No. 16AP2455

In the Supreme Court of Wisconsin

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, Case No. 15CF139

OPENING BRIEF AND APPENDIX OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

1. Whether a circuit court should exclude evidence obtained by law enforcement acting in reasonable reliance on a warrant that was void ab initio.

The circuit court answered yes.[1]

[1] This case is before this Court on a petition for bypass. Order Granting Petition for Bypass, *State v. Kerr*, No. 16AP2455 (Wis. Oct. 17, 2017). Accordingly, the Court of Appeals has not opined on this issue.

INTRODUCTION

A police officer responding to a 911 call from Christopher J. Kerr's residence learned that Kerr had an outstanding arrest warrant. When the officer arrived on the scene, he arrested Kerr pursuant to that warrant and, while conducting a standard search incident to arrest, found methamphetamine in Kerr's pocket. As the State later learned, the court that issued the arrest warrant had no authority to do so, rendering the warrant void ab initio. The circuit court subsequently held that the methamphetamine must be excluded from Kerr's trial.

The circuit court was wrong to exclude the methamphetamine because police conducted the arrest and concomitant search in reasonable reliance on an arrest warrant. Both the United States Supreme Court and this Court have made clear that the exclusionary rule's purpose is to deter future constitutional violations *by law enforcement*, and that the rule does not apply where the only possible misconduct is by judicial officers. *See United States v. Leon*, 468 U.S. 897, 916–17 & n.18 (1984); *State v. Scull*, 2015 WI 22, ¶ 55, 361 Wis. 2d 288, 862 N.W.2d 562 (Roggensack, J., concurring). Under this proper understanding of the exclusionary rule, when police have committed no misconduct, and instead have acted in reasonable reliance on an arrest warrant, exclusion of otherwise probative evidence is unjustified.

In holding that the circuit court should not have excluded the evidence at issue here, this Court should definitively overrule *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568. In that case, a fractured majority of this Court concluded that evidence obtained by officers in reasonable reliance on a warrant should be excluded when the warrant was void ab initio. *Hess* should be overruled because it relied entirely upon a rationale that both the United States Supreme Court and this Court have rejected: that exclusion of evidence can be justified solely to forward the goal of deterring *judicial*, not police, misconduct. What is more, uniform caselaw from both federal and state courts around the country since *Hess* has rejected *Hess*' holding. Overruling *Hess* will both bring coherence to this Court's jurisprudence and align Wisconsin law with the decisions of the United States Supreme Court and courts across the country.

ORAL ARGUMENT AND PUBLICATION

By granting the State's petition for bypass, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Authorities from the City of Ashland cited Kerr for disorderly conduct, in violation of a city ordinance. App. 22; *see* Ashland, Wis., Gen. Ordinances § 279.01 (2014). The citation required that Kerr either pay a forfeiture or appear in court on July 21, 2015. App. 22. When Kerr failed to

appear for the court date or pay the forfeiture by July 21, the Ashland County Circuit Court entered a default judgment against him. App. 19. On September 22, 2015, after Kerr failed to pay the judgment, the Ashland County Circuit Court issued a "Commitment Order for Non-Payment of Fine/Forfeiture," providing: "IT IS ORDERED that any law enforcement officer arrest and detain Christopher John Kerr in custody for 90 Days or until $298.50 is paid, or until the person is discharged by due course of law." App. 21; *see generally* App. 1–3.[2]

This arrest warrant, as it turns out, was void ab initio. A warrant is "void ab initio" when it was "[n]ull from the beginning, as from the first moment." *Void*, Black's Law Dictionary (10th ed. 2014) (including definition of "void ab initio"); *see also Hess*, 2010 WI 82, ¶ 2 n.1 (lead op.). A warrant can be void ab initio when the judge or magistrate lacked legal authority to issue any warrant, or when a mandatory condition precedent to the court's authority to issue a warrant was not met from the outset. *See Hess*, 2010 WI 82, ¶ 71 (Ziegler, J., concurring) (citing *State v. Kriegbaum*, 194 Wis. 229, 232, 215 N.W. 896 (1927); *State v.*

[2] While the Ashland County Circuit Court's action was labeled a "commitment order" rather than an "arrest warrant," this difference in nomenclature does not appear to be legally significant for purposes of this case. The order, like an arrest warrant, requires law enforcement to arrest the subject of the order. The police, parties, and court below all used the term "arrest warrant" when referring to the order. *See* R.12:3–4; R.28:1–2; R.32:1; R.33:3; App. 1–3. This Brief likewise refers to the order as an arrest warrant.

Loney, 110 Wis. 2d 256, 260, 328 N.W.2d 872 (Ct. App. 1982); *State v. Grawien*, 123 Wis. 2d 428, 430–31, 367 N.W.2d 816 (Ct. App. 1985)); *accord id.* ¶ 66 (lead op.) ("The bench warrant civil that the court issued was void *ab initio* because it did not comply with any statute authorizing the court to issue a warrant.").

The warrant in this case was void ab initio because, so far as the record reflects, the Ashland County Circuit Court had no authority to issue the warrant in the first place. The Wisconsin Statutes limit a circuit court's authority to order imprisonment of a defendant for failing to pay a judgment stemming from a citation for a municipal-ordinance violation. *See* Wis. Stat. §§ 66.0113–.0114, 800.09, & .095. Most relevant here, "*[n]o defendant may be imprisoned*" unless the circuit court makes one of four statutory findings, such as the defendant having the financial ability to pay the fine or the defendant having failed to attend an indigency hearing relating to the ability to pay. Wis. Stat. § 800.095(1)(b)2.[3]

[3] "No defendant may be imprisoned under subd. 1. unless the court makes one of the following findings:

a. Either at sentencing or thereafter, that the defendant has the ability to pay the judgment within a reasonable time. If a defendant meets the criteria in s. 814.29(1)(d), the defendant shall be presumed unable to pay under this subsection and the court shall either suspend or extend payment of the judgment or order community service.

b. The defendant has failed, without good cause, to perform the community service authorized under this subsection or s. 800.09.

Here, so far as the record reflects, the Ashland County Circuit Court did not make any of the findings required under Wis. Stat. § 800.095(1)(b)2. *See generally* App. 19. This was a fatal defect inhering in the warrant "from the beginning," Black's Law Dictionary, *supra*, because the Legislature has prohibited the imprisonment of an individual for failure to pay a municipal forfeiture without, as relevant here, assurances that the individual has the financial ability to pay. The State is not aware of any other statutory basis upon which the Ashland County Circuit Court could have ordered Kerr's arrest, and the State hereby expressly waives any such bases. *See Hess*, 2010 WI 82, ¶¶ 2, 24–28 (lead op.). Accordingly, the arrest order here was void ab initio. *Id.*; *accord* App. 7–9.[4]

B. A few days after the Ashland County Circuit Court issued the above-described arrest warrant, the Bayfield Police Department received a 911 call from Kerr's cell phone.

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c. The defendant has failed to attend an indigency hearing offered by the court to provide the defendant with an opportunity to determine whether he or she has the ability to pay the judgment.

d. The defendant has failed, without good cause, to complete an assessment or treatment program related to alcohol or drugs that was ordered in lieu of a monetary forfeiture."

Wis. Stat. § 800.095(1)(b)2.

[4] While the Ashland County Circuit Court's failure to make any of the findings required by Wis. Stat. § 800.095(1)(b)2 is sufficient to conclude that the warrant was void ab initio, the warrant also appears to have been invalid because the initial citation was mailed to Kerr, App. 22, as opposed to served by more readily verifiable methods, such as personal service, Wis. Stat. § 800.095(3); *see also id.* §§ 800.01, 801.11(1)(a).

R.12:3. The Bayfield Police Department sent Officer Ladwig to respond to the call, and dispatch informed Officer Ladwig that Ashland County had an active warrant out for Kerr's arrest. R.12:3–4; R.56:4; App. 30, 32. Officer Ladwig did not look at the warrant, as he did not have that "capability" while he was out on patrol. App. 32. Indeed, in the normal course of the Bayfield Police Department's business, dispatch will simply advise officers when an individual has an outstanding warrant. App. 32.

Deputy Leino of the Bayfield County Sheriff's Department assisted Officer Ladwig in responding to the call. App. 29, 41. The "Bayfield County Communications Center" advised Deputy Leino "[b]y radio" that there was an outstanding warrant for Kerr's arrest, but did not provide the "specifics" of the warrant. App. 41–42. Deputy Leino had the ability to look up warrants on his "squad computer," although he did not do so on this occasion. App. 42–43. The computer would not have shown Deputy Leino the warrant, it would have simply provided him with much the same information about the warrant that he had received via the radio. App. 42–43.

Both Officer Ladwig and Deputy Leino arrived at Kerr's residence after being informed of the outstanding warrant and heard some commotion inside. R.12:4; R.56:3–4; App. 28–29. Officer Ladwig knocked on the door, and Kerr answered and identified himself to the officers. R.12:4. Kerr told Officer Ladwig that the 911 call had been an accident. R.12:4; App.

30. Officer Ladwig then informed Kerr about the arrest warrant and placed Kerr under arrest. R.12:4; R.56:4; App. 30. Officer Ladwig searched Kerr incident to arrest, discovering a plastic baggie containing a substance that later tested positive as methamphetamine. R.12:4–5; R.56:6–7; App. 31.

C. The State charged Kerr with possession of methamphetamine, in violation of Wis. Stat. § 961.41(3g)(g) and Wis. Stat. § 939.50(3)(i). R.12:5; R.13. The penalty for the violations included up to three years and six months in prison. R.13.

Kerr moved to suppress the methamphetamine found during Officer Ladwig's search incident to arrest. R.25. Kerr initially claimed that the Ashland County Circuit Court's issuing the warrant without holding a hearing violated due process, and thus evidence discovered during that arrest should be suppressed. R.25:1–2; R.28:1–2 (amended motion).

The circuit court held several hearings on the motion, and the parties submitted several rounds of briefing. During the first hearing, Officer Ladwig, Deputy Leino, and Kerr all testified. App. 23–57. In his post-hearing brief, Kerr clarified that he was moving to suppress the evidence on the basis of the exclusionary rule because, in his view, Ashland County's arrest warrant did not comply with the requirements of the Fourth Amendment and the court lacked statutory authority to issue the warrant. R.32:2–5. Relying on this Court's decision in *Hess*, 2010 WI 82, Kerr argued that Officer

Ladwig's objectively reasonable reliance on the warrant did not preclude application of the exclusionary rule because the warrant was issued without statutory authority and without satisfying the constitutional oath or affirmation requirements. R.32:2–5. The State, in its post-argument briefing, argued that the arrest warrant was valid and, in any event, the exclusionary rule does not apply because there was no police misconduct. R.33:2–4 (citing *Scull*, 2015 WI 22). At a subsequent hearing on this issue, the State explained that the Ashland County Circuit Court believed that it was issuing the warrant pursuant to Wis. Stat. § 778.09, R.63:12, and Kerr's counsel argued that under alternative statutes the circuit court must make a finding of ability to pay prior to issuing an arrest warrant. R.63:3–4.

The circuit court ultimately granted Kerr's motion to suppress, relying upon this Court's decision in *Hess*. App. 1–17. The circuit court found that the Ashland County Circuit Court had not followed the statutory procedures for issuing a civil bench warrant, including by not holding a hearing on ability to pay, and therefore the court had "no legal authority" to issue the warrant. App. 8–9. This made the warrant void ab initio. *See* App. 8, 16–17. The circuit court then held that the exclusionary rule applied, relying upon this Court's decision in *Hess*. The court noted that "neither the defendant nor the state allege[d] even the slightest hint of misconduct or wrongdoing by law enforcement in this matter," and found that Officer Ladwig "followed appropriate and reasonable

police procedures and conduct" and "clearly could not ignore" "the outstanding arrest warrant from Ashland County." App. 3. However, based on *Hess*, the circuit court held that the exclusionary rule was applicable even in the absence of police misconduct when a warrant was void ab initio. App. 17. The court explained this was to deter "judicial malfeasance," including when "judicial error" is occurring "on a wide administrative level," as the court believed it was in Ashland County. App. 16–17. The circuit court noted that this Court's decision in *Scull*, and especially then-Justice Roggensack's concurrence, "[c]learly [ ] call[ed] into question the *Hess* court's decision." App. 14–16. However, because "[i]t is unclear if *Hess* has been overruled" and "[t]he facts of this case are far more aligned with *Hess* than they are with *Scull*," the circuit court was "compelled" to follow *Hess* and grant Kerr's suppression motion. App. 17.

The State appealed the circuit court's suppression order under Wis. Stat. § 974.05(1)(d)2. R.41. The State then petitioned this Court for bypass, which this Court granted. Order Granting Petition for Bypass, *State v. Kerr*, No. 16AP2455 (Wis. Oct. 17, 2017).

STANDARD OF REVIEW

When reviewing a circuit court's decision on a motion to suppress, this Court employs a two-step standard. *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625. First, this Court upholds the circuit court's findings of fact

"unless they are clearly erroneous." *Id.* Second, this Court will "review the application of constitutional principles to those facts *de novo*." *Id.*

SUMMARY OF ARGUMENT

The evidence that the police obtained during the search incident to Kerr's arrest should not be suppressed under the exclusionary rule because the police acted in objectively reasonable reliance on an arrest warrant.

I. The United States Supreme Court has created an exclusionary rule, which permits trial courts to prohibit the use at trial of evidence obtained in violation of the Fourth Amendment in certain narrow circumstances. The purpose of the exclusionary rule is to deter *law enforcement* from committing constitutional violations in the future, *Davis v. United States*, 564 U.S. 229, 236–37 (2011), and does not apply when the only objectionable conduct has been by judicial officers, *see United States v. Leon*, 468 U.S. 897, 916–17 & n.18 (1984). Consistent with these principles, the Supreme Court has held—under the so-called "good faith" exception—that when police act in objectively reasonable reliance on a warrant, the exclusionary rule should never apply. The Supreme Court has used this approach in a variety of circumstances, including where the warrant was not supported by probable cause, *Leon*, 468 U.S. 897, and when the warrant has been quashed or recalled, unbeknownst to police, *see Arizona v. Evans*, 514 U.S. 1 (1995)

A straightforward application of the Supreme Court's caselaw dictates the conclusion that when police reasonably rely upon a warrant that was void ab initio, the exclusionary rule has no application. After all, police typically have no more reason to know that a warrant was void ab initio than they would have reason to know that, for example, the warrant had been surreptitiously withdrawn, and suppression thus could not possibly serve the exclusionary rule's core purpose: deterring *police* misconduct. Notably, while the United States Supreme Court has not directly addressed the application of the exclusionary rule to evidence obtained in reasonable reliance upon void ab initio warrants, federal courts of appeals and state supreme courts have generally concluded that the exclusionary rule does not apply in these cases.

II. This Court has also created an exclusionary rule for evidence obtained in violation of Article I, Section 11 of the Wisconsin Constitution. Like the United States Supreme Court, this Court has held that the exclusionary rule is not an individual right and is only to be applied where its benefits outweigh its costs. *State v. Dearborn*, 2010 WI 84, ¶ 38, 327 Wis. 2d 252, 786 N.W.2d 97. And where there is no police misconduct to deter, there are no benefits to be gained by excluding evidence. *Id.* ¶ 44.

In *State v. Hess*, this Court significantly departed from United States Supreme Court precedent, and this Court should overrule that decision. In *Hess*, a majority of this

Court held that the exclusionary rule could apply when police acted in objectively reasonable reliance on a warrant that was void ab initio. 2010 WI 82, ¶ 69 (lead op.); *id.* ¶¶ 71–73 (Ziegler, J., concurring). The lead opinion explained that applying the exclusionary rule in such a case was necessary to protect judicial integrity, *id.* ¶ 69 (lead op.), a rationale that the Supreme Court rejected in cases like *Herring v. United States*, 555 U.S. 135 (2009). and that a majority of this Court subsequently rejected in *Scull*, 2015 WI 22. Overruling *Hess* would bring coherence to this Court's exclusionary-rule jurisprudence, while also placing that jurisprudence in line with United States Supreme Court caselaw and the vast majority of federal courts of appeals and state supreme courts.

III. Under proper exclusionary-rule jurisprudence, the evidence that Officer Ladwig obtained in this case is not subject to the exclusionary rule. Law enforcement acted in objectively reasonable reliance on a warrant, even though that warrant was later discovered to be void ab initio. In this case, there was no police misconduct, and thus there is no benefit to be gained by employing the exclusionary rule.

ARGUMENT

I. Under A Straightforward Application Of United States Supreme Court Caselaw, A Trial Court Should Not Exclude Evidence Obtained In Reasonable Reliance On A Warrant That Was Void Ab Initio

A. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be

secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Under this Amendment, the police must either obtain a warrant before conducting a search or seizure, or act under one of the recognized exceptions to the warrant requirement. *See Riley v. California*, 134 S. Ct. 2473, 2482 (2014). If the police arrest an individual or conduct a search on the basis of a warrant that is legally insufficient and where none of the exceptions apply, this violates the Fourth Amendment. *See Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984).

The exclusionary rule is a prophylactic, "prudential doctrine" that the Supreme Court created in order "to compel respect for [ ] constitutional guarant[ies]," such as the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 236 (2011) (citation omitted). The Supreme Court first announced the rule in *Weeks v. United States*, 232 U.S. 383 (1914), after federal officials had entered the defendant's home without a warrant and seized "various papers and articles found there." *Id.* at 386. The Court held that these papers could not be used in the defendant's criminal trial, as allowing the use of this illegally seized evidence at trial would render "the protection of the [Fourth] Amendment" "of no value." *Id.* at 393. The federal exclusionary rule is now applicable to the States

through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The exclusionary rule applies only to a limited category of constitutional violations. *See Illinois v. Gates*, 462 U.S. 213, 223 (1983). Exclusion is not an individual right, so even when there has been a constitutional violation, courts must undertake a separate, cost-benefit inquiry to determine whether the exclusionary rule applies. *Id.*; *see also Davis*, 564 U.S. at 236. Because exclusion of probative evidence of criminal wrongdoing imposes "substantial social costs," the exclusionary rule only applies where the costs are justified by the benefit of deterring future violations. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (citation omitted). Evidence subject to exclusion "is typically reliable and often the most probative information," thus excluding such evidence "often frees the guilty." *Stone v. Powell*, 428 U.S. 465, 490 (1976). "[T]he windfall afforded a guilty defendant" by the exclusion of evidence is often "contrary to . . . the concept of justice." *Id.*

When determining whether application of the exclusionary rule will sufficiently deter future violations to justify the serious social costs of exclusion, courts look to whether the *police* have committed some misconduct that can be deterred in the future. *See Leon*, 468 U.S. at 917; *Stone*, 428 U.S. at 492. The rule focuses on police misconduct because, as the Supreme Court has concluded, police may have the incentive to commit violations of the Fourth

Amendment since they are "engaged in the often competitive enterprise of ferreting out crime." *Arizona v. Evans*, 514 U.S. 1, 15 (1995).

Importantly for this case, the Supreme Court has made clear that the exclusionary rule was not designed "to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916. "[T]here exists no evidence suggesting that judges or magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." *Id.* Because judges and magistrates are not involved in the investigation of crime and "have no stake in the outcome of a particular criminal prosecution," excluding illegally obtained evidence from those prosecutions would have no deterrent effect on judicial conduct. *Id.* at 917. And while the Supreme Court once indicated that the protection of judicial integrity was a secondary purpose of the exclusionary rule, *see Elkins v. United States*, 364 U.S. 206, 222–23 (1960), the Court has since forsworn this as a permissible, stand-alone purpose of the exclusionary rule, *see Herring*, 555 U.S. at 142, 144–45; *Davis*, 564 U.S. at 236–39.

Consistent with the exclusionary rule's focus on deterring *police*, not judicial, misconduct, the Supreme Court has held—under the so-called "good faith" exception[5]—that

[5] While the Supreme Court has, "perhaps confusingly," used the "good faith" exception label, a court's analysis of this exception involves no

exclusion is not proper where police acted in objectively reasonable reliance on a warrant, even if it turns out that the judge or magistrate erroneously issued the warrant. *See Leon*, 468 U.S. at 911, 920–21. In the Supreme Court's landmark decision in *Leon*, police relied upon a search warrant that a reviewing court later found invalid because the warrant lacked sufficient probable cause. 468 U.S. at 902–03. The Supreme Court held that the exclusionary rule did not apply because police acted objectively reasonably in relying upon the warrant. *Id.* at 926. Excluding the evidence that the police obtained, the Supreme Court explained, would "not further the ends of the exclusionary rule in any appreciable way" because no police misconduct occurred. *Id.* at 920–21, 926 (citation omitted). So long as law enforcement's reliance on the warrant was objectively reasonable, "there is no police illegality and thus nothing to deter." *Id.* at 921.

The Supreme Court has subsequently applied the rule that it first recognized in *Leon* in numerous contexts, including in *Herring*, where the Court rejected exclusion of evidence obtained by officers acting in objectively reasonable reliance on a record of a warrant that had been recalled before execution. *See Herring*, 555 U.S. at 144; *see also Evans*, 514

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inquiry into the subjective state of mind of the officers, but is instead a wholly "objective" inquiry. *Herring*, 555 U.S. at 142–45. Moreover, the term "exception" is a misnomer, as the exclusionary rule applies only when its benefits outweigh its costs, and to this rule there are no exceptions. *See id.* at 144; *Hudson*, 547 U.S. at 591.

U.S. at 3–4 (police reasonably relied on record of an outdated arrest warrant in police database); *Illinois v. Krull*, 480 U.S. 340 (1987) (police reasonably relied on a statute later found to be unconstitutional). The Supreme Court in *Herring* made clear, once again, that the exclusionary rule applied only to deter *police* misconduct, and that the so-called "good faith" exception should govern whenever exclusion would not serve this specific deterrent purpose: "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." 555 U.S. at 145.

B. The Supreme Court's central rationale for not applying the exclusionary rule in cases such as *Leon*—that there is no police illegality to "deter" when the police have engaged in no misconduct—dictates the conclusion that exclusion is improper where the police reasonably relied upon a void ab initio warrant. A warrant is "void ab initio" when it is "[n]ull from the beginning, as from the first moment." Black's Law Dictionary, *supra*. This can occur if the judge lacks authority to issue any warrant, or if some mandatory condition precedent to the court's authority has not been met. *See supra* pp. 4–5. When police have no reason to know that the warrant they are relying upon was void ab initio, excluding the evidence obtained in reasonable reliance on that warrant would "not further the ends of the exclusionary rule in any appreciable way." *Leon*, 468 U.S. at 920, 926

(citation omitted); *accord Herring*, 555 U.S. at 145–46. There is generally no more reason for reasonable officers to know that a warrant was void ab initio than there would be to know that there was a probable-cause deficiency, as in *Leon*, or a mistake in failing to remove a recalled warrant from a police database, as in *Herring*. In each circumstance, "there is no police illegality and thus nothing to deter." *Leon*, 468 U.S. at 921; *Herring*, 555 U.S. at 145–46; *Evans*, 514 U.S. at 14–15.

While the United States Supreme Court has not specifically addressed the application of the exclusionary rule to police officers acting in reasonable reliance on void ab initio warrants, the federal courts of appeals and state supreme courts have regularly held that *Leon*'s and *Herring*'s rationale applies in full in that circumstance. Most recently, the FBI relied on a warrant that was void ab initio to secure evidence in over one-hundred cases across the country, generating extensive litigation regarding the exclusion of evidence obtained on the basis of such a warrant. *See United States v. Horton*, 863 F.3d 1041, 1045–46 (8th Cir. 2017). Because the warrant purported to authorize searches nationwide, the Eighth Circuit held that the issuing magistrate did not have the authority to issue it and the warrant was void ab initio. *Id.* at 1049. The Eighth Circuit concluded, however, that the exclusionary rule did not apply to the evidence obtained because law enforcement had acted in objectively reasonable reliance on the warrant. *Id.* at 1050–52. The court rejected the defendants' contention that warrants that are void ab

initio should be treated differently than other legally insufficient warrants under the exclusionary rule. *Id.* at 1050–51.

Other federal courts of appeals and state supreme courts are generally in accord. *See, e.g.*, *United States v. Levin*, 874 F.3d 316, 321–24 (1st Cir. 2017); *Ohio v. Brown*, 28 N.E.3d 81, 83 (Ohio 2015); *Arkansas v. Blevins*, 802 S.W.2d 465, 466–67 (Ark. 1991); *Illinois v. Turnage*, 642 N.E.2d 1235, 1238–41 (Ill. 1994); *but see South Dakota v. Wilson*, 618 N.W.2d 513, 519–20 (S.D. 2000). Indeed, the Sixth Circuit has overruled the only federal court of appeals case holding to the contrary. In *United States v. Master*, 614 F.3d 236 (6th Cir. 2010), the Sixth Circuit overruled its decision in *United States v. Scott*, 260 F.3d 512, 515 (6th Cir. 2001), which had held that the exclusionary rule can apply in the absence of police misconduct when a warrant was void ab initio. *See United States v. Beals*, 698 F.3d 248, 265 (6th Cir. 2012) (recognizing overruling). In reaching this conclusion, *Master* noted that the exclusionary rule never applies in the absence of police misconduct, even when a warrant was void ad initio. As the Supreme Court has explained, courts must not begin with a presumption of exclusion and then "require[ ] the government to qualify for an exception," but instead must engage in "a balancing test" to determine whether "'the benefits of deterrence [ ] outweigh the costs'" of exclusion. 614 F.3d at 242–43 (quoting *Herring*, 555 U.S. at 141). And because "'the exclusionary rule was crafted to curb police

rather than judicial misconduct'"—and, "[a]rguably, the issuing magistrate's lack of authority has no impact on police misconduct" if police have no reason to know the magistrate lacks authority—the exclusionary rule does not apply when police reasonably rely on a warrant that was void ab initio. *Id.* (quoting *Herring*, 555 U.S. at 142).

II. This Court Should Bring Its Caselaw In Line With The Supreme Court's By Overruling *Hess*' Erroneous Holding Requiring Exclusion Of Evidence Obtained In Reasonable Reliance On A Warrant That Was Void Ab Initio

A. Similar to the Fourth Amendment to the United States Constitution, Article I, Section 11 of the Wisconsin Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Wis. Const. art. I, § 11. Under the Wisconsin Constitution, police can only conduct a search or seizure under the authority of a warrant or under an enumerated exception to the warrant requirement. *See State v. Artic*, 2010 WI 83, ¶¶ 28–29, 327 Wis. 2d 392, 786 N.W.2d 430. If police arrest an individual on the basis of a warrant that is legally insufficient and no exceptions apply, that arrest violates the individual's rights under Article I, Section 11. *See State v. Eason*, 2001 WI 98, ¶¶ 16–18, 26, 245 Wis. 2d 206, 629 N.W.2d 625.

Before the United States Supreme Court held that the federal exclusionary rule applies to the States, *see Mapp*, 367 U.S. at 655, this Court created its own exclusionary rule to protect the rights secured by Article I, Section 11, *see Hoyer v. State*, 180 Wis. 407, 193 N.W. 89, 92 (1923).

This Court typically interprets Article I, Section 11 and the exclusionary rule consistent with the interpretations of the Fourth Amendment by United States Supreme Court. *See State v. Ward*, 2000 WI 3, ¶ 55, 231 Wis. 2d 723, 604 N.W.2d 517. This Court, like the United States Supreme Court, has recognized that the exclusionary rule is a judicially created rule and that determining whether it applies requires balancing its costs with the deterrent benefit its application would achieve. *Compare Eason*, 2001 WI 98, ¶ 43, *with Leon*, 468 U.S. at 913. And, like the United States Supreme Court, this Court has held that the rule only applies where exclusion's benefits outweigh its costs, *compare Dearborn*, 2010 WI 84, ¶ 35, *with Herring*, 555 U.S. at 141, and that the exclusionary rule's costs are "considerable," *compare Eason*, 2001 WI 98, ¶ 58 n.26, *with Leon*, 468 U.S. at 907.

This Court, again like the United States Supreme Court, has held that the purpose of the exclusionary rule is to deter police misconduct, not misconduct by other actors. The exclusionary rule's purposes are served when "[u]nlawful *police* misconduct is deterred." *Ward*, 2000 WI 3, ¶ 57 (citation omitted, emphasis added); *see also Dearborn*, 2010 WI 84, ¶ 38 ("the exclusionary rule should be applied as a

remedy to deter *police* misconduct" (emphasis added)); *accord Herring*, 555 U.S. at 142 ("The exclusionary rule was crafted to curb *police* rather than judicial misconduct." (emphasis added)). Indeed, four Justices of this Court explained in no uncertain terms that the exclusionary rule "requires police misconduct as a necessary predicate" before it may be applied. *State v. Scull*, 2015 WI 22, ¶ 55, 361 Wis. 2d 288, 862 N.W. 2d 562 (Roggensack, J., concurring).

Finally, this Court, like the United States Supreme Court, has adopted the so-called "good faith" exception, holding that when the police act in a way that is objectively reasonable, the exclusionary rule does not apply. *See Dearborn*, 2010 WI 84, ¶ 44; *accord Davis*, 564 U.S. at 240–41. When there is no deterrent benefit to be gained by applying the exclusionary rule, "the social cost of excluding relevant evidence will always" render application of the rule unjustifiable. *See Eason*, 2001 WI 98, ¶ 58 & n.26; *accord Davis*, 564 U.S. at 240–41. This is true when police reasonably rely on this Court's caselaw, *Dearborn*, 2010 WI 84, ¶ 44, a warrant, *Eason*, 2001 WI 98 ¶ 52,[6] or a statute, *see Ward*, 2000 WI 3, ¶ 50 (citing *Krull*, 480 U.S. at 349–50).

[6] In *Eason*, this Court departed from United States Supreme Court caselaw and held that, with regard to probable-cause determinations for warrants, an additional requirement applies under the Wisconsin Constitution. *Eason*, 2001 WI 98, ¶ 63. In particular, the process used to obtain a warrant must include "a significant investigation and [ ] review" by either a police officer or government attorney "knowledgeable of[ ] the legal vagaries of probable cause and reasonable suspicion." *Id.*

B. Notwithstanding the above-described similarities between this Court's exclusionary-rule caselaw and that of the United State Supreme Court, this Court in *State v. Hess* reached a conclusion on the issue at stake in this appeal that is irreconcilable with the core rationales underlying both the Supreme Court's exclusionary-rule precedents and this Court's articulation of those same rationales.

In *State v. Hess*, Hess pleaded guilty to operating a motor vehicle while intoxicated and was released on a conditional bond. 2010 WI 82, ¶ 4 (lead op.). The judge ordered a presentence investigation report and, after Hess failed to meet with a Department of Corrections agent to complete the report, the judge issued a civil bench warrant for Hess' arrest. *Id.* ¶ 8. While executing this arrest warrant, the police officer noticed the smell of intoxicants coming from Hess and so placed Hess under arrest for violating one of the conditions of his bond. *Id.* ¶¶ 9–10. After the State charged him with felony bail jumping, Hess moved to suppress the evidence of intoxication that the officer obtained as a result of the arrest warrant. *Id.* ¶ 11.

This Court did not explain whether this rule applies to warrants that are issued without police involvement, such as bench warrants. *Id.* ¶¶ 60–63. Indeed, application of the *Eason* requirement in such a case would "make[ ] no sense," *Hess*, 2012 WI 82, ¶¶ 92–94 (Gableman, J., dissenting), rendering *Eason*'s additional requirement irrelevant in the present case, where there was no police involvement in the issuance of the warrant.

In the lead opinion, three Justices of this Court concluded that although the officer's reliance on an arrest warrant was objectively reasonable, the evidence obtained during the arrest should be excluded because the arrest warrant was void ab initio. *Hess*, 2010 WI 82, ¶ 69 (lead op.). The lead opinion first explained that the judge had issued the warrant without statutory authority because none of the conditions precedent for issuing an arrest warrant obtained, rendering the warrant void ab initio. *Id.* ¶¶ 2, 24–28. Then, citing *State v. Kriegbaum*, 194 Wis. 229, 232, 215 N.W. 896 (1927), the lead opinion held that "exclusion is an appropriate remedy" in a case where the issuing judge or magistrate did not have authority to issue the warrant. *Hess*, 2010 WI 82, ¶¶ 29–32 (lead op.). The lead opinion also reasoned that even though law enforcement was not involved in procuring the void warrant and had no reason to know the warrant was void ab initio, the judicial error could not be "overcome" by the "good faith of the executing officer." *Id.* ¶ 62. The lead opinion held that "consideration of judicial integrity," *standing alone*, can require application of the exclusionary rule in the special circumstance of void ab initio warrants, in light of the seriousness of the judicial error in issuing such warrants. *Id.* ¶¶ 63–66. In all, the lead opinion found that the exclusionary rule should apply to void ab initio warrants, notwithstanding the so-called "good faith" exception, to "preserve the integrity of the judicial process." *Id.* ¶ 69.

Justice Ziegler concurred with the decision to exclude the evidence, but explained that her view was "based on the fact that this warrant was per se void *ab initio*." *Id.* ¶ 71 (Ziegler, J., concurring). Because the circuit court "complete[ly] lack[ed] authority to issue the warrant," the warrant was "*per se* invalid," and the exclusionary rule should apply. *Id.* ¶¶ 71, 73 (citing, *inter alia*, *Kriegbaum*, 194 Wis. 229, 232, *Loney*, 110 Wis. 2d at 260, and *Grawien*, 123 Wis. 2d at 430–31, 33).

Justice Gableman, joined by then-Justice Roggensack, dissented, explaining that the lead opinion "depart[ed] from the United States Supreme Court's well-articulated principles governing" the exclusionary rule. *Hess*, 2010 WI 82, ¶ 75 (Gableman, J., dissenting). The lead opinion erroneously "beg[an] with a presumption of exclusion and look[ed] for an exception," instead of asking in the first instance whether application of the exclusionary rule would be justified. *Id.* ¶¶ 75, 78. As recent cases from the United States Supreme Court such as *Herring* made clear, exclusion is a "last resort" and applies only in limited circumstances. *Id.* ¶¶ 77–78 (citation omitted). The lead opinion erroneously "ignor[ed] the singular animating purpose of exclusion: deterrence of police misconduct." *Id.* ¶¶ 75, 86. And the protection of judicial integrity "has effectively been subsumed under the main goal of deterring police misconduct," and is therefore not a sufficient justification for applying the exclusionary rule. *Id.* ¶ 90.

Five years after *Hess*, four Justices of this Court in *Scull*, 2015 WI 22, joined a separate opinion written by then-Justice Roggensack specifically rejecting *Hess*' central rationale: protecting judicial integrity can, standing alone, justify application of the exclusionary rule. As these Justices explained in criticizing the reasoning of the lead opinion in *Hess*, "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." *Scull*, 2015 WI 22, ¶ 47 (Roggensack, J., concurring). Citing the United States Supreme Court's opinions in *Davis* and *Herring*, these Justices explained that "[w]hen the error that leads to a Fourth Amendment violation is not that of police but that of a magistrate or judge who issues the warrant, the exclusionary rule does not apply." *Id.* ¶ 54. Likewise, "Article I, Section 11 of the Wisconsin Constitution requires police misconduct as a necessary predicate" to the application of the exclusionary rule. *Id.* ¶ 55.

C. While this Court generally "follows the doctrine of stare decisis scrupulously," "there are particular circumstances" in which this Court will "overturn prior decisions." *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶¶ 94, 96, 264 Wis. 2d 60, 665 N.W.2d 257; *see also State v. Denny*, 2017 WI 17, ¶ 69, 373 Wis. 2d 390, 891 N.W.2d 144. "[S]tare decisis is a principle of policy rather than an inexorable command," *Denny*, 2017 WI 70, ¶ 71 (citations omitted), and in circumstances where a prior

decision is "unsound in principle," has been "undermined" by subsequent "developments in the law," and/or is "detrimental to coherence and consistency in the law," this Court will overrule it, *Johnson Controls*, 2003 WI 108, ¶¶ 98–99.

Consistent with the above-described principles, this Court should overrule *Hess* and hold that under a straightforward application of the principles that both this Court and the United States Supreme Court have articulated, the exclusionary rule has no application where police reasonably relied upon a warrant that was void ab initio.

Unsound in Principle. *Hess* is unsound in principle because it erroneously "ignor[ed] the singular animating purpose of exclusion: deterrence of police misconduct." 2010 WI 82, ¶¶ 75, 86 (Gableman, J, dissenting). When the police have committed no misconduct, there is nothing to deter by application of the exclusionary rule. *See Leon*, 468 U.S. at 921; *Herring*, 555 U.S. at 144; *Dearborn*, 2010 WI 84, ¶ 44. And when there is nothing for the exclusionary rule to deter, its benefits cannot possibly outweigh its costs. *See Davis*, 564 U.S. at 240–41; *Eason*, 2001 WI 98, ¶ 58 & n.26. *Hess* failed to follow this established exclusionary-rule jurisprudence, and instead held that the fact that the police committed no misconduct was irrelevant, given the gravity of the judicial error. 2010 WI 82, ¶ 62 (lead op.). By failing to recognize the necessity of police misconduct to the exclusionary rule, *Hess* wrongly departed from the caselaw of both this Court and the

United States Supreme Court. *See Hess*, 2010 WI 82, ¶ 86 (Gableman, J, dissenting).

Since the *Hess* lead opinion could not justify its ruling based upon exclusion's impact on police misconduct, it erroneously turned to *judicial* misconduct. *Id.* ¶ 90 (Gableman, J., dissenting). The lead opinion held that, because the judicial error was "serious" in the case of a void ab initio warrant, exclusion was "necessary to preserve the integrity of the judicial process." *Id.* ¶¶ 66–67, 69 (lead op.). But the lead opinion's focus on the degree of judicial error was misplaced, as the purposes served by the exclusionary rule have nothing to do with correcting judicial error, "serious" or otherwise. Members of the judiciary are not engaging in "lawlessness" that "requires application of the extreme sanction of exclusion." *Leon*, 468 U.S. at 916. There is no need to resort to the exclusionary rule to inform judges of their mistakes or to ensure that they correct them. *Id.* at 917 & n.18. And if a judge were committing significant errors, or even engaging in misconduct that required correction, this Court has supervisory authority over the lower courts, *see Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 47, 376 Wis. 2d 147, 897 N.W.2d 384, and can rectify those errors or misconduct using that authority rather than the exclusionary rule, *see Leon*, 468 U.S. at 917 n.18. Indeed, this Court has explained that admitting evidence where no police misconduct occurred "would not compromise judicial integrity." *Eason*, 2001 WI 98, ¶ 55.

The lead opinion in *Hess* also erroneously "beg[an] with a presumption of exclusion and look[ed] for an exception." 2010 WI 82, ¶¶ 75, 78 (Gableman, J., dissenting). This error stems, in part, from the lead opinion's reliance on *Kriegbaum*, 194 Wis. 229. *See Hess*, 2010 WI 82, ¶¶ 29–31 (lead op.). *Kriegbaum* treated the exclusionary rule as a constitutional right, and held that admitting unconstitutionally obtained evidence was itself a constitutional violation. 194 Wis. 229, 215 N.W. 896, 897–98. But this is no longer good law: both this Court and the United States Supreme Court have long made clear that the exclusionary rule is *not* a constitutional right, but is instead a judicially created rule. *See United States v. Calandra*, 414 U.S. 338, 348 (1974); *Conrad v. State*, 63 Wis. 2d 616, 636, 218 N.W.2d 252 (1974); *see also Dearborn*, 2010 WI 84, ¶ 35.[7]

More generally, both the lead opinion and the concurrence in *Hess* treated similar situations inconsistently for reasons not grounded in established exclusionary-rule jurisprudence. As explained, *supra* pp. 18–21, there is no reason to treat a warrant that was void ab initio any differently than a warrant lacking in probable cause or a warrant that has been withdrawn under the exclusionary-rule analysis. Because the purpose of the exclusionary rule is

[7] The lead opinion also relied on the Sixth Circuit's decision in *Scott*, 260 F.3d 512, *see Hess*, 2010 WI 82, ¶¶ 61, 67 (lead op.), but the Sixth Circuit has since overruled that decision, *see Beals*, 698 F.3d at 265, for many of the same reasons that Justice Gableman articulated in his *Hess* dissent, *see supra* p. 26.

to deter *police* misconduct, *see Davis*, 564 U.S. at 236–37, the reasons for the warrant's invalidity are immaterial in the absence of such misconduct. So long as the police had "reasonable grounds for believing the warrant was properly issued," *Leon*, 468 U.S. at 922–23, and still in effect, *Evans*, 514 U.S. at 15–16; *see also Herring*, 555 U.S. at 144, the exclusionary rule simply does not apply.

Undermined by Subsequent Developments. In *Scull*, 2015 WI 22, a majority of the Justices of this Court rejected *Hess*' central rationale: excluding evidence solely for the sake of protecting judicial integrity. As the four-Justice concurrence explained in detail, "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). This is directly contrary to *Hess*' central rationale, which requires exclusion of evidence obtained in reasonable reliance on a void ab initio warrant *only* to serve the ends of "preserv[ing] the integrity of the judicial process." *Hess*, 2010 WI 82, ¶ 69 (lead op.).

Detrimental to Coherence and Consistency in the Law. That a majority of this Court's Justices in *Scull* rejected *Hess*' central rationale without formally overruling *Hess* has created confusion in the lower courts, as seen in the circuit court's decision here. Despite the unambiguous language in the *Scull* concurrence explaining that "police misconduct [is] a necessary predicate to . . . the exclusionary rule," 2015 WI

22, ¶ 55 (Roggensack, J., concurring), the circuit court here applied the exclusionary rule in a case involving no police misconduct based upon *Hess*, App. 15–17. The circuit court noted that "[c]learly *Scull* calls into question the *Hess* court's decision," but this Court "is the only court with the power to overrule, modify or withdraw language from a previous supreme court case." App. 16–17 (citation omitted). Because "the opinion in *Scull* does not formally overrule the Wisconsin rule that 'judicial integrity' is vital enough to justify exclusion of evidence" when a warrant was void ab initio, the circuit court felt "compelled to grant the defendant's motion to suppress." App. 17. Thus, in order to clear confusion in the lower courts, this Court should formally and definitively overrule *Hess*.

And, of course, *Hess* is an outlier among federal courts and state supreme courts. *Supra* pp. 19–21; *Horton*, 863 F.3d at 1050–51; *Levin*, 874 F.3d at 321–24; *Master*, 614 F.3d at 242–43; *Brown*, 28 N.E.3d at 83; *Blevins*, 802 S.W.2d at 466–67; *Turnage*, 642 N.E.2d at 1238–41.

III. Under The Above-Described Principles, The Circuit Court Improperly Excluded The Evidence In The Present Case

Assuming this Court agrees with the State's submission that the exclusionary rule should not apply where police officers reasonably relied upon a void ab initio warrant, *see supra* pp. 18–21, the remaining question is whether the officers' reliance on the Ashland County Circuit Court arrest

warrant was, in fact, objectively reasonable. It is undisputed that the officers here acted objectively reasonably in relying upon that arrest warrant, meaning the exclusionary rule does not apply.

In deciding whether police reliance on a warrant was objectively reasonable for purposes of the exclusionary rule and the so-called "good faith" exception, courts ask "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring*, 555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23). This inquiry includes consideration of not only the objective reasonableness of the "officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to [any] probable-cause determination." *Leon*, 468 U.S. at 923 n.24. In a case such as this one, where police were not involved in procuring the initial warrant, the reasonableness inquiry turns entirely on whether the executing officers should have known that the warrant was defective. For example, exclusion may be appropriate if the warrant was "so facially deficient" that a reasonable officer could not have relied upon it. *Leon*, 468 U.S. at 923; *accord Eason*, 2001 WI 98, ¶ 36.

Here, although the warrant was void ab initio, *see supra* pp. 5–6 & n.4, the exclusionary rule does not apply because the police acted in an objectively reasonable manner in relying upon the warrant. Bayfield police received a 911 call from Kerr's cell phone, to which they were obligated to

respond. R.12:3. After sending two officers to Kerr's residence, dispatch informed them of the outstanding arrest warrant, under standard police procedures. *See* App. 32, 41–42. Once the officers encountered Kerr and verified his identity, they placed him under arrest, as required by the arrest warrant, and then conducted a standard search incident to arrest. App. 21, 30. Officer Ladwig did not have the "capability" to review the warrant while responding to the call, App. 32, but even if he had reviewed it, there would have been no indication that the warrant was problematic. Deputy Leino, in turn, could have looked at details about the warrant on his "squad computer," but such a review would not have shown any defects. App. 42–43. Similarly, there is no argument that dispatch could have detected any problem in the warrant through reasonable diligence. As the circuit court found below, no one has "allege[d] even the slightest hint of misconduct or wrongdoing by law enforcement in this matter." App. 3.

Because law enforcement in this case acted in a way that was objectively reasonable, the exclusionary rule does not apply because the costs of suppression of probative evidence would not be outweighed by any deterrent effect on future police misconduct. In short, the undisputed "absence of police culpability dooms [Kerr's] claim." *Davis*, 564 U.S. at 240. Given that the police here did not engage in any misconduct, there is "nothing to deter." *Leon*, 468 U.S. at 921. And without any deterrent benefit to outweigh the

"substantial social costs" of exclusion, suppression of the evidence cannot be justified. *See Hudson*, 547 U.S. at 591.

CONCLUSION

The decision of the circuit court should be reversed.

Dated this 26th day of December, 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 8,481 words.

Dated this 26th day of December, 2017.

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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 26th day of December, 2017.

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