STATE OF WISCONSIN SUPREME COURT

Case No. 2016 AP 2455

STATE OF WISCONSIN,
PLAINTIFF-APPELLANT,
v.

CHRISTOPHER JOHN KERR,
DEFENDANT-RESPONDENT

One 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

BRIEF OF DEFENDANT-RESPONDENT

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ISSUES PRESENTED

1. Should this Court's ruling in *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568 finding the good-faith exception does not apply to a warrant is void *ab initio* be over-turned?[1]

   ANSWER: NO

2. If the Court determines that the good-faith exception can apply to a warrant that was void *ab initio*, should the good-faith exception apply based upon the facts of this case.

   ANSWER: NO

[1] The issue before this court is not whether the circuit court errored. The Attorney General conceded that the circuit court properly applied this court's holding in *State v. Hess*. As such, the Attorney General sought by-pass from the court of appeals and is asking this court to overrule its decision in *State v. Hess*.

STATEMENT OF THE CASE

On June 16, 2015, a citation was mailed to Christopher Kerr in Ashland County case number 15FO219 alleging Christopher Kerr violated a county ordinance prohibiting disorderly conduct and requiring Mr. Kerr to pay a forfeiture of $263.50 or appear in court on July 21, 2015. (R. 31:1, App. 19) The court record indicates that default judgment was entered against Mr. Kerr on July 21, 2015. (R. 31:4, App. 21.) However, the court failed to send Mr. Kerr any notice that default judgment was entered until over a year later, and after the events giving rise to this case. (R. 38:2-3, App. 2-3.) The notice sent to Mr. Kerr in September of 2016 (after the case at bar was under way) stated that Mr. Kerr had until September of *2015* to pay the forfeiture. *Id.*

Despite not sending Mr. Kerr notice that default judgment was entered requiring him to pay $298.50, on September 22, 2015 Judge Robert Eaton signed a Commitment Order for Non-Payment of Fine/Forfeiture. (R. 31:2, App. 19) There is no motion or affidavit in the court record indicating that a prosecutor was seeking an order of commitment. Rather, the record reflects that the court took up the issue on its own accord and generated the commitment order. (R. 38:2, App. 2.) The commitment order authorized

any law enforcement officer to "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." (R. 31:2, App. 19.)

On September 27, 2015, there was a call placed to 911 wherein the 911 operator could hear "a female in the background and when the dispatcher asked, the male said, 'shut the F-up' and the call was disconnected." (R. 55:5, R-App. 3) Officer Ladwig of the City of Bayfield Police Department was given an address in the City of Bayfield and proceeded to drive to that location. Id.

While in route, Officer Ladwig was advised that the phone number from which the 911 call was made connected to Christopher Kerr (R. 61:5, App. 28) Officer Ladwig was also informed that Mr. Kerr had an active warrant out of Ashland County. (R. 61:8, App. 30) Officer Ladwig did not review the warrant prior to arriving at the residence and didn't "have the capability of doing that." (R. 61:10, App. 32) Christopher Kerr answered the door when Officer Ladwig knocked and advised Officer Ladwig that there was no emergency and rather that the sensitivity dials on his phone were turned up. (R. 55:13, R-App. 26.) Officer Ladwig determined that the 911 call was accidental. (R. 61:10, App. 32)

Officer Ladwig proceeded to arrest Mr. Kerr solely due to the outstanding warrant out of Ashland County. *Id.* Officer Ladwig arrested Mr. Kerr because the officer was told by dispatch that there was a warrant, but did not see the warrant or know the basis for it. (R. 61:14, App. 36)

While Officer Ladwig was the primary officer responding to the September 27, 2015 call from Mr. Kerr's residence, (R. 61:19, App. 41), law enforcement officer Deputy Leino assisted at the scene. (R. 61:18, App. 40) Deputy Leino testified that he also never reviewed the warrant upon which the arrest of Mr. Kerr was founded. (R. 61:20, App. 42) Deputy Leino indicated that he could run a case through his squad computer and sometimes see details about a warrant, including what it is for, but that he did not do so prior to the arrest of Mr. Kerr. (R. 61:20-21, App.18-19)

Officer Ladwig placed Mr. Kerr under arrest due to the outstanding Ashland County warrant, and searched Mr. Kerr incident to arrest. (R. 61:9, App. 31). Officer Ladwig found a rock-like substance in Mr. Kerr's pocket that field tested positive for methamphetamine. (R. 55: 7-9, R-App. 20-22)

Christopher Kerr did not know on September 27, 2015 that there was a warrant for his arrest from Ashland County. (R. 61:23, App. 45) Mr. Kerr was never offered a hearing regarding the alleged nonpayment of fines. (R. 61:24, App. 46.)

Mr. Kerr, through counsel, brought a motion to suppress the evidence that was obtained during his arrest. This motion was premised on the precedent set in *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568, which was decided less than ten years ago. In *Hess*, the Supreme Court of Wisconsin ruled that the good faith exception to the exclusionary rule did not apply to evidence discovered as a result of an arrest premised upon a warrant that was "void *ab initio*." *Hess*, 327 Wis. 2d 524, ¶30.

The warrant in *Hess* was conceded to be improper as it lacked statutory authorization. *Id.* at ¶9. The Court determined that the evidence in that case "is subject to the exclusionary rule because it was found pursuant to a warrant issued by a judge with no legal authority to issue such a warrant." *Id.* ¶18. Turning to the application of the good faith exception, the Court noted that "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies." *Id.* ¶21 citing *State v. Eason*, 2001 WI 98, ¶74, 245 Wis.2d 206, 629 N.W.2d 625.

The *Hess* court disagreed with the State's argument in that case that the good faith exception applies because the faulty warrant was due to "judicial error" rather than an error by law enforcement. *Id.* ¶22. "When

good faith jurisprudence discusses 'judicial error,' it speaks of misjudging the sufficiency of the evidence or the warrant application's fulfillment of the statutory requirements….The trial court here did not make that type of error. Instead, it acted outside of the law." *Id.* (internal citations omitted). The Court went on to point out that "the act of issuing a warrant without any authority whatsoever to do so, thus being void from the beginning, is not a 'judicial' act and the attempt to clothe it as such is contrary to judicial integrity." *Id.* ¶30.

While the District Attorney opposed Kerr's motion to suppress, the State agrees with the defendant in this case that the warrant issued by Judge Eaton upon which Mr. Kerr's September 2016 arrest was based was "void *ab initio*." (Appellant's Brief, p. 6.)

ARGUMENT

I. THE GOOD FAITH EXCEPTION DOES NOT APPLY TO A WARRANT THAT WAS VOID *AB INITIO* UNDER EXISTING FEDERAL LAW.

The Supreme Court has long held that evidence "obtained by searches and seizures in violation of the Constitution is….inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (S .Ct. 1961). Suppression of such evidence serves two functions, to deter unlawful police conduct and to preserve judicial integrity. *Terry v. Ohio*, 392 U.S. 1, 12-13 (S. Ct. 1968).

In *United States v. Leon*, the Court carved out an exception to the rule of suppression of evidence obtained due to a constitutional violation when the arresting officers operated in "good-faith". 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). However, the *Leon* Court cautioned that "in so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant. Other objections to the modification of the Fourth Amendment exclusionary rule we consider to be insubstantial." *Id.* at 923-24. Thus, the good-faith exception is inapplicable to warrants that do not meet the requirements to be valid in the first place.

The Wisconsin Supreme Court adopted the good-faith exception in *State v. Eason*, 2001 WI 98, 245 Wis.2d 206, 629 N.W.2d 625. The Court later had occasion to consider the application of the good-faith exception to a warrant that did not meet the "various requirements for a valid warrant" in *State v. Hess*, 327 Wis. 2d 524. *Hess* involved a warrant that was conceded to have been issued without statutory authority (i.e. a warrant that was void *ab initio*). In that case, the State argued that the evidence was admissible because the warrant was issued due to "judicial error" and not "police misconduct." Ultimately, the *Hess* court concluded that the good-faith exception does not apply in cases where evidence was obtained pursuant to

a warrant that was void *ab initio*. *Id.* ¶30. This comports with *Leon*, which left untouched the requirements for a valid warrant.

a. The United States Supreme Court has never overruled its position in *Leon* that the requirements for a valid warrant were left intact by the good-faith exception.

The question of whether the good-faith exception applies to a warrant that was void *ab initio* is unresolved. See Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 1.3(f) n.60 ("It is unclear whether the [Leon good-faith] rule extends to a warrant 'that was essentially void *ab initio*' because of 'the issuing court's lack of jurisdiction to authorize the search in the first instance.'") (quoting *United States v. Baker*, 894 F.2d 1144, 1147 (10th Cir. 1990)). The *Leon* decision deals with warrants that a judge was authorized to issue. *United States v. Houston*, No. 3:13-09-DCR, 2014 WL 259085 at *26 n.14 (E.D. Tenn. Jan. 23, 2014) (where a warrant is "void *ab initio* . . . the [c]ourt never reaches the question of whether the search warrant is supported by probable cause") (internal citation omitted).

The State argues that the exclusionary rule is meant to deter future violations and, in judging whether exclusion will result in sufficient deterrence, courts "look to whether the *police* have committed some misconduct that can be deterred in the future." (Appellant's Brief, p. 15,

citing *Leon*, supra, and *Stone*, 428 U.S. at 492.) The appellant ignores that *Leon* and its progeny relate to warrants that meet the "various requirements for a valid warrant" at the outset. [2]

b. Other courts have determined that the good-faith exception is inapplicable to warrants and arrests that are void *ab initio*.

The State acknowledges that the United States Supreme Court has not ruled on the application of the exclusionary rule in a circumstance where a warrant was void *ab initio*. (Appellant's Brief, p. 19.) However, many courts facing this issue have found that the good-faith exception has no application to evidence obtained due to a void *ab initio* warrant. For example, in *United States v. Vinnie,* the United States District Court for the District of Massachusetts held that the good-faith exception created in *Leon* had no application to a case that was not about the "determination of what quantum of evidence constitutes probable cause" but instead "the more fundamental problem of a magistrate judge acting without subject matter jurisdiction." 683 F. Supp. 285, 288-89 (D. Mass. 1988). Likewise, evidence suppressed under a warrant issued by a judge lacking jurisdiction

[2] The Appellant posits that the Supreme Court, in *Herring v. United States*, determined that police misconduct but not judicial integrity could serve as a basis to exclude evidence obtained due to warrants issued in violation of the 4th Amendment. (Appellant's Brief, p. 13.) *Herring* did not involve a warrant that was void ab initio and, in any event, the Supreme Court in *Herring* rejected the "suggestion that *Evans* was premised on a distinction between judicial errors and police errors…" *Herring*, fn. 3.

could not be saved by the good-faith of the arresting officers as "actions by a police officer cannot be used to create jurisdiction, even when done in good faith." *State v. Wilson*, 618 N.W.2d 513, 520 (S.D. 2000). Similarly, an arrest predicated upon a statute that is later declared unconstitutional is void *ab initio*, and all evidence obtained pursuant to that arrest is subject to the exclusionary rule. *People of the State of Illinois v. Carrera,* 203 Ill. 2d 1, 16-17 (2002).

Other states have found evidence obtained by warrants void *ab initio* must be suppressed. "If a search warrant is void *ab initio*, the inquiry stops and all other issues pertaining to the validity of the search warrant, such as whether the purpose of the exclusionary rule is served, are moot." *State v. Vickers*, 290 Mont. 356, 964 P.2d 756, 762 (Montana 1998). The Montana Supreme Court found reliance on *Leon* and the exclusionary rule is misplaced when a warrant is void *ab initio*. *Id.*

Similarly, the Supreme Court of Connecticut affirmed the suppression of evidence where a search and seizure warrant was not signed even though the judge intended to sign it. *State v. Surowiecki*, 184 Conn. 95, 96, 440 A.2d 798, 798 (Conn. 1981). Failure to sign the warrant made it "fatally defective, invalid and void and conferred no authority to act thereunder". *Id* at 98.

The Supreme Court of Rhode Island suppressed evidence when a warrant was invalid (void *ab initio*) because it was signed by a retired judge *State v. Nunez*, 634 A.2d 1167, (R.I. 1993). In that case, the court noted that there was "no allegation on behalf of defendant that probable cause supporting the search warrant was lacking or that the police officers acted with anything but good faith." *Id.* at 1170–71. The court also noted that despite sensitivity to the dangers of illegal drug activity, the public must also be "protected from unconstitutional and illegal searches and seizures."

The Michigan Court of Appeals invalidated a search and suppressed evidence obtained therefrom because the warrant had not been signed. *People v. Hentkowski*, 154 Mich. App. 171, 397 N.W.2d 255, (Mich. 1986).

Needless to say, there are a number of states that found it proper to suppress evidence where a warrant is invalid because actions or inactions of the judiciary, irrespective of whether law enforcement acted in good faith. Many of these cases were decided before *Hess*.

c. When the requirements for a warrant to be valid are not met at the outset, the good-faith exception has no application.

While the Supreme Court has not ruled on a case squarely dealing with the application of the good-faith exception to a warrant that is void *ab initio*, it also has not retracted its language in *Leon* that the good-faith exception the court created left intact all requirements for a valid warrant.

In other words, *Leon* and its progeny outlining the good-faith exception pre-suppose the existence of an otherwise valid warrant.

The State argues that "the reasons for [a] warrant's invalidity are immaterial in the absence" of police misconduct. (Appellant's brief, p. 31.) But this ignores the "various requirements" for a valid warrant that the Supreme Court left untouched in *Leon. Leon*, supra, at 923-924, ("In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant.") A warrant that does not meet such basic requirements is not affected by the good-faith exception to the exclusionary rule because the Supreme Court determined that ensuring warrants meet such requirements at the time of issuance is important. (*"Other* objections [i.e. other than the probable cause standard and the various requirements for a valid warrant] to the modification of the Fourth Amendment exclusionary rule we consider to be insubstantial" (*Id.*, emphasis added.)) Nothing the Supreme Court has said since changes this holding.

In creating the good-faith exception, the Supreme Court made clear it has no application when a warrant is issued without any authority. This is why subsequent case law focuses on the good-faith actions of law enforcement as opposed to the judiciary – if a warrant is issued without any

authority, the good-faith exception doesn't apply anyway. The *Leon* decision recognizes that "deference to the magistrate, however, is not boundless….A magistrate failing to 'manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application' and who acts instead as an 'adjunct law enforcement officer' cannot provide valid authorization for an otherwise unconstitutional search." (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27, 468 U.S. 897, 915). The Supreme Court was careful to point out that "The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role…" *Id.*

The appellant reasons that it is inappropriate to exclude evidence that came about due to judicial error or even malfeasance because "there is no need to resort to the exclusionary rule to inform judges of their mistakes or to ensure that they correct them." (Appellant's Brief, p. 29, citing *Leon*, 468 U.S. at 917.) It is true that some cases following *Leon* have examined the difference between judicial and police error. However, " 'judicial error' in such cases refers to misjudging the strength of the evidence, not acting outside of the law entirely." *Hess*, 327 Wis. 2d 524, ¶22. *Leon* tells us that the exclusionary rule has no application to warrants that do not meet the various requirements for validity at the outset. It is only for warrants that

are at least valid when issued, even if voided later by a clarification in law or some other means, that the distinction between judicial and police error becomes relevant.

d. The warrant for Mr. Kerr's arrest was invalid from the outset and no one was entitled to rely thereon, whether acting in good faith or not.

The appellant concedes that the Ashland County Circuit Court "had no authority to issue the warrant in the first place." (Appellant's Brief, p. 5.) Wisconsin law does not provide for imprisonment of a citizen for failure to pay a fine for violation of a municipal ordinance unless the court finds that the citizen had the ability to pay the fine or failed to attend a hearing regarding his ability to pay. *State v. Hess*, 2010 WI 82, ¶58, citing Wis. Stat. §§818.03, 785.03(1)(a), 785.04(1)(b). These are the clear requirements of longstanding state statutes. No one suggests that these requirements were unclear, in flux, or hard to interpret. Rather, it appears that the Ashland County Circuit Court just ignored the statutory requirements for the issuance of a warrant.

This case stands apart from perhaps all other cases cited to this court regarding exclusion of evidence based upon a faulty warrant, save *Hess*, in that it appears the Ashland County court issued the warrant on its own initiative. There was no action that appears to have been taken by law

enforcement, the district attorney, or any other individual to prompt the court to make a finding that Mr. Kerr should be imprisoned. Rather, the Bayfield County Circuit Court felt that this warrant, and by all appearances many other warrants similarly issued by the Ashland County Circuit Court, were being issued "on a wide administrative level." It appears the warrant for Mr. Kerr, and for all other similarly situated defendants in Ashland County, was initiated at the request either of the Judge, himself, or of the court's administrative staff.[3]

The opinions cited to this Court by the Appellant involve cases where a warrant either was found to be void for lacking probable cause (i.e. *Leon*) or was void in retrospect due to clarifications in the law (i.e. *State v.*

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[3] The judge or the administrative staff can properly be considered 'law enforcement' in this case. There was no affidavit in support of a warrant application under Wisconsin Statute Sec. 818.04. Someone at the courthouse must have created the warrant document to pursue Mr. Kerr's arrest. The Supreme Court in *Leon* stated that references to "officer" in that decision "should not be read too narrowly. It is necessary to consider the objective reasonableness……of the officers who originally obtained [a warrant] or who provided information material to the probable-cause determination." *Leon*, supra, at fn. 24. Thus, the good-faith of the "officers" [i.e. the Judge or the administrative staff] who obtained this warrant is at issue.

The officer who obtained Mr. Kerr's warrant clearly acted in bad-faith. There was no legal basis for Mr. Kerr's arrest. The status of the law for such warrants was not in flux. Furthermore, if review of the relevant statutes was not enough to make clear the circumstances under which Mr. Kerr could be incarcerated for failure to pay a fine, judicial staff or the Judge himself certainly could have made use of the 2016 Judicial Benchbook for Municipal Judges. See Section 4-9 E.2) "you MAY enter a default judgment, but without acknowledgement of service on defendant, the court may not enforce judgment through warrants or license suspensions, but will instead have to rely solely on other collection procedures." See also, Section 4-9 F.2) "If an adult defendant fails to pay a citation, the court *after a good cause/poverty hearing* may incarcerate defendant…." (emphasis added) and Section 14-1, subsection 4. "Scheduling an Indigency Hearing;" and subsection 11. "Findings that must be made before the court can issue an order for imprisonment (commitment)." Appendix A to Chapter 14 of the bench book even contains a handy example Summons to be used to notify a defendant that an indigency hearing will occur.

Scull, 2015 WI 22 and *United States v. Horton*, 863 F.3d 1041, 1045-46 (8th Cir. 2017). The appellant characterizes *United States v. Horton* as a case where evidence obtained due to a warrant that was void *ab initio* was still subject to the good-faith exception. However, it is clear in the *Horton* case that the warrant was only found to be invalid after the fact due to clarifications in the law ("We, however, will not find an obvious deficiency in a warrant that a number of district courts have ruled to be facially valid.") Whether or not the *Horton* warrant was void *ab initio* was, itself, unclear.

In the case at bar, there is no dispute about the fact that this warrant was void at the time it was issued and that the issuing authority (and whoever sought the warrant from the issuing authority, which may have been the Judge himself) should have known that there was no basis for the warrant. The warrant plainly did not meet the various requirements for a valid warrant, including *any* basis in *any* law. Since such warrants are not affected by the good-faith exception created in *Leon*, the good faith or bad faith of those acting upon the warrant down the line is irrelevant. The evidence obtained pursuant to this clearly unlawful warrant must be suppressed.

II. THE GOOD FAITH EXCEPTION DOES NOT APPLY TO A WARRANT THAT WAS VOID *AB INITIO* UNDER WISCONSIN LAW.

The Fourteenth Amendment made the federal exclusionary rule applicable to the states. *Mapp v. Ohio,* 367 U.S. 643, 655 (1961). However, Wisconsin also protects its citizens from unlawful search and seizure under Article I, Section 11 of the Wisconsin Constitution. "The United States Supreme Court interpretations of the United States Constitution do not bind the individual state's power to mold higher standards under their respective state constitutions." *State v. Knapp*, 2005 WI 127, ¶ 57, 285 Wis. 2d 86, 113, 700 N.W.2d 899, 913. The Wisconsin Supreme Court, unlike the United States Supreme Court, has had occasion to address the issue of the application of the good-faith exception to a void *ab initio* warrant. This Court should adhere to the principle of *stare decisis* and, on that basis, exclude the evidence obtained in this case.

a. The Doctrine of *Stare Decisis* should be enforced.

The Wisconsin Supreme Court "follows the doctrine of *stare decisis* scrupulously. *Johnson Controls, Inc. v. Emp'rs Ins. Of Wausau,* 2003 WI 108, ¶¶94 and 96, 264 Wis. 2d 60, 665 N.W.2d 257. There are good reasons for this. The doctrine of *stare decisis* is "of fundamental importance to the rule of law." *Welch v. Texas Dep't of Highways and Public Transp.,* 483

U.S. 568, 494 (1987). Any departures from the doctrine "demand special justification." *Johnson Controls,* supra, at ¶94, internal citations omitted.

b. The holding in *State v. Hess* prohibits application of the good faith exception to warrants that are void *ab initio*.

In *Hess,* the Supreme Court of Wisconsin ruled that the good faith exception to the exclusionary rule did not apply to evidence discovered as a result of an arrest premised upon a warrant that was "void *ab initio*." *Hess*, 327 Wis. 2d 524, ¶30. The warrant in *Hess*, like the warrant at issue in this case, was conceded to be improper as it lacked statutory authorization. *Id.*¶9. The Court determined that the evidence in that case "is subject to the exclusionary rule because it was found pursuant to a warrant issued by a judge with no legal authority to issue such a warrant." *Id.* ¶18. Turning to the application of the good faith exception, the Court noted that "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies." *Id.* ¶21 citing *State v. Eason*, 2001 WI 98, ¶74.

The State made the argument in *Hess,* just as it does now, that the unlawful warrant at issue was the result of "judicial error" rather than "bad faith" by law enforcement, and as such the evidence should not be excluded. *Id.* ¶22. This Court disagreed. "When good faith jurisprudence

discusses 'judicial error,' it speaks of misjudging the sufficiency of the evidence or the warrant application's fulfillment of the statutory requirements….The trial court here did not make that type of error. Instead, it acted outside of the law." *Id.* (internal citations omitted). The Court went on to point out that "the act of issuing a warrant without any authority whatsoever to do so, thus being void from the beginning, is not a 'judicial' act and the attempt to clothe it as such is contrary to judicial integrity." *Id.* ¶30.

All parties to this action agree that the Ashland County Circuit Court acted outside of the law in issuing a warrant for Mr. Kerr's arrest. This action was not 'judicial' in any sense - there was no judgment as to whether there was probable cause; there was no judgment as to whether Mr. Kerr intentionally didn't pay a fine (which would have been particularly difficult to prove since the court never mailed him notice of default judgment alerting him of the need to pay prior to issuing a warrant for his arrest). There was simply no action by a detached and neutral magistrate viewing evidence and rendering an impartial decision. The attempt to clothe the unwarranted issuance of a meritless and unlawful warrant as 'judicial' is indeed contrary to the concept of judicial integrity.

This Court need not delve into whether or not law enforcement acted with good or bad faith in this case – what they knew or could have known about the warrant. Nor is there a need to determine if the judicial staff or the judge himself actually became an "officer" in seeking this warrant with no basis, and therefore consider the good or bad faith of those individuals. This case is perfectly aligned with *State v. Hess* and, for the same reasons set forth in that case, this Court should reaffirm that a Judge who issues a warrant with no legal basis whatsoever is not engaging in a judicial act. Evidence obtained by such a warrant, which does not meet the "various requirements for a valid warrant" that are still in place post-*Leon*, is not subject to good-faith protections.

c. *State v. Scull* is irrelevant to this case.

The State argues that the decision in *State v. Hess* was undermined by *State v. Scull,* 2015 WI 22. First, it is important to note that nothing in the majority decision of *Scull* shed light on the application of the good-faith exception to warrants that are void *ab initio*. The State relies on comments found in a concurring opinion issued by the Court. The concurrence stated "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

appellant characterizes this language in the concurrence as "directly contrary to *Hess'* central rationale." (Appellant's brief, p. 31.)

The language in the *Scull* cited above is in a concurring opinion. Nothing in the *Scull* case required consideration of whether judicial integrity, standing alone, was a sufficient basis for exclusion of evidence, as that case centered on a warrant that was voided only due to later developments in the law. Further, the Court did not overrule *Hess*. As noted above, pursuant to *Leon* and other cases outlining the good-faith exception, the exclusionary rule has no application to warrants that do not meet the "various requirements for a valid warrant" to begin with. The consideration of judicial misconduct, police misconduct and the difference between the two is irrelevant when the warrant at issue had no basis in law at the time of issuance.

Even if the comments in the *Scull* concurrence were binding and relevant, the *Scull* case is readily distinguishable from the case at bar. In *Scull,* an officer and a drug detection dog went to the defendant's residence, without a warrant, and the dog identified the presence of illegal drugs. *Scull,* 2015 WI 22, ¶6-8. A court commissioner approved a search warrant for the defendant's residence based upon the information provided by an informant and the results of the sniff by the drug detection dog. *Id.* ¶9. The

circuit court ruled that the use of a drug detection dog was not a warrantless search. The defendant appealed and, during the pendency of the appeal, the Supreme Court, considering a similar case, determined that a dog sniff does constitute a search for purposes of the Fourth Amendment. Nonetheless, the appellate court affirmed Scull's conviction because officers reasonably relied upon that warrant in carrying out their search of the residence. ¶15.

This Court determined in *Scull* that "the commissioner's decision to grant the warrant was a reasonable application of the unsettled state of the law at the time the warrant issued." ¶25. Because granting the warrant was a reasonable application of unsettled law, "we turn to our case law addressing the application of the good faith exception…" ¶31. Quite clearly, then, if the decision to grant the warrant was *not* a reasonable application of unsettled law, the court would not have cause to consider the good-faith exception. Again, we return to the Supreme Court's point in *Leon* that the requirements for a valid warrant were left untouched by the advent of the good-faith exception. It simply does not apply in situations where a warrant is void at the time it was issued.

In the present case, no one argues that the warrant for Mr. Kerr was granted based upon a reasonable application of unsettled law. Under *Scull*, we turn to the good-faith exception only after the court finds that the

warrant was based on a reasonable interpretation of the law. If the warrant had no basis, like the warrant for Mr. Kerr, we never arrive at the question of whether it was relied on in good-faith.

The facts in *Scull* mirror those in *Leon.* An official with the authority to issue warrants evaluated an affidavit prepared by someone else (law enforcement) and made an independent decision that, based upon the unsettled state of law at the time, there existed probable cause to issue a warrant. In both cases, there were developments in the law after the warrant was issued that retroactively invalidated the warrants. However, at the time both were issued, it was reasonable of the judicial officers to authorize them. None of that is true in this case. Judge Eaton didn't impartially review evidence submitted by law enforcement and make an independent determination as to whether it was sufficient to justify a warrant. Neither did Judge Eaton make a decision that was consistent with the then-existing law as to when a warrant is justified. At all times relevant, then and now, the law did not allow for Mr. Kerr to be arrested. Judge Eaton, at his own initiation or that of his judicial staff, acted completely outside of the law and caused an unlawful arrest.

III. EVEN IF THE GOOD FAITH EXCEPTION DID APPLY TO A WARRANT THAT WAS VOID *AB INITIO* UNDER FEDERAL AND WISCONSIN LAW, THE FACTS OF THIS CASE REQUIRE THE EXCLUSION OF EVIDENCE.

a. The "officers" that procured the warrant acted in bad faith.

The warrant for Mr. Kerr's arrest did not fall from the sky. It was prepared by someone and set before the judge. Nothing in the record suggests that it was sought by law enforcement or a prosecutor. It can only be presumed that either the judge prepared the warrant, or some other member of court staff prepared it. Whoever sought the warrant is an "officer" for purposes of evaluating the good-faith exception.

The Supreme Court, in *Leon*, tells us that references to the term "officer" in that opinion "should not be read too narrowly" and that we must consider the objective reasonableness of the "officers" who originally obtained a warrant or provided information material to the probable-cause determination. *Leon*, supra, at footnote 24. If the officers who obtained the warrant or provided material information acted unreasonably, then the officer can be said to have acted in bad faith and cannot "rely on colleagues who are ignorant of the circumstances under which the warrant was obtained." *Id.*

Whoever obtained the warrant for Mr. Kerr had no basis in law that would support seizure of the defendant. It was an act of bad faith to seek the arrest of a man without any probable cause. The officers who executed this bad-faith warrant, may have been ignorant of how it was obtained, but that does not excuse all of the "officers" who acted to effectuate this unlawful arrest.

b. The officers who carried out the arrest acted in bad faith.

The good-faith exception does not operate to save evidence obtained based upon a warrant "so facially deficient" that an officer could not "reasonably presume it to be valid" or "upon a warrant issued by a magistrate that wholly abandoned his [or her] judicial role." *Scull*, supra, ¶34, citing *Eason*, supra, other internal citations omitted. In this case, the State spends much time in its brief absolving law enforcement from any responsibility because they simply never saw the warrant. (Appellants Brief, pp. 9, 33-34.) If law enforcement is always found to have acted in good faith in executing a warrant so long as officers never lay eyes the warrant, the logical result is a see-no-evil, hear-no-evil policy regarding warrants.

The parties agree that the officers executing Judge Eaton's unlawful Ashland County warrant never actually saw the warrant. (Appellants Brief,

p. 34.) One of the officers perhaps could have pulled information on the warrant up on his computer, but did not do so. (Id.) According to the appellant, this means that the officers could have no knowledge of the warrant's obvious deficiencies. In fact, the Appellant argues that a review of the warrant "would not have shown any defects." *Id.* This is simply not true. The warrant, on its face, states that Mr. Kerr was ordered to pay a fine and that the balance "has not been paid within the period ordered by the court." (R. 31, 2.) There is no attached finding that Mr. Kerr had the ability to pay and failed to do so. There is no attached affidavit supporting his arrest. The warrant states that Mr. Kerr failed to pay a fine. Failure to pay a fine is not a basis for incarceration under Wisconsin law. On its face, the warrant lacks any basis in law that would authorize the seizure of Mr. Kerr. A warrant that provides no basis in law for arrest is certainly "facially deficient." At the least, a warrant must contain information as to *why* a person may be seized.

The State rather baldly asserts that "So long at the police had 'reasonable grounds' for believing the warrant was properly issued….and still in effect….the exclusionary rule applies." (Appellant's brief, p. 31.) But what were the reasonable grounds the police had for believing in the validity of this warrant? Someone at dispatch told them a warrant existed

from Ashland County. The officers appear to have had no knowledge about what the warrant was for, geographic restriction, whether the subject could post money in lieu of being taken into custody or, apparently, who even issued the warrant. Was that reasonable?

To find that police officers act in good faith when carrying out a warrant that they have never seen renders completely meaningless the language from *Scull (*and *Eason*) that the warrant must not be facially invalid and must issue from a detached and neutral magistrate. Those requirements mean nothing if they can be ignored by simply allowing law enforcement to carry out a warrant without ever glancing at it. Law enforcement will never know that a warrant is "facially invalid" if they avoid looking at the face of the warrant. Officers would never even know if there were geographic restrictions on the execution of such a warrant.

Further, it would render Wis. Stat. §800.095(1)(b)(2) meaningless, because effectively no court would need to make the statutorily required findings before ordering incarceration.

There may be some argument that, in emergency situations where the life or safety of others is involved, law enforcement may not have time to look at a warrant before executing it. However, law enforcement clearly has the power to respond to emergency situations with no warrant at all.

There were no facts presented in this case to explain why law enforcement could not review Judge Eaton's warrant before executing it.

c. There is a need for deterrence of systemic violations of Fourth Amendment rights.

The State also asserts that the exclusionary rule either cannot or does not deter judges. (Appellant's Brief, p. 28 "When the police have committed no misconduct, there is nothing to deter by application of the exclusionary rule.") The State does not articulate why exclusion would not deter the type of systemic constitutional violation that seems to have been occurring in Ashland County. It strains credulity to believe that suppression won't, in fact, deter such future violations.

The circuit court aptly noted in its decision that no other case found by the court "considered judicial error on a wide administrative level." (R. 38, 16). The Bayfield County Circuit Judge also was "administratively aware that Ashland County follows the procedure that occurred in this case in almost all of its civil nonpayments….There may be hundreds of similar commitments of records." The Circuit Court also noted that "already known to this Court….the error in this case results in several, or dozens or hundreds of arrest warrants being issued in complete disregard for the applicable law." (R. 38, 17). In other words, this is not an isolated occurrence or an accidental oversight.

The State, like the circuit court judge, apparently could find no case wherein judicial error is occurring on a "wide administrative level" and yet is excused by the "good faith" of police. It is clear that such repeated, flagrant violation of citizens' fourth amendment rights must be addressed. In fact, members of the Supreme Court have pointed out the real distinction to be drawn in terms of judicial responses to violations of Fourth Amendment rights is between technical violations and "flagrantly abusive violations." *Brown v. Illinois,* 422 U.S. 590, 610, (S. Ct. 1975), Powell concurrence. "In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system." *Herring v. United States*, 555 U.S. 135, 147, 129 S. Ct. 695, 704, 172 L. Ed. 2d 496 (2009).

The circuit court judge found that unlawful warrants with no basis, such as the one relied upon in Mr. Kerr's arrest, were occurring on a systemic level.[4] It is not reasonable for law enforcement to rely on warrants

[4] The court should be aware that the court of appeals has stayed briefing in *State v. Stecker*, Case No. 2017AP1837-CR, at the request of the Attorney General's office pending the outcome of this matter. (R-App. 12-13) *Stecker* is another Bayfield County criminal case originating from an Ashland County arrest warrant. Defense counsel in *Stecker* made a motion to suppress based upon *State v. Kerr* and the State stipulated to facts for the suppression hearing (R-App. 9-10), and the circuit court granted the suppression. (R-App. 11). As far as the record reflects in the present matter, Mr. Kerr's case represents the first occasion when the defendant has raised the defense that these Ashland County warrants are void ab initio. It can only be presumed, based upon the circuit court's findings herein, that many more such warrants exist or have existed and that more arrests based upon these warrants have occurred in Ashland County than Bayfield County.

for failure to pay a fine in Ashland County that routinely lead to false arrests. ("Surely it would *not* be reasonable for the police to rely…on a recordkeeping system….that *routinely* leads to false arrests" (*Id.* at 146, citing concurrence in *Arizona v. Evans*, 514 U.S. 1, 17, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). "If a *widespread pattern* of violations were shown…there would be reason for grave concern." *Id.* citing concurrence in *Hudson v. Michigan*, 547 U.S. 586, 604, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006).)

The warrant for Mr. Kerr is the product of a widespread pattern of violations emanating from the Ashland County Circuit Court. This is not a one-time mistake, like the failure to update a computer system to reflect that a warrant has been recalled. (*Herring*, supra.) The Supreme Court specifically held that "when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way'." *Herring*, supra, at 147-148, citing *Leon*, supra, at 907-908, n.6, 104 S.Ct. 3405.

The State cannot argue that Mr. Kerr's warrant was an anomaly and the State has not provided information as to how many of these illegal warrants were issued, how many resulted in arrests and additional unrelated

charges, and most troublesome, how many of these warrants have not been vacated and remain pending.

The State does not assert that there was no widespread pattern of violations, but merely excuses this widespread pattern as being not the fault of law enforcement. As noted earlier, *Leon* cautions us that whoever procures a warrant is properly considered an "officer," and his or her bad faith is ascribed to those acting down the line.

More broadly, exclusion is appropriate in this case because there is a widespread violation of constitutional rights that must be deterred. It is true that there is no need for deterrence when there is a one-time or sporadic clerical error that leads to a false arrest (*Herring*, supra) or when the law is in flux at the time a warrant is issued such that the illegality of the warrant becomes clear only in retrospect (*Scull*, supra and *Horton*, supra). Suppressing evidence in such cases is very unlikely to prevent such things from happening in the future. Inadvertent mistakes in recordkeeping are just that, inadvertent, and there will always be developments in the law that cannot be foreseen. In this case however, with widespread constitutional violations, suppression does "pay its way." Dozens or perhaps hundreds of unlawful arrests can be prevented.

The sort of systemic violations that have been apparently occurring in Ashland County are, hopefully, a rarity. The closest analogy in the caselaw raised to this Court is, in fact, the *Hess* case out of Wisconsin. Even in that case, though, it was not clear if the judge issuing a meritless warrant with no statutory authority previously issued similar warrants. Given the findings of the circuit court in this case, it is uncontested that the Ashland County Judge has routinely issued unlawful warrants of the type used in the arrest of Mr. Kerr. The facts present in *Hess* are amplified in this case, making clear that there is even more of a need to deter what is systemic error and reckless disregard for the rights of citizens.

d. The Ashland County Judge did not act as a detached and neutral magistrate.

When "no oath or affirmation supports a search warrant; 'it is plainly evident that a magistrate or judge had no business issuing a warrant.'" *State v. Tye*, 2001 WI 124, ¶24, 248 Wis.2d 530 (internal citations omitted). A detached and neutral magistrate is necessary to "interpose the impartial judgment of a judicial officer between the citizen and the police and also between the citizen and the prosecutor…" *Walberg v. State*, 73 Wis.2d 448, 455, 243 N.W.2d 190 (1976). "In most situations, a sworn affidavit is necessary for a court to act as a detached and neutral magistrate when issuing an arrest warrant." *State v. Hess*, 2010 WI 82, ¶55. "This is true

even for warrants issued in civil cases." *Id.* "Civil bench warrants….require an affidavit demonstrating the existence of the requisite cause of action, and a person may not be arrested as a remedial sanction for contempt without notice and a hearing." *Id.* at ¶58, citing Wis. Stat. §§818.03, 785.03(1)(a), 785.04(1)(b).

Part of the conceptual difficulty with this case is due to the fact that the Ashland County Circuit Judge does not appear to have acted in a judicial capacity at all. He was not a detached and neutral magistrate reviewing evidence. Other than summary arrest for contempt committed in the actual presence of the court (Wis. Stat. §785.03(2)), a judge must be presented with evidence and make a finding of probable cause before authorizing imprisonment of a citizen. When a judge abandons his judicial role and actually creates or directs the creation of a warrant (as seems to have occurred routinely in Ashland County), the subsequent warrant is not entitled to good-faith protections.[5] The requirement of a detached and

[5] The failure of the Ashland County Circuit Court judge to act in a detached and neutral fashion has only become more evident since the events that gave rise to Mr. Kerr's arrest. On March 14, 2016, the United States Department of Justice issued a "Dear Colleague" letter to state court judges warning against incarcerating citizens for failure to pay fines, and stating that "the Department of Justice has a strong interest in ensuring that state and local courts provide every individual with basic protections guaranteed by the Constitution and other federal laws, regardless of his or her financial means." Despite having been sent this letter, the Bayfield County Court found on October 31, 2016 that Ashland County still "follows the procedure that occurred in this case in almost all of its civil nonpayments." R-App. 1-8.

Furthermore, Ashland County apparently continued this practice well into 2017, as evidenced by the stipulated facts in *State v. Stecker*, Case No. 2017AP1837-CR. After this second Bayfield

neutral magistrate has been in place since the good-faith exception was created in *Leon*, and it is difficult to envision a case where preserving that requirement is so vital as in the instant case.

CONCLUSION

State v. Hess is less than a decade old and addresses the same issue as in the present matter. If the state truly thought *State v. Hess* was wrongly decided, the state could have petitioned for review by the U.S. Supreme Court, but chose not to do so. The U.S. Supreme Court has not decided any matter since 2010 that has any impact on the holding in *State v. Hess*. As such, this court should adhere to *stare decisis*.

The State would have this court believe that so long as law enforcement officers who make an arrest are told there is a warrant for a citizen, any evidence obtained in the proceeding arrest is admissible. According to the State, even if the warrant is blatantly defective or has no basis in law (as is the case with Mr. Kerr's warrant), the good-faith exception excuses all constitutional violations. This does not comport with precedent, either on the federal or state levels, nor with common sense.

County case resulting in suppression of evidence due to deficient Ashland County warrants, Ashland County has apparently suspended its unconstitutional practice. (App. R-App. 10) It appears, therefore, that the Ashland County Circuit Court judge has been *deterred* by the suppression of evidence in these two cases.

By all appearances, there has been a systemic violation of constitutional rights in Ashland County. Someone at the courthouse (be it the judge or his judicial staff) has been procuring warrants that are not authorized at law. The result is an untold number of unconstitutional arrests. The good-faith exception does not apply to warrants that do not meet the "various requirements" to be valid to begin with. Even if it did, the good-faith exception does not apply in this case. First, there was demonstrable bad faith on behalf of whoever the "officer" was that procured the Kerr warrant. Second, there is a need to curb widespread constitutional violations of this ilk. This is precisely the type of flagrant constitutional violation that the exclusionary rule was meant to protect against.

Dated this 11th day of January, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE § 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced using the following font: I hereby certify that this brief and appendix produced with a proportional serif font. The length of this brief is 34 pages and 8,205 words from Statement of Case through Conclusion.

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH §809.80(3)(b)

§809.80(3)(b) I hereby certify that the brief and appendix were delivered to a 3rd-party commercial carrier, UPS, for delivery to the clerk of the Wisconsin Court of Appeals, for delivery within 3 calendar days, in compliance with §809.80(3)(b). Further, I certify that the brief and appendix were sent to all other counsel by US-mail this same date.

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CERTIFICATE OF E-FILE COMPLIANCE

I hereby certify that a true and accurate copy of this brief has been contemporaneously e-filed with the Court of Appeals.

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