher John Kerr, the Defendant-Respondent, was arrested on an Ashland County commitment order, which was void *ab initio*. The court relied on *State v. Hess,* 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568, for the proposition that, absent police misconduct, exclusion of evidence is appropriate when the evidence is discovered as a result of a void warrant. *Hess* was wrongly decided and this case should be certified so that the supreme court can definitively overrule *Hess*. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (The court of appeals may not overrule, modify, or withdraw language from a prior published opinion.).

STATEMENT OF THE CASE

On September 27, 2015, the Bayfield County Communication Center received an "open air" 911 call. (R. 12:2, 4.) The dispatcher could hear a female yelling and then the line went dead. (R. 12:2.) The dispatcher did a callback and a man answered the phone by saying "shut the fuck up." (R. 12:2.) The dispatcher asked who the man was talking to, and the man said he was talking to his cat. (R. 12:2.) The man denied that there was a female with him, said there was no problem, and said that the call was placed by accident. (R. 12:2.)

The dispatcher connected the telephone number used to make the 911 call to Kerr and dispatched Officer Matthew Ladwig and Deputy Matthew Leino to Kerr's residence in Bayfield County. (R. 12:4; 61:3–4, 16.) While in route, dispatch notified Officer Ladwig and Deputy Leino that

Ashland County had an active warrant for Kerr. (R. 12:2, 4; 61:6, 16.) The officers were not provided with any further details. (R. 61:17–18.)

As Officer Ladwig was walking to the door of Kerr's home, he could hear a female's voice yelling "fuck." (R. 12:4; 61:4.) Officer Ladwig knocked on the door and Kerr answered. (R. 12:4; 61:4.) After speaking with Kerr about the 911 call and confirming that the call was accidental, Officer Ladwig advised Kerr that there was an active warrant for his arrest. (R. 12:4; 61:6, 8.) Officer Ladwig placed Kerr under arrest, did a pat-down, and found a rock-type substance in right pocket of Kerr's pants. (R. 3:1, A-App. 101; 12:4; 61:7.) The substance tested positive for methamphetamine. (R. 3:1, A-App. 101.)

The Bayfield County District Attorney charged Kerr with one count of possession of methamphetamine contrary to Wis. Stat. § 961.41(3g)(g). (R. 3, A-App. 101–02.) Kerr moved to suppress the evidence, arguing that his arrest was unlawful because the Ashland County order was issued in violation of his due process rights. (R. 25.)

In deciding the issue, the Bayfield County court found that Officer Ladwig did not know the basis for the Ashland County arrest warrant. (R. 38:1, A-App. 103.) The commitment order arose from a civil forfeiture action. (R. 38:1, A-App. 103.) Kerr was issued a citation for violating a City of Ashland ordinance prohibiting disorderly conduct. (R. 38:1–2, A-App. 103–04.) Kerr failed to appear for his court date and a default judgment was issued; Kerr had 60 days to pay a civil forfeiture. (R. 38:2, A-App. 104.) It is possible that Kerr never received notice of the default

judgement. (R. 38:2–3, A-App. 104–05.)[1] Kerr did not make the payment within the 60 days. (R. 38:2, A-App. 104.) On September 22, 2015, the Ashland County Clerk of Courts certified the unpaid forfeiture to the Department of Revenue and that same day, without a hearing of any kind, the circuit court issued a "commitment order for nonpayment" directing law enforcement to arrest and detain Kerr for 90 days or until he made the payment. (R. 38:2, A-App. 104.) Kerr was noticed of both the certification and commitment order. (R. 38:3, A-App. 105.)

The Bayfield County court noted that while the issue in this case was well defined, it "coincides with a national discussion regarding the validity, propriety, and constitutionality of arresting and incarcerating citizens for nonpayment of purely civil monetary penalties which never carried with it the possibility of incarceration for the underlying infraction." (R. 38:3, A-App. 105.) The court also noted that its decision was made in the context that there was not "even the slightest hint of misconduct or wrongdoing by law enforcement" and Officer Ladwig "clearly could not ignore" an outstanding arrest warrant. (R. 38:3, A-App. 105.)

In addressing the validity of the commitment order, the court concluded that Wis. Stat. § 66.0114(1)(c) provided the Ashland County court with the authority to render judgment on an ordinance violation as provided under Wis. Stat. §§ 800.09 and 800.095. (R. 38:4, 6, A-App. 106, 108.) And Wis. Stat. § 800.095(1)(b) provided that a defendant can be imprisoned for a failure to pay a forfeiture. (R. 38:7, A-

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[1] The record contains an entry that the default judgement was entered on July 21, 2015 and noticed on July 31, 2015. (R. 31:2, A-App. 121.) The Bayfield County court's conclusion was based on the lack of a default judgment document in the certified record from Ashland County. (R. 38:2–3, A-App. 104–05.)

App. 109.) Thus there was statutory authority for the warrant. (R. 38:7, A-App. 109.)

However, the court concluded that the Ashland County court did not follow the proper statutory procedure for issuing the warrant. (R. 38:7–8, A-App. 109–10.) Wisconsin Stat. § 800.09(1g) provides that the defendant must be presented with certain information by mail if he is not present for the judgment. (R. 38:8, A-App. 110.) This includes notice that he must notify the court if he is unable to pay the judgment because of poverty. Wis. Stat. § 800.09(1g). Kerr was not present at the time of judgment, and it is possible that the default judgment, which would have contained that information, was not sent to Kerr. (R. 38:8, A-App. 110.)

The court further concluded that the commitment order could not issue unless the Ashland County court had determined that Kerr had the ability to pay the forfeiture or that Kerr failed to attend an indigency hearing offered by the court. (R. 38:8 citing Wis. Stat. § 800.095(1)(b)2, A-App. 110.) There was no determination of Kerr's ability to pay and no indigency hearing was offered. (R. 38:8–9, A-App. 110–11.) Thus, the court concluded that "[c]learly, the commitment order issued in Ashland County did not follow the statutory provisions that are a prerequisite to the issuance of a commitment order to arrest a person and incarcerate the same for nonpayment of an ordinance forfeiture." (R. 38:9, A-App. 111.)

After concluding that the commitment order was invalid, the court briefly reviewed the history of the good-faith exception to the exclusionary rule and concluded that *United States v. Leon*, 468 U.S. 897 (1984), which disclaimed judicial integrity as a sole basis for exclusion, was not wholly applicable to this case because *Leon* concerned a search warrant, and this case involves an arrest warrant. (R. 38:11,

A-App. 113.) The court then decided that it was "compelled" to grant Kerr's motion to suppress pursuant to *Hess*, 327 Wis. 2d 524. (R. 38:17, A-App. 119.)

In *Hess*, the Wisconsin Supreme Court concluded that the good-faith exception to the exclusionary rule did not apply to evidence discovered as a result of an arrest when a judge had no authority to issue the warrant. *Hess*, 327 Wis. 2d 524, ¶¶ 53, 63. It reasoned that the assurance of judicial integrity is a secondary purpose of the exclusionary rule and evidence obtained as a result of an arrest warrant that was "per se void *ab initio*" should be suppressed. *Id.* ¶¶ 63–67.

The Bayfield County court concluded that this case is dissimilar to *Hess* in that the Ashland County court had authority to issue the warrant. (R. 38:13, 16, A-App. 115, 118.) However, the court was swayed by its administrative knowledge that Ashland County routinely issued commitment orders without following the proper statutory procedure. (R. 38:13–17, A-App. 115–19.) The court believed that Ashland County was engaged in "institutional or administrative disregard for the law governing civil commitments" and judicial "[d]eterrence certainly is a greater consideration under these facts." (R. 38:16–17, A-App. 118–19.)

The court further reasoned that while *State v. Scull*, 2015 WI 22, 361 Wis. 2d 288, 862 N.W.2d 562, called into question whether *Hess* is still good law, *Scull* did not overrule *Hess* and "until *Hess* has been fully reversed by our supreme court, I am compelled to grant the defendant's motion to suppress the evidence obtained during the search incident to arrest." (R. 38:14–17, A-App. 116–19.)

The State now appeals.

STANDARD OF REVIEW

This Court applies a two-step standard of review to issues concerning the suppression of evidence. *Scull*, 361 Wis. 2d 288, ¶ 16 (citation omitted). The circuit court's findings of fact are upheld unless clearly erroneous. *Id.* The application of constitutional principles to those fact is reviewed de novo. *Id.*

Here there is no dispute that a Fourth Amendment violation occurred. This question is whether the exclusionary rule should apply. "The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois v. Gates*, 462 U.S. 213, 223 (1983). Thus, the Court need only address whether the evidence is admissible under the good-faith exception to the rule. *Scull*, 361 Wis. 2d 288, ¶ 17. The application of the good-faith exception to the exclusionary rule is a question of law reviewed de novo. *Id.* (citation omitted).

ARGUMENT

I. The Ashland County court did not have authority to issue the commitment order, and thus, the order was void *ab initio.*

As an initial matter, it is necessary to address the circuit court's legal conclusion that the Ashland County Circuit Court had authority to issue the commitment order. Relying on Wis. Stat. § 800.95(1)(b), the court determined that there was authority for the order, but it was issued in disregard of the statute's requirement. The court, and both parties, however, overlooked the fact that the ordinance citation was mailed to Kerr. Because the citation was

mailed, the Ashland County court had no authority to issue the order.

The commitment order arose from a civil forfeiture action. (R. 38:1, A-App. 103.) Kerr was issued a citation for violating a City of Ashland ordinance prohibiting disorderly conduct. (R. 38:1–2, A-App. 103–04.) That citation, which included the summons, was mailed to Kerr. (R. 31:5, A-App. 124.) Kerr failed to appear for his court date and a default judgment was issued; Kerr had 60 days to pay a civil forfeiture. (R. 38:2, A-App. 104.)

While the circuit court had authority to issue a judgment in the forfeiture action, s*ee* Wis. Stat. §§ 66.0113(3)(d), 66.0114(1)(a), 66.0114(1)(c),[2] it did not have authority to issue a commitment order. Wisconsin Stat. § 800.095 governs the nonpayment of monetary judgments and Wis. Stat. § 800.095(1)(b) provides the court with the authority to issue a commitment order if certain conditions are met. However, Wis. Stat. § 800.095(3) expressly limits the court's authority under Wis. Stat. § 800.95(1)(b) to cases in which the citation was not mailed. When a court orders

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[2] "All forfeitures and penalties imposed by an ordinance or bylaw of the city, . . . except as provided in ss. 345.20 to 345.53, may be collected in an action in the name of the city . . . before a court of record." Wis. Stat. § 66.0114(1)(a). "If the alleged violator does not make a cash deposit and fails to appear in court at the time specified in the citation, the court may issue a summons or warrant for the defendant's arrest or consider the nonappearance to be a plea of no contest and enter judgment accordingly . . . ." Wis. Stat. § 66.0113(3)(d). "If the court considers the nonappearance to be a plea of no contest and enters judgment accordingly, the court shall promptly mail a copy or notice of the judgment to the defendant." Wis. Stat. § 66.0113(3)(d). "[T]he court shall render judgment as provided under ss. 800.09 and 800.095." Wis. Stat. § 66.0114(1)(c).

something that it was no authority to order, the order is considered void. *See, e.g., Fowler v. Wilkinson*, 353 U.S. 583, 584 (1957) (void equates to an "an absolute want of power" and voidable equates to "the defective exercise of the power possessed"). Because the court had no authority to issue the commitment order, the commitment order was void *ab initio* as opposed to voidable.

This distinction is significant because it renders the commitment order in this case indistinguishable from the order in *Hess*. Because the commitment order was void *ab initio*, the only question is whether it was proper to exclude the evidence in absence of police misconduct. The answer to that question should be no.

II. This Court should certify this case to the supreme court for the court to determine if the assurance of judicial integrity alone requires the exclusion of evidence discovered as a result of a warrant void *ab initio*.

A. There is a good-faith exception to the exclusionary rule because the rule is meant to deter police rather than judicial misconduct.

The Fourth Amendment to the United States Constitution "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *See Arizona v. Evans*, 514 U.S. 1, 10 (1995) (citation omitted). Rather, the exclusion of evidence is done pursuant to a judicially created rule designed to deter future Fourth Amendment violations. *See id.*

Since the creation of the exclusionary rule, the Supreme Court has limited the rule's application and rejected the "expansive dicta" of *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Whiteley v. Warden, Wyo. State Penitentiary*, 401

U.S. 560 (1971). *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

The application of the exclusionary rule is limited to situations which further the rule's primary purpose of deterring police misconduct. *See Evans*, 514 U.S. at 11–15 (explaining *Hensley*[3] and *Whiteley* in relation to the Court's good-faith jurisprudence). The rule is not generally applicable to judicial errors because a judicial officer has no stake in the outcome of any particular case. *Leon*, 468 U.S. at 917. "Thus the threat of exclusion of evidence could not be expected to deter such individuals from improperly issuing warrants, and a judicial ruling that a warrant was defective [is] sufficient to inform the judicial officer of the error made." *Illinois v. Krull*, 480 U.S. 340, 348 (1987).

The Court derived the "good-faith" exception to the exclusionary rule from these principles. *Leon*, 468 U.S. at 922 & n.23. In its simplest form, the good-faith exception provides that exclusionary rule does not apply when the police act with "objectively reasonable reliance" on a warrant that is later determined to be invalid. *See Leon*, 468 U.S. at 922. The exception is not without its limits. The good-faith exception should not be applied if: 1) the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; 2) the "magistrate wholly abandoned his judicial role in the manner condemned in *Lo–Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979)"; 3) "no reasonably well trained officer should rely on the warrant" because the affidavit is "so lacking in indicia of probable cause"; or 4) the warrant is "so facially deficient" "that the executing officers cannot

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[3] *United States v. Hensley*, 469 U.S. 221 (1985).

reasonably presume it to be valid." *Leon*, 468 U.S. at 923 (citations omitted).

Since the advent of the good-faith exception in *Leon*, the Court has conscientiously limited the exclusionary rule to deterring police misconduct and has noted that "punishing the errors of judges is not the office of the exclusionary rule." *Davis v. United States*, 564 U.S. 229, 238 (2011) (citation omitted). "[U]nder *Leon's* good-faith exception, [the Court has] 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Davis*, 564 U.S. at 240 (citation omitted).

Wisconsin adopted the federal exclusionary rule in *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923). And it has recognized that the exclusionary rule has two purposes: deterrence of police misconduct and the assurance of judicial integrity. *See State v. Eason*, 2001 WI 98, ¶ 44, 245 Wis. 2d 206, 629 N.W.2d 625 (citing *Conrad v. State*, 63 Wis. 2d 616, 635, 218 N.W.2d 252 (1974)); *Scull*, 361 Wis. 2d 288, ¶ 22.

Wisconsin first adopted the good-faith exception to the exclusionary rule in *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517, and first addressed *Leon* in *Eason*, 245 Wis. 2d 206. In recognizing a good-faith exception to the exclusionary rule under art. I, § 11 of the Wisconsin Constitution, the court adopted *Leon's* limitations on the exception and, in the context of search warrants, added two additional requirements. *Eason*, 245 Wis. 2d 206, ¶¶ 63, 74.[4]

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[4] "[I]n order for the good faith exception to apply, the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Id.* ¶ 63.

Wisconsin has yet to expressly apply the good-faith exception to arrest warrants. It has, however, concluded that the good-faith exception could not save evidence discovered as a result of a civil bench warrant that was void *ab initio*. *Hess*, 327 Wis. 2d 524, ¶¶ 60–63.

In two post *Leon* cases, the Wisconsin Supreme Court has considered whether to apply the exclusionary rule absent police misconduct. In *Ward*, a no-knock warrant issued before the decision in *Richards v. Wisconsin*, 520 U.S. 385 (1997), in which the Supreme Court "disagreed with our rule permitting an exception to the rule of announcement when officers execute a search warrant in felony drug investigations." *Ward*, 231 Wis. 2d 723, ¶ 16. The court recognized that judicial integrity can be "sullied" by the admission of wrongfully obtained evidence. But it ultimately concluded that the exclusionary rule *should not* apply because "the subsequent change in Fourth Amendment jurisprudence [did not] somehow transform[ ] the character of the evidence seized at the Ward home into something so tainted that it mars judicial integrity." *Id.* ¶¶ 49, 52.

In *Hess*, evidence was discovered as the result of arrest on a civil bench warrant that was later determined to be void *ab initio*. The court declined to apply the good-faith exception to the exclusionary rule because "judicial integrity is implicated when a judge issues a warrant" that it has no authority to issue. *Hess*, 327 Wis. 2d 524, ¶¶ 63–66. The court reasoned that because "[t]he constitutional violation was initiated when the court issued a warrant without authority to do so, and the officer's good-faith reliance on that warrant cannot save the resulting evidence." *Id.* ¶ 63.

Since *Hess*, there was been little to no discussion (in a majority opinion) of the assurance of judicial integrity as a standalone purpose for the exclusionary rule. In *Foster*, a case concerning the warrantless seizure of blood evidence,

Foster argued, pursuant to *Hess,* that suppression was warranted to preserve judicial integrity because the court failed to follow controlling precedent, and thus, the court decision relied upon by law enforcement was void *ab initio*. *State v. Foster*, 2014 WI 131, ¶ 51, 360 Wis. 2d 12, 856 N.W.2d 847. The court rejected the argument on grounds that its prior decision was not void *ab initio* "and we decline to find that considerations of judicial integrity require exclusion." *Id.* ¶ 57.

In *Scull*, a case concerning the issuance of a search warrant, the court noted that "[t]his court has cited two rationales in support of its application of the exclusionary rule: assurance of judicial integrity and deterrence of unlawful police conduct." *Scull*, 361 Wis. 2d 288, ¶ 22 (string citation omitted). However, the court clarified in a footnote that it was "not asserting that judicial integrity is a stand-alone basis for the exclusion of evidence." *Scull*, 361 Wis. 2d 288, ¶ 22 n.4. Rather, "[t]he protection of judicial integrity goes hand-in-hand with deterrence of police misconduct." *Id.* In a concurring opinion, the court further "clarif[ied] that the 'assurance of judicial integrity' standing alone, is not a sufficient basis upon which to employ the exclusionary rule . . . when there is no underlying finding of police misconduct." *Id.* ¶ 47 (Roggensack, J. concurring). The concurrence criticized *Hess* as lacking any basis for concluding that judicial integrity warranted exclusion absent police misconduct*, Scull,* 361 Wis. 2d 288, ¶¶ 56–60, but *Hess* was not overruled at the time, and has not been cited by the court since.

Most recently, the court has characterized the exclusionary rule as "a check on law enforcement," *State v. Zamzow*, 2017 WI 29, ¶ 69, and explained that "[c]ourts exclude evidence *only* when the benefits of deterring police misconduct 'outweigh the substantial costs to the truth-

seeking and law enforcement objectives of the criminal justice system.'" *State v. Jackson*, 2016 WI 56, ¶ 46, 369 Wis. 2d 673, 882 N.W.2d 422 (citation omitted) (emphasis added). Admittedly, neither *Zamzow* nor *Jackson* involves warrants, but the court's jurisprudence post *Scull* invites the question whether *Hess* has fallen by the wayside completely or if it is still applicable to warrants void *ab initio*. Thus, the State asks that this Court certify this case to the supreme court to clarify whether the assurance of judicial integrity alone requires the exclusion of evidence found as a result of a warrant that is later determined to be void *ab initio*.

B. *Hess* was wrongly decided and should be overruled because the assurance of judicial integrity is not a standalone justification for exclusion.

The State acknowledges that the supreme court "follows the doctrine of stare decisis scrupulously because of [its] abiding respect for the rule of law." *State v. Denny*, 2017 WI 17, ¶ 69, 373 Wis. 2d 390, 891 N.W.2d 144 (citation omitted). But "[u]ltimatley stare decisis is a '"principle of policy" rather than an "inexorable command."'" *Id.* ¶ 71 (citation omitted). "[D]eparture from the doctrine of stare decisis demands special justification" such as developments in the law that undermined the rationale behind a decision. *Id.* ¶ 69 (citation omitted). There is such special justification in the current case.

In *Hess*, a "Bench Warrant Civil" was issued when Hess refused to cooperate with a presentence investigation. *Hess,* 327 Wis. 2d 524, ¶¶ 6–7. An officer went to Hess's home to inform Hess of the warrant. *Id.* ¶ 9. While Hess and the officer were walking to the squad car, the officer smelled an odor of intoxicants coming from Hess. *Id.* Following normal procedure, the officer ran a check so see if Hess was on any conditions of bond. *Id.* ¶ 10. The officer was advised

that Hess was on bond for a sixth offense drunk driving and had a bond condition of not possessing or consuming alcohol. *Id.* Hess was charged with felony bail jumping for violating that bond requirement. *Id.* ¶ 11.

In the bail jumping case, Hess moved to suppress any evidence of alcohol consumption obtained as a result of the civil warrant. *Id.* He argued that the civil bench warrant was invalid and thus his arrest was illegal. *Id.* Ultimately, the Wisconsin Supreme Court decided that "[w]hen fundamental constitutional and statutory requirements for issuing a warrant are completely absent, the good-faith exception cannot save the resulting unconstitutionally obtained evidence." *Id.* ¶ 67.

The problem in *Hess* was that the circuit court issued an arrest warrant that it had no authority to issue. *Id.* ¶ 37. In review of the exclusionary rule, the court concluded that a proper use of the rule was to further judicial integrity. *Id.* ¶¶ 63–67. It relied on language from *Leon* that "*[a]bsent unusual circumstances*, . . . 'the integrity of the courts is not implicated.'" *Hess*, 327 Wis. 2d 524, ¶ 63 (quoting *Leon*, 468 U.S. at 921 n.22). The court reasoned that the statement in *Leon* meant that "judicial integrity [is] a secondary consideration when applying the exclusionary rule." *Hess*, 327 Wis. 2d 524, ¶ 64. The court further reasoned that *Herring v. United States*, 555 U.S. 135 (2009), and *Evans* did not preclude "judicial integrity [as] a secondary consideration that may come to the fore in unusual cases." *Hess*, 327 Wis. 2d 524, ¶ 65.

Not all of the justices agreed. In a dissenting opinion, Justice Gableman faulted the majority for presuming that the evidence should be excluded unless it fits into a recognized exception and noted that judicial integrity was no longer recognized by the Supreme Court as a standalone justification for exclusion. *Hess*, 327 Wis. 2d 524, ¶¶ 85, 90

(Gableman, J. dissenting). "[W]hile early exclusion cases did discuss 'judicial integrity' as a secondary purpose of the exclusionary rule, judicial integrity for Fourth Amendment violations has effectively been subsumed under the main goal of deterring police misconduct." *Hess*, 327 Wis. 2d 524, ¶ 90 (Gableman, J. dissenting).[5]

The *Hess* majority did not consider the *Leon* Court's reference to judicial integrity in context. The Supreme Court had previously explained that "the primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976). However, in the Fourth Amendment context the violation has already occurred so the "question [is] whether the admission of the evidence encourages violations of Fourth Amendment rights." *Id.* "[T]his inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose." *Id.* "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

The court in *Leon* found "most important" "that exclusion of evidence seized pursuant to a warrant will [not] have a significant deterrent effect on the issuing judge or magistrate." *Id.* at 917. "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Id.* "The threat of exclusion thus

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[5] The dissent also recognized that bench warrants are unlike search warrants and because involvement by law enforcement is so minimal, it is illogical to apply the additional *Eason* good-faith requirements. *Hess*, 327 Wis. 2d 524, ¶¶ 90–94.

cannot be expected significantly to deter them." *Id.* The exclusion of evidence does not "meaningfully . . . inform judicial officers of their errors." *Id.* And admitting evidence along with a declaration "that the warrant was somehow defective will [not] in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests." *Id.* Thus, exclusion in not appropriate because "a judicial ruling that a warrant was defective [is] sufficient to inform the judicial officer of the error made." *Krull*, 480 U.S. at 348.

That analysis is not altered by the fact that the warrant was void *ab initio*. Both the majority opinion and the concurring opinion[6] in *Hess* relied upon *United States v. Neering*, 194 F. Supp. 2d 620 (E.D. Mich. 2002), which relied upon the Sixth's Circuit's opinion in *United States v. Scott*, 260 F.3d 512 (6th Cir. 2001), for the conclusion that the good-faith exception to the exclusionary rule is not applicable in the limited circumstance of a warrant void *ab initio*. *Hess,* 327 Wis. 2d 524, ¶¶ 61, 73 (Ziegler, J. concurring). Since *Hess*, the Sixth Circuit decided *United States v. Masters*, 614 F.3d 236 (6th Cir. 2010). There, the court concluded that in light of the Supreme Court's decision in *Herring* it cannot be that the good-faith exception is foreclosed if the judge lacked authority to issue the warrant. *Id.* at 241–42. Rather, the "decision to exclude evidence is divorced from whether a Fourth Amendment violation

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[6] While Justice Ziegler agreed with the continued application of the good-faith exception, she reasoned that the line had to be drawn somewhere when it came to reliance on defective warrants. *Hess,* 327 Wis. 2d 524, ¶¶ 72–73 (Ziegler, J. concurring). "I draw it in a case such as this one, in which the warrant is not just defective, but rather, it is per se void *ab initio*." *Id.* ¶ 73

occurred." *Id.* at 242 (citing *Herring*, 555 U.S. at 140–41). The *Masters* court acknowledged that the exclusionary rule was meant to deter police rather than judicial misconduct and "[a]rguably, the issuing magistrate's lack of authority has no impact on police." *Id.* (citation omitted). Thus, the court concluded that the good-faith exception is not foreclosed if a warrant is void *ab initio*. *Id.* at 243.

The Supreme Court has yet to address how to analyze the exclusionary rule in cases concerning warrants void *ab initio*. But federal district courts have recently had to address void *ab initio* warrants in the context of Network Investigation Technique search warrants. The Network Investigation Technique "allow[ed] the government covertly to transmit computer code" to the users of a child photography website that "then generated a communication from those users' computers to the government-operated server containing various identifying information, including those users' IP addresses." *United States v. Levin*, 186 F. Supp. 3d 26, 30 (D. Mass. 2016). The warrants were (in some circumstances) considered void *ab initio* because they violated the territorial restrictions on the issuing magistrate's authority. *See, e.g., id.* at 35–36. The majority of district courts to address this issue have concluded that the good-faith exception was not foreclosed simply because the warrant was void *ab initio*. *See United States v. Taylor*, No. 2:16-CR-203, 2017 WL 1437511, at *3–4 (N.D. Ala. Apr. 24, 2017) (collecting cases).

There is no reason to treat a void warrant different from a voidable warrant. "[T]he legal status of the warrant under the Fourth Amendment does not inform the decision of whether the good-faith exception is available in a given case; that inquiry is separate and must be considered in light of the exclusionary rule's purpose and the officers' conduct at issue." *United States v. Werdene*, 188 F. Supp. 3d

431, 451 (E.D. Penn. 2016) (citation omitted). Because "[t]he protection of judicial integrity goes hand-in-hand with deterrence of police misconduct," *Scull*, 361 Wis. 2d 288, ¶ 22 n.4, if there is no police misconduct to deter, then exclusion is not appropriate. Thus, *Hess* should be overruled.

C. Because the assurance of judicial integrity is not a standalone basis for exclusion, the Bayfield County order granting suppression should be reversed.

The Bayfield County Circuit Court concluded that even absent police misconduct, exclusion was necessary because Ashland County routinely issued commitment orders in this manner. (R. 38:16, A-App. 118.) The court determined that because this was not an isolated instance of "judicial malfeasance," exclusion of the evidence could result in deterrence. (R. 38:16, A-App. 118.) This is contrary to Supreme Court precedent.

The commitment order was issued without any law enforcement input. It was not a warrant to arrest based on probable cause of suspected criminal activity. It was a bench warrant or capias. In the context of apprehension orders, there are a multitude of statutes and administrative rules that govern whether a court can issue such orders and the procedures to follow. *See, e.g., Hess,* 327 Wis. 2d 524, ¶¶ 24–28. And, as here, the determination whether there was actual authority to issue the order may involve an "array" of statutes "within the penumbra of the governing authority." (R. 38:7, A-App. 109.) There may be no way for the arresting officer to discern if the order is void, especially if the warrant originates from a different county, from the department of corrections, or in the context of fugitive warrants, a different state. Yet, officers are not permitted to simply ignore those orders when they encounter the subject of the order.

Here, the contact between Officer Ladwig and Kerr was not precipitated by the commitment order. Rather, Officer Ladwig was following-up on a 911 call. (R. 38:1, A-App. 103.) The Bayfield County dispatcher notified Officer Ladwig that Ashland County had an active warrant for Kerr. (R. 38:1, A-App. 103.) That is all Officer Ladwig knew. (R. 38:1, A-App. 103.) He did not have a physical copy of the order and the details available him were limited; yet he could not ignore an arrest order. (R. 38:3, A-App. 105; 61:8.)[7] And there was not even the "slightest hint of misconduct" in his execution of that order. (R. 38:3, A-App. 105.) Thus, it is inappropriate to apply the exclusionary rule.

In excluding the evidence, the Bayfield County court did not appropriately balance the cost of exclusion with its deterrent effect, if any. "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'" *Herring*, 555 U.S. at 141 (citation omitted). "[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." *Id.* (alterations in original) (citation omitted). This costly toll could not be outweighed by the limited, and possibly non-existent, deterrent effect of exclusion in this case.

Contrary to the Bayfield County court's belief, the exclusion of evidence in its case does not have an appreciable deterrent effect on the Ashland County court. *See Leon*, 468 U.S. at 917 (judicial officers have no stake in the outcome of

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[7] Even if Officer Ladwig was presented with a copy of the order, there is nothing that would suggest that the order was void. The order was a circuit court form that cannot be modified. (R. 31:4, A-App. 123.) And it was signed by a judge just days before the arrest. (R. 31:4, A-App. 123.)

any particular case); *Krull*, 480 U.S. at 348 (exclusion of evidence could not be expected to deter judicial officers from improperly issuing warrants). Rather, exclusion punished the residents of Bayfield County for the officer's reasonable good-faith reliance on an arrest order. This is exactly why police misconduct is a necessary predicate for the application of the exclusionary rule. *See Evans*, 514 U.S. at 14–15.

As was the case in *Evans*, here the "application of the exclusionary rule . . . could not be expected to alter the behavior of the arresting officer." *Evans*, 514 U.S. at 15. Officer Ladwig "clearly could not ignore" the information he received regarding the outstanding arrest warrant. (R. 38:3, A-App. 105.) Thus, like in *Evans*, "[e]xcluding the evidence can in no way affect the officer's future conduct unless it is to make him less willing to do his duty." *Evans*, 514 U.S. at 15 (citation omitted). "There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record." *Id.* at 15–16. It was inappropriate to apply the exclusionary rule in this case, but because *Hess* has yet to be overruled, the Bayfield County court and this Court were bound to exclude the evidence. *Cook*, 208 Wis. 2d at 189 (The court of appeals may not overrule, modify, or withdraw language from a prior published opinion.). *Hess* was wrongly decided, and thus, this case should be certified to the supreme court.

CONCLUSION

For the foregoing reasons, the State asks that this case be certified to the supreme court.

Dated this 15th day of May, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5952 words.

Dated this 15th day of May, 2017.

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TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 15th day of May, 2017.

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TIFFANY M. WINTER
Assistant Attorney General

Appendix
State of Wisconsin v. Christopher John Kerr
Case No. 2016AP2455-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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