STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2016AP000729CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER J. LONG,

Defendant-Appellant.

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OF WISCONSIN

ON APPEAL FROM AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED ON MARCH 24, 2016, IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOHN SIEFERT, PRESIDING CIRCUIT COURT CASE NO. 1998CT005997

DEFENDANT-APPELLANT'S REPLY BRIEF

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STATEMENT OF FACTS

It should be noted that the plaintiff re-alleges the Statement of the Case section from his previously filed Brief-In-Chief as though fully set forth at length herein.

Corrections to Defendant's *Statement of the Case* Section:

Although Attorney Jensen may have stipulated that Mr. Long had three prior OWI convictions as part of the factual basis for the plea, he did not stipulate that Mr. Long was represented by counsel for each of those convictions. (R41:11).

The plea negotiations and plea agreement between the parties did *not* include the seizure and subsequent forfeiture of Mr. Long's vehicle. (R:41: P 2, L 12 → P 3, L 5). Further, Judge Siefert's he did [n]ot even address or include the possible seizure and subsequent forfeiture of Mr. Long's vehicle during his plea colloquy. (R:41: P 7, L 21 → P 8, L 6). Further, Judge Siefert [n]ever includes the possible seizure and subsequent forfeiture of Mr. Long's vehicle when explaining the maximum possible penalties. (R:41: P 10, L 20). In fact, the first time the circuit court recommends a seizure is *after* his plea colloquy, at the *end* of the sentencing hearing, when Judge Siefert states, "Seizure of your vehicle is mandatory as well." (R:41: P 23, LL 4 → 5); and when he states, "... because he turns over the title and physical possession of the car and ... ." (R:41: P 26, LL 13 → 14). The State conveniently left the above facts out of their Statement of the Case section.

In addition to the seizure order for Mr. Long's pick-up truck (R21), on May 30, 2000, *after* sentencing, *without* Mr. Long even being present, Judge Siefert ordered Mr. Long's 1991 Ford Probe GT seized. (R27). On May 30, 2000, *after* sentencing, *without* Mr. Long even being present, Judge Siefert ordered Mr. Long's 1981 Buick Regal

Coupe seized. (R28). On September 7, 2000, *after* sentencing, *without* Mr. Long even being present, Judge Siefert ordered Mr. Long's 1993 Suzuki cycle seized. (R29). Thus, Judge Siefert ordered the seizure of four of Mr. Long's vehicles, amounting to a cumulative value over $60,000.00, for a criminal traffic offense (i.e., misdemeanor offense). The three aforementioned seizure orders were unconstitutional because Mr. Long was [n]ot present at sentencing and they violated Wis. Stat. § 346.65(6)(a)2, which only provided for the seizure **[a]** motor vehicle owned by Mr. Long when he committed his OWI offense on August 25, 1998. Once again, the State conveniently left the above facts out of their Statement of the Case section because they raise into question the overall validity of Mr. Long's sentence.

The State asserts that before the seizure was effectuated, the title for the pick-up truck had been transferred to another owner. (R26). However, the State fails to further inform the Court that this title transfer was deemed not made in good faith by the circuit court. Therefore, pursuant Wis. Stat. § 346.65(6)(k) the department may cancel a title or refuse to issue a new certificate of title in the name of the transferee as owner to any person who violates this paragraph. Thus, the title transfer for Mr. Long's pick-up truck to J.M.C. was cancelled by the circuit court and Mr. Long remained the legal owner so the State could legally seize and forfeit it. The forfeiture proceeding against Mr. Long confirmed that he was the lawful owner of the 1998 Dodge pick-up truck.

The State attempts to mislead the Court by stating that Mr. Long did not request an ***Ernst*** hearing on his allegations, and none was held. (State's Response Brief ("SRB"): P 4). As previously mentioned, on October 27, 2006, Mr. Long filed a collateral challenge Motion in Waukesha County Case No. 00-CF-611 (originally an

OWI 5th offense case) based on the denial of his right to counsel in the prior case: Marathon County Case No. 90-CT-526. (Mr. Long's Brief-in-Chief ("BIC"): PP 14-15). During these appellate proceeding Mr. Long was represented by Assistant State Public Defender, Donald T. Lang. ("ASPD Lang"). *Id.* A Motion Hearing ("*Ernst* Hearing") *was conducted* in Waukesha County Circuit Court on February 26, 2007, the Honorable Patrick L. Snyder presiding, and the Circuit Court *granted* Mr. Long's collateral challenge Motion and ordered that the original judgment of conviction shall be amended to reflect a conviction for a fourth offense of operating a vehicle while intoxicated. *Id.* This information was *included* in Mr. Long's BIC Exhibits. (*See BIC* Appendix B – Exhibit 6: Circuit Court Order). The circuit court Order clearly states, "and a hearing have been conducted before the court on defendant's motion." *Id.*

REPLY ARGUMENT

I. THE STATE ARGUES THAT BECAUSE LONG HAS COMPLETED HIS SENTENCE, THIS APPEAL IS MOOT AND SHOULD BE DISMISSED.

Because he is a *pro se* litigant, Mr. Long is held to a "less stringent standard" in crafting pleadings. ***Haines v. Kerner***, 404 U.S. 519, 521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

A. The State argues that because Long has completed his sentence, an order modifying the sentence to that permitted for an OWI 3rd would have no practical effect.

B. The State argues that because the penalties imposed in this case did not exceed the penalty permissible for OWI 3rd, the modification Long requests still could have no practical effect.

Mr. Long's motion to reopen is not moot because it involves a *new factor*. The focus of Mr. Long's motion and appeal is ***not*** the confinement time related to his OWI 4th conviction; rather, it is the seizure and subsequent forfeiture of his pick-up truck.

For a OWI 4th conviction, Mr. Long is sentenced pursuant to Wis. Stat. § 346.65(6)(a)2., for the *mandatory* seizure of a motor vehicle owned by Mr. Long. For a OWI 3rd conviction, Mr. Long is sentenced pursuant to Wis. Stat. § 346.65(6)(a)1., for the *discretionary* seizure or ignition interlock device or immobilization of any motor vehicle owned by Mr. Long. Mr. Long asserts that the circuit court would *not* have ordered the seizure of his pick-up truck for an OWI 3rd conviction because it was *not mandatory* at the time and not standard procedure in Milwaukee County OWI 3rd cases. According to Mr. Long's attorney at the time, Attorney Jeff Jensen, Milwaukee County Judges, to include Judge Siefert, did *not* order the seizure and forfeiture of the defendants' vehicles for OWI 3rd convictions. This was based upon the observation that the State usually did not pursue forfeiture in cases that were not drug-related or fourth-offense drunk driving crimes. ***State v. Boyd***, 2000 WI App 208 at 5 ¶ 6. Mr. Long knows of [n]o cases for OWI 3rd offenses in which Judge Siefert ordered the seizure and forfeiture of the defendant's vehicle.

In addition, previously Mr. Long was convicted of his OWI 3rd offense in the Milwaukee County Circuit Court for a 1995 arrest which occurred in the City of Milwaukee. (*See* Milwaukee County Case No.: 95CT500356). The ADA handling that case did not request the seizure of Mr. Long's vehicle, but instead, following protocol, requested an ignition interlock device. The presiding judge did not order seizure of Mr. Long's vehicle, but instead, consistent with protocol, ordered an ignition interlock device. After researching the issue, Mr. Long knows of only **one** vehicle seizure ordered in Milwaukee County for an OWI 3rd conviction, by the Honorable Maxine A.

White, due to aggravating circumstances. (*See* ***State v. Michels,*** 2002 WI App. 193, 256 Wis. 2d 1048, 650 N.W.2d 322. (Unpublished Opinion so *copy attached*).

The State's citations on mootness are not on point in the instant case. First, the State cites ***State v. Hungerford***, 76 Wis. 2d 171, 251 N.W.2d 9 (1977). That case did *not* even involve a [c]riminal sentence. It involved a [c]ivil commitment for [s]ex crimes under Wis. Stat. § 975.06. That case does not apply to the instant case because a civil commitment to a mental health institution varies greatly from a criminal sentence of confinement.

Second, the State cites ***State v. Theoharopoulos***, 72 Wis. 2d 327, 240 N.W.2d 635 (1976). In that case the Court reviewed mootness in the context of a motion under § 974.06, seeking to have the conviction overturned. This case is not on point because it involves confinement time and Mr. Long's motion does not involve confinement time. Further, Mr. Long's motion is based on a *new factor,* and [n]ot a motion filed under § 974.06. The ***Theoharopoulos*** case failed because the custody requirement of § 974.06 had not been met. *Id.*

C. The State argues that because the court is without authority to order reimbursement for the vehicle, that issue is moot.

Mr. Long now acknowledges that the Court is without authority to order reimbursement for the vehicle directly under this action, but affirmatively denies that the vehicle seizure issue is moot.

As stated above, pursuant Wis. Stat. § 346.65(6)(k) the title transfer for Mr. Long's pick-up truck to J.M.C. was cancelled and Mr. Long remained the legal owner so the State could legally seize and forfeit it. After researching the issue, Mr. Long acknowledges that the seizure and forfeiture under sub.(6) of a vehicle used in the

commission of the crime was deemed an in rem civil forfeiture pursuant ***State v. Konrath***, 218 Wis. 2d 290, 577 N.W.2d 601 (1998). However, Chief Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley dissented of this opinion and concluded that vehicle seizure under § 346.65(6) following a criminal conviction was *punishment* and violates the double jeopardy bar against successive punishments. ***Konrath***, at 329.

The forfeiture proceeding involving Mr. Long's 1998 Dodge pick-up truck is Milwaukee County Case No. 2001-CV-1834. The forfeiture action *proved* that Mr. Long was the lawful owner of his 1998 Dodge pick-up truck. However, Mr. Long cannot move to reopen and challenge that separate civil case until he first is **granted** this motion under section 973.19, Stats., based on a ***new factor***, to *reopen* the instant case and for the entry of an order to modify or commute the original sentence imposed in this OWI 4th offense case to that which could have been imposed for a OWI 3rd offense which **does *not* include** a order to seize Mr. Long's pick-up truck. In the 1990's, Judge Siefert, did not order the seizure and forfeiture of the defendants' vehicles for OWI 3rd convictions. Since there were no aggravating circumstances to include, but not limited to, no accident, no high-speed chase, no passengers in the vehicle, during Mr. Long's August 1998 arrest in the City of Greenfield, there would be no legal reason to deviate from protocol and seize Mr. Long's vehicle for an OWI 3rd offense.

Mr. Long has a constitutional right to actually be sentenced to an OWI 3rd offense and not an OWI 4th offense. Then, if the sentencing court wants to break the ***Boyd*** protocol and attempt to still order the seizure of his vehicle, Mr. Long will have legal grounds to challenge the seizure and forfeiture in a separate action.

In addition to the seizure order for Mr. Long's pick-up truck (R21), on May 30, 2000, after sentencing, *without* Mr. Long even being present, Judge Siefert ordered Mr. Long's 1991 Ford Probe GT seized. (R27). On May 30, 2000, after sentencing, *without* Mr. Long even being present, Judge Siefert ordered Mr. Long's 1981 Buick Regal Coupe seized. (R28). On September 7, 2000, after sentencing, *without* Mr. Long even being present, Judge Siefert ordered Mr. Long's 1993 Suzuki cycle seized. (R29). Thus, Judge Siefert ordered the seizure of four of Mr. Long's vehicles, amounting to a cumulative value over $60,000.00, for a traffic misdemeanor. The three aforementioned seizure orders were unconstitutional because Mr. Long was not present at sentencing and they violated Wis. Stat. § 346.65(6)(a)2, which only provided for the seizure **[a]** motor vehicle owned by Mr. Long when he committed his OWI offense on August 25, 1998. According to ***State v. Michels,*** 2002 WI App. 193, 256 Wis. 2d 1048, 650 N.W.2d 322, Judge Siefert was only allowed to order the seizure **[a]** motor vehicle owned by Mr. Long at the time of his OWI 4th arrest. (*See attached* ***Michels*** case).

Civil forfeitures "have historically been limited to the property actually used to commit an offense and no more." ***United States v. Bajakajian***, 524 U.S. 321, 333 n.8, 141 L. Ed. 2d 314, 118 S. Ct. 2028 (1998). A forfeiture that reaches beyond this strict historical limitation is *ipso facto* punitive.... ' *Id.* Here, there is not an adequate nexus between the additional three motor vehicles and the offense to justify the forfeitures as civil remedial sanctions. Because these three vehicles were not the actual means by which the offense in question was committed, the Court of Appeals ("COA") concludes that the seizure and forfeiture of these vehicles is punishment and, therefore, subject to the Double Jeopardy Clause. *See Id.* at 333. Accordingly, because the seizure of Mr.

Long's additional three vehicles is so punitive as to be criminal in nature, this Court concludes that it is a second punishment unauthorized by Wis. Stat. § 346.65(6) and violates the Double Jeopardy Clause. *See attached* ***Michels*** at P11.

Further, ***State v. Boyd,*** 2000 WI App 208, 238 Wis. 2d 693, 618 N.W.2d 251[I], provides that the full civil forfeiture of Mr. Long's 1998 Dodge Ram 2500 pick-up truck valued at $28,927[1] (R30:6) would have been excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.[2] Wis. Stat. §§ 346.65(2)(c) and (d) establish the penalties upon conviction for 3rd and 4th offense OWI and in 1998, that statute provided a maximum fine of $2,000 for both offenses. The United States Supreme Court has addressed excessive civil forfeitures and resolved the question of which test should be applied to evaluate if a fine is excessive. That determination was made in ***United States v. Bajakajian***, 524 U.S. 321, 141 L. Ed. 2d 314, 118 S. Ct. 2028 (1998). 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. *See* EN I: ***Boyd,*** 2000 WI App 208, P14; *see* EN II: ***Towers v. City of Chicago***, 173 F.3d 619, 1999 U.S. App. LEXIS 7419[II].

According to ***Bajakajian***, the Court must consider that the maximum fine that Mr. Long could have received for his crime was $2,000. *See Id.* Additionally, the Court

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[1] Mr. Long's 1998 Dodge Ram 2500 pick-up truck had approximately $6,000 worth of after market accessories permanently installed on it within two weeks after purchase by Monroe Truck Equipment out on Silver Spring in Milwaukee. Mr. Long has receipts.

[2] The Eighth Amendment to the United States Constitution proclaims: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

must consider that Mr. Long's conduct caused minimal harm and "affected only one party, the Government." *See* ***Bajakajian***, 524 U.S. at 339.

Considering these factors, the full forfeiture of Mr. Long's 1998 Dodge Ram 2500 pick-up truck valued at $34,927 with attached accessories, would be disproportionate to the offense. *See* ***Bajakajian***, 524 U.S. at 339-40. The full forfeiture would be larger than the $2,000 *maximum* fine by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government. *Id.*

Therefore, Mr. Long has a right to be sentenced to a constitutionally valid sentence for his OWI 3rd conviction by Judge Siefert.

II. THE STATE ARGUES THAT LONG'S ASSERTION THAT THE PREDICATE OWI CONVICTION WAS OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL DOES NOT CONSTITUTE A NEW FACTOR, WHICH WOULD JUSTIFY RELIEF 16 YEARS AFTER HE COMPLETED HIS SENTENCE.

As stated above, the State attempts to mislead the Court by stating that Mr. Long did not request an ***Ernst*** hearing on his allegations, and none was held. (State's Response Brief ("SRB"): P 4). As previously mentioned, on October 27, 2006, Mr. Long filed a collateral challenge Motion in Waukesha County Case No. 00-CF-611 (originally an OWI 5th offense case) based on the denial of his right to counsel in the prior case: Marathon County Case No. 90-CT-526. (Mr. Long's BIC: PP 14-15). During these appellate proceeding Mr. Long was represented by Assistant State Public Defender, Donald T. Lang. ("ASPD Lang"). *Id.* A Motion Hearing ("***Ernst*** Hearing") was conducted in Waukesha County Circuit Court on February 26, 2007, the Honorable Patrick L. Snyder presiding, and the Circuit Court *granted* Mr. Long's collateral challenge Motion and ordered that the original judgment of conviction shall be amended

to reflect a conviction for a fourth offense of operating a vehicle while intoxicated. *Id.* This information was included in Mr. Long's BIC Exhibits. (R:36 – Exhibit 6, *see BIC* Appendix B – Exhibit 6: Circuit Court Order). The Circuit Court Order clearly states, "and a hearing have been conducted before the Court on defendant's motion." *Id.*

To assist this Court, and to erase all doubt unnecessarily [c]reated by the State, Mr. Long presents the ***Ernst*** Hearing Transcript from February 26, 2007, the Honorable Patrick L. Snyder presiding, in the Waukesha County Circuit Court. A true and correct "two-on-one" copy of the ***Ernst*** Hearing Transcript from February 26, 2007, for Waukesha County Case No. 00-CF-611 is attached hereto, marked as Exhibit H, and is made a part of this Reply Brief as though fully set forth at length herein. Mr. Long requests that this Court take Judicial Notice of the ***Ernst*** Hearing Transcript from February 26, 2007, pursuant to Wis. Stat. § 902.01 and Federal Rules of Evidence 201.

The Court should allow Mr. Long to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to cure some unfair prejudice. We [WSC] also note that "in Wisconsin, when one party accidentally . . . takes advantage of a piece of evidence that is otherwise inadmissible (i.e. State's *false* ***Ernst*** Hearing argument in Response Brief: PP 14-17), the court may, in its discretion, allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to cure some unfair prejudice." ***State v. Dunlap***, 2002 WI 19, ¶32, 250 Wis. 2d 466, 640 N.W.2d 112 (emphasis and i.e. added).

Mr. Long **testified** during the ***Ernst*** Hearing on February 26, 2007, that he was not represented by counsel and that he did not knowingly and voluntarily waive his right to counsel in Marathon County Case No. 90-CT-526. He testified that the Marathon

County Circuit Court did *not* conduct any colloquy warning about waiver of counsel and self-representation. After Mr. Long made a sufficient prima facie showing on the collateral attack, then the burden shifted to the State to prove by clear and convincing evidence that Mr. Long's waiver of counsel was knowingly, intelligently, and voluntarily entered. *See* ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). We agree with the parties as to the burden of proof, and conclude that the court should at such a time, hold an evidentiary hearing to allow the State an opportunity to meet its burden. (citing ***Keller v. State,*** 75 Wis. 2d 502, 511-12, 249 N.W.2d 773 (1977)). "If the State is unable to establish by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived his right to the assistance of counsel, the defendant will be entitled ... " to attack, successfully and collaterally, his or her previous conviction. *Id.* After a lengthy ***Ernst*** Hearing, Judge Snyder ruled that the State failed to meet its burden and *granted* Mr. Long's collateral attack motion. (*See attached* Exhibit H: ***Ernst*** Hearing Transcript from February 26, 2007).

Subsequently, in Winnebago County Case No. 06-CF-222, the Honorable William Carver, former Circuit Court Judge for Branch 5 in Winnebago County, also "set aside" the defective conviction from Marathon County Case No. 90-CT-526. Judge Carver made this ruling after verifying that a proper ***Ernst*** Hearing was conducted by Judge Snyder.

Subsequently, in Winnebago County Case No. 08-CF-151, the Honorable Bruce K. Schmidt, former Circuit Court Judge for Branch 6 in Winnebago County, also "set aside" the defective conviction from Marathon County Case No. 90-CT-526. Judge

Schmidt made this ruling after verifying that a proper ***Ernst*** Hearing was conducted by Judge Snyder.

Mr. Long is not a lawyer, but it would appear logical that if an ***Ernst*** Hearing was conducted and three circuit court judges have granted his collateral attack argument and position, that it would also stand in Milwaukee County. Mr. Long's collateral attack argument and position has remained consistent throughout. The State suggests that Mr. Long should have requested another ***Ernst*** Hearing in Milwaukee County. That appears to be a waste of judicial resources, especially since it took the State three "time extensions" just to file their Response Brief.

The State is *incorrect* that Judge Siefert is still allowed to consider an unconstitutional conviction during sentencing. Because a guilty plea accepted in violation of constitutional requirements raises doubts about the reliability of the conviction, the conviction cannot be used to support guilt or to enhance punishment for a subsequent offense. ***State v. Baker***, 169 Wis. 2d 49, 71, 485 N.W.2d 237. Where a conviction is established to be constitutionally defective, that conviction cannot be relied on for either charging or sentencing a present offense. ***State v. Foust***, 214 Wis. 2d 567, 570 N.W.2d 905 (Ct. App. 1997).

III. THE STATE ARGUES THAT WERE LONG ENTITLED TO RELIEF ON APPEAL, THAT RELIEF WOULD BE AN ORDER REMANDING THE MATTER TO THE CIRCUIT COURT FOR A DETERMINATION OF WHETHER THE NEW FACTOR WARRANTED RESENTENCING.

Mr. Long now acknowledges that the Court is without authority to order reimbursement for the vehicle *directly* under this action, but affirmatively denies that the vehicle seizure issue is moot.

In the case at bar, the circuit court failed to even acknowledge Mr. Long's *new factor* argument as the basis from bringing his Motion to Reopen under Wis. Stats. § 973.19. The State now concedes that, "The trial court denied Long's motion as untimely, finding that it was subject to requirement in Wis. Stat. § 973.19 that it be filed within 90 days. That determination is in error." (SRB:19 ¶ 2). The act of the trial court in dismissing was an abuse of discretion, for discretion can never be exercised appropriately when based on an error of law. ***State v. Hutnik***, 39 Wis. 2d 754, 763, 159 N.W.2d 733 (1968).

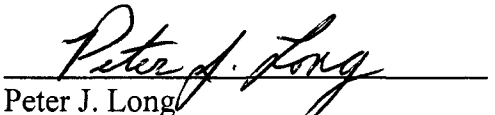
CONCLUSION AND RELIEF REQUESTED

WHEREFORE, based on the aforementioned facts, statutes, and controlling precedent, a manifest error in law and fact has occurred because the circuit court was required to grant Mr. Long's Motion to Reopen the case based on a meritorious *new factor* and subsequently grant his Motion to Commute Sentence filed March 17, 2016, to that which would have been imposed for a OWI 3rd conviction in Milwaukee County.

Therefore, the Defendant, Peter J. Long, respectfully request that the Court of Appeals reverse and remand this matter to the circuit court with instructions to reopen the case based on the meritorious *new factor* presented by Mr. Long and subsequently grant his Motion to Commute Sentence based on the legal merits of the arguments presented by Mr. Long. Mr. Long should be awarded costs for this appeal pursuant to §§ 809.25 and 814.04, Wis. Stats.

Dated this 20th day of January, 2017.

Respectfully Submitted By:



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[1] ***State v. Boyd*, 2000 WI App 208; 238 Wis. 2d 693, *; 618 N.W.2d 251, **; 2000 Wisc. App. LEXIS 810, *** (All reference to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.)

OPINION

The State appeals from a circuit court order concluding that if the entire $28,000 value of William W. Boyd's vehicle were forfeited, the forfeiture would violate the United States Constitution's prohibition of excessive fines. The **[***2]** order thus **[**253]** reduced the forfeited amount to $10,000. Boyd cross-appeals from the order, challenging the court's decision to accept an affidavit based on hearsay information as proof of service. We disagree with the merits of both the appeal and cross-appeal and affirm the order.

Background

P2. Boyd was convicted of felony endangering safety by use of a dangerous weapon contrary to Wis. Stat. § 941.20(2)(a). This conviction arose from events occurring on August 5, 1998. Boyd, angry at the city of Elkhart Lake Police Department because he had been arrested for driving while intoxicated three days before, drove around the police station's block twice, stopped his truck in front of the station, got out of the truck and fired a .22-caliber handgun at the police station's door. He then returned to his truck and drove away. A witness observing the events immediately phoned the authorities.

[696] P3. Boyd was subsequently charged, tried and found guilty in a jury verdict. At the sentencing hearing on December 15, 1998, he was personally served with a summons and complaint for the forfeiture action by Assistant District Attorney Joseph DeCecco in accordance with Wis. Stat. § 973.076. The **[***3]** forfeiture complaint alleged that Boyd's 1998 Chevrolet pickup truck should be forfeited to the State pursuant to Wis. Stat. § 973.075(1)(b)1m because Boyd used it to commit the felony. In his answer to the forfeiture complaint, Boyd argued as an affirmative defense that the State did not properly serve him with the summons and complaint. The State subsequently moved for summary judgment, asserting that no factual disputes remained in the action. Boyd responded with his own summary judgment motion in which he contended that the State's service was improper because DeCecco was a party to the action and that the forfeiture of his truck was an excessive fine. A hearing was held on the motions on April 21, 1999.

P4. At the April 21 hearing, the court granted the parties more time to brief issues raised during the course of the hearing. Following up on the request, Boyd's counsel wrote a May 14 letter to the court where he contended:

> My search of the Court file for this case (98 CV 667) found no affidavit of service. My search of the criminal case file (98 CF 407) found a photocopy of a nonauthenticated Summons stamped "Proof of Service" on the front, with stamped and written [***4] information on the back .... The required proof of service is not only not in the Court's file, to the extent it does exist it is not in the form of an affidavit and does not contain the information required by statute. See § 801.10(4)(a), Stats. .... Defendant Boyd submits that service and proof of service has failed, and the action should be dismissed.

The court addressed this issue at a May 28, 1999 hearing. It asked DeCecco whether he served an authenticated copy of the summons and complaint on Boyd. Being unfamiliar with service of process in a civil matter, DeCecco admitted that he was unsure whether he served Boyd with an authenticated copy. The court noted that the record was deficient because the State did not file an affidavit or certificate of service. It granted the State additional time to provide an affidavit.

P5. The next hearing was held on June 2, 1999. At that time, the State argued that Boyd had waived his opportunity to contest the authenticity of the service of the summons and complaint because he had not previously raised it. Boyd countered that he questioned the sufficiency of the service of **[***5]**

process as an affirmative defense in his answer. He further contended that the affidavit submitted by the State was improper because it was based on hearsay information. Boyd's counsel argued:

> Up until today, we had no affidavit of service, of course, as the Court is well **[**254]** aware. Today we're given an affidavit which is not proper, because it is not based on the personal knowledge of the affiant, so your Honor, I believe that this affidavit is not-is not appropriate and not sufficient.

The court announced its decision on the summary judgment motions shortly thereafter. On the issue of the sufficiency of service, the court found that the State's affidavit adequately proved that the service complied **[*698]** with the appropriate statutes. It also found that DeCecco was not a party to the action within the meaning of the statutes governing service. Regarding the claim that the forfeiture was an excessive fine, the court determined that this issue was not appropriate for summary judgment and set a fact-finding hearing for the matter.

P6. The hearing on the excessive fine issue was held on September 1, 1999. After hearing the evidence, the court ruled that Boyd's truck, valued at $28,000 **[***6]** should be sold and the first $10,000 from the proceeds should go to the Elkhart Lake police department. The court noted that in reaching this conclusion it had considered and weighed the following factors: the public's interest in stopping weapons from being transported and used in crimes; the fact that there was no injuries and only nominal damage resulting from Boyd's act; **its observation that the State usually did not pursue forfeiture in cases that were not drug-related or fourth-offense drunk driving crimes (emphasis** added by Appellant); the truck was registered as a farm vehicle and not used for primary personal use; there was no lien on the truck, which effectively increased the penalty on Boyd; and the $28,000 forfeiture would be a disproportionate penalty for an offense carrying a maximum fine of $10,000. The State appeals the reduction in the forfeiture amount. Boyd cross-appeals, contesting the court's decision that the proof of service was sufficient.

Discussion

Appeal

P7. We begin our discussion by addressing whether the forfeiture of Boyd's $28,000 truck violates **[*699]** the Excessive Fines Clause of the Eighth Amendment. This in a constitutional issue which we review de novo. *See* **[***7]** ***State v. Hammad***, 212 Wis. 2d 343, 347-48, 569 N.W.2d 68 (Ct. App. 1997). If the goal of a civil forfeiture action is, at least in part, punishment, the forfeiture may not be constitutionally excessive. *See* ***Austin v. United States***, 509 U.S. 602, 610, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993). We have previously determined that forfeiture under Wis. Stat. § 973.075(1)(b) fall within the purview of the Excessive Fines Clause and are subject to its limitations. *See* ***Hammad***, 212 Wis. 2d at 352.

The Eighth Amendment to the United States Constitution proclaims: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

P8. Presently, the leading Wisconsin authority on determining whether a civil forfeiture violates the Excessive Fines Clause is ***Hammad***. Attempting to clarify which of the "bumper crop of tests" should be used in this state, the ***Hammad*** **[***8]** court instructed that the multi-factor test in ***State v. Seraphine***, 266 Wis. 118, 62 N.W.2d 403 (1954), was the correct analysis to apply. *See* ***Hammad***, 212 Wis. 2d at 355-56. The ***Seraphine*** standard was explained as:

> In determining whether a fine authorized by statute is excessive in the constitutional sense, due regard must be had to the object designed to be accomplished, to the importance and magnitude of the public interest sought to be protected, to the circumstances and the nature of the act for which it is imposed, and in some instances, to the ability of accused to pay. In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive

and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

Hammad, 212 Wis. 2d at 355-56 (quoting ***Seraphine***, 266 Wis. at 121-22).

P9. The thrust of the State's argument on appeal is that the circuit court incorrectly interpreted **[***9]** the multi-factor ***Seraphine*** standard when it found that the amount of Boyd's forfeiture was excessive. However, since the ***Hammad*** court declared that the ***Seraphine*** standard was the test for this issue, the United States Supreme Court has addressed it and resolved the question of which test should be applied to evaluate if a fine is excessive. That determination was made in ***United States v. Bajakajian***, 524 U.S. 321, 141 L. Ed. 2d 314, 118 S. Ct. 2028 (1998).

P10. In ***Bajakajian***, Bajakajian willfully attempted to remove $357,144 in currency from this country without complying with the requirement in 31 U.S.C. § 5316(a)(1)(A) (1994) to report the removal of sums in excess of $10,000. *See* ***Bajakajian***, 524 U.S. at 324-25. The government seized the entire amount and instituted forfeiture proceedings pursuant to 18 U.S.C. § 982(a)(1) (1994), which authorized the seizure of any property involved in a § 5316 offense. *See* ***Bajakajian***, 524 U.S. at 325. The district court ordered a reduced forfeiture of $15,000, refusing to seize the entire **[***10]** sum on Eighth Amendment grounds. *See* ***Bajakajian***, 524 U.S. at 326. In addition to this forfeiture, the court ordered a sentence of three years of probation and a fine of $5,000 – the maximum fine under the federal sentencing guidelines. *See* ***id.*** The government appealed. *See* ***id.***

P11. To weigh the excessiveness of the forfeiture in the ***Bajakajian*** appeal, the Supreme Court adopted the standard commonly referred to as "the proportionality **[*701]** test." *See* ***Bajakajian***, 524 U.S. at 323-24. It held that 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 334. The precise nature of this relationship was described as follows: "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." ***Id.***

P12. Applying the proportionality test, the ***Bajakajian*** Court held that forfeiting the entire $357,144 violated the Excessive Fines Clause. *See* ***Bajakajian***, 524 U.S. at 337. **[***11]** In reaching this conclusion, it first considered the gravity of the offense. *See* ***Bajakajian***, 524 U.S. at 336-37. The Court emphasized Bajakajian's culpability rather that the crime's severity, noting that his crime was "solely a reporting offense." *See* ***id.*** at 337. Because Bajakajian did not commit any other illegal activities, the Court stated that he did not fit into the "class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader." ***Id.*** at 338. The Court also considered that the maximum fine that Bajakajian could have received for his crime was $5,000. *See* ***id.*** Additionally, the Court emphasized that Bajakajian's conduct caused minimal harm and "affected only one party, the Government." *See* ***Bajakajian***, 524 U.S. at 339.

P13. Considering these factors, the court determined that full forfeiture would be disproportionate to the offense. *See* ***Bajakajian***, 524 U.S. at 339-40. It remarked that full forfeiture would be "larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it bears no articulable correlation **[***12]** to any injury suffered by the Government." ***Bajakajian***, 524 U.S. at 340. **[**256]**

[*702] P14. 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. These factors are strikingly similar, but yet not identical, to those in the ***Seraphine*** standard.

P15. We will now apply ***Bajakajian's*** proportionality test to the present case. Boyd's conduct does constitute a serious offense. With great fortune, the harm from his conduct was minimal; nevertheless, we do not overlook the recklessness and the potential for severe injuries that could have resulted from it. Even so, we are troubled by the disparity in this case between the forfeiture amount, $28,000, and the maximum fine for the crime, $10,000.

P16. The State suggests that when a case concerns a civil forfeiture, the amount of the monetary fine that could be imposed should not be considered. It argues:

> With in rem vehicle forfeitures, however, it is the Defendant, and only the Defendant, **[***13]** who decides the value of the vehicle to be forfeited by choosing that vehicle to use in the commission of a felony.

Although we agree that an offender puts his or her property at risk by using it to commit a felony, many cases, in addition to ***Bajakajian***, have emphasized that where the value of the forfeited property has greatly exceeded the underlying crime's potential fine, the forfeiture was excessive. *See, e.g.,* ***United States v. 18755 N. Bay Rd.***, 13 F.3d 1493, 1498-99 (11th Cir. 1994) (holding that forfeiture of property valued at $150,000 **[*703]** was excessive where the maximum statutory fine was $20,000). Moreover, whether a forfeiture would be far in excess of the maximum fine is a factor appropriately considered under the ***Bajakajian*** test. *See* ***Bajakajian***, 524 U.S. at 336-37. Even if a forfeiture is greater than the maximum fine, the forfeiture is not automatically deemed excessive. *See* ***id.*** n.11. Instead, this circumstance is a factor to be weighed against the others and will only be found to be excessive if the balancing reveals that the forfeiture is "grossly disproportional to the gravity of the defendant's **[***14]** offense." ***Id.*** at 337.

P17. Although we acknowledge that Boyd's conduct was a serious offense, we nonetheless conclude that imposing the full forfeiture would be an excessive fine. The harm that Boyd caused was minimal and will be sufficiently satisfied from the reduced forfeiture amount of $10,000. As the State points out, Boyd's conduct was highly unusual "because not many people in Sheboygan County fire shots into police stations." The purpose of the forfeiture statute-to deter offenders from using their vehicles to commit a felony-is not significantly impacted as this is a situation not likely to recur. The full forfeiture amount is also significantly greater than the crime's maximum fine. Weighing all these factors, we hold that a full forfeiture would be grossly disproportionate to the gravity of the offense and affirm the circuit court's reduction of the forfeiture amount.

....

II *Towers v. City of Chicago*, 173 F.3d 619, *; 1999 U.S. App. LEXIS 7419, **

DISCUSSION

A. Excessive Fines

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. The parties have not disputed that the Eighth Amendment's Excessive Fines Clause applies to the civil penalties **[*624]** at issue in this case. Indeed, **[**12]** the Supreme Court has interpreted the Excessive Fines Clause to apply to civil fines. *See* ***Hudson v. United States***, 522 U.S. 93, 118 S. Ct. 488, 495, 139 L. Ed. 2d 450 (1997) (stating that "the Eighth Amendment protects against excessive fines, including forfeitures"); ***Austin v. United States***, 509 U.S. 602, 609, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993) (concluding that the civil forfeiture of property used in a drug crime constituted punishment and was therefore subject to the Excessive Fines Clause). In ***Austin***, the Supreme Court stated that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" ***Id.*** at 609-10 (quoting ***Browning-Ferris Indus. V. Kelco Disposal, Inc.***, 492 U.S. 257, 265, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989)). The Court then explained **[**13]** that civil sanctions can constitute punishment, and therefore are subject to the limitations of the Excessive Fines Clause, if they serve, at least in part, retributive or deterrent purposes. *See* 509 U.S. at 610. The Court ultimately concluded that the civil forfeiture under 21 U.S.C. § 881(a) of a mobile home and an autobody shop that were used in a drug crime constituted a "payment to a sovereign as punishment for some offense" and was thus subject to the limitations of the Excessive Fines Clause. ***Id.*** at 622.

The fines imposed by the City under the ordinances at issue here are not solely remedial. In fact, they appear to serve little or no remedial purpose; they do not compensate the City for any loss sustained as a result of the violations. Rather, it is clear that the fines, at least in part, serve the punitive purpose of deterring owners from allowing their vehicles to be used for prohibited purposes. At oral argument, the City emphasized that the ordinances were enacted in an effort to curb illegal drug and firearm activity **[**14]** by supplementing the criminal laws required for a criminal conviction. Because the fines, at least in part, serve this deterrent purpose, they constitute payment "as punishment for some offense." 509 U.S. at 610. Therefore, we must determine whether they violate the Excessive Fines Clause.

The Supreme Court of the United States has adopted a "gross disproportionality" test to determine whether a fine is "excessive" for purposes of the Excessive Fine Clause. *See* ***United States v. Bajakajian,*** 524 U.S. 321, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314 (1998). The Court explained that "the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish" and held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." ***Id.*** In ***Bajakajian***, the defendant pleaded guilty to failing to report that he was transporting more than $ 10,000 in currency out **[**15]** of the country. The district court found the entire amount of the currency -- $ 357,144--subject to forfeiture under 18 U.S.C. § 982(a)(1). In applying the gross disproportionality standard to the facts of Bajakajian's case, the Supreme Court considered several factors: that the defendant was guilty of only a reporting offense, that the violation was unrelated to any other illegal activities (such as drug dealing, money laundering, or tax evasion), that the maximum criminal sentence would have been six months and the maximum fine $ 5,000, and that the offense caused only minimal harm. Based on these considerations, the Supreme Court determined that the forfeiture of $ 357,144 was grossly disproportional to the gravity of Bajakajian's offense. *See* 118 S. Ct. at 2038-39.

....

In this context, we agree with the City that any distinction between in rem forfeitures (which proceed against the offending property) and in personam fines (which proceed against the owner) is one of form, but not substance. Both proceedings result in an economic penalty to the owner because his property was used improperly; both serve the same **[*627]** governmental purpose of deterring unlawful conduct. There is only one functional difference between an in rem forfeiture proceeding and the in personam fines at issue in this case: The in rem forfeiture proceeding results in varying economic consequences from defendant to defendant, based on the value of the property; the in personam fine results in a fixed economic penalty.

....

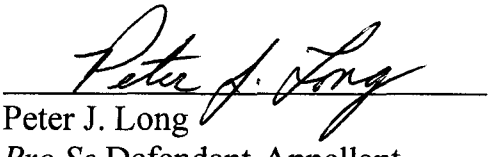
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font: Times New Roman – 13 point.

The length of this brief is 2,891 words with a proportional serif font and is 13 pages long plus endnotes.

Date: January 20, 2017

Sincerely,



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CERTIFICATION OF MAILING

I certify that this Reply Brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on January 20, 2017. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Date: January 20, 2017

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APPELLANT'S REPLY BRIEF APPENDIX

ALL OPEN RECORDS DOCUMENTS TO ASSIST THE COURT OF APPEALS

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[1] Exhibit numbering is continuous from Brief-in-Chief Exhibits A through F.