STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

No. 2017 AP 1345

STATE OF WISCONSIN,

Plaintiff–Appellant,

v.

MICHAEL J. SCOTT, A BLACK 1966 OLDSMOBILE AUTOMOBILE VIN #338676M362750, A BROWN 2015 CHEVROLET SILVERADO VIN #1GC1KWE81FF631314, ALLY FINANCIAL, INC. *a/k/a* CT CORPORATION SYSTEM, A 2008 POLARIS RANGER SERIAL #4XARB50A482701431, A 2008 SEA DOO "JET SKI" HULL #YDV13580E808, A 2008 SEA DOO "JET SKI" HULL #YDV24947C808, APPROXIMATELY 55 LBS. OF TETRAHYDROCANNABINOLS (THC) AND $22,955 IN UNITED STATES CURRENCY,
Defendants,
LORI M. SCOTT,

Defendant-Respondent.

CONSOLIDATED BRIEF AND SHORT APPENDIX OF DEFENDANT-RESPONDENT MICHAEL & LORI SCOTT

Appeal from Order Granting Motion for Partial Summary Judgment
Green County Circuit Court, Honorable Thomas Vale, Presiding

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ISSUE

Following binding precedent of the United States Supreme Court—applying the exclusionary rule to forfeiture proceedings where evidence of a crime is unlawfully seized and the State seeks to use the very same evidence in support of its efforts to forfeit the property, a rule that, according to one court, has been followed by 34 states and 11 federal circuits—did the Circuit Court err in barring the admission of all unlawfully seized evidence in this forfeiture proceeding and decide summary judgment in favor of the defendants where, absent the unlawfully seized evidence, the State did not have sufficient admissible evidence to raise genuine issues of material fact?

In its oral ruling, the Circuit Court held that "all of the evidence that was seized" was the "result of what were the faulty warrants," and the warrants "weren't saved by a good faith exception." R43:28. The Circuit Court acknowledged the argument made by the State in opposition to the application of the exclusionary rule, noting "at some point illegality does not always equate with inadmissibility. Neither does under the circumstances of this case equate that it should be admitted here. I'm also aware of this balancing act." *Id.* at 29. The Circuit Court was bothered by the fact that the admission of evidence, unlawfully seized by police, would benefit them directly, and therefore applying the exclusionary rule on these facts was pragmatic and proper. "What is the remedy if we say it's no good over here in the criminal case but it's good in this case we're kind of saying you may benefit from this activity, and unfortunately, I agree with that even when you can say this hurts because we know what's going on, folks, here in this context." *Id.* "I think for those reasons I feel bound by the *Plymouth* case and that [case] hasn't been rejected anywhere along the line." *Id.* "For those reasons I will grant the defendants' motion for summary judgment in this case, and I think if the court correctly applies those rules there is no evidence to talk about in the case." *Id.*, at 30.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues raised in this appeal can be fully addressed by briefing, but if the Court has questions, Michael and Lori Scott welcome the opportunity for oral argument. The decision of the Court should be published if the matter is decided by three judges, as is this Court's practice.

STANDARD OF REVIEW

Whether the circuit court properly granted summary judgment is a question of law that this Court reviews *de novo*. *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294. This Court employs the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987).

A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). This Court examines the moving party's submissions to determine whether they constitute a *prima facie* case for summary judgment. *Gross v. Woodman's Food Market, Inc.*, 2002 WI App 295, ¶ 30, 259 Wis. 2d 181, 655 N.W.2d 718. If they do, then this Court examines the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial. *Id.*

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from the grant of a motion for summary judgment in a civil case in Green County Circuit Court. The Circuit Court granted Michael and Lori Scott's motion, holding that evidence unlawfully seized from the Scotts could not be used at trial in a forfeiture proceeding relating to the same evidence. Because the ruling left the State without sufficient evidence to prove the forfeiture case, there could be no genuine dispute of material fact, and so summary judgment was proper.

Procedural Status. Believing that Michael Scott was possibly involved in distributing controlled substances, an investigator sought a series of court orders to pursue his investigation. Three court orders were issued, the last of which lead to a search of the Scott residence. *See* R19.

Michael Scott was charged in Green County Circuit Court with four criminal offenses related to controlled substances. About a month later, the State filed a civil forfeiture complaint pursuant to WIS. STAT. §§ 961.55 and 961.555. Michael and Lori Scott, personal property, and contraband that was seized pursuant to a search warrant were all named as defendants. R1. Lori Scott was charged criminally about four months after the search warrant was executed (and three months after the forfeiture complaint) was filed. She was charged with the same offenses as Michael Scott. All three cases (two criminal cases and the forfeiture case) were assigned to Judge Thomas Vale.

The Scotts timely filed an answer and affirmative defense to the forfeiture complaint. R5. The criminal case proceeded ahead of the forfeiture case. *See* WIS. STAT. § 961.555(2)(a).[1]

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[1] WIS. STAT. § 961.555(2)(a) provides that a defendant in a forfeiture proceeding "may request that the forfeiture proceedings be adjourned until after adjudication of any charge concerning a crime which was the basis for the seizure of the property. The request shall be granted."

In the criminal case, the Scotts moved to suppress the evidence seized from their residence. *See* R18, R43. Following briefing, Judge Vale heard argument on November 22, 2016. R44. At the hearing, the State did not argue that the good faith exception applied. *Id.*, at 26 ("Not that it's a good faith exception, but the state of the law").[2] Judge Vale evaluated all three warrants and concluded that two of the three warrants lacked probable cause; but, more specifically, the search warrant for the residence lacked probable cause. R44:29. The ruling meant that all of the evidence seized by investigators was excluded from use at the criminal trial.

The State did not seek reconsideration of the court's decision. There was no appeal of Judge Vale's decision. Lacking the evidence necessary to prosecute the case, the State dismissed the charges against Michael and Lori Scott. Following the dismissal of the criminal case, the Scotts filed an amended answer and affirmative defenses to the forfeiture complaint. R12, R13. They then moved for partial summary judgement. R15.

After briefing, Judge Vale heard arguments, and issued an oral decision on May 22, 2017. R43. Judge Vale, in his oral ruling, acknowledged the arguments raised by the parties, but granted summary judgment in favor of the Scotts finding that "I will grant the defendants' motion for summary judgment in this case, and I think if the court correctly applies those rules there is no evidence to talk about in the case." R43:28-30.

An order granting the motion was entered on May 31, 2017. R30, R31. Notice of entry of judgement was also docketed on May 31, 2017. R32.

The State filed a notice of appeal. R35. The same day, the State also asked Judge Vale for relief. R34. Particularly, the State urged the Circuit Court to grant it relief from the order requiring the return of the

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[2] The State did not argue that the good faith exception applied in briefs filed in the Circuit Court. *See* R22, R27.

Scotts' property. After hearing argument, the Circuit Court granted the State's request. R39.

Facts. The investigation into the Scotts' alleged possession of controlled substances was lead by Investigator Worm of the Green County Sheriff's Department. He was responsible for drafting the affidavits in support of three court orders, including the search warrant for the residence. Too, he signed both the criminal complaint and the forfeiture complaint. *See* R:14, R18, R19.

During the search of the Scott residence, Worm and his team seized contraband, including about 55 pounds of marijuana. They also seized a great deal of personal property, including cash, firearms, vehicles, boats and personal watercraft. *See id.* Following the execution of the search warrant, criminal charges were filed against Michael and then Lori Scott. R13, R16.

The Circuit Court ruled that the seizure of the property violated the Scotts' right against unreasonable searches and seizures under the state and federal constitutions. The Circuit Court concluded that two of the three warrants lacked probable cause.

> [T]he affidavit did not set forth, did not give the court information as to why this information would be reliable or other information as to why this informant would be reliable or other information that would have made—factual information that was verified that would have given some other indication of reliability. There was really nothing other than this in my confidential informant.
>
> For those reasons I will find that that affidavit, the search warrant was not founded on proper probable cause. I will grant the motion to suppress that evidence, which is the evidence of the case here—in both of these cases, Mr. Scott and Mrs. Scott.

R43:29.

The consequence of Judge Vale's decision was that all evidence was excluded from use at trial in the criminal case. The Circuit Court's findings and ruling are undisputed, as the State never sought reconsideration or an appeal of the order. That left the forfeiture case.

On the record before the Circuit Court it was clear that the criminal and the forfeiture cases presented an identity of parties, witnesses, facts and legal issues. Indeed, the forfeiture complaint relied on the same police investigation and the complaining witness in both cases was Investigator Worm of the Green County Sheriff's Office. And the basis for the forfeiture was alleged to be the criminal offenses charged.

The State timely initiated a forfeiture action against the property seized from the Scott residence. R1. The Scotts moved for summary judgment. R15, 17. They argued that the Circuit Court's ruling excluding evidence applied with equal force in this forfeiture case. The Scotts pointed to a decision of the United States Supreme Court which held that, when evidence derived from searches and seizures is found to violate a citizen's constitutional rights, the excluded evidence cannot be used in a forfeiture proceeding relating to the same property. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 702 (1965) ("we conclude that the nature of a forfeiture proceeding . . . and the reasons which led the Court to hold that the exclusionary rule of *Weeks v. United States* [ ] is obligatory upon the States under the Fourteenth Amendment . . . support the conclusion that the exclusionary rule is applicable in forfeiture proceedings"). Application of the exclusionary rule meant that the excluded evidence could not be used at trial in the forfeiture proceeding. Absent the unlawfully seized evidence, the State could not carry its burden of proof at trial.

The State could not dispute that the evidence was seized unlawfully from the Scotts. It argued that the Circuit Court should follow a case decided by the Texas Supreme Court, *State v. One 2004 Lincoln Navigator*, 494 S.W.3d 690 (Tex. 2016), which declined to apply the exclusionary rule in a forfeiture proceeding (under Texas law and its

constitution). Relying on this out-of-state authority, the State urged the Circuit Court to ignore binding precedent and to create a new test under Wisconsin law: a balancing test that the State believed would permit the admission of unlawfully seized evidence at a forfeiture proceeding.

The Circuit Court acknowledged the arguments raised by counsel, and weighed whether the application of the exclusionary rule would have a deterrent effect on police; the Court answered the question affirmatively. In the end, the Circuit Court followed binding precedent in granting the Scotts' motion.

> Here all of the evidence that was seized as a result of what were the faulty warrants. They weren't saved by a good faith exception. I don't think there is any intentional misconduct by the police certainly, but as the court noted in making that decision, there were some mistakes and omissions.
>
> The Texas case notes at some point illegality does not always equate with inadmissibility. Neither does under the circumstances of this case equate that it should be admitted here. I'm also aware of this balancing act. If the intent of this law is to deter wrongful police action, that certainly is the concept in a criminal proceeding, that we want to make sure this is fundamental constitutional rights, Fourth Amendment search and seizure we're going to protect that in personam, folk's individual rights. When it hurts and we know there is criminal activity but it didn't go down the right way that's the remedy, because that remedy is protecting the constitutional rights of all of us even though in a specific application we can say hey, we kind of know what's going on here, but that's the harsh result of the rule.
>
> So then the court is stuck with this application of this concept does it deter criminal activity over here? Is this

the result that we want, the remedy over in a civil context in a forfeiture context, and I would agree in part with that argument that well, if we don't do this how do we do it? The police could still act incorrectly. They could still benefit from their actions in the civil forfeiture case. The state, and in this case the way our rules are written the police benefit or their departments benefit from that. I don't think that's on their mind when this is happening here, but that's a result also. What is the remedy if we say it's no good over here in the criminal case but it's good in this case we're kind of saying you may benefit from this activity, and unfortunately, I agree with that even when you can say this hurts because we know what's going on, folks, here in this context.

I think for those reasons I feel bound by the *Plymouth* case and that [case] hasn't been rejected anywhere along the line. Unfortunately, we don't have the perfect case here in the state of Wisconsin. If this case is appealed maybe we'll have some clear direction on that. I do note I guess I don't know what a pending law means in terms of weight or persuasiveness, but I do note, as defense counsel has pointed out, that the state of Wisconsin has a law pending which would say that if the criminal case is dismissed there is no action for civil forfeiture, which is pretty black and white and I guess is the bright line that we might have here if that law is passed.

For those reasons I will grant the defendants' motion for summary judgment in this case, and I think if the court correctly applies those rules there is no evidence to talk about in the case. I guess at the end of the day that it boils down to something that simple, so I am granting the motion for summary judgment. I guess at this juncture I don't know if there is anything further we need to do.

R44:28-30. This appeal followed.

ARGUMENT

The Circuit Court properly granted the Scotts' motion. Binding precedent guided the court's decision. Judge Vale's order granting summary judgment should be affirmed.

The Circuit Court, having held that two search warrants lacked probable cause, excluded from use at trial all evidence seized from the Scotts' residence. The State did not seek reconsideration, nor did it appeal the ruling. Rather, acknowledging the Circuit Court's decision, the State dismissed the charges against Michael and Lori Scott.

In the forfeiture proceeding the State could not contest that the search and seizure was unlawful. Rather, it took the position that, notwithstanding the uncontested fact that police violated the Scotts' constitutional rights, the evidence unlawfully seized ought be available for use in the forfeiture proceeding. But no Wisconsin case supports its position, and a case from the United States Supreme Court (cited twice by our supreme court) directs the opposite conclusion: the exclusionary rule should apply where evidence of a crime is unlawfully seized and the State seeks to use the very same evidence in support of its efforts to forfeit the property. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965); *see also State ex rel. White v. Simpson*, 28 Wis. 2d 590, 137 N.W.2d 391 (1965); and *State v. Voshart*, 39 Wis. 2d 419, 159 N.W.2d 1 (1968). The result ought remain the same on these facts even if the Circuit Court engages in a balancing of interests, as the State argues; and, indeed, the Circuit Court in its oral ruling did weigh the competing interests of deterrence before deciding that application of the exclusionary rule was proper.

I. THE CIRCUIT COURT PROPERLY DECIDED SUMMARY JUDGMENT.

Controlling legal precedent determined that evidence should be excluded because its collection violated the state and federal

constitutions. After the evidence was excluded, there were no genuine issues of material fact in dispute. Where there was only a question of law, summary judgment was properly rendered. *Kenosha County Dept. of Social Services v. Nelsen*, 95 Wis. 2d 409, 413, 290 N.W.2d 544 (Ct. App. 1980). Where the moving party does not have the ultimate burden of persuasion at trial,

> [t]he Supreme Court has clearly indicated that, in appropriate cases, a moving party may carry its initial burden of production by showing that the nonmoving party does not have enough evidence to carry its ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc., 210 F.3d 1099, 1106 (9th Cir. 2000), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Thus the ultimate issue in deciding this motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). This is just such a case.

A. United States Supreme Court Precedent Controls: The Exclusionary Rule Applies to Forfeiture Proceedings Where Evidence of a Crime Is Unlawfully Seized and the State Seeks to Use the Very Same Evidence In Support of its Efforts to Forfeit the Property.

On the question of whether the exclusionary rule applies in forfeiture proceedings, a decision of the United States Supreme Court controls. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965), is directly on point. Wisconsin's Supreme Court has twice referenced this decision, and has never broken from the precedent. *See State ex rel. White v. Simpson*, 28 Wis. 2d 590, 596, 137 N.W.2d 391, 393 (1965); *State v. Voshart*, 39 Wis. 2d 419, 159 N.W.2d 1 (1968).

On federal questions, the determinations of the United States Supreme Court are binding upon state courts. *State v. Mechtel*, 176 Wis. 2d 87,

94, 499 N.W.2d 662 (1993); *State v. Ward*, 2000 WI 3, ¶ 38, 231 Wis. 2d 723, 742, 604 N.W.2d 517, 525. The Wisconsin Supreme Court's interpretation of the Wisconsin Constitution's search and seizure provision has normally been consistent with the requirements of the United States Constitution as interpreted by the Supreme Court. *Ward*, 2000 WI 3, ¶ 55. Indeed, the Wisconsin Supreme Court was one of the first in the nation to adopt the exclusionary rule. *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923), was decided almost 40 years before *Mapp v. Ohio*, 367 U.S. 643 (1961), obliged the court to adopt the exclusionary rule. "This early adoption of the exclusionary rule demonstrates this state's commitment to protecting the privacy of its citizens." *Ward*, 2000 WI 3, ¶ 87 (Abrahamson, C.J., dissenting).

The Circuit Court ruled that the unlawfully seized evidence could not be admitted at trial.

> Here all of the evidence that was seized as a result of what were the faulty warrants. They weren't saved by a good faith exception. [. . .] The Texas case notes at some point illegality does not always equate with inadmissibility. Neither does under the circumstances of this case equate that it should be admitted here. I'm also aware of this balancing act. If the intent of this law is to deter wrongful police action, that certainly is the concept in a criminal proceeding, that we want to make sure this is fundamental constitutional rights, Fourth Amendment search and seizure we're going to protect that in personam, folk's individual rights. When it hurts and we know there is criminal activity but it didn't go down the right way that's the remedy, because that remedy is protecting the constitutional rights of all of us even though in a specific application we can say hey, we kind of know what's going on here, but that's the harsh result of the rule. [. . .] I think for those reasons I feel bound by the *Plymouth* case and that [case] hasn't been rejected anywhere along the line. [. . .]

> For those reasons I will grant the defendants' motion for summary judgment in this case, and I think if the court correctly applies those rules there is no evidence to talk about in the case.

R44:28-30.

Where the evidence was excluded, then the absence of the excluded evidence does not support the continuation of the action: where there is no evidence, there is no genuine issue of material fact.[3]

In *One 1958 Plymouth Sedan*, 380 U.S. 693 (1965), the Court held that the exclusionary rule, set forth in *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961), which hold that evidence obtained in violation of the Fourth Amendment not be used in criminal

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[3] The Scotts argued that collateral estoppel/issue preclusion applied in the Circuit Court, albeit in passing. R18:9. The test for defensive issue preclusion is set forth in *Jensen v. Milwaukee Mut. Ins. Co.*, 204 Wis. 2d 231, 237–38, 554 N.W.2d 232, 234–35 (Ct. App. 1996) (internal citations omitted):

> Before a court may employ defensive issue preclusion against a nonparty in the prior action, the court must apply the test of "fundamental fairness." This involves a consideration of some, or all, of the following factors: (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

The five factors demonstrate that the exclusion of evidence could not be relitigated, having been decided by the Circuit Court in the criminal case.

proceedings applies to quasi-criminal proceedings, like forfeiture proceedings.[4] No Wisconsin case holds otherwise.

One 1958 Plymouth Sedan relied heavily on *Boyd v. United States,* 116 U.S. 616 (1886), a case in which it was alleged that crates of plate glass were imported without the payment of the proper customs duty. The statute in that case provided a criminal penalty of $50 to $5000, up to two years imprisonment, and forfeiture of the goods. The government instituted a civil *in rem* forfeiture action against the imported glass. Addressing the civil nature of the proceeding, the Supreme Court in *Boyd* explained:

> If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form,—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. [. . .] As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this *quasi* criminal nature, we think that they are within the reason

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[4] *One 1958 Plymouth Sedan* speaks in general terms, labeling any forfeiture action based upon inherently criminal activity as "quasi-criminal" if its object is to penalize for the commission of an offense against the law. *One 1958 Plymouth Sedan,* 380 U.S. at 700. Forfeiture statutes are quasi-criminal because they are both punitive and criminal in nature. For one, the statutes are found in the criminal code (CH. 961). And these forfeiture statutes target criminal activity because they are primarily designed to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. The statutes illustrate that assets are forfeitable only because of some underlying criminal activity, not because a particular asset poses an inherent danger to the public that would be against the state's regulatory interest . Under this analysis, civil forfeiture statutes are quasi-criminal because they are intended to punish criminal conduct and supplement general criminal aims by attacking the economics behind crime.

> of criminal proceedings for all the purposes of the fourth amendment of the constitution. . . .

Id. at 633–34, *quoted in One 1958 Plymouth Sedan,* 380 U.S. at 697–98.

One 1958 Plymouth Sedan made clear that, although *Boyd* involved evidence sought by subpoena, that factual difference was irrelevant because "the essential question is whether evidence[,] ... the obtaining of which violates the Fourth Amendment may be relied upon to sustain a forfeiture." 380 U.S. at 698. Going on to explain its holding, the Court reasoned that "[t]here is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss." *Id.* at 699. Additionally, "a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700. "[W]e conclude that the nature of a forfeiture proceeding, so well described . . . in *Boyd,* and the reasons which led the Court to hold that the exclusionary rule . . . is obligatory upon the States under the Fourteenth Amendment . . . in *Mapp,* support the conclusion that the exclusionary rule is applicable to forfeiture proceedings such as the one involved here." *Id.* at 702.

Reference by our supreme court to *One 1958 Plymouth Sedan* is telling.

> Neither the Fourth Amendment to the United States constitution nor sec. 11, art. I of the Wisconsin constitution distinguishes between civil and criminal cases as far as the issuance of warrants is concerned; we perceive no distinction. ***The right of an individual to be protected from improper arrests or searches applies with equal vitality to those which stem from civil actions as well as those which stem from criminal actions.*** The immediate impact on the individual is precisely the same whether the arrest arises from one type of case or the other.

State ex rel. White v. Simpson, 28 Wis. 2d 590, 596, 137 N.W.2d 391, 393 (1965) (emphasis added); *see also State v. Voshart*, 39 Wis. 2d 419, 435, 159 N.W.2d 1 (1968) ("In a leading case in this field of law, the United States Supreme Court held that an automobile, even though used in the commission of a crime, could not be confiscated").[5] Any claim that Wisconsin does not follow *One 1958 Plymouth Sedan* is misplaced.

B. The Exclusionary Rule Should Apply In Forfeiture Cases Such as This.

The Fourth Amendment is not limited by its language or its history to the context of criminal trials. Its goal is to ensure freedom from unreasonable governmental searches and seizures of any nature. The exclusionary rule remedies certain violations of the Fourth Amendment, but is not coextensive with it. Although the purpose of the exclusionary rule may be to curb improper police conduct, the purpose of the Fourth Amendment is to protect "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." Amend. IV, United States Constitution; and Art. I, § 11 Wis. Constitution. It protects everybody, not just those of the criminal milieu, and, thus, is not limited to criminal proceedings. *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993).

The Supreme Court in *Austin* noted that the Fourth Amendment's provisions were not limited to criminal proceedings, but, that the

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[5] *White* involved an arrest warrant issued in a paternity action, a civil special proceeding, which lead to the arrest of the defendant. Citing *One 1958 Plymouth Sedan*, our Supreme Court stated that "Neither the Fourth Amendment to the United States constitution nor sec. 11, art. I of the Wisconsin constitution distinguishes between civil and criminal cases as far as the issuance of warrants is concerned; we perceive no distinction." *State ex rel. White v. Simpson*, 28 Wis. 2d at 596–97. *Voshart* involved the disposition of contraband (various items of hard-core pornography) after criminal charges were dismissed following the trial court's finding the search warrant to be invalid and ordering the evidence suppressed. Citing to *One 1958 Plymouth Sedan*, the court noted "Obviously, there are limits to what a state may declare to be contraband." *State v. Voshart*, 39 Wis. 2d 419, 434 n.31, 159 N.W.2d 1, 9 (1968). The nature of the property at issue in *Voshart* differs greatly from the personal property that is at issue in this case.

Confrontation Clause, the due process "reasonable doubt" standard, double jeopardy, and self-incrimination provisions were so limited. The Court thus distinguished the applicability of these various provisions, squarely refusing to limit the Fourth Amendment's provisions to criminal cases, relying on *One 1958 Plymouth Sedan* and *Boyd*. *Id.* The Court thus clearly implied in *Austin* that, although the exclusionary rule is a judicially created remedy intended to apply primarily to criminal and "quasi-criminal" proceedings, the Fourth Amendment applies to *all* "unreasonable searches and seizures" by the government, regardless of context. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 51 (1993) ("It is true, of course, that the Fourth Amendment applies to searches and seizures in the civil context and may serve to resolve the legality of these governmental actions without reference to other constitutional provisions.").

C. *The Rule of* One 1958 Plymouth Sedan *is Widely Followed And Remains Good Law.*

The rule of *One 1958 Plymouth Sedan* is clear and widely accepted. One court counted 34 states and 11 federal circuit courts that follow the rule of *One 1959 Plymouth Sedan*. *One 1995 Corvette VIN No. 1G1YY22P585103433 v. Mayor and City Council of Baltimore*, 353 Md. 114, 123, 724 A.2d 680, 684-85 (1999). As recently as 1994, the Supreme Court cited *One 1958 Plymouth Sedan* as authority for the proposition that the exclusionary rule applies to civil forfeiture proceedings. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965) (holding that the exclusionary rule applies to civil forfeiture), but it does not follow that the Fourth Amendment is the sole constitutional provision in question when the Government seizes property subject to forfeiture")).

Many federal courts continue to apply the exclusionary rule in forfeiture cases, on facts similar to those here. Those cases underscore the continued vitality of *One 1958 Plymouth Sedan*. *See In re 650 Fifth Ave. & Related Properties*, 830 F.3d 66, 98 (2d Cir. 2016) ("It is well-

established that the Fourth Amendment's exclusionary rule applies in forfeiture cases"); *United States v. $32,750 in U.S. Currency*, 200 F. Supp. 3d 1132 (D. Nevada 2016) (Fourth Amendment and exclusionary rule are applicable to both criminal and forfeiture proceedings "); *United States v. $186,416 in U.S. Currency*, 590 F.3d 942 (9th Cir. 2009) (finding no probable cause to support forfeiture when illegally obtained evidence is excluded); *United States v. $493,850 in U.S. Currency*, 518 F.3d 1159, 1164-65 (9th Cir. 2008) ("[U]nder the fruits of the poisonous tree doctrine, evidence obtained subsequent to a violation of the Fourth Amendment is tainted by the illegality and is inadmissible"); *United States v. $69,530.00 in U.S. Currency*, 22 F. Supp. 2d 593, 595 (W.D. Tex. 1998) ("It is certainly well-settled that suppression of evidence can be an appropriate remedy in a civil forfeiture proceeding, if a Claimant's Fourth or Fifth Amendment rights have been violated"); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (finding that the Fourth Amendment places restrictions on seizures conducted for civil forfeiture purposes; applying *One 1958 Plymouth Sedan*); *United States v. One Ford 198X Mustang, Vehicle Identification No. 1FAB42E5JF290177*, 749 F. Supp 324 (D. Mass. 1990) ("If the search and seizure is found to be unconstitutional, the evidence must be excluded"); *United States v. One 1977 Mercedes Benz, 450 SEL, VIN 11603302064538*, 708 F.2d 444, 447 (9th Cir. 1983)("Because forfeiture proceedings are quasi-criminal in character and meant to penalize the commission of an offense against the law, the exclusionary rule applies to such proceedings, barring evidence obtained in violation of the fourth amendment"); *United States v. One 1989 Mercury Cougar XR-7*, 666 F.2d 228, 230 (5th Cir. 1982) ("The exclusionary rule of *Mapp v. Ohio*, applies in forfeiture proceedings, so probable cause for forfeiture cannot rest upon tainted evidence"); *Vance v. United States*, 676 F.2d 183 (5th Cir. 1982) (applying the exclusionary rule to the forfeiture and stating, the "civil nature of forfeiture proceedings will not be permitted to provide an avenue through which the fundamental rights of protection against unreasonable searches and seizures and self-incrimination can be frustrated," citing *Bramble v. Richardson*, 498 F.2d 968 (10th Cir. 1974).

Other states, Minnesota, Illinois, and Iowa, by way of example, follow *One 1958 Plymouth Sedan* and its reasoning. *See Garcia Mendoza v. 2003*

Chevy Tahoe, VIN No. 1GNEC13V23R143453, Plate No. 235JBM, 852 N.W.2d 659, 667 (Minn. 2014) ("Because *Plymouth Sedan* is on point and good law, we conclude that the Fourth Amendment exclusionary rule applies to civil forfeiture actions"); *People v. $280,020 in U.S. Currency*, 2013 Ill. App. (1st) 111820, ¶ 23, 992 N.E.2d 533, 537 (2013) ("Because the exclusionary rule applies to forfeiture proceedings, the trial court properly allowed Shayne to challenge the evidence of the currency seized at the train station on grounds that the search and seizure violated Shayne's constitutional rights"); and *Matter of Flowers*, 474 N.W.23d 546 (Iowa 1991).[6]

Cases cited by the State are distinguishable, and none overturned *One 1958 Plymouth Sedan*. The federal cases cited do involve facts where the law enforcement agency would directly (and financially) benefit from their unlawful seizure of evidence. In the language of the federal cases, they are distinguishable because use of the evidence fell outside of the police's "zone of primary interest." *United States v. Janis*, 428 U.S. 433, 458 (1976). *Janis* involved local police action (which violated the Fourth Amendment) lead to a federal civil tax proceeding. Because the federal tax proceeding fell outside of the local police's "zone of primary interest" the exclusionary rule was found not to apply. Thus, in *Janis*, application of the exclusionary rule had no deterrent effect because it was local police, not federal tax authorities who should be deterred.

In contrast to the facts in *Janis*, here, the forfeiture and criminal cases both fell into the "zone of primary interest" of the State's complaining witness: Investigator Worm. His averments bear this out. Worm was involved in both the criminal and civil case, and his department will benefit from the forfeiture action, unlike the Los Angeles Police in *Janis*.

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[6] *See also* Wayne LaFave, SEARCH & SEIZURE (5th ed.), § 1.7(a); and 37 C.J.S. Forfeitures § 67 (Admissibility of evidence in forfeiture proceedings) ("Evidence obtained in violation of the Fourth Amendment has frequently been barred in forfeiture proceedings, or held subject to the exclusionary rule").

Thus unlike in *Janis*, here the exclusion of evidence in this forfeiture proceeding will have a significant and substantial deterrent effect.[7]

True, *Janis* notes that "[i]n the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." But that particular sentence is explained by a footnote that follows: "[T]he Court has applied the exclusionary rule in a proceeding for forfeiture of an article used in violation of the criminal law." *Id.* at 447 n. 17 (citing *One 1958 Plymouth Sedan*, 380 U.S. 693).

The exclusionary rule was held not to apply in *Immigration and Naturalization Services v. Lopez-Mendoza*, 468 U.S. 1032 (1984), a civil deportation case. The INS sought to deport two illegal aliens using evidence obtained from illegal searches. The Court stated that deterrence would be limited by the fact that in criminal trials the application of the rule already achieved a baseline level of deterrence. But the Court also found marginal deterrence in the fact that "only a very small percentage of arrests of aliens are intended or expected to lead to criminal prosecutions." *Id.* at 1043. Several factors reduced this deterrent effect: (1) many illegal aliens could still be deported by using evidence that was not illegally obtained; (2) most illegal aliens do not challenge their deportation, thus limiting the potential use of the rule; (3) the INS had a policy against illegal searches, and (4) many alternative remedies were available to illegal aliens. *Id.* at 1043-45. As such, application of the exclusionary rule in this setting is *sui generis*.

Pennsylvania Bd. of Probation v. Scott, 524 U.S. 357 (1998), is distinguishable. *Scott* dealt with parole revocation hearings, a type of proceeding completely unrelated to any issue determinative to this case. The Court noted that parole is essentially an agreement, *i.e.*, a contract, between the state and a prisoner, granting "a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release." *Id.* at 365. To

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[7] In this case, unlike in *Janis*, the same parties, facts and legal issues were involved. *See* note 3, *supra*.

allow an exclusionary rule in that context would hinder the state's ability to maintain close supervision over a parolee and, in turn, prove to the parole board that a parolee has violated his or her end of the "deal," *i.e.*, contract, thus exacting great societal costs which outweigh any deterrence effect. *See id.*

Unlike tax assessments, parole revocations, or deportation hearings, civil forfeitures are today "ingrained into mainstream police practices." Daniel Kaminski, *Conclude to Exclude: The Exclusionary Rule's Role in Civil Forfeiture Proceedings*, 6 SEVENTH CIR. L. REV. 268, 306 ("the changing objectives of law enforcement agencies have led forfeiture to become 'ingrained into mainstream police practices.' Thus '[t]he unique role of civil forfeiture in modern policing makes it *sui generis* in the level of deterrence the exclusionary rule will produce' and would not be outweighed by the minimal costs associated with the relatively government-friendly proceeding") (internal citations omitted).

The State's argument springs from a decision of the Texas Supreme Court. *State v. One 2004 Lincoln Navigator*, 494 S.W.3d 690 (Tex. 2016). Application of the decision to Wisconsin is neither clear nor automatic. Not only is the decision based on Texas law (and Constitution) which differs from the statutes and decisional authority here, but *One 2004 Lincoln Navigator* is the product of a few peculiarities unique to Texas law. First, Texas has a separate supreme court for criminal and civil cases. This can result in disparate results—that for Texas—seem consistent. *See One 2004 Lincoln Navigator*, 494 S.W.3d at 703 (Willet, J. concurring) ("We and our sister high court fulfill substantively distinct roles: 'The Court of Criminal Appeals is the court of last resort for criminal matters, . . . while this Court is the court of final review for civil matters[.]' Admittedly, the line between civil and criminal matters is sometimes gauzy, and we have previously wrestled with whether cases, though civil by design, involve matters more substantively criminal than civil and thus outside our bailiwick. Ambiguity often makes this determination a vexing one.") Not so for a unified court system like Wisconsin's. Second, in contrast to Wisconsin, Texas statutes permit the seizure of property without a warrant. Next, as a

matter of Texas law (and Constitution), and not Wisconsin law, the exclusionary rule is codified and expressly applies only in criminal cases (and only where permitted by statute. Moreover, "in *Plymouth Sedan* the forfeiture proceeding's 'object, like a criminal proceeding, [was] to penalize for the commission of an offense against the law.' Chapter 59 forfeitures, on the other hand, are expressly civil and non-punitive . . ." *One 2004 Lincoln Navigator*, 494 S.W.3d at 698. Wisconsin's forfeiture statute is quasi-criminal and is punitive.[8] Lastly, the statute relied on by the (civil) Texas Supreme Court was concerned solely with the seizure of property subject to forfeiture, and not (as is the case here) with the State's use of evidence to prove that property is subject to forfeiture. *Id.* at 699.

D. Like the Property Involved in One 1958 Plymouth Sedan, *What the Scotts Seek to Have Returned Is Not Contraband Per Se.*

The Scotts have identified what property they believe ought be returned to them. *See* R18:2 n.1. They do not seek the return of contraband, but rather, only the property that is not contraband. *Id.* The *One 1958 Plymouth Sedan* court noted that

> It is apparent that the nature of the property here, though termed contraband by Pennsylvania, is quite different. There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss. ***And it is conceded here that the Commonwealth could not establish an illegal use without using the evidence resulting from the search which is challenged as having been in violation of the Constitution.*** Furthermore, the return of the automobile

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[8] A statute that permits forfeiture of property alleged to have been used in a felony "clearly has a punitive purpose because the legislature 'has chosen to tie forfeiture directly to the commission of [felony] offenses.'" *State v. Hammad*, 212 Wis. 2d 343, 351, 569 N.W.2d 68, 71 (Ct. App. 1997), citing *Austin v. United States*, 509 U.S. 602, 620 (1993).

> to the owner would not subject him to any possible criminal penalties for possession, or frustrate any public policy concerning automobiles, as automobiles. This distinction between what has been described as contraband *per se* and only derivative contraband has indeed been recognized by Pennsylvania itself in its requirement of mandatory forfeiture of illegal liquor and stills, and only discretionary forfeiture of such things as automobiles illegally used.

380 U.S. at 699-700 (emphasis added).

In *One 1958 Plymouth Sedan*, the Court noted that possession of an automobile is not "even remotely criminal." *Id.* at 699. "It is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss." *Id.* The Court explained that, like in *Boyd*, the property involved in the forfeiture proceeding was "not intrinsically illegal in character." *Id.* at 700. The same holds true for the personal property and currency identified in the forfeiture complaint here.

A great deal of what was seized does not (by the nature of the property) support the State's claim in light of the excluded evidence. Absent the excluded evidence, the state cannot show that the seized property is contraband. *Return of Property in State v. Jones*, 226 Wis. 2d 565, 596, 594 N.W.2d 738 (1999) (State must show a "significant connection to items which are illegal to possess"); *United States v. $405,089 in U.S. Currency*, 122 F.3d 1285, 1290-91 (9th Cir. 1997) (Government must present evidence of "sufficient connection between the detailed narcotics activity and the particular assets targeted by the forfeiture proceeding"). When the evidence seized from the Scott residence was excluded from use at trial in the forfeiture proceeding, the State was left without sufficient evidence to prove its case at trial; summary judgment was proper on these facts.

II. THE BALANCING TEST ADVANCED BY THE STATE FAVORS EXCLUSION OF THE UNLAWFULLY SEIZED EVIDENCE.

The State believes that, if police seize a citizen's property in violation of the state and federal constitutions, the police may nevertheless directly benefit from the unlawful seizure by keeping the property. If this were the rule, then there would be no limit on what a police officer can do when he suspects a citizen of misconduct. Police would be licensed to act unlawfully; they would not have to abide by the constitution, because the goal of forfeiting property to the state could be accomplished all the same without the inconvenience of legal proceedings. The failure to extend the exclusionary rule to these cases would encourage "policing for profit" and violate the state and federal constitutions.

Citizens are right to be vigilant when it comes to action by government without criminal due process protections. Abuses have been well-documented. *See* Dick Carpenter II, Ph.D., et al. *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed), INSTITUTE FOR JUSTICE (available at http://ij.org/report/policing-for-profit/) (last accessed October 21, 2017) (noting that "forfeiture laws pose one of the greatest threats to property rights in the nation today. They encourage law enforcement to favor the pursuit of property over the pursuit of justice"). The system proposed and endorsed by the State makes it profitable for police to ignore constitutional violations. This stands in contrast to the many reforms to forfeiture laws that have been suggested recently, including in Wisconsin.[9] Under the changes proposed in Wisconsin,

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[9] The legislature is presently considering significant changes to the forfeiture statute. 2017 Senate Bill 61 will change the procedure for forfeiting property after it has been seized by police. The Circuit Court was aware of the proposed changes. While the proposed modification to the forfeiture statutes, because of their broad support, may more accurately reflect the community's values in regard to forfeitures, and limiting the State's authority to seize personal property, the Circuit Court did not rely on the proposed legislation in reaching its decision. *See* R44:29-30 ("I do note I guess I don't know what a pending law means in terms of weight (continued...)

for example, a case like this could not be brought by the State: if the underlying criminal case was dismissed (for example if the evidence necessary was suppressed because it was unlawfully collected), then the State would be barred from seeking forfeiture of the assets that were evidence in the criminal case.

Government actions should be closely scrutinized when the government has a "direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993). Here, the very agency—indeed the very investigator—that seized the property would benefit the most from the forfeiture proceeding. *See* WIS. STAT. § 961.55(5)(a), (b) & (e) (allowing agency to retain or sell property). This very much bothered the Circuit Court and favored the application of the exclusionary rule on these facts. The Circuit Court expressed concern noting that:

> The police could still act incorrectly. They could still benefit from their actions in the civil forfeiture case. The state, and in this case the way our rules are written the police benefit or their departments benefit from that. I don't think that's on their mind when this is happening here, but that's a result also. What is the remedy if we say it's no good over here in the criminal case but it's good in this case we're kind of saying you may benefit from this activity, and unfortunately, I agree with that even when you can say this hurts because we know what's going on, folks, here in this context.

R44:29.

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[9](...continued)
or persuasiveness, but . . . the State of Wisconsin has a law pending which would say that if the criminal case is dismissed there is no action for civil forfeiture, which is pretty black and white and I guess is the bright line that we might have here if that law is passed").

It would be anomalous to hold that, in a criminal proceeding, the illegally seized evidence is excludable, while simultaneously in the forfeiture proceeding—which requires the determination that the criminal law has been violated—the same evidence would be admissible. Conceptually, this makes sense: if the exclusionary rule is to deter police from engaging in misconduct, then the fruits of unlawfully obtained evidence ought be excluded from use by the same party in the quasi-criminal forfeiture proceeding.[10]

As for the costs attendant to the application of the exclusionary rule, the Scotts note that courts have observed that the cost/benefit rationale of the exclusionary rule may cut in favor of the citizen, and against the State. That logic applies with equal force here.

> [T]he exclusion of evidence in forfeiture proceedings is without major societal cost associated with exclusion in criminal cases: setting a criminal free. [. . .] The only tangible cost to society from excluding evidence in a [forfeiture case] is monetary, a far less compelling reason to restrict the rule's application than the risk of freeing a guilty party.

United States v. $186,416 in U.S. Currency, 590 F.3d 942, 950 (9th Cir. 2009).

> At the same time, substantial deterrence interests will be served by refusing to allow the government to rely on the [] declaration, given law enforcement's strong incentive to prevail in forfeiture actions. The integrity of this court is also served by our refusal to allow the government to profit from illegal activity by law enforcement when such activity produces incriminating evidence . . .

Id. at 952.

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[10] Deterrence works not only to curb police misconduct, but also to further "the imperative of judicial integrity." *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968).

The State asserts that the exclusionary rule should not apply in cases where the evidence is obtained through illegal means by state agents because the Supreme Court noted that the rule applies only in situations "where its deterrence benefits outweigh its 'substantial social costs.'" *Pennsylvania Bd. of Probation v. Scott,* 524 U.S. 357, 363 (1998). The State believes that applying the rule to this case would provide minimal deterrence because the loss of the ability to use the evidence in the criminal prosecution alone would deter the police, especially given the severity of the criminal penalty (as opposed to the loss of personal assets). This approach is not feasible because, in part, the applicability of the exclusionary rule is dependent on the value of the property seized.

In a civil drug-related forfeiture case, where property and not just contraband is seized by the State, the need for deterrence exceeds the societal costs. Without the application of the exclusionary rule to such proceedings, police could seize contraband, absent sufficient probable cause to do so, even if that same evidence would be inadmissible in a criminal context to prove the wrongdoer's guilt.

The exclusionary rule's deterrent effect prevents police from engaging in unlawful seizures of property from which they would profit. Especially where governments increasingly have filed civil forfeiture actions in lieu of criminal charges, knowing that constitutional protections provide greater obstacles to their criminal cases, and that forfeitures have a great financial impact not only on the defendant but on the government's coffers as well. *See* Carpenter, *Policing For Profit, supra;* William Patrick Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture,* 80 CAL. L. Rev. 1309, 1328 (arguing that pragmatic concerns, *i.e.,* increased budgetary revenue, the ability to use valuable assets in future under cover operations, and an appearance of stronger job performance, have encouraged greater use of forfeiture laws, and noting one study in which eighty percent of property owners who lost their assets to forfeiture were never charged with a criminal offense); *State ex rel. Frederick City Police Dept. v. One 1988 Toyota Pick-up Truck,* 334 Md. 359, 375, 639 A.2d 641, 649 (1994)

("forfeitures are disfavored in law because they are considered harsh extractions, odious, and to be avoided when possible").

The exclusion of unconstitutionally obtained evidence will have little practical effect on civil forfeiture, as is exhibited by the fact that police continue to use forfeiture fifty-two years after *One 1958 Plymouth Sedan* was decided. Indeed, the particular nature of civil forfeiture reduces the baseline cost of the exclusionary rule—the loss of relevant, probative evidence. If evidence is excluded from a forfeiture hearing, police still may prevail by establishing the underlying criminal activity by other means, so long as the asset itself is not the product of the invalid search. As a result, application of the exclusionary rule has a relatively low impact on civil forfeiture proceedings. But even if a forfeiture action should fail, the costs to society are far less than in most contexts. In a failed forfeiture, the only cost is the loss of an asset. This cost is obviously less than continuing violations of the law, such as the retention of illegal aliens, or the social cost of allowing a criminal go free; the potential consequence of the rule's application to criminal proceedings. And if the seized item is contraband, the police are not required to return it, even under *One 1958 Plymouth Sedan*. *See State v. Voshart*, 39 Wis. 2d 419, 159 N.W.2d 1 (1968).

The benefits of the deterrent effect of the exclusionary rule outweigh the costs society may incur as a result of its proper application to forfeitures and underscore why the rule of *One 1958 Plymouth Sedan* is correct and was properly applied to these facts.

CONCLUSION

The Circuit Court correctly held that precedent required the exclusion of evidence unlawfully seized by police in the forfeiture proceeding. Lacking admissible evidence, the Circuit Court then properly found that there was no genuine issue of material fact, and summary judgment for the Scotts was proper.

For these reasons, Michael and Lori Scott now respectfully request that this Court **AFFIRM** the judgment of the Green County Circuit Court and **REMAND** for further proceedings consistent with this Court's opinion.

Dated at Madison, Wisconsin, October 24, 2017.

Respectfully submitted,

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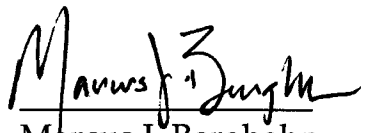

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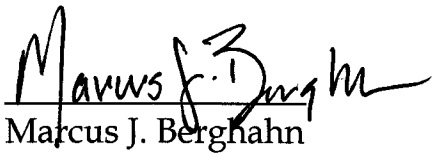

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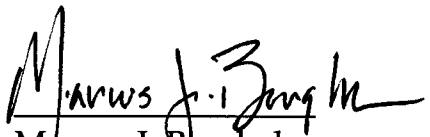

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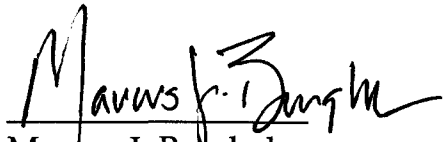

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