IN THE SUPREME COURT OF WISCONSIN

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No. 2008-AP-0658-CR

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STATE OF WISCONSIN,

*Plaintiff–Respondent,*

*v.*

MICHAEL A. SVEUM,

*Defendant–Appellant-Petitioner.*

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# BRIEF AND SHORT APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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On Review from Wisconsin Court of Appeals,
District IV

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1. When police officers three times attached Global Positioning System (GPS) devices to Michael Sveum's car in the driveway of the home in which he resided, and then electronically monitored that car's movement in public and private places for five weeks, did they effect a "seizure" or a "search," or both, within the meaning of the Fourth Amendment to the United States Constitution?

The circuit court held that there was no search for purposes of the Fourth Amendment. R116:106.[1] The Wisconsin Court of Appeals held that there was neither Fourth Amendment search nor seizure. ***State v. Sveum***, 2009 WI App 81, ¶19, 319 Wis. 2d 498, 769 N.W.2d 53, 60.

2. Does the Wisconsin Electronic Surveillance Control Law, WIS. STAT. §§ 968.27—968.31, require police to obtain judicial approval to place a GPS device on a car and to monitor its travel?

The circuit court held that WESCL does not apply to the police conduct here. R113. The court of appeals agreed that WESCL does not apply, because a GPS unit is a "tracking device" excepted from the definition of "electronic communications." ***Sveum***, 2009 WI App 81, ¶¶24-30.

[1] Sveum uses this format for citations to the record and its docket numbers.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court already has set oral argument. The reasons for granting review also counsel publication, which rightly is this Court's usual practice.

## STATEMENT OF THE CASE

***Nature of the Case.*** This is a direct appeal from Michael Sveum's criminal conviction in Dane County Circuit Court. On October 13, 2009, this Court granted review to determine whether the warrantless placement of a Global Positioning System (GPS) device on a car by the police, and the subsequent continuous monitoring of the car's location in public and private places, violated the Fourth Amendment to the United States Constitution. It also granted review on the question whether the Wisconsin Electronic Surveillance Control Law, WIS. STAT. §§ 968.27 through 968.31, requires judicial approval before police place a GPS device on a car.[2]

***Procedural Status.*** The state charged Sveum in Dane County Circuit Court with aggravated stalking in 2003. R1, R9. He had a jury trial and lost, R58, R62-64, but before and after trial preserved the challenges at issue here. R7, R 23, R, 24, R29,, R30, R93, R95. Following a timely post-conviction motion, the circuit court, Hon. Steven D. Ebert presiding, denied post-conviction relief on the issues this Court has agreed to review and on others. R126.

Sveum then pursued a timely *pro se* appeal to the Wisconsin Court of Appeals, District IV. The court of appeals affirmed his conviction. ***State v. Sveum***, 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53. It expressly addressed and rejected the two issues on which Sveum sought this Court's review. ***Sveum***, 2009 WI App 81, ¶¶6-22 (Fourth Amendment issue), ¶¶23-30 (WESCL issue).

***Disposition in Courts Below.*** Sentenced to 7-1/2 years of initial confinement for this aggravated stalking conviction, with 5 years of

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[2] In his *pro se* petition for review, Sveum cited WIS. STAT. §§ 968.27 through 968.37. Nothing beyond § 968.31 arguably applies here, though.

extended supervision to follow, R77, R81, Sveum is in prison now. As he notes above, the Wisconsin Court of Appeals affirmed his conviction.

***Facts.*** On April 22, 2003, police obtained a court order allowing them to place a GPS device on Michael Sveum's car, to enter and re-enter the car, to replace the GPS unit's batteries as needed, and to monitor Sveum's movement in the car for up to 60 days. R116:31 & Ex. 18. Faced with concerns that this court order was both overbroad, ***Sveum***, 2009 WI App 81, ¶6, and technically not a warrant, ***id.*** at ¶6 n.3, the Wisconsin Court of Appeals eventually addressed only the question whether the police conduct constituted a Fourth Amendment search or seizure at all. ***Id.*** at ¶6.

After obtaining the order, in the early morning hours on April 23, 2003, four police officers entered the Cross Plains property where they believed Sveum was living. R116:86-87. His car was in the driveway. That driveway was approximately the length of two cars with a garage at the end. Sveum's car was parked close to the garage, pointed toward the street. R116:73. The rear of the car was "only a couple of feet" from the closed garage door. R116:74. Officers approached the car and attached a GPS device to the rear undercarriage of the car with a magnet and tape. R116:42-43. Attaching the device involved officers lying on their backs under the car. R116:74. One of the officers, Det. Mary Lou Ricksecker, earlier had consulted with a DCI agent who assisted in attaching the GPS device to Sveum's car. That agent had reported to Ricksecker that he assisted other police agencies in placing GPS devices "quite routinely and often." R116:41.

Because the GPS device ran on a battery, it required replacement every 14-21 days. R116:45. Accordingly, after perhaps two weeks or a bit less, officers went to the home again, removed the original device from Sveum's car in the driveway, and attached a new one in the same

manner as the first. R116:46, 72, 86. Officers then downloaded the information from the first GPS device. R116:46-47.

They repeated this procedure once more, removing the second GPS device and attaching a third. R116:47, 72. Officers removed that last device from the car on May 27, 2003. R116:47. At least some information from the GPS devices made its way into a May 27 application for two search warrants directed at Sveum. R116:51-52.

Sveum later moved to suppress the results of the GPS devices and of three search warrants[3] that followed the use of the GPS devices. R23, 24, R29, R30.

After hearing testimony from two police officers at a suppression hearing on November 4, 2005, the trial court denied Sveum's motions. R113, R116. The court held that it could not find that going into the driveway was a "violation of curtilage." R116:106. Further, as to the GPS devices, the court found that no search occurred. R116:106.

A jury later convicted Sveum. R68 On post-conviction motion, the circuit court again refused to suppress the results of the GPS devices. R93, R96 (motion), R113 (order).

The Wisconsin Court of Appeals affirmed Sveum's conviction. It "agree[d] with the State that neither a search nor a seizure occurs when the police use a GPS device to track a vehicle while it is visible to the general public." ***Sveum***, 2009 WI App 81, ¶8. The court of appeals also agreed "with the State that the police action of attaching the GPS device to Sveum's car, either by itself or in combination with

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[3] A third warrant to search the hard drive and tower of a computer followed the two May 27, 2003 warrants. R116:58-59, Ex. 23.

subsequent tracking, does not constitute a search or seizure." ***Id.*** at ¶12.

Responding to Sveum's argument that because the GPS device also transmitted the location of the car when out of public view, all tracking information should be suppressed, ***id.*** at ¶16, the court of appeals disagreed. While the court of appeals conceded that the police presumably obtained location information while Sveum's car was inside areas not open to surveillance, it concluded first that, "there is no indication that this same information could not have been obtained by visual surveillance from outside these enclosures. Such surveillance could have told the police when Sveum's car entered or exited his garage and the garage at his workplace and, therefore, informed them when his car remained in those places." ***Id.*** at ¶17. Second, it noted that Sveum suggested no reason why all tracking information should be suppressed even if information about the car's location in enclosures should have been suppressed. ***Id.*** at ¶18.

In short, the court of appeals concluded "that no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view." ***Id.*** at ¶19. Having reached that result, the court of appeals added:

> We are more than a little troubled by the conclusion that no Fourth Amendment search or seizure occurs when police use a GPS or similar device as they have here. So far as we can tell, existing law does not limit the government's use of tracking devices to investigations of legitimate criminal suspects. If there is no Fourth Amendment search or seizure, police are seemingly free to secretly track *anyone's* public movements with a GPS device.

***Id.*** at ¶20 (italics in original).

After noting similar concerns about private use of GPS surveillance devices, the court of appeals "urge[d] the legislature to explore imposing limitations on the use of GPS and similar devices by both government and private actors." ***Id.*** at ¶22.

Addressing Sveum's separate claim that the use of the GPS device here violated Wisconsin's Electronic Surveillance Control Law, the court of appeals held that the GPS device fell within the exclusion for "Any communication from a tracking device." WIS. STAT. § 968.27(4)(d); *see* ***Sveum***, 2009 WI App 81, ¶¶24-29.

Sveum responded with a *pro se* petition for review in this Court.[4] His petition presented two issues. First, "Does the warrantless secret placement of a Global Positioning System (GPS) device on a vehicle by the police, and its subsequent 24-hour a day recording of the vehicle's location on public roads and inside private premises, violate the Fourth Amendment to the United States Constitution?" Second, "Does the Wisconsin Electronic Surveillance Control Law, codified at Wis. Stat. §§ 968.27-.37, require the police to obtain judicial approval to place a GPS device on a vehicle to record its travels?"

This Court granted review and appointed *pro bono* counsel for Sveum.

Sveum's argument refers to additional facts as necessary.

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[4] Although Sveum had counsel for most steps in the trial court, he was without counsel in post-conviction proceedings, R93, R95, in the court of appeals, and on petition for review in this Court.

## ARGUMENT

### I. GPS AND THE FOURTH AMENDMENT.

#### A. *Overview of GPS Technology.*

The Court might begin by understanding something about GPS technology and its rapid advance. Most simply, GPS is a satellite-based navigation system. R115:33-37. Present applications of GPS technology to military, commercial and consumer products are countless. At a cost of more than $10 billion, the United States Department of Defense developed GPS originally for military use. Scott Pace *et al.*, THE GLOBAL POSITIONING SYSTEM: ASSESSING NATIONAL POLICIES 1-2 (Rand 1995). "The purpose of this massive effort was to provide a highly accurate, secure, reliable way for U.S. forces to navigate anywhere in the world, without having to reveal themselves through radio transmissions." Pace *et al.*, GPS: ASSESSING NATIONAL POLICIES at 1.

But today GPS guides much more than military materiel and personnel. It has found its way into cell phones, cameras, surveying equipment, navigational aids for airplanes and passenger vehicles, tracking devices for management of truck fleets, gadgets for tracking dogs or children, and even tools for monitoring sex offenders. *See* WIS. STAT. § 301.48; *see generally*, David Schumann, *Tracking Evidence with GPS Technology*, 77 WIS. LAWYER 5 (2004). The device can be active or passive, depending on whether the application calls for documenting the travels of a subject in real time or in historical terms.

GPS consists of three different components: a space segment, a control segment, and a user segment. Pace *et al.*, GPS: ASSESSING NATIONAL POLICIES at 1-2; Schumann, *supra*. The first two

are under government control. The space segment is composed of a minimum of 24 geo-synchronous satellites that follow the same orbital track and configuration over any point on earth in less than 24 hours. The satellites orbit the earth in six orbital planes with at least four satellites in each that are equally spaced sixty degrees apart and are inclined at about fifty-five degrees with respect to the equatorial plane. At any point in time, this means that the space segment includes between five and eight satellites visible from any point on earth. The satellites continuously transmit signals from space.

The control segment is the second part of GPS. That control segment is based at a master control facility at Schriever Air Force Base in Colorado. The control facility measures signals coming from the satellites, which are then incorporated into orbital models for each satellite. The stations measure precise orbital data and determine satellite clock corrections for each satellite which data is then returned to the satellite so that, in turn, the satellite sends back subsets to GPS receivers by radio signal. Schumann, *supra*; Pace *et al.*, GPS: ASSESSING NATIONAL POLICIES at 1-2.

The final component of the GPS system is the user segment. GPS receivers, whether installed in cell phones, OnStar, GPS navigational aids or emergency locating beacons convert data received from the satellites into position, velocity and time estimates. The non-military uses of GPS have exploded since the 1995 Rand Institute report that Sveum cites above. Some of those uses are purely commercial. But some involve domestic police surveillance—an application hardly foreseen just more than a decade ago. The potential uses of GPS technology in policing and surveilling the citizenry got barely a mention in that 300+ page Rand Institute study, including appendices. *See* Pace *et al.*, GPS: ASSESSING NATIONAL POLICIES at 15.

Today GPS technology in fact provides police with a powerful and inexpensive method to track remotely in great detail the

movements of an individual over a prolonged period of time, whether in public or private areas. As a practical matter, GPS does much more than merely augment the senses of police officers. The technology provides a complete replacement for human surveillance. It permits round-the-clock surveillance at nominal cost. The technology enables police to monitor cars in private places and on public roads in essentially unlimited numbers.

And GPS enables police surveillance for unlimited time. Consider Wisconsin. Some child sex offenders now are subject to lifetime GPS surveillance. WIS. STAT. § 301.48(2). Monitoring the every movement of ex-offenders for the rest of their lives would have been wholly infeasible, as a budgetary matter if not a technological one, less than two decades ago.

This technology far exceeds the capability of devices that the police used when the United States Supreme Court last examined the Fourth Amendment implications of radio tracking beacons. ***United States v. Knotts***, 460 U.S. 276 (1983); ***United States v. Karo***, 468 U.S. 705 (1984). Both in ***Knotts*** and in ***Karo***, human surveillance was necessary for the electronic beepers to fulfill their purpose. Here, advances in technology allow police to detail investigating officers to other cases while the GPS device collects information that officers can download later. The technology does not require police officers to follow or make any personal observations of the subject once they install the device. *See also* ***United States v. Garcia***, 474 F.3d 994, 998 (7th Cir. 2007) (noting that GPS permits "wholesale surveillance" and commenting, "Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive").

The device that police officers attached to Sveum's vehicle collected location and directional data. R115:33. It could not identify who was operating the car. R115:37. Before the battery life expired

officers removed the device and downloaded the data onto a police computer. R116:45. The GPS tracking unit installed on Sveum's car automatically recorded movements and location regardless whether the automobile was in motion. R115:35; R116:45-46 ("If the vehicle is in motion, the device can be set at a variance of time to record that location of that vehicle and it can be as short as you want it from ten seconds to up to every two minutes that if the vehicle is in motion, the device will click and record where that vehicle is located"). The police then translated accumulated data about the car's movements into maps that graphically illustrated where the car had gone in those five weeks. R115:34, Ex. 2.

The upshot of the device's simplicity is that today police can, without court oversight, track unlimited numbers of people for days, weeks, months or years without officers leaving the station house. However, as the Supreme Court has warned, "'[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.'" ***Arizona v. Gant***, 129 S. Ct. 1710, 1723 (2009), quoting ***Mincey v. Arizona***, 437 U.S. 385, 393 (1978).

**B.** ***Searches.***

1. Given the potential for widespread, even indiscriminate, tracking of thousands, or hundreds of thousands, of citizens with relatively cheap GPS units, the Wisconsin Court of Appeals' concerns were serious. *See* ***Sveum***, 2009 WI App 81, ¶¶20-22. But the court of appeals' basic conclusion—that the monitoring here did not invoke Fourth Amendment protections—is at least partly at odds with its worries about overbroad police surveillance. At bottom, the interest the court of appeals identified is privacy; a rightful wariness of government snooping. That is the very concern that animates the Fourth Amendment and its assurance against unreasonable searches and seizures. *See, e.g.,* ***Minnesota v. Dickerson***,

508 U.S. 366, 380 (1993) (Scalia, J., concurring) ("The purpose of the [Fourth Amendment], in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable'"). Yet the court of appeals found the Fourth Amendment an idle bystander to the prolonged police surveillance here, which Det. Ricksecker quoted a DCI technical agent as admitting Wisconsin police agencies engage in "quite routinely and often." R116:41.

The Wisconsin Constitution might address this issue, but Sveum's *pro se* petition for review and this Court's October 13, 2009 order together bar counsel from arguing so here.[5] Sveum notes only that the highest courts in other states have begun to take similar concerns seriously, holding that GPS tracking constitutes a search or seizure for purposes of state constitutional analogs to the Fourth Amendment. *See* ***Commonwealth v. Connolly***, 454 Mass. 808, 913 N.E.2d 356 (2009) (installation and subsequent monitoring of GPS tracking device placed in defendant's minivan was a seizure under the state constitution); ***People v. Weaver***, 12 N.Y.3d 433, 909 N.E.2d 1195 (2009) (placement of GPS tracking device on defendant's automobile and subsequent monitoring of automobile's location was a search requiring a warrant under state constitution); ***State v. Jackson***, 150 Wash. 2d 251, 76 P.3d 217 (2003) (installation of GPS device on

[5] Sveum's *pro se* petition for review addressed only the Fourth Amendment, not Article I, § 11 of the Wisconsin Constitution. This Court's order granting review then forbade the defendant-appellant-petitioner to "raise or argue issues not set forth in the petition for review unless otherwise ordered by the court." ORDER at 1 (Wis. Sup. Ct. October 13, 2009). Counsel accordingly cannot argue here that the Wisconsin Constitution provides broader protection than the Fourth Amendment, if in fact the Fourth Amendment permits the GPS monitoring at issue here. But Article I, § 11 remains open to this Court's consideration.

defendant's automobile involved a search and seizure requiring a warrant); ***State v. Campbell***, 306 Or. 157, 759 P.2d 1040 (1988) (use of beeper to locate automobile belonging to burglary suspect was a search under Oregon constitution and violated defendant's constitutional rights absent warrant or exigency).

Within the scope of Sveum's petition and this Court's order granting review, the Court could adapt the reasoning of ***Connolly***, ***Weaver*** and ***Jackson*** as to the Fourth Amendment's protection against unreasonable searches. Those decisions make a compelling case that the GPS surveillance here is a search within the Fourth Amendment's ambit.

Neither ***Knotts*** nor ***Karo*** foreclose the conclusion that this GPS device resulted in searches within the scope of the Fourth Amendment. Both cases concerned older beeper technology that required active human involvement, tracking the beepers' emitted signals with a receiver. ***Knotts***, 460 U.S. at 277-79; ***Karo***, 468 U.S. at 708-10. Moreover, in ***Knotts***, the defendant who sought suppression arguably had no privacy interest at stake: the beeper was in a drum, with the consent of the seller of the drum, and the defendant was not the buyer or in possession of the drum until it entered his cabin. When it did, agents no longer monitored the beeper. ***Knotts***, 460 U.S. at 278-79, 284-85. The facts were similar in ***Karo***, except that agents did monitor the beeper once the drum was inside a home that several defendants shared. But the Supreme Court distinguished ***Knotts*** and held that monitoring the beeper inside the home *was* a warrantless search that the Fourth Amendment barred. ***Karo***, 468 U.S. at 714-19.

Here, the police affixed the GPS units to Sveum's car and thrice entered private property where he resided to attach the devices. Plainly Sveum had a privacy interest in his car, and in the home if police were within the curtilage when they attached the GPS devices. As he notes above, too, the GPS technology does not rely on human or

visual surveillance, so its potential intrusiveness is greater than the beepers in ***Knotts*** and ***Karo***. Finally, as in ***Karo***, the police here presumably obtained GPS monitoring information about Sveum's movements in his car while it was in private places. *See* ***Sveum***, 2009 WI App 81, ¶17.

2. Even assuming, though, that installation of the GPS unit on Sveum's car was not a search, the entry to his property surely was. Although the trial court declined to find that officers entered the curtilage of the home, R116:106, that conclusion clearly was erroneous.

Curtilage is a question of constitutional fact as to which this Court employs a two-step standard of review. ***State v. Martwick***, 2000 WI 5, ¶¶2, 16-24, 231 Wis. 2d 801, 810-14, 604 N.W.2d 552, 556-58. This Court will review the circuit court's findings of historical fact only for clear error, including evaluation of the four factors that the United States Supreme Court laid out in ***United States v. Dunn***, 480 U.S. 294, 301 (1987). ***Martwick***, 2000 WI 5, ¶24, 231 Wis. 2d at 814, 604 N.W.2d at 558. Then it will review *de novo* the ultimate determination of the extent of curtilage. ***Id.***

In ***Dunn***, the Supreme Court identified four factors for "particular reference" in separating curtilage from public areas or open fields. These are:

> [T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

***Dunn***, 480 U.S. at 301.

The undisputed testimony was that the driveway of the home where Sveum stayed was relatively short: about two car-lengths. R116:73. Officers crawled under the rear of Sveum's car, which was "only a couple of feet" from the garage door because the car was backed into the driveway. R116:74.

That area was very close to the home. The back of the car was within two feet of the garage door. The garage itself was attached to the single family ranch home at the north end. R116:48, Ex. 19 at 1 (complaint for search warrant). The two feet between the car and the garage was within the zone of the home's intimate activities. Basketball hoops, flower beds, vegetable gardens, sandboxes or swingsets, and patio furniture all commonly are farther than two feet from a garage door or a wall of the house, yet emblematic of the private activity that makes a house one's home. For that matter, the police approached the home even closer than Sveum had parked his car, and parking a car nearby for safekeeping is among the activities of home life.[6] The manner in which Sveum placed his car also tended to protect its rear end from public view.

In sum, the space between car and garage was a place in which the home's occupants had both a subjective and an objectively reasonable expectation of privacy. If Sveum or his mother had looked out of the window in the dead of night to see people lurking within two feet of their garage door and crawling under the car, they surely would have taken those people as prowlers and called the police or taken other action to protect their property and privacy. To the extent that the circuit court's historical findings are inconsistent with the undisputed facts elicited at the suppression hearing and set out here, the circuit court clearly erred.

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[6] The Court may consider the reality that, for many homeowners, a car is their most expensive possession after their home.

Further, this Court independently should conclude that the area here was within the curtilage. If the space within two feet of an attached garage, and behind a resident's parked car, is not a home's curtilage, it is hard to imagine what is. A home's curtilage cannot be so stingily understood today that it extends less than an arm's-length from the detached, single family home itself. So even if placing the GPS unit was not a search, entering the property of this private home as the police did three times to place the unit was a search.

### C. *Seizure: The Overlooked Simplest Ground.*

There is a still simpler concern that the courts below largely overlooked, so Sveum applies Occam's Razor. Physically placing the GPS devices here inescapably entailed temporary seizures of Sveum's car. Those seizures fit comfortably within the class of temporary seizures to which the Fourth Amendment applies, under longstanding, stable precedent of the United States Supreme Court.

Sveum also explains why the GPS unit itself, once installed on his car by temporary, physical seizure, constituted a related but additional electronic seizure. That device anchored Sveum's car to an electronic tether with government agents at the other end, just as surely as a collar anchors a dog to a leash. That the leash here was electronic, not woven rope, and that it had almost limitless length made it no less a tether by which the police had Sveum's movements constantly in hand.

As Sveum's case comes to this Court, those seizures were without a valid warrant. The Wisconsin Court of Appeals tacitly treated them that way. As warrantless seizures, the state—not Sveum—had the burden of justifying them by pointing to a recognized exception to the Fourth Amendment's warrant requirement. The state did not do that.

Failing that burden, the state still might have tried to avoid application of the exclusionary rule by proving an independent source for the same information that the GPS unit provided, or by convincing a court that discovery of that information or the materials it later seized pursuant to the May 27 search warrants was inevitable. The court of appeals erred in intimating that Sveum bore the burden of disproving an independent source or inevitable discovery. *See* ***Sveum***, 2009 WI App 81, ¶¶16-17. The state, which instead had that burden, never sought to prove an independent source or inevitable discovery.

On the solid foundation of the United States Supreme Court's long interpretation of the Fourth Amendment, then, the state cannot escape exclusion of the products of these warrantless seizures, which fall into no recognized exception to the warrant requirement and have not the saving grace of an independent source or inevitable discovery. This Court should reverse the court of appeals' decision and remand.

## II. PLACING THREE GPS DEVICES INVOLVED TEMPORARY "SEIZURES" OF SVEUM'S CAR WITHIN THE SCOPE OF THE FOURTH AMENDMENT, AS DID ELECTRONICALLY MONITORING THE CAR IN PRIVATE PLACES.

### A. *The Fourth Amendment and Temporary Seizures.*

The text of the Fourth Amendment provides in full:

> The 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.

The threshold question here is what governmental interferences with possessory interests or detentions the Fourth Amendment covers. In other words, what is a seizure? The court of appeals found no seizure within compass of that amendment. ***Sveum***, 2009 WI App 81, ¶¶8, 12, 19. The reasonableness of a seizure is a question this Court need address only if it first finds some "seizure" within the meaning of the Fourth Amendment.

A quite broad array of temporary governmental interferences with things and people invoke the Fourth Amendment's protection. As to things, "A 'seizure' occurs when there is some meaningful interference with an individual's possessory interests in that property." ***United States v. Jacobsen***, 466 U.S. 109, 113 (1984); ***Karo***, 468 U.S. at 712. A seizure of a person is "meaningful interference, however brief, with an individual's freedom of movement." ***Jacobsen***, 466 U.S. at 113. n.5.

Police actions within the Fourth Amendment's understanding of "seizure" include "seizures that involve only a brief detention short of traditional arrest." ***Reid v. Georgia***, 448 U.S. 438, 440 (1980) (per curiam). Short detentions solely to secure fingerprints are seizures within the meaning of the Fourth Amendment. ***Davis v. Mississippi***, 394 U.S. 721, 727 (1969).

Traffic stops entail temporary seizures of both driver and passengers that ordinarily last reasonably for the duration of the stop. ***Arizona v. Johnson***, 129 S. Ct. 781, 788 (2009). Brief investigative stops of a person on the street are seizures. ***Terry v. Ohio***, 392 U.S. 1, 16 (1968). Even more so are compelled trips to a police station, on less

than probable cause and without formal arrest. ***Dunaway v. New York***, 442 U.S. 200, 206-07 (1979).

Brief investigative detentions of things are "seizures" under the Fourth Amendment even when they do not affect a privacy interest and only minimally delay a possessory interest in the item. They may be reasonable on less than probable cause in some circumstances, but they are seizures all the same. This is the rule for first-class mail held briefly at a post office after deposit there for mailing, ***United States v. Van Leeuwen***, 397 U.S. 249, 252-53 (1970), and for luggage in the possession of a passenger leaving an airport, ***United States v. Place***, 462 U.S. 696, 701-06 (1983).

The Fourth Amendment allows seizures and searches at or near national borders without a warrant, probable cause, or even suspicion. That is true not because these fail to count as searches and seizures, but because the historical interdiction of people and things at borders simply is reasonable. The rule applies to seized and searched mail, ***United States v. Ramsey***, 431 U.S. 606, 616-19 (1972), and to people in cars at or near a border. *See generally* ***United States v. Brignoni-Ponce***, 422 U.S. 873 (1975); ***United States v. Martinez-Fuerte***, 428 U.S. 543 (1976). When there is more than just the border crossing to justify the seizure, longer temporary detentions may be reasonable. *See, e.g.*, ***United States v. Montoya de Hernandez***, 473 U.S. 531, 537-44 (1985) (on reasonable suspicion that traveler at border was alimentary canal smuggler, 16-hour detention reasonable).

Away from the border, temporary seizures of cars (and the people in them) at highway checkpoints may be reasonable if tied to traffic safety and not random. But they *are* seizures. ***Delaware v. Prouse***, 440 U.S. 648, 653-63 (1979) (random spot checks for license and registration were unreasonable seizures); ***Michigan Dep't. Of State Police v. Sitz***, 496 U.S. 444, 450-55 (1990) (drunk driving checkpoints were reasonable seizures). However, even brief seizures of cars and

the people in them at checkpoints that serve only general law enforcement purposes are unreasonable. ***City of Indianapolis v. Edmond***, 531 U.S. 32, 40-44 (2000) (drug interdiction highway checkpoints were unreasonable seizures).

What these cases all have in common is that the temporary, compelled detention of things, including cars, or people is a "seizure" for purposes of the Fourth Amendment. That is true "even though the purpose of the stop is limited and the resulting detention quite brief." ***Delaware v. Prouse***, 440 U.S. at 653. Some of these seizures are reasonable without a warrant and some are unreasonable. But they all are seizures in the first instance.

**B.** ***The Seizures Here.***

Three times police officers approached Sveum's car in his mother's driveway, where Sveum was staying. Three times the officers shimmied under his car, lay on their backs, and attached a GPS device to the underside of the car by magnet and tape. During the time the police officers were under the car, working to attach a foreign device to it, that car was under police control. The police obviously would not have allowed Sveum to move or drive the car while officers were at work underneath it. At least four officers were present and, of those, at least one stood by on watch. R116:42-43, 72, 74, 86.

These three episodes were akin to other temporary, brief seizures that the Supreme Court consistently has recognized as subject to the Fourth Amendment. However briefly, the police here temporarily put hands on Sveum's car, attached something to it, and while doing so prevented its movement and interfered with his possessory interest in using it. The intrusion was not great. But the Fourth Amendment requires no great intrusion at the threshold to qualify a temporary detention or interference as a "seizure." Police officers three times physically seized Sveum's car for brief periods

when they crawled under it and attached a GPS unit to it under the watch of other officers.

The police also interfered in two more nuanced and prolonged ways with Sveum's possessory interest in his car, and with Sveum himself. As to his possessory interest, they affixed something to his car that eroded his ordinary property right to determine what accessories his car would bear, and what accessories it would not. To a significant extent, the police appropriated Sveum's property interest in the car by affixing something that served a government purpose, not the owner's purpose. As to his own autonomy, the police in effect attached him to an electronic leash by which they could know remotely his every movement in the car.

1. Affixing the GPS device to Sveum's car served only the purposes of the police and the state. Sveum neither knew that the state had added an accessory to his car nor wanted that accessory, for all the record shows. This was a partial seizure of the possessory interest in the car with which ownership imbued him. Suppose by analogy that the police had seized Sveum's car for a short time to apply a bumper sticker to its rear end, without his knowledge. Imagine that Sveum did not discover the sticker or, if he did, that he could not remove it. Suppose further that the bumper sticker bore a slogan that would offend passing police officers or otherwise draw their notice, and thus would subject Sveum to unwanted police attention by reason of the message that the state forced him to display when it affixed the bumper sticker to his car. The seizures at issue would not be limited to the initial brief time during which the government applied the sticker. A more lasting, if subtle, seizure would be the erosion of Sveum's control of his property, and the transfer of some of that possessory interest to the state so that Sveum's car served in measure a purely governmental interest by displaying a slogan that would invite further police attention.

That is very much like the seizure of possessory rights that occurred here. As the owner of the car, Sveum ordinarily would have the sole right to decide what accessories it would carry: what messages to display on his bumper, if any; what attachments to fly from his radio antenna, if any; what trinkets to hang from his rear view mirror. But here the state commandeered or seized some of that possessory control. The car now carried an accessory that served only a government interest, and contradicted Sveum's own interests.[7]

2. Having attached the GPS unit, police officers in effect also had placed a collar on the car that gave them control over an electronic leash. While Sveum could drive the car as he pleased, officers now could track its (and his) every movement, once they removed and downloaded the GPS unit. During the five weeks that the three GPS units were in place, hidden under his car, Sveum's car was on a high-tech, electronic leash.

It was not just the car on the tether, for that matter. Cars go nowhere without a human being operating them. When a human being drives a car, he goes where the car does. It is he whose movements the police really monitor with a GPS device, not the car's. A 1990 Chevy Beretta commits no crime, stalks no one, and holds no police interest by itself. It is the man who drives the car who holds police interest: unlike the inanimate car, he may stalk and commit a crime.

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[7] This hypothetical example is unlike the license plate and registration sticker that cars display, for several reasons. Licensing and registration are laws of universal application to all motorists. These laws are known or knowable before one buys a car, or elects to drive the car on Wisconsin's public roads. One can own a car without affixing a license plate or registration sticker, too, for those are mere conditions of operating the car lawfully on public roads. The mere presence of a proper license plate and registration sticker also draws no police attention and does not single out the motorist. All of these points distinguish the license plate and registration sticker from the GPS device here or the hypothetical bumper sticker.

3. This reveals the Seventh Circuit's mistake in ***United States v. Garcia***, 474 F.3d 994 (7th Cir. 2007). The mistake had two aspects. First, in concluding that a GPS device installed on a car effected no "seizure" under the Fourth Amendment, 474 F.3d at 996, ***Garcia*** considered only the ongoing use of the car itself, not the initial surreptitious installation of the device. Sveum agrees that the GPS unit here did not impede operation of his car after installation; there was no seizure in that sense. But the fact remains that installation itself involved a temporary, physical seizure of the car—three times. It also entailed affixing an accessory to the car that Sveum had not chosen, and this was an appropriation of his property rights of control. Sveum's car carried a government fixture for five weeks that he did not want and that served only the government's purposes, not the purposes that the property owner intended.

Second, the ***Garcia*** court did not consider the electronic seizure of the car and the driver. It considered only the physical nature of the car itself. But the Fourth Amendment does not exist to serve inanimate objects or places. It exists to protect people. *See* ***Katz v. United States***, 389 U.S. 347, 351 (1967). In places public and private, Sveum was tethered electronically to the government when he drove his car for five weeks. That it gave him unlimited leash is not the issue. The issue is that the state held the other end of the leash.

### C. *In the Absence of a Valid Warrant, the State Must Justify these Warrantless Seizures.*

In the court of appeals, the state did not defend the validity of the April 22, 2003 court order that purported to allow attaching a GPS device to Sveum's car and monitoring that device for up to 60 days. Rather, the state argued that no Fourth Amendment event, no search or seizure, occurred at all.

Following the state's cue, the court of appeals tacitly assumed the invalidity of the court order. It addressed instead the underlying Fourth Amendment question, concluding that the police neither searched nor seized Sveum's car. ***Sveum***, 2009 WI App 81, ¶¶8, 12. That conclusion mooted questions about the sufficiency or propriety of the court order.

As the case arrives in this Court, then, the police actions were without a valid warrant. In the absence of a valid warrant, the longstanding rule is that a search or seizure is presumptively unreasonable. "The United States Supreme Court has consistently held that warrantless searches are *per se* unreasonable under the fourth amendment, subject to a few carefully delineated exceptions." ***State v. Murdock***, 155 Wis. 2d 217, 227, 455 N.W.2d 618, 622 (1990); *see also* ***State v. Williams***, 2002 WI 94, ¶18, 255 Wis. 2d 1, 10, 646 N.W.2d 834, 838 ("Warrantless searches are per se unreasonable under the Fourth Amendment"). "The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn," Justice Harlan wrote for the Supreme Court more than fifty years ago. ***Jones v. United States***, 357 U.S. 493, 499 (1958). The sovereign bears the burden of demonstrating that some recognized exception to the warrant requirement saves the seizure. ***State v. Sanders***, 2008 WI 85, ¶27, 311 Wis. 2d 257, 268, 752 N.W.2d 713, 718, citing ***Chimel v. California***, 395 U.S. 752, 762 (1969).

While the Supreme Court often has applied this rule to warrantless searches, it also has applied the rule to a warrantless seizure. "In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." ***United States v. Place***, 462 U.S. 696, 701 (1983) (going on to note that seizure pending a warrant application may be proper when there is probable cause to believe the item contains

contraband or evidence of a crime, if there is exigency or some recognized exception to the warrant requirement); *see* ***United States v. Edwards***, 415 U.S. 800, 802 (1974) (considering post-arrest seizure of clothing and applying "incident to arrest" exception; "The prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions"); ***Edwards***, 415 U.S. at 809 (Stewart, J., dissenting) (applying the same burden of proof to the justification of warrantless seizures as to warrantless searches; disagreeing that this seizure was incident to arrest); *see also* ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759, 762 (1994) ("The burden is on the state to show that the search and seizure in question fall within one of the recognized exceptions to the warrant requirement").

The burden of proof is critical. An accused has no obligation to disprove the application of possible exceptions to the warrant requirement when he challenges a warrantless seizure. The opposing burden instead rests on the state. The state must convince a court that an established exception does apply.

In Sveum's case, the state made no effort to justify these seizures, if they occurred, on the basis of any recognized exception to the warrant requirement. Sveum knows of no possibly applicable exception, in any event. While there is an automobile exception to the warrant requirement, that exception applies only to *searching* cars upon probable cause. It does not apply to *seizing* them, temporarily or otherwise. The reason lies in the twin rationales integral to the exception: first, probable cause to believe that the vehicle contains evidence; and second, the exigent circumstance that a motor vehicle's mobility often presents. *See* ***Carroll v. United States***, 267 U.S. 132, 149-53 (1925); ***Thompson v. State***, 83 Wis. 2d 134, 141, 265 N.W.2d 467, 470 (1978); ***Maryland v. Dyson***, 527 U.S. 465, 466-67 (1999) (per curiam) (no separate exigency requirement for automobile exception; "'If a car is readily mobile and probable cause exists to believe it contains

contraband,'" the automobile exception applies; quoting ***Pennsylvania v. Labron***, 518 U.S. 938, 940 (1996) (per curiam)); *but see also* ***California v. Carney***, 471 U.S. 386, 391 (1985) ("Even in cases where an automobile was not readily mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception").

In short, neither rationale supports an exception to the warrant requirement for seizing a car here. First, the quest for contraband or evidence of a crime concerns a car's contents, not the car itself. Second, seizing the car would obviate any exigency.

Beyond that, Sveum's case never presented an exigency of the sort that the United States Supreme Court associates both with automobiles generally and with the need to search them without delay. To the contrary, the police held a hope, not a fear, that the car would move. The law enforcement objective was that Sveum eventually would drive the car away and use it to stalk the complaining witness. R116:45.[8] In the end, the police gained precisely that evidence supporting a probable cause finding because the car did move.

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[8] At the suppression hearing, this exchange occurred on the prosecutor's direct examination of Det. Ricksecker, who sought the GPS device:

> Q Does it [the GPS device] in any way impair the owner or possessor from using the vehicle as they would normally use it?
>
> A No.
>
> Q In fact, your hope is that they use it as if they would normally use it; is that correct?
>
> A That's correct.

R116:45.

R116:51-52. The utility of the GPS device, attached to the car during a temporary police seizure, was that it collected evidence of location as the car moved. With the GPS unit affixed, there was no danger of loss of evidence when the car moved. There was the opposite prospect of gaining evidence. The exigency necessary to support the automobile exception was missing altogether. It was negated, in fact.

The state surely has not pointed to any other exception, or explained why the automobile exception would cover three temporary physical seizures of Sveum's car, and a five-week seizure by electronic tether that the temporary physical seizures made possible. This was and is the state's burden. It has not carried that burden. These warrantless seizures stand unjustified by any exception to the Fourth Amendment's warrant requirement.

### D. *The State Alternatively Had the Burden of Proving Inevitable Discovery or an Independent Source.*

The court of appeals below conceded that "the police presumably obtained location information while Sveum's car was inside areas not open to surveillance." ***Sveum***, 2009 WI App 81, ¶17. Note well that under ***Karo***, this was tantamount to a concession that a Fourth Amendment search presumably did occur here. ***Karo***, 468 U.S. at 714-17. As the case comes to this Court, that search was warrantless. On that presumption of an illegal search while the car was in private areas, the court of appeals then implicitly shifted the burden to Sveum to prove that the police could not have obtained the same information by visual surveillance from outside the private places. *See* ***Sveum***, 2009 WI App 81, ¶17 ("there is no indication that this same information could not have been obtained by visual surveillance from outside these enclosures. Such surveillance could have told the police when Sveum's car entered or exited his garage and the garage at his workplace and, therefore, informed them when his car remained in those places").

Regardless what the police "could" have done, the court of appeals implicitly flipped the burden of proof entirely.

Whether as to an illegal seizure, which Sveum offers as the simplest basis of decision, or as to an illegal search as ***Karo***, ***Connolly***, ***Weaver***, and ***Jackson*** frame the issue, the state had the burden of proving the court of appeals' hypotheses. Sveum did not have the burden of disproving them. The exclusionary rule prohibits evidentiary use of tangible materials seized during an unlawful search, ***Weeks v. United States***, 232 U.S. 383 (1914), and of testimony concerning knowledge acquired during an unlawful search, ***Silverman v. United States***, 365 U.S. 505 (1961). The rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence or the indirect result of the unlawful conduct, up to the point that the connection with the unlawful search becomes "so attenuated as to dissipate the taint." ***Nardone v. United States***, 308 U.S. 338, 341 (1939); *see also* ***Wong Sun v. United States***, 371 U.S. 471, 484-485 (1963).

Before a court may excuse an illegal seizure, the state must show either that the evidence would have been discovered independently of any constitutional violation, ***Nix v. Williams***, 467 U.S. 431 (1984), or that evidence would have been discovered inevitably even without the constitutional violation. There is a functional similarity between these two doctrines: both assure that a constitutional violation does not leave the police in a worse position than they would have occupied absent the violation. ***Nix***, 476 U.S. at 446. The exclusionary rule aims to deter, not to punish. If the prosecution can prove by a preponderance of the evidence that it would have obtained the same evidence independently or inevitably by lawful means, then courts do not apply the exclusionary rule.

An independent source means that the police actually obtained evidence legally, notwithstanding some earlier illegal

conduct. ***Murray v. United States***, 487 U.S. 533 (1988). The independent source doctrine "does not rest upon . . . metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply." ***Murray,*** 487 U.S. at 542.

The inevitable discovery doctrine in turn assumes the validity of the independent source doctrine as applied to evidence initially acquired unlawfully. ***Murray***, 487 U.S. at 539. Inevitable discovery requires that the state show the police would have found the same evidence by legal means. ***Nix v. Williams***, 467 U.S. 431.

Wisconsin requires a three-part showing under the inevitable discovery doctrine. First, the state must show a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct. Second, the state must prove that police possessed the leads making the discovery inevitable at the time of the misconduct. And third, the state must prove that prior to the unlawful search, it was actively pursuing the alternate line of investigation. ***State v. Lopez***, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264, 269 (Ct. App. 1996); ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292, 297 (Ct. App. 1992).

Here, the state made no effort to prove an independent source for the data seized. Neither did it prove inevitable discovery. While it is possible for the state to argue that Sveum's travels could have been observed by police, in fact he was not surveilled during the five weeks the GPS tracking unit was attached to car. The trial court did not address either doctrine when finding that the placement of the GPS unit on Sveum's car was not a search. R49:106.

### E. *The Exclusionary Rule Applies.*

Under settled Fourth Amendment standards, the police temporarily seized Sveum's car physically three times to attach GPS devices. More subtle seizures of some of his possessory interest and of Sveum himself, through an electronic tether, continued for five weeks. The record demonstrates that these were temporary seizures within ken of the Fourth Amendment. Two or more law enforcement officers crawled under Sveum's car each time to attach a device, magnetically and by tape, to the car's undercarriage that Sveum never approved and about which he did not even know. Sveum could not have moved the car while officers were engaged in that activity. Constitutionally, the installation process was no different than temporarily impounding the car. And the seizure of part of his possessory control over the car, as well as the placement of an electronic tether on him, in effect, continued for weeks. While he might continue to use it, the car was attached continuously to a government tether during the time it bore the GPS unit, which itself was an accessory that served the state's interest, not the car owner's.

There also were warrantless searches here. As the court of appeals all but conceded, the police monitored Sveum's car while it was in private places, not just on public roads. ***Sveum***, 2009 WI App 81, ¶17. ***Karo*** surely suggests that this was a search for purposes of the Fourth Amendment. In monitoring the car, the police were monitoring Sveum, of course—they were tracking not just a car, but the activities of the man who drove the car. Earlier, the police three times entered the curtilage to place the GPS devices.

The court of appeals treated the events here as warrantless, and so the case arrives in this Court. On that point, there were good reasons for the court of appeals' approach: the April 22, 2003, court order well may have been overbroad, and it may not have been a

warrant within the meaning of the Fourth Amendment anyway. *See* ***Sveum***, 2009 WI App 81, ¶6.

Again applying longstanding, unchallenged Fourth Amendment principles, even temporary warrantless seizures are presumptively unreasonable. The state has the burden of establishing that some exception to the warrant requirement applies. The state never has attempted to shoulder that burden here. Sveum knows of no recognized exception to the warrant requirement that would have applied to these seizures in any event.

Without an exception to the warrant requirement that saves these seizures, the exclusionary rule applies unless the state can point to an independent source or inevitable discovery doctrine. This is the state's burden; Sveum has no burden to disprove the existence of an independent source or to demonstrate that discovery was *not* inevitable. *See* ***Murray***, 487 U.S. at 541-44 (not expressly deciding burden of persuasion, but intimating government burden); ***Nix***, 467 U.S. at 444 (explicitly establishing preponderance standard, with government bearing burden, for inevitable discovery doctrine); ***Lopez***, 207 Wis. 2d at 427-28, 559 N.W.2d at 269 (state's burden under inevitable discovery doctrine). Once more, the state never has sought to shoulder the burden of demonstrating an independent source or inevitable discovery. Indeed, Det. Ricksecker and the prosecutor in the circuit court conceded that the subsequent May 27, 2003 warrant applications included information from the GPS device. R116:51-52.

Accordingly, this Court confronts in the end warrantless seizures within the meaning of the Fourth Amendment that the state neither has justified as reasonable by pointing to a recognized exception to the warrant requirement, nor excused by proving an independent source or inevitable discovery. The exclusionary rule applies as a matter of settled law under the Fourth Amendment, as the United States Supreme Court understands and construes that

amendment. The contrary conclusion of the court of appeals is incorrect. This Court should reverse and remand with appropriate instructions, now that the existence of seizures — and searches — within the Fourth Amendment's concern is clear.

## III. THE COURT OF APPEALS CORRECTLY REJECTED SVEUM'S CHALLENGE UNDER THE WISCONSIN ELECTRONIC SURVEILLANCE CONTROL LAW.

Sveum raised a statutory challenge under the WESCL in the trial court and in the Wisconsin Court of Appeals. Both courts rejected his challenge. While Sveum's Fourth Amendment claim is sound, his statutory claim is not. Appointed counsel concludes that the court of appeals was correct: a GPS device is a "tracking device" and its communications are excluded from the definition of "electronic communications." WIS. STAT. § 968.27(4)(d); ***Sveum***, 2009 WI App 81, ¶¶25-29.

While the wisdom of that statute is open to doubt, its meaning is not. At least three other Wisconsin statutes expressly treat a GPS unit as a "tracking device." *See* WIS. STAT. §§ 100.203(1)(e); 301.48(1)(a), (1)(c), 2(d); 946.465. Even if this Court accepted Sveum's argument below, that the electronic communication was from the GPS satellites and that the GPS unit on his car merely intercepted those communications rather than making any electronic communications, Sveum would face two additional serious obstacles. First, he would have to prove that he then is an "aggrieved person" under WIS. STAT. § 968.27(1). Second, he would have to avoid the exception under WIS. STAT. § 968.31(2)(b), for if the GPS unit only intercepted the communications, then the police probably were consenting parties to the intercepted communications. In the end, counsel would undermine the Fourth Amendment argument, which he believes has merit, and

disserve Sveum, the Court, and his ethical obligations by pursuing the statutory claim.

Again, as a matter of wisdom, there are good reasons for this statute or another to cover the placement of GPS devices on cars, whether the police or private actors place those devices. The court of appeals explained some of those reasons. ***Sveum***, 2009 WI App 81, ¶¶20-22. But the fact that the WESCL does not apply to GPS units simply underscores the court of appeals' concerns. That fact does not make the statute apply to something outside its scope.

Appointed counsel had a telephone conversation with Michael Sveum concerning his decision to concede the inapplicability of WESCL to the GPS unit at issue here.

## CONCLUSION

Michael Sveum requests that this Court REVERSE the judgment of the Wisconsin Court of Appeals and REMAND for proceedings consistent with this Court's opinion.

Dated at Madison, Wisconsin, December 28, 2009.

Respectfully submitted,

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## CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 9,533 words. *See* WIS. STAT. § 809.19(8)(c)1.

Dated this _____ day of December, 2009.

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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12). I further certify that:

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

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

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Dean A. Strang

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

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## INDEX TO SHORT APPENDIX

## CERTIFICATION OF APPENDIX

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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