STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

State of Wisconsin,
Plaintiff-Respondent,

Appeal No. 2014AP002226

v.

One 2013, Toyota Corolla/s/le four-door, LICENSE #437MXR, VIN #2T1BU4EEXDC038839, ITS TOOLS AND APPURTENANCES,
Defendant,

Steven T. Baumgard and Gladys A. Vogel,
Defendants-Appellants.

Appeal from the Order of the
Circuit Court for Walworth County
The Honorable Kristine E. Drettwan Presiding
Walworth County Case No. 13-CV-657

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Wisconsin Statutes

Other Sources

STATEMENT OF ISSUES

I. Is a grandmother who lent her grandson $20,000 to purchase a new car with the expectation of repayment and who was a joint title holder when it was purchased and when it was seized for purposes of section 961.55(1)(d)2, Wis. Stats. an owner of the vehicle?

The circuit court answered no.

II. Was the forfeiture of a $22,500 vehicle a violation of the Excessive Fines Clauses of the United States and Wisconsin Constitutions when the offense involved the sale of $175 of marijuana?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The facts in the case are straight forward and the issues lend themselves best to briefing. The appellants do not request oral argument but are certainly not averse if the Court would find it would be helpful.

The appellants submit that the opinion in this case meets the criteria for publication under Rule 809.23(1) and should be published. The facts are similar to an unpublished case (Peloza) in which this Court found that it was "patently obvious" that the forfeiture was disproportionate. The publication of the opinion will provide better guidance to circuit courts in applying the ownership and proportionality tests that are integral parts of all

forfeiture cases. The seizure and forfeiture of assets under section 961.55 is a serious and ongoing matter and affects the lives of many people whether accused of crimes or not. These cases involve important constitutional rights that must be guarded by the courts.

STATEMENT OF THE CASE

Nature of the Case

This is a forfeiture action arising under section 961.55, Wis. Stats.[1] Steven Baumgard, a student at U.W.-Whitewater exercised terrible judgment when he decided to sell very small quantities of marijuana on three occasions while in a car. He was charged with three counts under section 961.41(1m)(h)1, Stats. The vehicle, which is titled jointly in the names of Steven and his grand-mother, Gladys Vogel, was seized.

As an innocent joint owner, Mrs. Vogel, who had lent Steven $20,000 toward the purchase price is seeking the return of her share of the vehicle's value. All charges against Steven were dismissed after completion of a deferred prosecution agreement. He is seeking the reversal of the forfeiture order on the grounds that the value of the vehicle is grossly disproportionate to the offense.

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[1] Unless otherwise indicated, all statutory references are to the 2013-14 edition of the Wisconsin statutes.

Procedural Status

The Walworth County Sheriff's office seized the vehicle on June 14, 2013. (R. 2, ¶1). Over two weeks later, the Walworth County District Attorney's office filed this action on July 2, 2013. (R. 1). Criminal charges were not filed until September 24, 2013. State v. Steven T. Baumgard, Walworth County case number 2013-CF-444 (R. 14, Ex. 11). By stipulation, the circuit court stayed this action pending the resolution of the criminal charges. (R. 12). The criminal charges were dismissed in their entirety on June 7, 2014. (R. 14, Ex. 11).

The circuit court conducted an evidentiary hearing in this action on July 10, 2014. (R. 19). The court granted judgment in favor of the State at the conclusion of the hearing. (R. 19 at 60:1-2). The written Order Granting Forfeiture was entered on August 4, 2014. (R. 15).

Statement of Facts

Steven Baumgard is a student at the U.W. Whitewater. (R. 19 at 26-27). When not at school, he lives with his mother in Jefferson, Wisconsin, a block away from his grandmother. (R. 19 at 24) The court may take judicial notice that he has no prior or subsequent criminal history. http://wcca.wicourts.gov/index.xsl.

Prior to the purchase of the subject vehicle, Steven owned a 1998 Infinity I30, which he used to get back and forth from school and work. On April 24, 2013, Mrs. Vogel and Steven purchased a

2013 Toyota Corolla from Smart Motors in Madison. (R. 14, Ex. 5) Steven traded in his Infinity and was credited with $2,500 toward the purchase price. (Id.) Mrs. Vogel paid the dealership the balance of $20,000. (R. 14, Exs. 5 and 6; R. 19 at 18-19). Mrs. Vogel and Steven were named as joint owners on the title. (R. 14, Ex. 7).

Mrs. Vogel's $20,000 was a loan to Steven, which she expected to be repaid. (R. 19 at 20-21). Steven had repaid $350 before the seizure. (Id.). Between the date of the seizure and the forfeiture hearing in July 2014 he was only able to repay an additional $200 leaving a balance due on the loan of $19,450. (Id.)

The defendants stipulated at the start of the hearing that the State could prove the allegations of the criminal complaint by a preponderance of the evidence. (R. 19 at 4) The only issues in dispute at the hearing were: (a) whether Gladys Vogel is an innocent joint owner of the car and (b) whether the forfeiture of the $22,500 vehicle under the circumstances would constitute a violation the Excess Fines Clauses of the United States and Wisconsin Constitutions. (R. 19 at 4:25-5:8).

The affidavit of the seizing officer fleshes out the criminal complaint. He avers that Steven sold 3.46 grams of marijuana to a confidential informant (CI 1055) for $60 on April 23, 2013. The purchase took place in Steven's Infinity. (R. 2 at ¶3). The

affidavit goes on to state that CI 1055 purchased 3.46 grams of marijuana on May 1, 2013. (Id. at ¶4). CI 1055 made one additional purchase of 3.43 grams for $55 on May 8, 2013. All of the purchases took place in the parking lots of either Wal-mart or Sentry. (Id. at ¶¶3-5). While they could have met in CI 1055's vehicle, CI 1055 walked over and met in Steven's car. (Id.).

ARGUMENT

I. GLADYS VOGEL IS AN INNOCENT JOINT OWNER OF THE COROLLA.

The standard of review on the question of ownership is *de novo*. Ordinarily, where the facts concerning ownership are disputed, the issue is one of fact and the appellate courts will defer to the circuit court's findings unless they are clearly erroneous. State v. Kirch, 222 Wis. 2d 598, 606-07, 587 N.W.2d 919 (Ct. App. 1998).

However, in this case the material facts are essentially undisputed. The circuit court's findings do not depend on weighing conflicting testimony. Where the facts are undisputed, the conclusion to be drawn is one of law. GMAC Mortage Corp. v. Gisvold, 215 Wis. 2d 459, 470, 572 N.W.2d 466 (1998). An appellate court owes no deference to a lower court on questions of law; the appellate court reviews those questions on a *de novo* basis. City of Muskego v. Godec, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

The circuit court does have discretion in determining whether a forfeiture would be appropriate. However, a circuit court erroneously exercises its discretion as a matter of law when it applies the law incorrectly. See Sullivan v. Waukesha County, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998); Sunnyside Feed Co. v. City of Portage, 222 Wis. 2d 461, 471-72, 588 N.W.2d 278 (Ct. App. 1998).

Where an issue presents a mixed question of fact and law, the appellate court must separate the two and apply the appropriate standard of review to each one. Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 19, 531 N.W.2d 597 (1995). The determination of whether an issue is one of fact or of law is itself a question of law. See State v. Byrge, 2000 WI 101, ¶32, 237 Wis. 2d 197, 614 N.W.2d 477; State v. McMorris, 213 Wis. 2d 156, 165, 614 N.W.2d 477 (1997).

A. The facts concerning the innocent owner defense are undisputed.

1. It is undisputed that Mrs. Vogel had no knowledge of and did not consent to the use of the car for the sale of marijuana.

Mrs. Vogel testified that she had no idea that Steven had sold marijuana while inside the car. (R. 19 at 22). She certainly did not approve of the sale of the substance nor did she consent to the use of the car for that purpose. (R. 19 at 23). The deputy who testified at the hearing said as far as he knew Mrs. Vogel had not participated in and had no knowledge of Steven's activities. (R. 19 at 14-15). The circuit found that Mrs. Vogel had no knowledge of and did not consent to the use of the car in any criminal activity. (R. 19 at 55).

2. Only Steven drove the car and paid for related expenses.

Mrs. Vogel does not claim that she used the car. The car was purchased for Steven's use for school and work. (R. 19 at 26-27). Naturally, Mrs. Vogel did not keep any possessions in the car. There was never any dispute that Steven paid for gas, insurance and maintenance and kept some of his possessions in the car. (R. 19 at 9-10). However, that alone does not establish complete dominion and control over the vehicle. Steven had the right to use the car, but did not have sole control over the sale or the disposition of the Corolla.

3. Mrs. Vogel has the largest financial stake in the vehicle.

The Corolla was purchased with a combination of cash from Mrs. Vogel and the trade-in of Steven's 1998 Infiniti I30. (R. 14, Ex. 5). The purchase contract with Smart Motors shows that Steven's trade-in was valued at $2,500 and that a balance of $20,000 was due on delivery, which Mrs. Vogel paid. (Id.). The May 2013 statement for Mrs. Vogel's checking account verifies her payment of $20,000 to Smart Motors. (Id., Ex. 6).

There is no question that the $20,000 was only a loan and not a gift to Steven. (R. 19 at 20). Before the seizure he had already repaid $350. (R. 19 at 20). Between the date of the seizure in June 2013 and the hearing in July 2014, Steven had only managed to make one additional payment of $200, leaving a balance of $19,450 due and owing to his grandmother on the date of the forfeiture hearing. (R. 19 at 21).

4. The Corolla was purchased as joint property.

The Corolla was not a mere gift to Steven; Mrs. Vogel expected to be repaid. One means of securing her interest in the vehicle was to retain an ownership interest. On the purchase contract, the "prospective purchasers" are listed as "Steven T. Baumgard and Gladys A. Vogel." (R. 14, Ex. 5). At the dealership, the Corolla was titled jointly in Steven's and Gladys' names. (R. 14, Ex. 7).

B. An "owner" must be more than a mere title holder.

The State and the circuit court took an excessively broad view of what constitutes a "nominal" owner under State v. Kirch, 222 Wis. 2d 598, 587 N.W.2d 919 (Ct. App. 1998). In Kirch, this Court faced an issue of first impression, i.e. what is the definition of an "owner" under section 973.075(1)(b)2, Wis. Stats. (1997-98) for purposes of the innocent owner defense to forfeiture of a vehicle? The Court found the section to be analogous to section 961.55(1)(d)2 and concluded that the legislature intended the word to have the same meaning in both sections. Id. at 605.

1. Kirch looked to the fundamentals of property ownership.

The State in Kirch offered the Black's Law Dictionary definition of owner:

> "'The person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant with restrains his right.'"

Id. at 604 (quoting Black's Law Dictionary, 1105 (6th ed. 1990)(emphasis added). Since there was no Wisconsin precedent, the Court looked to federal cases for guidance. After reviewing certain cases, the Court concluded that the cases favored the State's interpretation. Id. at 605.

The basic rule is that having bare legal title to property, in and of itself, is insufficient to be treated as an "owner." Indicia of ownership include: possession, dominion and control and a financial stake. Id. at 606 (citing United States v. One 1981 Datsun 289ZX, 563 F. Supp. 470 (E.D. Penn. 1983)). A person who holds title but lacks any other indicia is a mere "nominal" owner.

> Black's Law Dictionary defines "dominion" as follows:
>
> "Generally accepted definition of 'dominion' is perfect control in right of ownership. The word implies both title and possession and appears to require a complete retention of control over disposition."

Black's Law Dictionary, 436 (1979) (emphasis added).

> In contrast a "nominal" owner is one whose ownership is:
>
> "Titular; existing in name only; not real or substantial; connected with the transaction or proceeding in name only, not in interest."

Id. at 946 (definition of "nominal").

2. The court in Kirch looked to federal law for guidance.

The court in Kirch reviewed the facts of three federal cases in reaching its decision. 222 Wis. 2d at 606. In United States v. One 1990 Chevrolet Corvette, 37 F.3d 421 (8th Cir. 1994), the government seized a Corvette worth $42,000 from the driver under federal drug seizure laws. The government claimed that

its purchase could be traced to the sale of drugs. Id. at 421. A woman who held legal title claimed that she had purchased the car and sought its return as an innocent owner. The district court found that she lacked the financial means to buy the car and that she, in fact, had not purchased it. At the time of the seizure the driver told the agents that they could not confiscate the car because "he had it in his aunt's name." Id. at 422. The court concluded that the woman had no legal interest in the car and was a mere nominal owner.

In United States v. One 1981 Datsun, 563 F. Supp. 470 (E.D. Penn. 1983), a father, Joseph Esposito, Sr., claimed to be the innocent owner of a Datsun allegedly used by his son, Joseph Esposito, Jr. to facilitate a drug purchase. Id. at 471. The title listed the owner as "Joseph Esposito" with no designation of "Jr." or "Sr." The car was insured in the same manner. The district court said that "the most telling factors" governing ownership concerned the purchase. Id. at 475. In rejecting the father's claim, the court found that the father did not pay for the car, it was merely titled in his name.

The third federal case the court in Kirch reviewed was United States v. One 1971 Porsche Coupe Auto, 364 F. Supp. 745 (E.D. Penn. 1973). The case involved a father who purchased the car and held title but who had given it to his son as a gift. Consequently, the father no longer had any financial stake in the

vehicle and was "only the nominal owner of the Porsche" Id. at 748.

3. Kirch shared the same factual situation as the three federal cases which found the claimants to be nominal owners.

Kirch shares material facts in common with the three federal cases, namely that the claimants had no financial stake backing up their title. In Kirch the truck was titled in the driver's mother's name despite that fact that her son had paid for it. "She stated at the hearing that the truck was listed in her name because Walter 'was undergoing a bankruptcy and he said that he could not have a vehicle in his name.'" 222 Wis. 2d at 601. That situation demonstrates exactly the meaning of a "nominal" owner—an owner in name only. The mother was not a true owner because she had no financial interest in addition to legal title.

4. Mrs. Vogel is much more than a mere nominal owner.

Unlike the title holders in Kirch and the three federal cases on which it relied, there is no dispute that Mrs. Vogel paid the lion's share of the purchase price of the Corolla. There is no dispute that the $20,000 was not a gift to Steven. It was a loan and she expects repayment.

Mrs. Vogel's joint ownership means that Steven does not have complete dominion and control over the Corolla as a matter

of law. As Black's Law Dictionary reminds us, dominion includes total control over the disposition of the property. Steven, having only joint ownership, could not sell the Corolla without Mrs. Vogel's consent and would not be entitled to the entire proceeds of a sale.

C. Forfeiture analysis must take into account dual ownership of property.

It is axiomatic that a single piece of property may be owned by more than one person. It is as true for property subject to forfeiture as any other. Two of the most influential Federal Circuit Courts of appeal, the Second and the Ninth, have recognized that separate ownership interests must be recognized even if neither of the owners is innocent.

In Van Hofe v. United States, 492 F.3d 175 (2007), a husband and wife jointly owned their home. The husband cultivated marijuana plants in two basement compartments. One housed the home's oil tank and the other one contained the hot-water heater. Both were closed off with large curtains. Id. at 180. The wife testified that she was unaware of the plants. After agents obtained a warrant and discovered the plants the government sought the forfeiture of the home.

The wife asserted an "innocent owner" defense. The circuit court's opinion leaves little doubt that Mrs. Van Hofe's one-half ownership interest would not have been subject to forfeiture if

she were innocent. What is significant is that, even though the court found that she was not entirely innocent, her "culpability [fell] at the low end of the scale, which is best described as turning a blind eye to her husband's marijuana cultivation in their basement." Id. at 189. Because the seriousness of their offenses differ sharply, the court held that Mrs. Van Hofe was entitled to a separate analysis of proportionality with respect to her ownership interest in the home.

In United States v. Ferro, 681 F.3d 1105 (9th Cir. 2012), Robert and Maria Ferro were married. In 1994, Robert was convicted of possessing explosives, a felony that barred him from possessing firearms. Before his conviction, he conveyed all of his assets to his wife, including a number of firearms. Years later, in 2006, the ATF raided their house and seized over 700 firearms as well as ammunition, grenades, machine guns and silencers, much of it hidden under floors or in walls. The seized property was valued at $2.55 million. It comprised a combination of contraband and collectible items, some were gold-plated and others were very rare specimens from the early twentieth century. The court found that the latter category were not the sort of inexpensive firearms that would be used in the commission of crimes. Maria objected to the forfeiture of the entire haul, arguing that she was an innocent owner. The district found that she was not entirely innocent and ordered the

return of 10percent of the value of the property to her. Both the government and Mrs. Ferro appealed.

The Ninth Circuit agreed that she was not an innocent owner, but reversed the decision on the grounds that her culpability was considerably less than her husband's and consequently, she was entitled to a separate evaluation of proportionality with respect to her ownership interest tailored to the degree of her guilt. The case was remanded for further proceedings.

While the ultimate issue in these two cases involved the proportionality of a seizure, they remind us that property can be jointly owned and that each owner's interest must be considered separately. The recognition of joint ownership has to apply with even greater force where one owner is wholly innocent.

D. Mrs. Vogel is entitled to the innocent owner defense with respect to her proportionate interest in the Corolla.

For the reasons discussed earlier, Mrs. Vogel has an ownership interest in the Corolla. Steven is an owner, but not the sole owner of the vehicle. Even if, hypothetically, Mrs. Vogel had been a limited participant in the marijuana sales, Van Hofe and Ferro teach us that she would have a constitutional right to a separate analysis of the proportionality of the forfeiture of her joint ownership interest based on her culpability. Clearly, as an

innocent owner, she has a constitutional right to her proportionate interest in the vehicle.

Joint ownership of property is recognized in seizures where both owners have some degree of culpability. Since guilty owners are afforded rights to their respective ownership interests, it would make no rational sense that innocent owners would not be protected with respect to their joint ownership rights.

If Mrs. Vogel had a perfected security interest in the car rather than holding joint ownership, there is no question that she would be entitled to repayment of the loan before any proceeds went to the government. Wis. Stats. § 961.55(1)(d)4. The principle behind this exception is the same as with the innocent owner defense, namely to protect innocent people who have a financial stake in property subject to forfeiture.

II. THE FORFEITURE OF A $22,500 VEHICLE IN A CASE INVOLVING $175 OF MARIJUANA IS A PATENTLY, GROSSLY DISPROPORTIONATE FINE .

A. The forfeiture of property in connection with the commission of a crime is a fine for purposes of the Excessive Fines Clauses.

The Eighth Amendment to the U.S Constitution and Article I, § 6 of the Wisconsin Constitution prohibit the levy of excessive fines. The U.S. Supreme Court has held that civil forfeitures that are based on the property's connection with the commission of crimes have a punishment component and fall within the

provisions of the Excessive Fines Clause. Austin v. United States, 509 U.S. 602, 622-23 (1993).

Austin applies to Wisconsin's civil forfeiture laws. See State v. Bergquist, 2002 WI App 39, 250 Wis. 2d 792, 641 N.W.2d 179 (addressing section 968.20(1m)(b), Wis. Stats. authorizing the seizure of firearms used in the commission of a crime). Section 961.55, Wis. Stats., is likewise subject to the Excessive Fines Clauses. See State v. Peloza, 2013 WI App 73, 348 Wis. 2d 264, 831 N.W.2d 825 (unpublished).

What standards apply to the Excessive Fines Clause in the Wisconsin Constitution does not appear to have been addressed to date by the courts. However, the language mirrors the Eighth Amendment and has been presumed to have the same scope. See City of Milwaukee v. Arrieh, 211 Wis. 2d 764, n.8, 565 N.W.2d 291 (Ct. App. 1997); see also State v. Hammad, 212 Wis. 2d 343, 355, 569 N.W.2d 68 (Ct. App. 1997); State v. Seraphine, 266 Wis. 118, 62 N.W.2d 403 (1954)(applying Wisconsin constitution).

B. The Excessive Fines Clauses require proportionality.

The test of whether a fine is excessive under the Eight Amendment was amplified in United States v. Bajakajian, 524 U.S. 321 (1998).

> "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish."

Id. at 329. The Wisconsin courts have described the test as follows:

> "In the simplest terms, the Bajakajian Court applied the proportionality test by considering these factors: the nature of the offense, the purpose for enacting the statute, the fine commonly imposed upon similarly situated offenders and the harm resulting from the defendant's conduct."

State v. Boyd, 2000 WI App 208, ¶14, 238 Wis. 2d 693, 618 N.W.2d 251.

Boyd and Bajakajian require consideration of all circumstances of the offense at issue. They do not permit a mere formulaic approach where the statutory maximum penalties for the alleged violations are plugged in and multiplied by the number of charges that are filed.

C. The forfeiture of a $22,500 car in a case involving the sale of $175 of marijuana is patently disproportionate to the offense.

1. This Court has expanded on the factors to be considered in determining the proportionality and constitutionality of a forfeiture.

The Court of Appeals applied the proportionality test to a case strikingly similar to this case. In a terse, eight paragraph opinion, this Court reversed a forfeiture order, finding it "patently obvious" that it was excessive and unconstitutional. State v. Peloza, 2013 WI App 73, 348 Wis. 2d 264, 831 N.W.2d 825 (unpublished).

In Peloza, an investigator for the Milwaukee Metropolitan Drug Enforcement Group conducted a sting operation and purchased one ounce (28 grams) of marijuana from the defendant for $355. On a second occasion, the defendant agreed to sell the investigator another six ounces (170 grams) for about $1,500. The defendant was arrested and his car was seized. For reasons that are not clear, he was apparently charged with only a single count of felony possession with intent to deliver. Just as in this case, the felony count carried a maximum penalty of a $10,000 fine and imprisonment for up to 3.5 years. Peloza sold a combined amount of 198 grams of marijuana (versus a little over 10 grams in this case). If Peloza had sold 201 grams in a single transaction, he would have been charged under section

941.41(1m)(h)2, which carries a maximum penalty of a $10,000 fine and up to 6 years in prison.

Peloza pled guilty to misdemeanor possession and entered into a deferred prosecution agreement. Upon successful completion, he paid a $250 fine and his conviction was expunged. Nevertheless, the State proceeded with the forfeiture action.

The car that was seized, a 2009 Mitsubishi Lancer GTS, was worth $16,000. The defendant's grandfather had lent him $15,000 to pay off his high-interest car loan. At the time of the hearing, he still owed his grandfather about $8,000. The circuit court ordered the vehicle forfeited subject to an $8,000 payment to Peloza's grandfather.[2]

The Court of Appeals did not find it a close case or struggle with whether to overturn the circuit court's order.

> "When we consider the factors in this case, it is patently obvious that forfeiture of Peloza's car is excessive. Certainly, drug sales are not to be encouraged, but Peloza was ultimately convicted of mere possession. Peloza's offense did not involve violence, did not result in injury to anyone, and was not gang related. There is no suggestion that Peloza is a large-scale drug dealer, and he had no prior criminal record. The total value of the drugs he sold was less than $2000. The State apparently does not view the offense as exceptionally serious, as it was willing to permit a disposition resulting in expunction of the conviction and payment of a small $250 fine.

[2] The circuit court in Peloza recognized the grandfather's financial stake in the vehicle and the harm the seizure would cause him.

> The maximum fine for misdemeanor possession was $1000, and even for the originally charged felony, the maximum fine was only $10,000. Forfeiture of a $16,000 vehicle is unconstitutionally disproportionate to the offense at hand."

Id. at ¶8 (emphasis added).

The court in Peloza expanded on the "simplest terms" that the court in Boyd had outlined. The factors it considered were: (1) the offense for which the defendant was ultimately convicted (if any), (2) whether the offense involved violence, (3) whether the offense resulted in bodily injury, (4) whether the defendant was a "large-scale drug dealer" or involved in a gang (presumably a gang involved in drug trafficking), (5) the value of the drugs that were sold, (6) the sentence actually imposed as an indication of the seriousness with which the State views the circumstances of the specific offense, (7) the maximum penalty for the offense with which the defendant was charged and (8) the maximum penalty for the offense of which the defendant was actually convicted.

2. This Court has applied the test of proportionality consistently throughout many cases.

It is instructive to compare this Court's rulings in several other forfeiture cases in addition to Peloza.

a. Berquist

In State v. Bergquist, 2002 WI App 39, 250 Wis. 2d 792, 641 N.W.2d 179, the State seized two of the defendant's guns

after neighbors reported that he had fired them toward their property. He was charged with two counts of felony reckless endangerment under section 941.30(2). Second degree reckless endangerment is a Class G felony subject to a fine not to exceed $25,000 and up to 10 years' imprisonment per offense. Wis. Stats. §939.50(3)(g)

Berquist pled no contest to a misdemeanor count of disorderly conduct, which carries a maximum fine of $1,000 and up to 90 days' imprisonment. The total value of the two guns was between $5,000 and $7,150. Under those circumstances the circuit court found that the forfeiture of the guns would be "grossly disproportionate to the maximum penalty for the crime" and ordered that the guns be returned. Id., ¶5. This Court affirmed the decision.

b. Boyd

In State v. Boyd, 2000 WI App 208, 238 Wis. 2d 693, 618 N.W.2d 251, the defendant fired a .22-caliber handgun at the door of the Elkhart Lake police station because he was angry at having been arrested for drunk driving several days earlier. He was convicted of felony endangering safety by use of a dangerous weapon in violation of section 941.20(2)(a) (1999-2000). The crime carried a maximum penalty of $10,000 fine at the time of the offense. The State sought the forfeiture of the $28,000 truck that Boyd had driven to the police station. The circuit court

found that a forfeiture of the entire truck would be disproportionate. It ordered the truck to be sold with the first $10,000 to be paid to the police department. The State appealed and this Court affirmed the order.

c. Hammad

In State v. Hammad, 212 Wis. 2d 343, 569 N.W.2d 68 (Ct. App. 1997), the City of Milwaukee conducted a sting operation in which the defendant agreed to purchase ostensibly stolen goods worth $2,005. He was convicted of a Class E felony, which carried a maximum fine of $10,000 at the time of the offense in 1995. Hammad appealed the circuit court's forfeiture order for the $4,300 car he used in the commission of the crime. This Court rejected the defendant's argument that the forfeiture was excessive noting among other things that it was only twice the value of the stolen property and significantly less than the maximum allowable fine.

3. In reviewing the outcomes in these cases, it is obvious that the forfeiture of the Corolla is grossly disproportionate.

The following table compares the four cases to this one. Column A shows the value of the property involved in the offense; Column B shows the maximum fine applicable to the offenses that were charged; Column C shows the maximum fines for the offense the defendant was convicted of (if any); Column D shows

the value of the property that was seized; and Column E shows the amount of the forfeiture imposed, if affirmed.

Case	A	B	C	D	E
Berquist	N/A[3]	$50,000	$1,000	$5-7,500	$0
Peloza	$1,855	$10,000	$1,000	$16,000	$0
Hammad	$2,005	$10,000	$10,000	$4,300	$4,300
Boyd	N/A	$10,000	$10,000	$28,000	$10,000
Baumgard	$175	$30,000[4]	N/A	$22,400	$22,400

Without question, the two cases presenting the greatest risk of bodily harm or death are Berquist and Boyd. Both involved shooting firearms. Berquist was charged with two felonies and was facing up to $50,000 in fines and 20 years in prison. Nevertheless, the circuit court concluded that the forfeiture of two guns worth between $5,000 and $7,500 was unwarranted. In Boyd, where a drunk man intentionally fired a handgun at the door of a police station the court ordered a forfeiture of only $10,000, the same as the maximum that could be imposed for the offense.

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[3] Berquist and Boyd involved reckless endangerment, not a sale of property.

[4] The defendant in Peloza was charged with only one count despite two occasions in each of which the value and amount of marijuana were higher than the three counts against Baumgard combined. The number of counts that are charged is within the district attorney's discretion and does not necessarily reflect the seriousness of the particular offenses.

Comparing the amounts of the forfeitures to the value of the property involved in the crimes, the forfeiture in Hammad was twice the value of the stolen goods. In Peloza, the defendant was only charged with one offense rather than two, the value of the marijuana sold was $1,855, the defendant ultimately pled to a misdemeanor possession charge, yet a forfeiture in any amount was deemed disproportionate to the offense. In this case, Steven was charged with three counts despite the minor quantities involved, thereby inflating the hypothetical penalties of the offenses that were charged well beyond anything that would actually be imposed on any defendant in the same circumstances. Then, despite the fact that Steven never pled to and was not convicted of any offense, the circuit court hit him with a $22,500 forfeiture.

By any measure, the forfeiture of any amount is grossly disproportionate to the offense.

D. The circuit court erroneously exercised its discretion as a matter of law because it did not apply the law correctly to the specific facts of this case.

The circuit court acknowledged that the law requires a case-by-case review in determining proportionality. (R. 19 at 59: 17-20). However, instead of an individualized review, the court used a formulaic approach with two variables: (a) the maximum penalty applicable to the sections of the statute that were charged and (b) the number of charges filed. The two were

multiplied and the product was compared to the value of the asset subject to forfeiture. Applying this formula, the circuit court concluded that a $22,500 seizure was proportional when compared to the hypothetical $30,000 maximum fine and 10.5 years' imprisonment for the offenses that were charged.

The State and the circuit court misconstrued the term "offense" to mean the general prohibition of marijuana sales in section 961.41(1m)(h)1, Wis. Stats., rather than the facts of the particular incident supporting the charge. They forgot the language in Boyd that the court is to consider "the fine imposed upon similarly situated offenders." 2000 WI App 208 at ¶14 (emphasis added).

The circuit court did not factor in the quantity of marijuana involved other than to note in passing that it was "not a huge amount" before disregarding it. (R. 19 at 58). With respect to the seriousness of the offense, rather than looking at the circumstances of this particular case, the circuit court referred to the "public ramifications and the dangers of drug dealing." (R. 19 at 59). This was in keeping with the State's closing argument placing the seriousness of the entire "war on drugs" at Steven's feet.

> "What the Court can consider is that even deliveries of marijuana can result in violent crimes and damage to our community. There have been examples of robberies over marijuana. People have been shot over marijuana. There is discussion that marijuana

> purchases can further drug cartels in other countries depending on where the marijuana comes from."

(R. 19 at 38:1-9)(emphasis added).

> "There is damage based on how these controlled buys or when they're not controlled buys where they're occurring. These are occurring in community places where there are children and people who don't want to be subject to the dangers of that come from drug deliveries."

(R. 19 at 38:9-14). The circuit court picked up on the theme stating only that "the public ramifications and the dangers of drug dealing are well-known, and I don't think I need to go through what they are." (R. 19 at 59:10-13).

The problem with State's argument and the circuit court's approval of it is that it would apply across the board to every marijuana offense regardless of the quantities involved or the surrounding circumstances of the particular case.

They point out the potential dangers, but fail to take into account that there was no violence; no one was robbed; no one was shot. Steven was not even armed, nor was he a "large-scale drug dealer" or gang member. The drug sales took place in Steven's car; there were no children or other people exposed to the transactions.

The court further erred in considering only the penalty that theoretically could have been imposed based on the three counts that were pled rather than the fact that all charges against

Steven were dismissed with no conviction and no fine. Indeed the Court actually discounted the result, noting that Steven "got a huge benefit" from the dismissal of the charges--apparently presuming that he would otherwise have received the maximum penalties.

The circuit court even suggested that the legislature did not intend that there be proportionality.

> "If the only time a seizure and a forfeiture can be done is if they're driving junkers or something that's proportionate so to speak to what they're doing at the time, I think that would have been put into the statute but it is not."

(R. 19 at 59:1-7). There are at least two fundamental problems with the court's reasoning. First, regardless of what the legislature intended, the Eighth Amendment and Article 1, section 6 of the United States and Wisconsin Constitutions respectively constrain what the legislature can do. They mandate proportionality.

Second, the statutory scheme clearly indicates the legislature's intent to incorporate proportionality. Subsection 961.41(1m)(h) has five graduations of penalties dependent on the quantity of the marijuana involved. Moreover, the penalties within the various classes of felonies provide for "up to" a certain fine. If the legislature deemed that all offenses within a given

class required the maximum penalty, it would have set a fixed penalty for every violation.

Although counsel was unable to find any official statistics listing the sentences imposed for small scale sales of marijuana in Wisconsin, no one can reasonably contend that offenders "similarly situated" to Steven receive anything remotely like the maximum penalties. The relevant question is not whether the State views the sale of marijuana in general as a serious offense. It is the seriousness of the particular offense that comes into play in a proportionality review.

III. PUBLIC POLICY DEMANDS THAT THE COURTS RESTRAIN ABUSES IN THE USE OF CIVIL FORFEITURE LAWS.

The use of civil forfeiture laws has exploded. The value of seized property at the federal level went from $338 million in 1996 to almost $2 billion in 2010. Brent Skorup, Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases, Vol. 22:3 Civil Rights Law Journal, 427, 438. Data from the federal Bureau of Justice Statistics show that forfeitures have increased at an average annual rate of 19.4% between 1989 and 2010. Andrew A. Laing, Asset Forfeiture & Instrumentalities: the Constitutional Outer Limits, 8 NYU J.L. & Liberty 1201, 1203. The statistics for state seizures are difficult to track but are clearly substantial. Id. at 1203-04.

State and federal law enforcement agencies engage in "equitable sharing" by which the state and local agencies submit forfeitures to the federal government, which then returns up to 85% to them. Skorup at 438. The federal government has transferred around $4.5 billion to over 8,000 state and local law enforcement entities. Laing at 1206. Journalists and academics have raised concerns about law enforcement agencies using equitable sharing to circumvent state and local limits on the amount of money the agencies are allowed to keep.[5] The problem has become so bad that the U.S. Attorney General has stopped the program. "Holder Limits Seized-Asset Sharing Process that Split Billions with Local, State Police," The Washington Post, January 16, 2015.

Civil liberties groups on the both the right and left sides of the political system have decried the expanding use of civil forfeitures from their original intention as a tool against major drug traffickers and other major crimes to even the most minor of offenses. See, e.g., Lawrence A. Kasten, Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation, 60 Geo. Wash. L. Rev. 194 (1991-92);

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[5] See Wis. Stats. § 961.55(5)(b) and (e) (authorizing the retention of 50% of the value of forfeitures by the law enforcement agency which made the seizure to cover the "payment of forfeiture expenses." The "expenses" include the costs of prosecution meaning that both law enforcement agencies and prosecutors have vested interests in funding their operations through forfeitures.

Mary M. Cheh, Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution, 39 N.Y.L. Sch. Rev. 1 (1994); John L. Worrali, Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement, Journal of Criminal Justice, 171-187, (May-June 2001); Eric Moores, Reforming the Civil Asset Forfeiture Reform Act, 51 Ariz. L. Rev. 777 (2009).

Among the criticisms are: (a) that law enforcement agencies become addicted to the revenue generated from forfeitures and depend on a regular stream of funds, especially in times of tight budgets, and (b) that the lower burden of proof in the civil actions result in forfeiture actions being brought without any criminal charges ever being filed. See Skorup at 428 and 439. According to one study, in 80% of civil forfeiture cases, no criminal charges are ever filed. Skorup at 453 (citing Radley Balko The Forfeiture Racket, Feb. 2010 at 35).

The impact of civil asset foreclosure laws fall disproportionately on the lower and middle classes. Skorup at 454. A defendant facing the loss of hundreds of thousands or even millions of dollars can afford to fight. People of modest means are less able to afford to contest the forfeiture of several thousand or even tens of thousands of dollars. In those cases the State

either wins by default or the property owner wins a pyrrhic victory.

The courts must be a bulwark to protect the public from overly aggressive seizures by providing clear guidelines and binding precedent that will prevent disproportionate seizures from occurring in the first instance rather than requiring beleaguered property owners to defend them after they occur.

CONCLUSION

For the reasons set forth above, the appellants respectfully request that this Court reverse the circuit court's order, and remand the case with instructions that the appellants' Corolla be released to them.

Dated this 30th day of January, 2015.

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CERTIFICATE OF SERVICE

Mark J. Steichen certifies that on January 30, 2015, three true and correct copies of this brief were mailed to:

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,022 words.

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