No. 16AP2455

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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

REPLY BRIEF OF THE STATE OF WISCONSIN

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INTRODUCTION

Caselaw from both this Court and the U.S. Supreme Court makes clear that the exclusionary rule applies only when the interest in deterring *police* misconduct outweighs the substantial harms to society from suppressing probative evidence. In *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568, this Court upended this settled doctrine, holding that the protection of judicial integrity required suppressing evidence obtained by police in reasonable reliance on a void ab initio warrant, even when no police misconduct occurred. Given that *Hess* violates the bedrock principle that suppression can be justified only by deterrence of police misconduct, this Court should overrule *Hess*.

In his Response Brief, Kerr offers no persuasive reason for retaining *Hess* or suppressing the evidence in the present case. Kerr misunderstands the relationship between the Fourth Amendment and the exclusionary rule, quoting outdated dicta in support of the view that suppression is the default presumption. He also argues in favor of *Hess*' core rationale of protecting judicial integrity, even though that reasoning is contrary to the overwhelming body of law. And as to the present case, Kerr repeatedly castigates both the police who arrested him and the circuit court that issued the arrest warrant without placing his criticisms within the context of proper exclusionary-rule doctrine.

ARGUMENT

I. Kerr Offers No Legally Sustainable Defense For This Court's Decision In *Hess*

In its Opening Brief, the State described several principles that govern application of the exclusionary rule. The rule is a judicially created, prophylactic doctrine, designed to "compel respect" for certain constitutional rights. Opening Br. 14–16, 22–23 (quoting *Davis v. United States*, 564 U.S. 229, 236 (2011) (citation omitted), and citing *State v. Dearborn*, 2010 WI 84, ¶ 38, 327 Wis. 2d 252, 786 N.W.2d 97; *State v. Eason*, 2001 WI 98, ¶ 43, 245 Wis. 2d 206, 629 N.W.2d 625). It applies only in the limited circumstances when suppression's deterrent benefits outweigh its costs. Opening Br. 15, 22 (citing *Hudson v. Michigan*, 547 U.S. 586, 591–92 (2006); *Dearborn*, 2010 WI 84, ¶ 35). Importantly, the exclusionary rule can *only* ever apply to deter police, not judicial, misconduct. Opening Br. 17–19, 23 (citing *United States v. Leon*, 468 U.S. 897, 920–21, 926 (1984); *Eason*, 2001 WI 98, ¶ 52). After all, judges are not "'engaged in the often competitive enterprise of ferreting out crime'" and therefore "'have no stake in the outcome of a particular criminal prosecution,'" Opening Br. 15–16 (quoting *Arizona v. Evans*, 514 U.S. 1, 15 (1995), and *Leon*, 468 U.S. at 917, respectively), such that exclusion of evidence from that prosecution would affect their future behavior, Opening Br. 16 (citing *Leon*, 468 U.S. at 917). Consistent with these principles, when police reasonably rely upon a warrant that is later discovered to be

invalid, suppression is not warranted. Opening Br. 16–18, 23 (citing *Leon*, 468 U.S. at 920–21, 926).

These principles make clear that this Court should overrule *State v. Hess*, 2010 WI 82, which erroneously held that the exclusionary rule applies where a police officer reasonably relies upon a void ab initio warrant. Opening Br. 27–32. *Hess* is "unsound in principle," *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 99, 264 Wis. 2d 60, 665 N.W.2d 257, because it "'ignor[ed] the singular animating purpose of exclusion: deterrence of police misconduct,'" Opening Br. 28–29 (quoting *Hess*, 2010 WI 82, ¶¶ 75, 86 (Gableman, J, dissenting)). When the police have committed no misconduct, suppression of evidence provides no deterrent benefit. *See Leon*, 468 U.S. at 918–20; *Davis*, 564 U.S. at 236–37. *Hess* erroneously held that judicial misconduct was sufficient to justify suppression, contrary to the U.S. Supreme Court's clear holdings. Opening Br. 28–29 (citing *Leon*, 468 U.S. at 916–17 & n.18; *Herring v. United States*, 555 U.S. 135, 144 (2009)). The *Hess* lead opinion also erred by "'beg[inning] with a presumption of exclusion and look[ing] for an exception,'" instead of recognizing that the exclusionary rule applies only when its benefits outweigh its costs. Opening Br. 30 (quoting *Hess*, 2010 WI 82, ¶¶ 75, 78 (Gableman, J., dissenting)); *Hudson*, 547 U.S. at 591. And both the lead opinion and the concurrence in *Hess* treated void ab initio warrants differently than warrants invalid for other reasons, based on a distinction with no grounding in

exclusionary-rule jurisprudence. Opening Br. 30–31. Four Justices of this Court also subsequently undermined *Hess*, *see Johnson Controls*, 2003 WI 108, ¶ 98, by explaining in *State v. Scull*, 2015 WI 22, 361 Wis. 2d 286, 862 N.W.2d 562, that "'police misconduct [i]s a necessary predicate to . . . the exclusionary rule,'" Opening Br. 31–32 (quoting *Scull*, 2015 WI 22, ¶ 55 (Roggensack, J., concurring)).

Kerr's arguments in support of *Hess*' holding are based upon a fundamental misunderstanding of the relationship between the Fourth Amendment and the exclusionary rule. Kerr commits the same errors as did the lead opinion in *Hess*, erroneously "begin[ing] with a presumption of exclusion and look[ing] for an exception." *Hess*, 2010 WI 82, ¶¶ 75, 78 (Gableman, J., dissenting); *see* Resp. Br. 22. Kerr describes the exclusionary rule as presumptively applying every time a constitutional violation occurs, quoting *Mapp v. Ohio*, 367 U.S. 643 (1961), for the proposition that "evidence 'obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.'" Resp. Br. 12–13 (quoting *Mapp*, 367 U.S. at 655). But the U.S. Supreme Court has made clear that this overly "[e]xpansive dicta [from] *Mapp*" is *not* the law, thereby "reject[ing] th[e] reflexive application of the exclusionary rule." *Hudson*, 547 U.S. at 591 (citation omitted). Instead, the Court has explained that for the exclusionary rule to apply, "the deterrence benefits of suppression must outweigh its heavy costs." *Davis*, 564 U.S. at 237; *accord Dearborn*, 2010 WI 84, ¶ 35.

Kerr further errs by citing language from the Supreme Court's *Leon* decision to argue that the so-called "good-faith exception is inapplicable to warrants that do not meet the requirements to be valid in the first place." Resp. Br. 13. The warrant in *Leon* did not "meet the requirements to be valid" because it was not supported by probable cause. *Leon*, 468 U.S. at 903–04. Nevertheless, the Court held that suppression was inappropriate because the police acted in objectively reasonable reliance on the warrant. Opening Br. 16–17 (citing *Leon*, 468 U.S. at 920–21, 926). Put another way, Kerr's repeated refrain that *Leon* "left untouched the requirements for a valid warrant," Resp. Br. 14, 18, 28, is *irrelevant to the exclusionary-rule analysis* because exclusion does not depend on the type of defects in the warrant, but on whether police acted objectively reasonably. Opening Br. 16–19 (citing *Leon*, 468 U.S. at 920–23, 926).

Kerr is similarly wrong to defend *Hess* on the ground that the exclusionary rule can apply to "preserve judicial integrity." Resp. Br. 12. As the Supreme Court explained in *Davis*, the "rule's *sole purpose* . . . is to deter future Fourth Amendment violations." 564 U.S. at 236–37 (emphasis added). Four Justices of this Court in *Scull* made the same point, explaining that "protection of judicial integrity, standing alone without underlying police misconduct, is [not] sufficient to permit courts to suppress relevant evidence." 2015 WI 22, ¶ 56 (Roggensack, J., concurring). Kerr does not attempt to explain why the four-Justice concurrence in *Scull*

was incorrect, instead merely pointing out that *Scull* did not involve a void ab initio warrant. Resp. Br. 27–29. But the critical point is that the four Justices' *legal* conclusion—that the "protection of judicial integrity, standing alone" is insufficient to justify exclusion, *Scull*, 2015 WI 22, ¶ 56 (Roggensack, J., concurring)—is incompatible with *Hess*' reasoning.

In all, Kerr provides no legally defensible reason why the exclusionary rule should apply to searches conducted in reasonable reliance on void ab initio warrants (such as in this case and *Hess*) when it clearly does not apply to searches based upon warrants unsupported by probable cause (such as in *Leon*). As the State explained in its Opening Brief, the type of judicial error is immaterial for purposes of the exclusionary rule; what matters is whether *police* acted objectively reasonably in relying upon the warrant. Opening Br. 15–19. Of course, when the police have reason to know that a warrant is invalid—whether that reason be lack of probable cause or voidness ab initio—their reliance on the warrant is not reasonable and suppression can be appropriate. *See Herring*, 555 U.S. at 145–46. But that analysis looks to the conduct of the police, not judicial actors, contrary to *Hess*' approach.

Finally, Kerr is wrong when he argues that federal and state caselaw supports *Hess*' holding. As the State pointed out in its Opening Brief, every federal court of appeals to have addressed the issue (as well as several state supreme courts) has held that the exclusionary rule does not apply when police

reasonably relied on a void ab initio warrant. Opening Br. 19–21. Just last week, the Fourth Circuit adopted the same approach. *See United States v. McLamb*, --- F.3d. ----, 2018 WL 541851 (4th Cir. Jan. 25, 2018). The only federal case that Kerr can muster to the contrary—*United States v. Vinnie*, 683 F. Supp. 285 (D. Mass. 1988)—has been displaced by the First Circuit's recent decision in *United States v. Levin*, 874 F.3d 316, 321–24 (1st Cir. 2017). With regard to Kerr's state-court authorities, Resp. Br. 15–17, *Connecticut v. Surowiecki*, 440 A.2d 798, 799 (Conn. 1981), and *Michigan v. Hentkowski*, 397 N.W.2d 255, 258–59 (Mich. Ct. App. 1986), involved *unsigned* warrants, which would have been facially invalid and thus unreasonable for police to rely upon (assuming police knew the warrants were unsigned). None of the other state court decisions applied the balancing test required by U.S. Supreme Court precedent and instead improperly engaged in a "reflexive application of the exclusionary rule," *Hudson*, 547 U.S. at 591 (citation omitted), just like the *Hess* lead opinion did, *see South Dakota v. Wilson*, 618 N.W.2d 513, 520 (S.D. 2000); *Montana v. Vickers*, 964 P.2d 756, 761–62 (Mont. 1996); *Illinois v. Turnage*, 642 N.E.2d 1235, 1238–41 (Ill. 1994); *Rhode Island v. Nunez*, 634 A.2d 1167, 1170–71 (R.I. 1993).

II. There Is No Basis For Excluding The Evidence Here Because The Police Acted Reasonably

If this Court overrules *Hess* and holds that evidence obtained in reasonable reliance on a void ab initio warrant

should not be excluded, the proper result in this case is straightforward: the evidence is admissible. Opening Br. 32–35. The police acted reasonably in relying upon the arrest warrant, as a "reasonably well trained officer would [not] have known that the search was illegal in light of all of the circumstances." *Herring*, 555 U.S. at 145 (citation omitted). As the circuit court explained below, Kerr never "allege[d] even the slightest hint of misconduct or wrongdoing by law enforcement in this matter." App. 3. The Bayfield police appropriately responded to the 911 call from Kerr's phone and dispatch properly informed the responding officers of the outstanding warrant. R.12:3, App. 32, 41–42; Opening Br. 33–34. Once officers identified Kerr, they "clearly could not ignore" "the outstanding arrest warrant from Ashland County," App. 3, and so arrested Kerr and conducted a standard search incident to arrest, App. 21, 30; Opening Br. 33–34. Nothing about the warrant, had the officers had the opportunity to review it, *but see* App. 32, 42–43, would have suggested to them that it was defective, *see* App. 21; Opening Br. 34. As the circuit court explained, the arresting officer "followed appropriate and reasonable police procedures and conduct during his interactions with [Kerr]." App. 3.

In his Response Brief, Kerr asserts that the officers who executed the warrant engaged in misconduct but does not come close to showing that the circuit's court's contrary conclusion was incorrect. Kerr claims that the warrant was "facially deficient" because the warrant did not provide

enough information to justify the arrest, or that the officers should have done something more to investigate the warrant's validity. Resp. Br. 31–34. That is simply wrong; the warrant was signed by a judge with personal knowledge of the underlying cause for the arrest, *see* Wis. Stat. §§ 785.03(2), .04(2)(b); *Minnesota v. Mohs*, 743 N.W.2d 607, 612–13 (Minn. 2008) (collecting cases); 22 C.J.S. *Criminal Procedure and Rights of Accused* § 185, and named the particular person to be seized, Wis. Const. art. I, § 11. Kerr's suggestion that the warrant required "an attached finding that [ ] Kerr had the ability to pay and failed to do so" to be facially valid has no basis in the law, and Kerr cites no authority in support. Resp. Br. 32. Kerr's additional claim that "[f]ailure to pay a fine is not a basis for incarceration," Resp. Br. 32, is similarly incorrect, as Wisconsin law permits courts to order imprisonment for failure to pay fines when certain prerequisites are met, *see* Wis. Stat. §§ 66.0113(3)(d); 778.09; 800.095(1)(b). More generally, Kerr's arguments against the officers' action here are foreclosed by the U.S. Supreme Court decisions in *Evans* and *Herring,* which held that police may reasonably rely on the record of a warrant in a computer database without having seen the warrant personally. *Evans*, 514 U.S. at 3–4; *Herring*, 555 U.S. at 137.

Kerr also repeatedly casts aspersions on the Ashland County circuit court that issued the arrest warrant, but none of this overwrought rhetoric justifies application of the exclusionary rule. Resp. Br. 21 & n.3, 25, 30–31, 34–40.

First, Kerr claims that either the Ashland County judge or the court staff acted as a law enforcement "'officer'" for purposes of the exclusionary rule because the arrest warrant was issued by the court administratively rather than at the request of police or a prosecutor. Resp. Br. 21 n.3, 30. Kerr cites no authority for his novel assertion that judges transform into police officers when they issue bench warrants. Judges regularly issue bench warrants, *see, e.g.*, Wis. Stat. §§ 785.03(2), .04(2)(b), and that standard exercise of judicial authority does not render the judge an adjunct of law enforcement. For purposes of exclusionary-rule analysis, what matters is that the judge has no interest in "ferreting out crime," *Evans*, 514 U.S. at 15, or in discovering evidence that will affect the "outcome of a [ ] criminal prosecution" as a member of law enforcement might, *Leon*, 468 U.S. at 917.

Second, Kerr claims that the judge here failed to act in a detached and neutral manner, Resp. Br. 39, and conducted himself in "bad faith," Resp. Br. 21 n.3, 31. Kerr points to no evidence that what occurred here was meaningfully different from a typical issuance of a void ab initio warrant based upon a mistake of law, including in cases like *Hess* or in the numerous federal and state void ab initio cases that the State has cited. *See* Opening Br. 19–21. So far as the record reflects, and so far as the police officers who executed the arrest reasonably knew, the judge who issued the arrest warrant had no stake in the outcome of criminal prosecutions and did not do anything indicating that he was abandoning

his judicial role; accordingly, the judge necessarily acted in a "detached and neutral" manner for purposes of the exclusionary-rule analysis. *Leon*, 468 U.S. at 913, 917, 923. The proper vehicle for dealing with such alleged errors is this Court's supervisory power over circuit courts, not depriving prosecutors of probative evidence of criminal wrongdoing. *See id.* at 917 n.18.

Finally, Kerr argues that applying the exclusionary rule here is necessary to deter future unlawful arrest warrants, Resp. Br. 34–38, but this argument is contrary to controlling law. Kerr focuses on the allegedly systemic nature of the Ashland County circuit court's error, but there is no record evidence supporting Kerr's assertion that circuit courts in Ashland County or elsewhere are systemically issuing warrants in error. *See* App. 17 (circuit court below explaining that the "record does not reflect" a systemic problem in Ashland County, but that the circuit court here was personally aware that Ashland County generally follows this same procedure). In any event, while Kerr cites *Herring* for the claim that the exclusionary rule applies when an error is systemic, Resp. Br. 34–38, *Herring* explained that systemic errors in *police* recordkeeping could trigger the exclusionary rule, not that systemic errors by *courts* could do so. 555 U.S. at 146. Again, judges and court staff "have no stake in the outcome of a particular criminal prosecution," and thus exclusion would have no deterrent effect on them. *Evans*, 514 U.S. at 14–15. A clear holding by this Court that the warrant

here was void ab initio should be sufficient to prevent lower courts from issuing such warrants in the future. *See Leon*, 468 U.S. at 925.

CONCLUSION

The decision of the circuit court should be reversed.

Dated this 29th day of January, 2018.

Respectfully submitted,

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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 2,847 words.

Dated this 29th day of January, 2018.

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

I hereby certify that:

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I further certify that:

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

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 29th day of January, 2018.

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