

APR 04 2014

No. A13-445

FILED

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**STATE OF MINNESOTA  
IN SUPREME COURT**

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Daniel Garcia-Mendoza,  
a/k/a Ricardo Cervantes-Perez,

Appellant,

vs.

2003 Chevy Tahoe, VIN: 1GNEC13V23R143453  
Plate #235JB, \$611.00 in U.S. Currency

Respondent.

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***RESPONDENT'S BRIEF***

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	v
LEGAL ISSUES .....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS .....	3
Facts Related to Stop, Search and Arrest.....	3
Facts Relating to Federal Indictment, Motion to Suppress Evidence and Plea Agreement.....	5
Facts Related to the Granting of Summary Judgment.....	7
STANDARD OF REVIEW .....	8
A. Summary Judgment.....	8
B. Constitutional and Statutory Question.....	9
SUMMARY OF ARGUMENT .....	10
ARGUMENT.....	11
I. THE PETITION FOR REVIEW IN THIS MATTER WAS IMPROVIDENTLY GRANTED AS THE RECORD DOES NOT PRESENT THE NECESSARY FACTS FOR THIS COURT TO DECIDE THE ISSUE FOR WHICH REVIEW WAS GRANTED .....	11
A. Appellant lacks standing to pursue return of the seized property following his guilty plea since this plea resulted in all right title and interest in this property vesting in the United States and leaving Appellant no legal claim to ownership.....	11
B. The question presented is not properly before this court because the stop was previously found to be lawful by the United States District Court in the related criminal case.....	15
C. The District Court erred when it made decisions of material contested facts concerning the stop when it decided the summary judgment motion .....	17
D. The Petition should be dismissed as improvidently granted because neither of the decisions below were based upon the	

admission of improperly seized evidence .....	19
II. THE STATUTORY EXCLUSIONARY REMEDY PROVIDED BY MINN. STAT. § 626.21 RENDERS UNNECESSARY THE NEED TO DETERMINE IF THE FOURTH AMENDMENT REQUIRES APPLICATION OF THE EXCLUSIONARY RULE TO THIS CIVIL REMEDIAL FORFEITURE PROCEEDING.....	20
III. THERE IS NO NEED TO REACH THE ISSUE OF WHETHER THE FOURTH AMENDMENT EXCLUSIONARY RULE APPLIES IN THIS CIVIL REMEDIAL FORFEITURE SINCE THERE WAS SUFFICIENT ADMISSIBLE EVIDENCE TO SUSTAIN THE FORFEITURE .....	22
A. The stop and subsequent search of the vehicle was proper under the Fourth Amendment.....	22
1. The police had a reasonable basis for stopping Appellant when he was driving the seized vehicle.....	22
2. The search of the vehicle was proper.....	25
a. Impoundment of the vehicle was proper and Appellant waived his right to contest that there was an insufficient basis for the inventory search.....	25
b. There was probable cause for the search.....	26
B. Appellant’s guilty plea provides sufficient basis for the forfeiture even if the evidence resulting from the search is excluded.....	28
IV. THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO THIS CIVIL <i>IN REM</i> REMEDIAL FORFEITURE ACTION SINCE ANY MARGINAL INCREMENTAL BENEFIT FROM APPLYING IT IN THIS PROCEEDING DOES NOT JUSTIFY ITS APPLICATION.....	29
A. The United States Supreme Court’s decisions since 1965 have both consistently declined to extend the exclusionary rule to civil proceedings and have limited its application to criminal related proceedings on the ground that such applications will not significantly advance the deterrent value of the rule beyond its application in criminal prosecutions.....	29

1.	Early application of the exclusionary rule to a civil proceeding.....	29
2.	The Supreme Court’s subsequent cases have consistently refused to apply the exclusionary rule to other civil cases and have limited application of the rule in criminal proceedings casting doubt upon <i>One 1958 Plymouth Sedan’s</i> continuing vitality.....	30
	(a) The Court has consistently decline to extend the exclusionary rule to civil proceedings since <i>One 1958 Plymouth Sedan</i> .....	30
	(b) Since <i>One 1958 Plymouth Sedan</i> , the Supreme Court has also relied upon the rule’s deterrent purpose to hold that the rule is not applicable in criminal-related proceedings and, under certain circumstances, has even limited its application in criminal proceedings.....	32
3.	A subsequent Supreme Court forfeiture decision has called into question the application of <i>One 1958 Plymouth Sedan’s</i> characterization of forfeiture as a quasi-criminal or quasi-punitive proceeding.....	33
4.	Since <i>Ursery</i> , several courts are questioning the application of the exclusionary rule to civil <i>in rem</i> drug forfeiture cases.....	34
B.	The minimal deterrent value from applying the constitutional exclusionary rule in civil <i>in rem</i> forfeitures does not justify its application to civil forfeiture actions.....	36
	1. State cases on appellate review do not support applying the exclusionary rule to civil forfeiture actions. ....	36
	2. Other authorities referenced to in the <i>amicus curiae</i> briefs do not show wide-spread abuses pursuant to the state forfeiture laws.....	38
C.	Although application of the federal constitutional exclusionary rule should not be applied to this civil <i>in rem</i> remedial forfeiture action, the Court does not need to reach this issue given both the constitutional uncertainty and the presence of the a state statutory remedy providing for exclusion. ....	41

V. THIS COURT NEED Not EXPAND THE PROTECTIONS OF THE MINNESOTA CONSTITUTION BEYOND THOSE PROVIDED BY THE FEDERAL’S CONSTITUTION SEARCH AND

## TABLE OF AUTHORITIES

Page

### Minnesota Cases

Akkouche v. 1999 Chrysler Concorde, No. A06-1333, 2007 WL 2600861 (Minn. Ct. App. Sept. 11, 2007).....	37
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....	9
Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593 (Minn. 1957).....	18, 42
Backstrom v. One Freightliner Semitractor, No. C7-92-2222, 1993 WL 139539 (Minn. Ct. App. May 4, 1993).....	38
Blanche v. 1995 Pontiac Grand Prix, 599 N.W.2d 161 (Minn. 1999).....	37
Borgen v. 418 Eglon Ave., 712 N.W.2d 809 (Minn. Ct. App. 2006).....	37
Brosnahan v. 1572 Naples Street, No. A12-0659, 2013 WL 491517 (Minn. Ct. App. Feb. 11, 2013).....	37
Bublitz v. Comm’r of Revenue, 545 N.W.2d 382 (Minn. 1996).....	37
Burton v. Minneapolis, No. A06-546, 2007 WL 968778 (Minn. Ct. App. Apr. 3, 2007).....	37
DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997).....	9
Freeman v. 1215 East 21st St., 552 N.W.2d 275 (Minn. Ct. App. 1996).....	37
Freeman v. 1215 East 21st Street, No. CX-94-484, 1994 WL 440263 (Minn. Ct. App. August 16, 1994).....	37
Gallagher v. 1989 Lincoln Mark VII-MN License 828-JDV, No. C6-92-1997, 1995 WL 81375 (Minn. Ct. App. Feb. 28, 1995) .....	21
Gordon v. \$1,171.90, No. CX-96-2322, 1997 WL 406648 (Minn. Ct. App. July 22, 1997).....	38
Humphrey v. \$1109, 539 N.W.2d 1 (Minn. Ct. App. 1995).....	37
Jackson v. One Yellow Necklace with Medallion, Nos. C3-92-1567, C6-92-1594, 1993 WL 140775 (Minn. Ct. App. May 4, 1993).....	38
Jacobson v. \$55,900, 728 N.W.2d 510 (Minn. 2007).....	37
Johnson v. One 1994 Honda Civic, Nos. A06-2430, A07-0255, 2007 WL 4472480 (Minn. Ct. App. Dec. 24, 2007).....	37
Johnson v. 6508 Hodgson Road, No. C9-93-2362, 1994 WL 323366 (Minn. Ct. App. July 5, 1994).....	37, 38
Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005).....	42
King v. One 1990 Cadillac Deville, 567 N.W.2d 752 (Minn. Ct. App. 1997).....	37
Mapp v. Ohio, 367 U.S. 643 (1961) .....	21, 30, 36
Marien Credit Union v. Detlefson-Delano, 830 N.W.2d 859 (Minn. 2013) .....	11

SEIZURE PROTECTIONS.....	41
CONCLUSION.....	43
CERTIFICATION OF BRIEF LENGTH.....	45

O'Brien v. 1991 Pontiac Bonneville, No. A05-1802, 2006 WL 2347999 (Minn. Ct. App. Aug. 15, 2006).....	37
O'Malley v. Ulland Bros., 549 N.W.2d 889 (Minn. 1996) .....	8
Osborne v. Twin Town Bowl, Inc., 749 N.W.2d 367 (Minn. 2008) .....	9
Riley v. 1987 Station Wagon, 650 N.W.2d 441 (Minn. 2002).....	37
Rife v. One 1987 Chevrolet Cavalier, 485 N.W.2d 318 (Minn. Ct. App.), rev. denied (Minn. June 30, 1992) .....	28
Rosenow v. Commissioner of Revenue, No. 5236, 1991 WL 227915 (Minn. Tax Ct., Oct. 15, 1991) .....	21
Schmitz v. \$40,703, 572 N.W.2d 760 (Minn. Ct. App. 1997).....	37
Star Tribune Co. v. Univ. of Minn. Bd. Of Regents, 683 N.W.2d 274 (Minn. 2004)....	9
State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) .....	8
State v. Anderson, 733 N.W.2d 128 (Minn. 2007).....	42
State v. Askerooth, 681 N.W.2d 353 (Minn. 2004).....	42
State v. Duesterhoeft, 311 N.W. 2d 866 (Minn. 1981).....	23
State v. Fuller, 374 N.W.2d 722 (Minn. 1985).....	42
State v. Greer, No. C8-99-1796, 2000 WL 781298 (Minn. Ct. App. June 20, 2000)...	37
State v. Harris, 590 N.W.2d 90 (Minn. 1999).....	42
State v. Martin, 595 N.W.2d 214 (Minn. 1999).....	43
State v. Mauer, 741 N.W.2d 107 (Minn. 2007).....	9
State v. Pike, 551 N.W. 919 (Minn. 1996) .....	23
State v. Pleas, 329 N.W. 2d 329 (Minn. 1983).....	24
State v. Pluth, 195 N.W. 789 (Minn. 1923).....	29
State v. Rosenfeld, 540 N.W.2d 915 (Minn. Ct. App. 1995).....	37
State v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985) .....	11
State v. Welke, 216 N.W.3d 641 (Minn. 1974).....	21
Strange v. 1997 Jeep Cherokee, 597 N.W.2d 355 (Minn. Ct. App. 1999).....	13
Theiler v. Chevy Avalanche, No. A06-1604, 2007 WL 2177882 (Minn. Ct. App. July 31, 2007).....	37
Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988).....	9
Thompson v. State, No. 49F07-0808-CM-202690, 2009 WL 1704357 at * 3 (Ind. App., June 18 2009) .....	26
Torgelson v. 17138 880th Ave., 749 N.W.2d 24 (Minn. 2008).....	37
Torgelson v. 17138 880th Ave., 734 N.W.2d 279 (Minn. Ct. App. 2007).....	37
Valley Oil, Inc. v. 2002 Chevy Tahoe, No. A08-0338, 2009 WL 66965 (Minn. Ct. App. Jan. 13, 2009).....	37
Voraveth v. \$68,514 in U.S. Currency, Nos. A04-1818, A04-1820, 2005 WL 1021763 (Minn. Ct. App. May 3, 2005).....	37

Wood Motor Co. v. One 2000 Ford F-350, 658 N.W.2d 900 (Minn. Ct. App. 2003)...	37
Zappa v. Fahey, 245 N.W.2d 258 (Minn. 1976).....	8

**Minnesota Statutes**

Minn. Stat. § 171.02.....	23
Minn. Stat. § 609.5311.....	20, 34, 36, 39
Minn. Stat. § 609.5314.....	8
Minn. Stat. § 626.21.....	passim

**Minnesota Rules**

Minn. R. Civ. P. 56.03 .....	8
Minn. R. Civ. P. 56.05 .....	9

**United States Constitution**

21 U.S.C. § 853.....	passim
21 U.S.C. § 881.....	13, 34
U.S. Const. amend. IV .....	30

**Federal Cases**

Alderman v. United States, 394 U.S. 165 (1969) .....	33
Belcher v. Stengel, 429 U.S. 118 (1976) .....	18
Boyd v. United States, 116 U.S. 616 (1986).....	31
Brown v. United States, 411 U.S. 223 (1973) .....	33
Elkins v. United States, 364 U.S. 206 (1960).....	36
Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984)...	31
Linkletter v. Walker, 381 U.S. 618 (1965).....	31
Pennsylvania v. Labron, 518 U.S. 938 (1996).....	26
Pennsylvania Bd. Of Parole & Probation v. Scott, 524 U.S. 357 (1998).....	43
Scott v. United States, 436 U.S. 128 (1978) .....	24
Smith v. Butler, 366 U.S. 161 (1961) .....	20
South Dakota v. Opperman, 427 U.S. 364 (1976).....	25
Stefanelli v. Minard, 342 U.S. 117 (1951).....	36
Stone v. Powell, 428 U.S. 465 (1976) .....	32
United States v. Betterton, 417 F.3d 826 (8th Cir. 2005).....	26
United States v. Caldwell, 97 F.3d 1063 (8th Cir. 1996) .....	24
United States v. \$7,850.00, 7 F.3d 1355 ( 8th Cir. 1993).....	35

United States v. \$231,930.00 in U.S. Currency, 614 F.3d 837 (8th Cir. 2010).....	24
United States v. \$291,828.00, 536 F. 3d 1234, 1236 (11th Cir. 2008).....	35
United States v. \$304,980.00, 2013 WL 54005 at *7 (N.D. Ill, Jan. 3, 2013).....	35
United States v. \$493,850.00, 518 F.3d 1159 (9th Cir. 2008).....	35
United States v. Calandra, 414 U.S. 338 (1974).....	31, 32, 33
United States v. Calvo-Saucedo, 409 Fed. App'x 21 (7th Cir., 2011) .....	27
United States v. Carbajal, 449 Fed. App'x. 551 (8th Cir. 2012) .....	27
United States v. Ceccolini, 435 U.S. 268 (1978).....	33
United States v. Cervantes-Perez, No. 12cr122 (DSD/TNL), 2011 WL 3288674 at * * 4-5 (D. Minn. July 23, 2012).....	25
United States v. Cervantes-Perez, No. 12cr133 (DSD/TNL), 2011 WL 3288946 (D. Minn. August 10, 2012).....	16, 25
United States v. Cowan, 674 F.3d 947 (8th Cir. 2012) .....	26
United States v. Havens, 446 U.S. 620 (1980) .....	32
United States v. Herrera-Gonzalez, 474 F.3d 1105 (9th Circ. 2008) .....	22
United States v. Janis, 428 U.S. 433 (1976) .....	30, 31, 34
United States v. Leon, 468 U.S. 897 (1984).....	33
United States v. Marracoo, 578 F.3d 627 (7th Cir. 2009) .....	34
United States v. One Sixth Share of James J. Bulger in all Present & Future Proceedings of Mass Millions Lottery Ticket No. M246233, 326 F. 3d 36 (1st Cir. 2003).....	11
United States v. Orta, 228 Fed. App'x 633 (8th Cir. 2007).....	28
United States v. Pena-Ponce, 588 F.3d 579 (8th Circ. 2009) .....	27
United States v. Timley, 507 F.3d 1125 (8th Cir. 2007) .....	11
United States v. Ursery, 518 U.S. 267 (1996) .....	34, 35
United States v. Washington, 455 F.3d 824 (8th Cir. 2006) .....	23
Weeks v. United Sates, 232 U.S. 383 (1914) .....	29
Wren v. United States, 517 U.S. 806 (1996) .....	24

**Foreign Jurisdictions**

Baltimore v. 1995 Corvette, 119 Md. App. 691, 706 A.2d 43 (1998).....	30, 35
One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) .....	passim
People v. \$241,600, 67 Cal.Rptr. 4th 1100, 79 Cal.Rptr. 2d 588 (1998).....	35

**Other Authorities**

8 Wigmore, Evidence § 2183 (3d ed. 1940).....	29
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## LEGAL ISSUES

- I. Was the Petition for Review improvidently granted given the full record in this case?

Neither the district court nor the Court of Appeals ruled on this issue.

- II. Given the state statutory exclusionary rule for search and seizure violations, is it necessary for this Court to reach the issue of application of the federal constitutional exclusionary rule to civil *in rem* forfeitures?

The district court was not asked to rule on the application of the constitutional exclusionary rule to civil forfeiture proceedings. The Court of Appeals was not asked to rule and affirmed the summary judgment on other grounds, but it stated it was declining to apply the federal constitutional exclusionary rule to this forfeiture action without reference to the statutory exclusionary rule.

- III. Was there sufficient admissible evidence to support the presumption of forfeiture and did Appellant fail to rebut this presumption?

Both the district court and the Court of Appeals ruled in the affirmative.

- IV. Should the Fourth Amendment Exclusionary Rule be applied to the civil *in rem* forfeiture proceeding at issue in this case?

The trial court did not rule on this issue and the Court of Appeals declined to apply the federal constitutional exclusionary rule to this proceeding.

- V. Should the Minnesota Constitution constitute a separate basis for applying an exclusionary rule to the civil *in rem* forfeiture proceedings at issue in this case?

Neither the district court nor the Court of Appeals ruled on this issue.

## **STATEMENT OF THE CASE**

This forfeiture matter comes before this Court on Appellant's appeal from the Court of Appeals decision affirming the District Court's grant of Respondent's motion for summary judgment.

This forfeiture arose from events occurring on March 19, 2012, including: a vehicle stop by Plymouth Police Officer Ryan Peterson; an inventory search of the vehicle; discovery of 225 grams of methamphetamine in the vehicle; arrest of Appellant; and, the seizure of the vehicle driven by Appellant and cash located on Appellant. Appellant was given a Notice of Seizure and Intent to Forfeit Property to which Appellant filed a Demand for Judicial Determination.

Although Appellant was original charged with state criminal charges in Hennepin County District Court, these charges were dismissed because Appellant was indicted in Federal Court on three counts of Distribution of Methamphetamine and one count of Possession with Intent to Distribute Methamphetamine which included the charges arising from the incident on March 19, 2012.

On July 21, 2012, U.S. District Court Magistrate Leung denied Appellant's motion to suppress the evidence obtained as a result of the March 19, 2012 search and seizure finding the stop, search and seizure ("stop") were lawful. On August 10, 2012, U.S. District Court Judge Doty overruled Appellant's objection to Magistrate Leung's recommendation and adopted it in full. On August 10, 2012, Appellant pled guilty to Count 2 of the Indictment and the factual basis of this plea encompassed the events of March 19, 2012.

On January 11, 2013, Hennepin County District Court Judge Thomas M. Sipkins issued his Order granting summary judgment to Respondent. In granting summary judgment, the district court did not make any rulings with respect to the Fourth Amendment Exclusionary Rule.

The Minnesota Court of Appeals affirmed the grant of summary judgment in its opinion filed November 25, 2013. *Garcia-Mendoza v. 2003 Chevy Tahoe*, No. A12-0455, 2013 WL 6152304 (Minn.Ct. App. Nov. 25, 2013). The Court of Appeals declined to extend the exclusionary rule to this civil forfeiture, but affirmed the grant of summary judgment on grounds unrelated to the contested evidence.

Appellant subsequently filed a Petition for Review with this Court. Respondent filed a Response to Petition for Review and Request for Cross-Review. On January 27, 2014, this Court granted Appellant's Petition for Review and denied Respondent's Request for Cross-Review.

## **STATEMENT OF FACTS**

### **Facts Related to Stop, Search and Arrest**

On March 19, 2012, Plymouth Police Officer Ryan Peterson and Northwest Drug Task Force Officer Casey Landherr were on patrol on I-94 in Hennepin County. At approximately 1:45 p.m., while traveling south on I-94 near the West Broadway exit, Officer Peterson noticed a white Chevy Tahoe in the left lane pass him travelling 62 to 63 miles per hour in a 60 miles per hour zone. As the vehicle passed, Officer Peterson noticed there were two occupants in the Tahoe and neither occupant looked at him. He

further noticed that the driver had both hands on the steering wheel and was looking straight ahead. Officer Peterson performed a registration check on the Tahoe. The check came back to a registered owner identified as Ricardo Cervantes Perez (a/k/a Daniel Garcia-Mendoza, Appellant). There was no driver's license information associated with the check, which in Officer Peterson's experience, is common when a driver does not possess a valid driver's license. Officer Peterson then activated his emergency lights and stopped the Tahoe. (A- App.<sup>1</sup> 19-20).

Officer Peterson approached the Tahoe and spoke with the driver, the Appellant in this case, who admitted he did not have a Minnesota driver's license. Appellant's passenger also did not have a valid Minnesota driver's license. While speaking with the driver, Officer Peterson noticed the driver (later identified as Appellant) appeared very nervous and was breathing heavy when questioned. The vehicle was very well kept on the outside; it had newer oversized tires and rims, had several air fresheners, had only one single key in the ignition and had a card with a reference to Santa Muerte on it. Officer Peterson issued the Appellant a citation for driving without a Minnesota driver's license. Because neither Appellant nor his passenger had a Minnesota driver's license and because the location of the Tahoe posed a traffic hazard, Officer Peterson decided to have the Tahoe towed. (A-App. 19-20).

While conducting an inventory search of the Tahoe prior to it being towed, Officer Landherr located a gallon sized Ziploc bag inside a Pringles can containing what ultimately tested positive for methamphetamine weighing 225.90 grams unpackaged (A-

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<sup>1</sup> "A-App." Refers to Appellant's Appendix.

App.8, 21). Appellant was arrested and brought to the Plymouth Police Department. Appellant was provided a Notice of Seizure and Intent to Forfeit the Tahoe and \$611.00 in United States currency. (A-App. 20-23; R-App. 1).

On March 21, 2012, Appellant was charged in Hennepin County District Court with one count of controlled substance crime first degree – possession as a result of the March 19, 2012 arrest. On June 6, 2012, the State of Minnesota dismissed the charge because Appellant had been indicted in federal court with charges arising from the same incident. (A-App. A8-11).

**Facts Relating to Federal Indictment, Motion to Suppress Evidence and Plea Agreement**

On or about May 21, 2012, Appellant was indicted on three counts of distribution of methamphetamine and one count of possession with intent to distribute methamphetamine which related to his arrest March 19, 2012 arrest, and the subject of this appeal. (R-App.<sup>2</sup> 2-4).

As noted by the Minnesota Court of Appeals, on July 21, 2012: “[A] federal magistrate judge determined that the March 19 traffic stop was lawful and recommended denial of [A]pellant’s motion to suppress the evidence resulting from the search. A federal district court judge later adopted that recommendation.” (A-App. 26).

As part of the plea agreement, Appellant agreed to the factual basis set forth in the Plea Agreement and Sentencing Stipulations which state:

Factual Basis. From on or about November 3, 2011 through on or about March 19, 2012, in the State and District of

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<sup>2</sup> “R-App.” refers to Respondent’s Appendix.

Minnesota, Defendant distributed approximately 180 grams of actual methamphetamine. Additionally, from on or about November 3, 2011 on or about March 19, 2012, Defendant possessed with the intent to distribute said 180 grams of actual methamphetamine, as well as an additional 162 grams of actual methamphetamine.

Defendant admits, for relevant conduct purposes, that he is responsible for distributing and possessing with an intent to distribute between 150 and 500 grams of actual methamphetamine. Defendant agrees that he acted voluntarily and that he knew his actions violated the law.

(R-App. 5-6).

Additionally, as part of the plea agreement, Appellant agreed to forfeit any and all property and proceeds derived from or used in the commission of his violation stemming from November 3, 2011, through March 19, 2012. (R-App. 9). The indictment, itself, under the heading “Forfeiture Allegations” provided as follows:

If convicted of any Count of this Indictment, the defendant shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853(a), any and all property constituting or derived from any proceeds the defendant obtained, directly or indirectly as a result of said violation(s), and any and all property used or intended to be used in any manner or part to commit or facilitate the commission of such violation(s).

(R-App. 3-4). Per the terms of Appellant’s plea agreement and the terms of the Indictment, it is uncontested that Appellant forfeited all legal right, interest and titled to the property to the federal government and has no legal ownership interest in the forfeited property. (*See* Argument I.A).

### Facts Related to the Grant of Summary Judgment

On or about May 7, 2012, Appellant served and filed a Demand for Judicial Determination of Forfeiture of Property. On November 15, 2012, Respondent brought a Motion for Summary Judgment. During Appellant's argument, his counsel argued that his prior plea agreement was not *res judicata* in this case because he had not yet been sentenced. (R-App.<sup>3</sup> 22, lines 5-7). Appellant's counsel did not submit or refer to the federal magistrate decision finding that the stop and seizure did not violate the Fourth Amendment's dictates. (R-App. 11-18, 21-23).

On January 11, 2013, Judge Thomas M. Sipkins issued his Order granting Respondent Summary Judgment and finding that Appellant, under the terms of his federal criminal plea agreement, agreed to forfeit the defendant property. In so ruling, the district court held that "[i]rrespective of the legality of the stop and search," Appellant's guilty plea and agreement to forfeit the property constituted an uncontested basis for the forfeiture. (A-App. 1-7). After Appellant's motion for reconsideration was denied, he appealed.

On November 25, 2013, the Minnesota Court of Appeals affirmed the District Court's grant of summary judgment. (A-App. 24-32). In its decision the Court of Appeals, in *dicta*, declined to extend the Exclusionary Rule to forfeiture proceedings, but based its affirmance of the summary judgment upon the factual basis for Appellant's

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<sup>3</sup> Although this Court did not grant Respondent's cross-appeal, Respondent respectfully submits that the federal district court's ruling on the search and seizure in this case, along with Appellant's plea agreement, constitutes both *collateral estoppel* barring him from re-litigating the propriety of the stop and search in this forfeiture proceeding.

guilty plea was sufficient to establish that the property was subject to forfeiture and that Appellant failed to rebut the presumption in Minn. Stat. § 609.5314, subd. 1(a)(1)(i) (2010). Thus, it concluded there was no genuine issue of material fact as to whether the property was subject to forfeiture. (A-App. 32).

Appellant filed his Petition for Review from this decision. Respondent filed a Response to Petition and Request for Cross-Review. On January 27, 2014, this court granted Appellant's Petition for Review and denied Respondent's Request for Cross-Review.

## STANDARD OF REVIEW

### A. Summary Judgment.

Summary judgment "shall be rendered forthwith" if "there is no genuine issue as to any material fact" and the record shows that a "party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. When a district court's grant of summary judgment is challenged, an appellate court applies a *de novo* standard, asking: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *See State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). (Citation omitted). "A fact is material if its resolution will affect the outcome of the case." *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976)).

To defeat a motion for summary judgment the nonmoving party cannot rely upon general, conclusory statements but must demonstrate the existence of specific facts

which create a genuine issue for trial. *See* Minn. R. Civ. P. 56.05. When the moving party has established a prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party. As noted by this Court in *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988):

“[T]he party resisting summary judgment must do more than rest on mere averments.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). “[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *Id.*

Unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for opposing party, there is no issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Reviewing courts view the evidence in the light most favorable to the non-moving party and apply *de novo* review. *See Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). If a genuine issue of material fact is found, the Court should deny the motion and the matter should be set on for trial.

#### **B. Constitutional and Statutory Question.**

This Court applies the *de novo* standard of review to issues of both constitutional interpretation and statutory interpretation. *See Star Tribune Co. v. Univ. of Minn. Bd. Of Regents*, 683 N.W.2d 274, 283 (Minn. 2004); *State v. Mauer*, 741 N.W.2d 107, 111 (Minn. 2007).

## SUMMARY OF ARGUMENT

The petition for review was improvidently granted because: (1) the Appellant lacks standing to pursue the return of the seized property; (2) the exclusionary rule is not properly before this Court as the stop, search and seizure were already found lawful in Appellant's criminal case; (3) the District Court erred when it made decisions of material disputed facts when deciding the summary judgment motion; and (4) neither of the decisions below were based on the admission of improperly seized evidence.

If the Court does reach the merits of the petition, the Court does not need to determine if the Fourth Amendment requires application in this civil *in rem* remedial forfeiture because: (1) Minnesota Statute § 626.21 provides a person who has been aggrieved by an improper search and seizure can make a motion for both return of property and for exclusion of evidence in any subsequent proceeding; (2) sufficient admissible evidence exists to show the seized money and car were in proximity to controlled substances supporting forfeiture of both; (3) extending application of the Fourth Amendment to this civil *in rem* remedial forfeiture action will not advance the deterrent value of the rule beyond its application in criminal prosecutions; and, (4) the Court need not expand the protection of the Minnesota Constitution beyond those provided by the Federal Constitution.

The petition was improvidently granted and, if this Court does reach the merits of the petition, Appellant's petition should be dismissed in its entirety and the Court should affirm the decision below granting Respondent summary judgment.

## ARGUMENT

### I. THE PETITION FOR REVIEW IN THIS MATTER WAS IMPROVIDENTLY GRANTED AS THE RECORD DOES NOT PRESENT THE NECESSARY FACTS FOR THIS COURT TO DECIDE THE ISSUE FOR WHICH REVIEW WAS GRANTED.

The underlying facts of the present case and the decisions of the District Court and Court of Appeals reveal that this case is a poor vehicle for this Court to use to decide whether the exclusionary rule should be applied in civil forfeitures for the reasons listed below. Under these circumstances, Respondent respectfully requests that this Court dismiss the Petition for Review as improvidently granted.

#### A. Appellant lacks standing to pursue return of the seized property following his guilty plea since this plea resulted in all right title and interest in this property vesting in the United States and leaving Appellant no legal claim to ownership.

Appellant lacks standing<sup>4</sup> to challenge the forfeiture because he forfeited all right, title and interest when he pled guilty to Count II of the federal indictment on August 10, 2012. A party contesting a forfeiture action must have standing to do so. Standing in forfeiture cases has both constitutional and statutory aspects. *See United States v. Timley*, 507 F.3d 1125, 1129 (8<sup>th</sup> Cir. 2007) (citing *United States v. One Sixth Share of James J. Bulger in all Present & Future Proceedings of Mass Millions Lottery Ticket No. M246233*, 326 F. 3d 36, 40 (1st Cir. 2003)). As to constitutional standing,

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<sup>4</sup> Respondent raised standing at page 20 of its Brief to the Court of Appeals. Even if standing had not been raised below, standing is an issue that cannot be waived and can be raised at any time. *See Marien Credit Union v. Detlefson-Delano*, 830 N.W.2d 859, 864 n.3 (Minn. 2013) (quoting *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (an objection to want of standing goes to the existence of a cause of action, is jurisdictional, and may be raised at any time)).

“[i]t is well established that a party seeking to challenge a forfeiture of property must first demonstrate an ownership or possessory interest in the seizure property in order to have standing to contest the forfeiture. *Id.* With respect to statutory standing, the court in *Timley* stated a party must have a legal interest, which is a right, claim, title or legal sharing of something. *Id.* Appellant has neither constitutional nor statutory standing to challenge forfeiture of the property seized on March 19, 2012.

In the Appellant’s Plea Agreement and Sentencing Stipulations, he agreed as follows with respect to the forfeiture of his property:

Pursuant to 21 U.S.C. § 853(a), the Defendant agrees to forfeit any and all property constituting, or derived from, any proceeds the Defendant obtained, directly or indirectly, as the result of Defendant’s property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the Defendant’s violation.

(R-App. 9). Appellant argues because he only pled guilty to Count II, not Count IV, of the Indictment, the property seized on March 19, 2012 was not subject to forfeiture.

Appellant’s argument fails because the indictment itself provides:

If convicted of *any Count* of this Indictment, the defendant shall forfeit to the United States, pursuant to Title 21, United States code, Section 853(a), any and all property constituting or derived from any proceeds the defendant obtained, directly or indirectly as a result of said violation(s), and any and all property used or intended to be used in any manner or party to commit or facilitate the commission of such violation(s).

(R-App. 5) (emphasis added).

Therefore, under the terms of the indictment, and as set forth in the factual basis of the Plea Agreement, by pleading guilty to *any* Count in the indictment, Appellant

agreed to forfeit all property including the property seized on March 19, 2012. (R-App. 4).

Appellant next argues that his plea in federal court has no bearing on the state district court forfeiture action because the United States was not a party to the forfeiture action and that Minnesota law applied. Both the Court of Appeals and Appellant relied on *Strange v. 1997 Jeep Cherokee*, 597 N.W.2d 355 (Minn. Ct. App. 1999) to support his argument. That reliance is misplaced.

The *Strange* case involved a federal civil *in rem* forfeiture action pursuant to 21 U.S.C. § 881. *Id.* at 357. The state initiated an *in rem* administrative forfeiture and the claimant filed a complaint in state court challenging the forfeiture. The state later abandoned its interest and the federal government gave notice it would be proceeding against the property in an *in rem* federal action. Based upon federal cases concerning federal *in rem* civil forfeitures, *Id.* at 357-58, the Minnesota Court of Appeals held that, given the *in rem* nature of the proceedings, jurisdiction of the property could not be transferred without a state court order. *Id.* at 359.

The federal forfeiture action at issue in this case is not an *in rem* proceeding against the property. Instead, it is an *in personam* criminal forfeiture pursuant to 21 U.S.C. § 853. Because this case involves a criminal forfeiture, *Strange* does not bar the federal forfeiture.

Under 21 U.S.C. § 853(a), all right, title and interest in the seized property was forfeited to the United States on March 19, 2012. After Appellant pled guilty and was

sentenced, the property vested in the United States on the date giving rise to the forfeiture. *See* 21 U.S.C. § 853(c).

That state law does not affect the legality of this waiver of claim is clear from the language of the statute which indicates that the forfeiture occurs despite any state law to the contrary:

Any person convicted of a violation of this subchapter or subchapter II of this chapter . . . *shall forfeit* to the United States, *irrespective of any provision of state law* . . . (2) any of the person's property used, or intended to be used, in any manner of part, to commit, or to facilitate the commission of such violation . . . .

21 U.S.C. § 853(a) (2) (emphasis added). The statute orders the forfeiting of the property as follows:

The Court, in imposing sentence on such person, *shall order* . . . that the person forfeit to the United States all property described in this subsection.

21 U.S.C. § 853(a) (emphasis added). The statute then vests title in the United States:

All right "(a) of this section" title, and interest in the property described in subsection *vests in the United States upon the commission of the act* giving rise to the forfeiture under that section.

21 U.S.C. § 853(c) (emphasis added).

As set forth in the Plea Agreement and Sentencing Stipulations, Appellant pled guilty and he agreed to forfeit the property. Pursuant to both the statute's relation back provision and the plea agreement, all of Appellant's interests and title in this property vested in the United States retroactively on March 19, 2012.

The federal government has authority pursuant to 21 U.S.C. §853(i)(4) to transfer the seized property to the Plymouth Police Department. But even if the federal government does not take action to disburse the property, Appellant still lacks standing since “[a]ny property right or interest not exercisable by, or transferable for value to, the United States shall expire and *shall not revert to the defendant.*” 21 U.S.C. § 853(h) (emphasis added).

Appellant also argues that because Respondent was not a party to the Plea Agreement in federal court, it does not have standing to challenge and/or enforce the criminal forfeiture. Respondent need not challenge or enforce the Plea Agreement to prevail in this forfeiture action. This plea agreement is *binding* upon Appellant even when the federal government is not a party in an action involving the property. (R-App 5). Per the terms of this agreement and criminal forfeiture, Appellant has given up all legal claims to this property. Thus, absent an interest in the seized property, Appellant lacks standing to challenge the forfeiture and the district court’s granting of summary judgment against Appellant in this action was proper.

**B. The question presented is not properly before this court because the stop was previously found to be lawful by the United States District Court in the related criminal case.**

As noted in the Court of Appeals decision below, the federal district court held that the traffic stop was lawful and denied Appellant’s motion to suppress evidence

resulting from the stop and search in the federal criminal case. (A-App. 26).<sup>5</sup> In opposing summary judgment and arguing that the stop and seizure was unlawful, Appellant did not bring the federal suppression ruling to the district court's attention.<sup>6</sup> Appellant respectfully submits that the federal district court's ruling that the search and seizure did not violate the Fourth Amendment in the criminal case bars re-litigation of the search and seizure issue in this forfeiture action. The question, as presented, is not properly before this Court because the stop was litigated and found lawful by the United States Magistrate Judge and the United States District Judge in Appellant's underlying criminal case. (A-App. 26).

Also, since the federal district court ruling on the suppression issue was not presented to the district court when it granted summary judgment, it is submitted that the existing record does not reflect an adequate presentation of the question upon which review was granted. Given that the district court did not have the opportunity to know

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<sup>5</sup> See *U.S. v. Cervantes-Perez*, Crim. No. 12-133 (DSD/TNL), 2012 WL 3288946 at \*1 (D, Minn. Aug. 10, 2012); *U.S. v. Cervantes-Perez*, No. 12CR133 (DSD/TNL), 2012 WL 3288674 at \*\* 4-5 (D. Minn. July 23, 2012).

<sup>6</sup> There is nothing in the record to indicate that Appellant's counsel, who was not his counsel in the federal criminal case, was aware of this ruling when he opposed summary judgment. Respondent counsel was not aware of this federal ruling on the suppression motion until an appeal was filed in this case. When Respondent became aware of the decision, it included this federal court decision in its Appendix to the Minnesota Court of Appeals and used this decision to support its *collateral estoppel* argument. Appellant moved to strike this decision from Respondent's Brief and strike all reference to it. The Court of Appeals granted this motion to strike the document from the Appendix but, as previously noted, it referred to the outcome of this ruling in its decision (A-App. 26). Respondent submits that consideration of this federal decision was necessary since it is legal authority that is directly adverse to Appellant's position.

that the federal court had held that the search and seizure was proper, its ruling below was not based on a full and complete record.

In *Belcher v. Stengel*, 429 U.S. 118 (1976), after the case had been fully briefed and orally argued, the Supreme Court found that the question framed in the petition for *certiorari* was not in fact presented in the record before it. The Court stated:

Now that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition of *certiorari* was considered, we have concluded that the writ should be dismissed as improvidently granted.

*Id.* at 119-120.

As the Court of Appeals explicitly noted, the legality of the stop has been litigated and was deemed lawful (A-App. 26). Once this Court has had an opportunity to fully examine the record, it is respectfully submitted that this Petition should be dismissed because the application of the exclusionary rule is not at issue given that the federal court has already held that the evidence supporting the forfeiture was lawfully obtained. It is requested that the Petition be dismissed as improvidently granted and that Appellant should be estopped from re-litigating the facts underlying his federal suppression motion criminal conviction in this civil forfeiture proceeding.<sup>7</sup>

**C. The District Court erred when it made decisions of material contested facts concerning the stop when it decided the summary judgment motion.**

“[T]he rule [is] well established that, in passing upon a motion for summary judgment, it is not part of the court’s function to decide issues of fact but solely to

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<sup>7</sup> See Respondent’s Court of Appeals Brief. pp. 15-17.

determine whether there is an issue of fact to be tried.” *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 605 (Minn. 1957). Below, the district court’s role in ruling on Respondent’s summary judgment motion was to determine whether there was sufficient uncontested evidence to grant summary judgment. The district court did so and awarded summary judgment. (A-App. 7).

But the district court went on to make findings regarding the search and seizure even though it acknowledged that these findings were not relevant for the purpose of resolving the forfeiture. (A-App. 3). It is respectfully submitted that the district court’s findings regarding the propriety of the search and seizure were not appropriate in the context of a summary judgment motion.

To make these findings, the court effectively and without benefit of testimony by the officer, made credibility determinations when it rejected the credibility of Officer Peterson’s statements set forth in his police report and affidavit. Instead, the district court determined that Officer Peterson’s actions were due to a racial bias. (A-App. 2-3). Such credibility determinations may be appropriate in an evidentiary hearing, but cannot be made in a summary judgment proceeding unless it is supported by uncontested evidence. When material evidence is contested in a summary judgment, the district court should deny summary judgment and let the trier of fact “determine the fact issues at trial in which all the evidence respecting [these] matters may be received after thorough investigation . . . and the opportunity to thoroughly test the admissibility of the evidence.” *Id.* at 605-06.

The district court's factual findings below are at best *dicta* and are not supported by the uncontested evidence. In a summary judgment appeal, these contested factual findings do not provide a proper factual basis upon which this Court should determine application of the exclusionary rule since these findings may ultimately not be upheld in the district court. Therefore, it is respectfully submitted that the Petition be dismissed as improvidently granted.

**D. The Petition should be dismissed as improvidently granted because neither of the decisions below were based upon the admission of improperly seized evidence.**

The district court, in granting Respondent's motion for summary judgment, based its holding on Appellant's plea agreement and the fact that Appellant had pled guilty to the indictment and agreed to forfeit the property. The Court stated:

Plaintiff does not argue, and the Court does not find, that genuine issues of material fact exist regarding the Plea Agreement or whether the property falls within the scope of 21 U.S.C. 853(a). Based on the parties' Plea Agreement and applicable statutory provision, there are no genuine issues as to any material facts. Therefore, Defendant's motion for summary judgment is granted.

(A-App. 7). Indeed, as previously noted, the district court held that "the legality of the stop and subsequent seizure are not the issues before this Court." (A-App. 3).

Although the Minnesota Court of Appeals declined to extend the exclusionary rule concluded to this forfeiture proceeding, it noted that Appellant's federal plea provided the factual basis for the forfeiture and that Appellant failed to rebut this presumption. Consequently, the Court of Appeals affirmed summary judgment holding that:

[T]here is no genuine issue of material fact as to whether the respondent property is subject to forfeiture under the Minnesota forfeiture statutes. Minn. Stat. 609.5311, .5314 (2012). The district court did not err in granting summary judgment to respondent Hennepin County.

(A-App. 32).

Because both the district court and Court of Appeals based their decisions below on other proper grounds, this Court need not decide the question presented in the Petition. *See Smith v. Butler*, 366 U.S. 161 (1961) (writ dismissed when it became clear that the lower court decision did not turn on the “basis of which certiorari was granted”). As such, it is respectfully submitted that the Petition should be dismissed as improvidently granted.

## **II. THE STATUTORY EXCLUSIONARY REMEDY PROVIDED BY MINN. STAT. § 626.21 RENDERS UNNECESSARY THE NEED TO DETERMINE IF THE FOURTH AMENDMENT REQUIRES APPLICATION OF THE EXCLUSIONARY RULE TO THIS CIVIL REMEDIAL FORFEITURE PROCEEDING.**

Under Minn. Stat. § 626.21, a person who has been aggrieved by an improper search and seizure may make a motion for both return of the property and for exclusion of the evidence in any subsequent proceeding.<sup>8</sup> This statute, which is still in effect, was enacted by the Minnesota Legislature in 1963 shortly after the United States Supreme Court made the Fourth Amendment Exclusionary Rule applicable to state criminal

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<sup>8</sup> As noted in Argument IV.A.2 of this Brief, the Supreme Court limits the application of the Fourth Amendment Exclusionary Rule in multiple civil, quasi-criminal and even criminal proceedings. In comparison, the language in Minn. Stat. § 626.21 provides individuals with much broader rights to seek redress from improper searches and seizures.

prosecutions. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Given this broad statutory remedy, it is respectfully submitted that it is unnecessary for this Court to reach the issue of whether the federal constitutional exclusionary rule is required in the non-criminal and remedial *in rem* proceeding at issue in this case.

Although the remedies of Minn. Stat. § 626.21 were available to Appellant at the start of this proceeding, he did not raise it before the district court, the Minnesota Court of Appeals or even in his petition for review to this court. His failure to seek return of property under this statute below waives his right to now raise it for the first time in his brief before this Court. *See Gallagher v. 1989 Lincoln Mark VII-MN License 828-JDV*, No. C6-92-1997, 1995 WL 81375 (Minn. Ct. App. Feb. 28, 1995) (No. C6-92-1997) (Gallagher waived any claim under Minn. Stat. § 626.21 when he sought return of property solely under the state forfeiture statutes); *Rosenow v. Commissioner of Revenue*, No. 5236, 1991 WL 227915 (Minn. Tax Ct., Oct. 15, 1991) (where Rosenow failed to move to suppress evidence of the marijuana found in the trunk of his car pursuant to Minn. Stat. § 626.21, it will not be addressed in this appeal).

Additionally, to prevail under Minn. Stat. § 626.21, a party seeking return of property must establish ownership of the property. Without showing ownership, the party does not have standing to seek return. *See State v. Welke*, 216 N.W.3d 641, 404 (Minn. 1974) (where defendant was not owner of the seized materials, he was not an aggrieved person and he “had no standing” to demand return of seized materials). As previously noted in Argument I.A of this Brief, Appellant gave up all ownership interest in this property when he entered his guilty plea pursuant to 21 U.S.C. § 853(a). Thus,

he does not constitute an aggrieved person with standing to bring a claim under Minn. Stat. § 626.21.

**III. THERE IS NO NEED TO REACH THE ISSUE OF WHETHER THE FOURTH AMENDMENT EXCLUSIONARY RULE APPLIES IN THIS CIVIL REMEDIAL FORFEITURE SINCE THERE WAS SUFFICIENT ADMISSIBLE EVIDENCE TO SUSTAIN THE FORFEITURE.**

Assuming, without conceding, that Appellant has standing to contest the forfeiture, there was sufficient admissible evidence to show that the money and the car were in proximity to controlled substances both: (1) because the stop and search was permissible under the Fourth Amendment; and (2) even if the search was constitutionally flawed, there was sufficient other evidence based upon Appellant's plea admissions to sustain the forfeiture.

**A. The stop and subsequent search of the vehicle was proper under the Fourth Amendment.**

Even though the district court, based solely upon unsworn police reports, determined that the stop and search violated the Fourth Amendment, this determination was at best *dicta* since the trial court ultimately upheld the forfeiture. More importantly, both the available information in the record and the applicable case law show that the stop and search was permissible under the Fourth Amendment.

**1. The police had a reasonable basis for stopping Appellant when he was driving the seized vehicle.**

Police officers are permitted to make a traffic stop if there is "an articulable and reasonable suspicion that a traffic violation has occurred." *United States v. Herrera-*

*Gonzalez*, 474 F.3d 1105, 1109 (9<sup>th</sup> Cir. 2008) (quoting *United States v. Washington*, 455 F.3d 824, 826 (8<sup>th</sup> Cir. 2006).

Here, the record shows that the police had two valid reasons for conducting an investigatory stop of Appellant's vehicle: (1) the computer check showed both that the car was registered in Minnesota but that there was no record that registered owner had a valid Minnesota driver's license (A-App. 19); (2) the vehicle was going 62 to 63 miles an hours in a 60 miles speed zone (A-App. 19-20).

The lack of any record of a valid driver's license for the owner, by itself, constituted sufficient reason to justify the stop. This Court has explicitly held "that is not unconstitutional for an officer to make a brief, investigatory *Terry*-type stop of a vehicle if the officer knows that the owner of the vehicle has a revoked license so long as the officer remains unaware of any facts which would render unreasonable an assumption that the owner is driving the vehicle." *State v. Pike*, 551 N.W.919, 922 (Minn. 1996). *See State v. Duesterhoeft*, 311 N.W. 2d 866, 869 (Minn. 1981) (affirmed stop when record check showed that owner of vehicle had a suspended license). Here the record shows that the officer knew the car was licensed in Minnesota and there was an articulable basis for him to believe that the person driving was violating Minn. Stat. § 171.02, Subd. 1 (drivers must be properly licensed) (A-App. 19). When a police officer sees a vehicle being driven and the officer has a reasonable basis to believe that the owner of the car does not have a valid driver's license, "it is enough to form the basis of reasonable suspicion of criminal activity" as long as the officer does not know have reason to believe that the owner is not driving. *Pike*, 551 N.W. 2d at 922.

The record also shows that the officer had a reasonable basis to believe that Appellant was going 62 to 63 miles in an area where the posted limit was 60 miles per hour (A-App. 20). Courts have repeatedly upheld vehicle stops on the basis that the driver was only going slightly over the speed limit. *See, e.g., United States v. \$231,930.00 in U.S. Currency*, 614 F.3d 837, 842 (8<sup>th</sup> Cir. 2010) (upheld stop where car was 2.6 miles over the speed limit); *United States v. Caldwell*, 97 F.3d 1063, 1066-67 (8<sup>th</sup> Cir. 1996) (fact that vehicle was determined to be “slightly faster than the posted speed limit” was sufficient to justify traffic stop).

Although the district court, without benefit of any testimony to make credibility determinations, stated that that the stop was motivated by improper reasons (A-App. 3), the uncontested evidence in the record shows that there were two proper factual grounds supporting the stop. “Under the ‘objective theory’ of probable cause which the United States Supreme Court has adopted, a search must be upheld, at least as a matter of federal constitutional law, if there was a valid ground for the search, even if the officers conducting the search based the search on the wrong ground or had an improper motive.” *State v. Pleas*, 329 N.W. 2d 329, 332 (Minn. 1983) (upheld a stop based on the officer’s observation of a broken windshield, no front license plate, and real plate upside down) (citing *Scott v. United States*, 436 U.S. 128, 136 (1978)). *See also Wren v. United States*, 517 U.S. 806, 814 (1996) (in upholding police traffic stop for minor traffic offenses despite claim of selective enforcement based on race, the Court noted that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”).

Moreover, the federal district court magistrate judge and judge who reviewed this very stop both determine that the stop was reasonable under the circumstances. *United States v. Cervantes-Perez*, No. 12cr133 (DSD/TNL), 2011 WL 3288946 (D. Minn. August 10, 2012) (adopting report and recommendation of *United States v. Cervantes-Perez*, No. 12cr122 (DSD/TNL), 2011 WL 3288674 at \* \* 4-5 (D. Minn. July 23, 2012) (held that officer had a “reasonable articulable basis for stop of vehicle)).<sup>9</sup>

**2. The search of the vehicle was proper.**

**a. Impoundment of the vehicle was proper and Appellant waived his right to contest that there was an insufficient basis for the inventory search.**

Since neither Appellant nor his passenger had a proper driver’s license to allow them to remove the car from a major freeway (A-App. 19-21), it was proper for the police to have the car towed to an impound lot to prevent a traffic hazard (A-App. 19).<sup>10</sup> Inventory searches following impoundment can be proper if it is done according to established inventory standards. *See generally South Dakota v. Opperman*, 427 U.S. 364, 369 (1976) (police can remove and impound vehicles “impeding traffic” and inventory of contents of the car pursuant to impoundment is proper); *United States v.*

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<sup>9</sup> Although the Minnesota Court of Appeals struck this case from Respondent’s Appendix below, it is being submitted as an unpublished decision *solely* for the purpose of showing authority in support of Respondent’s legal argument on this issue.

<sup>10</sup> Officer Peterson could also reasonably assume that, if the vehicle was not impounded, it was likely that either Appellant or his passenger again would commit the offense of driving without a valid license. This likelihood was especially high given that Appellant provided Officer Peterson with a citation indicating that Appellant had previously been driving without a valid license. (A-App. 19).

*Betterton*, 417 F.3d 826, 830 (8<sup>th</sup> Cir. 2005) (police could “impound the car because it was stopped in a traffic lane in a no-parking zone and would be a hazard if left in that location” and inventory of contents of car pursuant to impoundment is proper).

Although the district court made reference to the absence of evidence of a departmental inventory policy (A-App. 2), the district court never determined the specific issue of whether the inventory search was improper. Since Appellant’s Memorandum in Opposition to Summary Judgment only challenged the impoundment and made no claim that there was an insufficient basis for an inventory search, he waived any claim to challenge the results of the inventory search (R-App. 14-18).<sup>11</sup>

**b. There was probable cause for the search.**

Even assuming, without conceding, that the inventory search was faulty, the police had sufficient other evidence to justify a probable cause search of the vehicle once the impoundment decision was made. *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (upheld the warrantless search of a vehicle permissible when there was probable cause to believe it contained contraband); *United States v. Cowan*, 674 F.3d 947, 956 (8<sup>th</sup> Cir. 2012) (probable cause to believe vehicle contains contraband justified warrantless search).

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<sup>11</sup>When a defendant challenges only the impoundment of the vehicle and he makes no claim that the subsequent inventory search was not conducted pursuant to established police department’s regulations, he fails to preserve this claim as a basis for excluding evidence. *See Thompson v. State*, No. 49F07-0808-CM-202690, 2009 WL 1704357 at \* 3 (Ind. App., June 18 2009) (defendant’s objected to the seized evidence “only on the basis of the impoundment and not the subsequent inventory” and failed to preserve inventory issue). Had Appellant made a timely challenge to the basis for the inventory search, it would have given notice to Respondent of the need to introduce a copy of the inventory policy for Officer Peterson’s department.

Officer Peterson's report shows that based on his prior training and experience, sufficient facts supported probable cause to believe that that Appellant and his passenger were involved in some type of criminal activity related to narcotics (A-App. 19-21). These factors supporting probable cause to believe the vehicle was being used for illicit drug trafficking included: (1) Appellant was driving with a single ignition key; (2) Appellant appeared very nervous and was breathing heavy when the officer questioned him; (3) the vehicle had multiple air fresheners; (4) Appellant had two insurance cards for the vehicle with two different owner names; (5) neither Appellant nor his passenger had a valid driver's; (6) a computer check showed that Appellant had multiple addresses; (6) Appellant had been previously cited for driving without a license in Minnesota; (7) Appellant had difficulty giving the officer his home address and; (8) both Appellant and his passenger had previously been deported from the country; and (9) the officer observed a card reference the saint Santa Muerte (A-App.19- 20).

While each of these factors individually would not support probable cause, taken as a whole they provide sufficient evidence of drug trafficking to sustain a probable cause for the search of the vehicle. *See, e.g., United States v. Pena-Ponce*, 588 F.3d 579, 582 (8<sup>th</sup> Cir. 2009) (officer testified that the icon Santa Muerte is "commonly used by drug traffickers for protection"); *United States v. Carbajal*, 449 Fed. App'x 551, 552 (8<sup>th</sup> Cir. 2012) (multiple air-fresheners was a factor supporting probable cause that there was contraband in vehicle); *United States v. Calvo-Saucedo*, 409 Fed. App'x 21, 23 (7<sup>th</sup> Cir., 2011) (single ignition key, excessive nervousness by defendant, use of

silicone known for masking drugs contributed to determination that probable cause existed for search); *United States v. Orta*, 228 Fed. App'x 633, 634 (8<sup>th</sup> Cir. 2007) (single ignition key along with presence of insurance card that did not match the vehicle and other factors supported finding search was justified by probable cause).

**B. Appellant's guilty plea provides sufficient basis for the forfeiture even if the evidence resulting from the search is excluded.**

Assuming, without conceding, the search of the vehicle was improper, the factual basis for Appellant's plea agreement provides both an *independent* and sufficient basis for the forfeiture. As noted by the Minnesota Court of Appeals, "[A]ppellant admitted possessing methamphetamine over a course of conduct that included March 19" (A-App. 32) which is the date of the seizure of the vehicle and money occurred. This guilty plea provides an evidentiary presumption for forfeiture independent from any alleged taint resulting from the stop and search. As noted by the Court of Appeals below:

Appellant has failed to raise any genuine fact issue sufficient to rebut the evidentiary presumption in favor of forfeiture. Therefore, the respondent property is properly subject to forfeiture, and the district court did not err in granting summary judgment in favor of respondent Hennepin County. [A-App. 32.]

*See Rife v. One 1987 Chevrolet Cavalier*, 485 N.W.2d 318, 322 (Minn. Ct. App.), *rev. denied* (Minn. June 30, 1992) (even if seizure of car was constitutionally flawed, other evidence established forfeiture presumption). Because exclusion of the results of the stop and search in this proceeding would not undermine the admissible factual basis for

the presumption of forfeiture, there is no need for this Court to reach the issue of whether the Fourth Amendment Exclusionary Rule should apply to this remedial, civil *in rem* forfeiture proceeding.

**IV. THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO THIS CIVIL *IN REM* REMEDIAL FORFEITURE ACTION SINCE ANY MARGINAL INCREMENTAL BENEFIT FROM APPLYING IT IN THIS PROCEEDING DOES NOT JUSTIFY ITS APPLICATION.**

- A. **The United States Supreme Court's decisions since 1965 have both consistently declined to extend the exclusionary rule to civil proceedings and have limited its application to criminal related proceedings on the ground that such applications will not significantly advance the deterrent value of the rule beyond its application in criminal prosecutions.**

**1. Early application of the exclusionary rule to a civil proceeding.**

Under the common-law, evidence is admissible regardless of how it was acquired. *See* 8 Wigmore, Evidence § 2183 (3d ed. 1940). As long as evidence was deemed to be competent, "relevant and material" it was admissible in court even in criminal proceedings. *See State v. Pluth*, 195 N.W. 789, 792-94 (Minn. 1923) (evidence improperly seized by police is still admissible). The United States Supreme Court departed from this common-law rule when, in *Weeks v. United States*, 232 U.S. 383, 392 (1914), it chose to use its rule-making authority to exclude evidence in federal criminal proceedings if it was obtained by federal law enforcement officers in violation of the Fourth Amendment's requirements for a lawful search and seizure. *See generally* U.S. Const. amend. IV. Eventually, through a series of decisions, the Court extended this

exclusionary rule to state criminal proceedings in 1961. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Four years after the *Mapp* decision, the Court held that the exclusionary rule applied in a civil forfeiture case in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700-02 (1965). In applying the rule to this civil forfeiture case, the Court focused on the punitive nature of the proceeding given that the value of the vehicle being forfeited was twice as much as the maximum fine that could be imposed for the applicable criminal offense of possessing liquor without proper tax seals. *See Id.* The Court did not consider or discuss whether the Pennsylvania forfeiture law at issue had any other purposes other than to impose an effective fine on those engaging in this offense. *Id.*

**2. The Supreme Court's subsequent cases have consistently refused to apply the exclusionary rule to other civil cases and have limited application of the rule in criminal proceedings casting doubt upon *One 1958 Plymouth Sedan's* continuing vitality.**

**(a) The Court has consistently decline to extend the exclusionary rule to civil proceedings since *One 1958 Plymouth Sedan*.**

The vitality of *One 1958 Plymouth Sedan* became questionable in 1976 when the Court refused to apply the exclusionary rule to a civil tax proceeding.<sup>12</sup> *See United States v. Janis*, 428 U.S. 433, 447 (1976). In refusing, the Court stated: "In the complex

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<sup>12</sup> An in-depth analysis of Supreme Court decisions showing why the exclusionary rule holdings in both *One 1958 Plymouth Sedan* and *Boyd v. United States*, 116 U.S. 616 (1986) lack continued vitality is set forth by the Maryland Court of Appeals in *Baltimore v. 1995 Corvette*, 119 Md. App. 691, 706 A.2d 43, 46-101 (1998).

and turbulent history of the rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state.” *Id.* (footnote omitted). It distinguished the *One 1958 Plymouth Sedan* case in a footnote by stressing the fact that the forfeiture in that case was “clearly a penalty for the criminal offense.” *Id.* at 447 n.17.

*One 1958 Plymouth Sedan* did not consider the issue of the exclusionary rule’s purpose. But in a series of decisions issued after *One 1958 Plymouth Sedan*, the Court has made clear that the rule’s “purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment.” *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) (declined to apply the rule retroactively holding it would not further the rule’s deterrent purpose). “[A]pplication of the rule” is “restricted to those areas where its remedial objectives are thought most efficaciously served.” *United States v. Calandra*, 414 U.S. 338, 348 (1974).

Since 1965, the Court has consistently declined to apply the exclusionary rule to civil proceedings, even those that could be deemed to have punitive effects, on the ground that exclusion of illegal evidence from a criminal prosecution was a sufficient deterrent. Any “additional marginal deterrence provided” by extending the rule to other proceedings did not justify the costs of excluding otherwise admissible evidence. *Janis*, 428 U.S. at 453-54 (exclusion in state criminal proceedings was sufficient and the rule’s deterrence effect is not significantly furthered by applying it federal civil tax forfeiture). *See, e.g., Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deterrent effect of the rule not furthered by exclusion of the fruits of an unlawful seizure in a civil deportation proceeding).

**(b) Since *One 1958 Plymouth Sedan*, the Supreme Court has also relied upon the rule's deterrent purpose to hold that the rule is not applicable in criminal-related proceedings and, under certain circumstances, has even limited its application in criminal proceedings.**

In several cases, the Court declined to extend application of the exclusionary rule in criminally-related procedures such as grand jury proceedings, parole revocation proceedings and federal *habeas corpus* review based on its determination that the minimal deterrent effect served by application to these proceedings were outweighed by the societal costs caused by excluding probative evidence. *See, e.g., Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 368 (1998) (declined to extend the rule to parole revocation hearings even though they may result in additional prison time); *Stone v. Powell*, 428 U.S. 465, 486 (1976) (deterrent effect of the rule is not advanced by applying it to federal habeas corpus review of state court criminal convictions); *United States v. Calandra*, 414 U.S. 338, 351-52(1974) (refused to extend the rule to a grand jury proceeding since such an application “would achieve a speculative and undoubtedly minimal advance in the deterrent of police misconduct at the expense of substantially impeding the role of the grand jury”).

The Court has even refused to apply it in a criminal prosecution when, under certain circumstances, if it found its application did not further the deterrent value of the rule. *See, e.g., United States v. Leon*, 468 U.S. 897, 930 (1984) (declined to apply rule to evidence in a criminal prosecution since police in good faith relied up a warrant that was defective and exclusion under these circumstances would not serve the rule's deterrent effect); *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (improperly

seized evidence can be used to impeach a defendant because exclusion of the evidence in the prosecution's case-in-chief is sufficient to accomplish the rule's deterrent purpose); *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978) (refused to exclude a witness whose identity became known as the result of an illegal search since "[t]he cost of permanently silencing [a live witness] is too great for an (evenhanded) system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect").

Significantly, the Court has also repeatedly declined to apply the exclusionary rule to a criminal prosecution's case-in-chief if the individual does not have standing to object to the search. *See, e.g., Brown v. United States*, 411 U.S. 223, 229 (1973) (despite defective warrant, exclusionary rule did not apply to evidence seized from a third party's store because defendants lacked standing to object to the search); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969) (any additional benefits resulting from expanding the exclusionary rule to others than those whose rights were violated does not outweigh the costs of applying the rule to those who lack standing). "This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Calandra*, 414 U.S. at 348 (footnote omitted).

- 3. A subsequent Supreme Court forfeiture decision has called into question the application of *One 1958 Plymouth Sedan's* characterization of forfeiture as a quasi-criminal or quasi-punitive proceeding.**

Although the Court in *Janus* indicated that its holding in *One 1958 Plymouth Sedan* was premised on the criminal or punitive nature of the proceedings, *Janis*, 428 U.S. at 447 n.17, the Court has called into question the continued viability of this distinction especially when it is applied to civil *in rem* drug forfeitures such as the forfeiture at issue in the case. In 1996, the Supreme Court held that drug related civil *in rem* forfeitures are neither “punishment nor criminal for the purposes of the Double Jeopardy Clause.” *United States v. Ursery*, 518 U.S. 267, 292 (1996). In so holding, the Supreme Court noted that the forfeiture statute at issue<sup>13</sup> served remedial deterrent purposes limiting future use of the property for illegal purposes and “encourages property owners to take care in managing their property and to ensure that they will not permit that property to be used for illegal purposes.” *Id.* Notably, in a concurrence, Justice Kennedy questioned the continued viability of cases such as *One 1958 Plymouth Sedan* that treat forfeiture as punitive. *Id.* at 293-94 (Kennedy, J., concurring).

**4. Since *Ursery*, several courts are questioning the application of the exclusionary rule to civil *in rem* drug forfeiture cases.**

Since *Ursery*, some courts have either refused to apply the exclusionary rule to civil *in rem* drug forfeitures or have questioned the continued vitality of *One 1958 Plymouth Sedan* in the context of remedial drug forfeiture proceedings. *See, e.g., United States v. Marracoo*, 578 F.3d 627, 631 n.5 (7<sup>th</sup> Cir. 2009) (Easterbrook, J., concurring) (court did not rule on application of the exclusionary rule because government did not

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<sup>13</sup> The drug forfeiture statute at issue was 21 U.S.C. §881(1)(6)(7) which is similar in operation and purpose to Minn. Stat. § 609.5311, which is the state forfeiture statute at issue in this case.

raise it, but concurrence expressed concern with whether the exclusionary rule should apply in forfeiture proceedings given more recent supreme court decisions); *United States v. \$304,980.00*, No. 12cv0044 MJR-SCW, 2013 WL 54005 at \*7 (N.D. Ill, Jan. 3, 2013) (although not ruling on the issue, court questioned whether *One 1958 Plymouth Sedan* applied to civil drug forfeitures); *People v. \$241,600*, 67 Cal.Rptr. 4th 1100, 1113, 79 Cal.Rptr. 2d 588, 595 (1998) (state appellate court held that exclusionary rule does not apply to civil forfeiture cases); *Baltimore v. 1995 Corvette*, 119 Md. App. 691, 706 A.2d 43 (1998) (following an in-depth analysis of Supreme Court decisions from *One 1958 Plymouth* to *Urserly*, concluded that exclusionary rule did not apply to civil forfeiture proceedings).

Appellant and the three *amicus curiae* briefs supporting Appellant's position cite to various three-judge federal circuit court panels and state court decisions that have applied the exclusionary rule to civil forfeiture proceedings. But the continued vitality of these holdings is questionable given that many of them either pre-date the *Urserly* decision, or are based upon prior decisions that predate *Urserly*. See, e.g., *United States v. \$291,828.00*, 536 F. 3d 1234, 1236-38 (11<sup>th</sup> Cir. 2008) (relies solely upon *One 1958 Plymouth Sedan* and makes no mention of *Urserly*); *United States v. \$493,850.00*, 518 F.3d 1159, 1164 (9<sup>th</sup> Cir. 2008) (based its application of the exclusionary rule on an prior Ninth Circuit decision that predated *Urserly*); *United States v. \$7,850.00*, 7 F.3d 1355, 1357( 8<sup>th</sup> Cir. 1993) (pre-*Urserly* and holding based on *One 1958 Plymouth Sedan*).

**B. The minimal deterrent value from applying the constitutional exclusionary rule in civil *in rem* forfeitures does not justify its application to civil forfeiture actions.**

Given the deterrence purpose of the rule, the rules application should not be expanded absent a showing that such an expansion is necessary to deter police violations of the Fourth Amendment beyond what is already provided by its application in criminal proceedings. Indeed, the Supreme Court only extended the exclusionary rule to the states when, despite years of cautioning law enforcement officials of the need to stop their search and seizure violations, the Court continued to receive on appeal cases showing flagrant violations of the Fourth Amendment. *See, e.g., Mapp*, 367 U.S. at 1085-86 (flagrant police misconduct in search of a home without warrant or exigency); *Elkins v. United States*, 364 U.S. 206, 207 (1960) (law enforcement officials repeatedly trespassed in home without warrant to plan listening devices); *Stefanelli v. Minard*, 342 U.S. 117, 118 (1951) (warrantless entry of home to seize evidence).

**1. State cases on appellate review do not support applying the exclusionary rule to civil forfeiture actions.**

Appellant and the *amicus curie* supporting his position argue that application of the exclusionary rule is necessary to curb what they allege are rampant police violations in forfeiture cases. But this argument is based upon sheer *speculation* and is without factual support.

A review of all Minnesota appellate decisions involving forfeitures under Minn. Stat. § 609.5311 between the time of the 1993 *Rife* decision and the current case show that in *none* of these cases was there any indication that the police had violated the

Fourth Amendment in seizing the property at issue. *See, e.g., Torgelson v. 17138 880th Ave.*, 749 N.W.2d 24 (Minn. 2008); *Jacobson v. \$55,900*, 728 N.W.2d 510 (Minn. 2007); *Riley v. 1987 Station Wagon*, 650 N.W.2d 441 (Minn. 2002); *Blanche v. 1995 Pontiac Grand Prix*, 599 N.W.2d 161 (Minn. 1999); *Torgelson v. 17138 880th Ave.*, 734 N.W.2d 279 (Minn. Ct. App. 2007); *Borgen v. 418 Eglon Ave.*, 712 N.W.2d 809 (Minn. Ct. App. 2006); *Wood Motor Co. v. One 2000 Ford F-350*, 658 N.W.2d 900 (Minn. Ct. App. 2003); *King v. One 1990 Cadillac Deville*, 567 N.W.2d 752 (Minn. Ct. App. 1997); *Schmitz v. \$40,703*, 572 N.W.2d 760 (Minn. Ct. App. 1997); *Bublitz v. Comm'r of Revenue*, 545 N.W.2d 382 (Minn. 1996); *Freeman v. 1215 East 21st St.*, 552 N.W.2d 275 (Minn. Ct. App. 1996); *Humphrey v. \$1109*, 539 N.W.2d 1 (Minn. Ct. App. 1995); *State v. Rosenfeld*, 540 N.W.2d 915 (Minn. Ct. App. 1995); *Brosnahan v. 1572 Naples Street*, No. A12-0659, 2013 WL 491517 (Minn. Ct. App. Feb. 11, 2013); *Valley Oil, Inc. v. 2002 Chevy Tahoe*, No. A08-0338, 2009 WL 66965 (Minn. Ct. App. Jan. 13, 2009); *Johnson v. One 1994 Honda Civic*, Nos. A06-2430, A07-0255, 2007 WL 4472480 (Minn. Ct. App. Dec. 24, 2007); *Akkouche v. 1999 Chrysler Concorde*, No. A06-1333, 2007 WL 2600861 (Minn. Ct. App. Sept. 11, 2007); *Theiler v. Chevy Avalanche*, No. A06-1604, 2007 WL 2177882 (Minn. Ct. App. July 31, 2007); *Burton v. Minneapolis*, No. A06-546, 2007 WL 968778 (Minn. Ct. App. Apr. 3, 2007); *O'Brien v. 1991 Pontiac Bonneville*, No. A05-1802, 2006 WL 2347999 (Minn. Ct. App. Aug. 15, 2006); *Voraveth v. \$68,514 in U.S. Currency*, Nos. A04-1818, A04-1820, 2005 WL 1021763 (Minn. Ct. App. May 3, 2005); *State v. Greer*, No. C8-99-1796, 2000 WL 781298 (Minn. Ct. App. June 20, 2000); *Freeman v. 1215 East 21st Street*, No. CX-94-

484, 1994 WL 440263 (Minn. Ct. App. August 16, 1994); *Gordon v. \$1,171.90*, No. CX-96-2322, 1997 WL 406648 (Minn. Ct. App. July 22, 1997); *Johnson v. 6508 Hodgson Road*, No. C9-93-2362, 1994 WL 323366 (Minn. Ct. App. July 5, 1994); *Backstrom v. One Freightliner Semitractor*, No. C7-92-2222, 1993 WL 139539 (Minn. Ct. App. May 4, 1993); *Jackson v. One Yellow Necklace with Medallion*, Nos. C3-92-1567, C6-92-1594, 1993 WL 140775 (Minn. Ct. App. May 4, 1993).

**2. Other authorities referenced to in the *amicus curiae* briefs do not show wide-spread abuses pursuant to the state forfeiture laws.**

*Amicus curiae* briefs supporting Appellant's position also make reference to news articles and a Report of the Metro Gang Strike Force Review Panel (August 20, 2009)<sup>14</sup> (hereinafter "MGSF Report") to support their claims that there are wide-spread abuses of the forfeiture laws by law enforcement officials. These materials consist of uncross-examined, unsworn hearsay which often do not identify the speakers. Since these materials were not offered before the district court judge in these proceedings, it is respectfully submitted that the facts alleged in these materials should not form a *factual basis* for determining a need to extend the federal constitutional exclusionary rule to civil *in rem* drug forfeitures in Minnesota. See Minn. Civ.App. P. 110.01 (papers filed in trial court shall constitute the record on appeal).

If this Court does consider these materials, the cases cited above show that alleged forfeiture abuses cases are not being raised in state judicial forums either by a

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<sup>14</sup> This panel consisted of two panel members, Andrew Luger and John Egelhof, and the MGSF Report can be found at [https://dps.mn.gov/divisions/co/about/Documents/final\\_report\\_mgsf\\_review\\_panel.pdf](https://dps.mn.gov/divisions/co/about/Documents/final_report_mgsf_review_panel.pdf).

forfeiture challenge. Even in the instant case, there are no uncontested facts to show that the stop and seizure was not in conformance with the applicable case law.

Review of the MGSF Report also does not support the contention that the state forfeiture laws led to the alleged abuses of the strike force. The report repeatedly notes that a major problem was that the strike force did not bother to submit the items seized for forfeiture. *See* MGSF Report, pp. 14, 16, 21 n. 16, 27, 29, 30. The report noted that a significant amount of property was never submitted to the Minnesota Attorney General's office for forfeiture and, if it was, the "Attorney General rejected the forfeitures for failing to comply with legal requirements." *Id.* at 27.

The most egregious alleged misbehavior was not that property that was taken and subjected to proper forfeiture procedures. Instead, it was the allegation that officers took property without benefit of the forfeiture laws and took it home. *See Id.* at 16, 32. The state forfeiture law *explicitly* provides notice requirements and an opportunity for judicial review before property is forfeiture – nothing in the statute authorizes police to seize property without notice and judicial process and keep the property for themselves. *See* Minn. Stat. § 609.5311.

Although the report indicates that forfeiture provided an improper climate fostering the abuses, the report *emphatically* shows that it was not the forfeiture laws that led to the abuses. Instead, it appears that the alleged abuses were due to the strike force's failure to adhere to the due process requirements of the existing forfeiture laws.

There has been no showing that application of the exclusionary rule to civil forfeiture proceedings would have curbed the alleged strike force abuses. Even if an

exclusionary rule was necessary for such abuses, Minn. Stat. § 626.21 already provides a statutory remedy that both excludes evidence and allows the owner to seek return of wrongfully seized property. This statutory remedy is a superior remedy for curbing the strike force abuses since the owner can initiate judicial oversight of the search and seizure. In contrast, the constitutional exclusionary rule only comes into play when the government goes to court and seeks to introduce evidence that may be tainted by an improper search and seizure. The constitutional exclusionary rule would do nothing for many of the victims of the strike force since the report shows that most of the seizures at issue were never subject to a forfeiture proceeding.

The final contention by Appellant and the *amicus curiae* for application of the constitutional exclusionary rule is that because police departments financially benefit from forfeitures, application of the rule is needed to defeat the additional financial incentive that police would have to seize property even if it will not be admissible in a criminal proceeding. But in the instant case, it is absurd to think that a police officer's interest in seeking forfeiture of an old car and \$611.00 in cash would outweigh his interest in the successful prosecution of a defendant who possessed 225.90 grams of methamphetamine. This evidence was ruled admissible in the criminal case (A-App. 26). What further deterrent value would be served by excluding this evidence in a forfeiture action, especially one where the value of the property seized is so minimal? If a further deterrent value is necessary, it is already being provided by the statutory exclusionary rule which, if timely raised, applies to forfeiture seizures.

- C. **Although application of the federal constitutional exclusionary rule should not be applied to this civil *in rem* remedial forfeiture action, the Court does not need to reach this issue given both the constitutional uncertainty and the presence of the a state statutory remedy providing for exclusion.**

As noted in parts A of this argument, a long line of Supreme Court decisions since *One 1958 Plymouth Sedan* do not support extending the constitutional exclusionary rule to this case. As noted in Part B, there are no wide-spread search and seizures abuses in forfeiture cases that are appearing before the courts and, even in this case, the case law supports the search and seizure. Therefore, if this Court reaches the issue of applying the constitutional exclusionary rule to civil *in rem* forfeiture actions, it is respectfully submitted that this court should follow the lead of the courts in both California and Maryland and decline to apply the constitutional rule.

Until there is greater clarification from the U.S. Supreme Court on this issue, this Court does not need to reach the issue regarding the rule's application to civil forfeitures. Despite the *dicta* in the Minnesota Court of Appeals decision in both this case and in *Rife* that the rule does not apply, these references are not the holdings for those cases. Given that statutory exclusionary rule can be applied to forfeiture proceedings, a ruling in this case is not necessary to protect the rights of victims who have had property unlawfully seized for forfeiture.

- V. **THIS COURT NEED NOT EXPAND THE PROTECTIONS OF THE MINNESOTA CONSTITUTION BEYOND THOSE PROVIDED BY THE FEDERAL'S CONSTITUTION SEARCH AND SEIZURE PROTECTIONS.**

The Minnesota Constitution, like the Fourth Amendment, guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Minn. Const. art. I, §10. Appellant requests that this Court interpret this state constitutional guarantee to extend the criminal exclusionary rule to civil forfeiture proceedings. However, the federal constitution and the federal courts provide adequate protection for the basic rights and liberties of the citizens of Minnesota and there is no need for this Court to provide a broader application of the exclusionary rule under the state constitution.

As this Court has stated in the past, “[l]ooking to the state constitution as an independent basis for individual rights is a task we approach with restraint and some delicacy especially when the right at stake is guaranteed by identical or substantially similar language in the federal constitution.” *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004) (citing *State v. Fuller*, 374 N.W.2d 722, 726-27 (Minn. 1985); accord *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999)). Additionally, this Court has said that it will independently apply the state constitution.

“when we conclude the United States Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law and when we discern no persuasive reason to follow such a departure. We will also apply the state constitution if we determine that the Supreme Court has retrenched on Bill of Rights issues, or if we determine that federal precedent does not adequately protect our citizens’ basic rights and liberties.”

*State v. Anderson*, 733 N.W.2d 128, 140 (Minn. 2007) (quoting *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005)). The United States Supreme Court has not made a

sharp or radical departure from its previous decisions nor has it retrenched on a fundamental right pertaining to the Fourth Amendment and its exclusionary rule.

The Supreme Court has repeatedly stated that the purpose of the exclusionary rule is to deter police misconduct. Expanding the criminal exclusionary rule to civil forfeitures would provide only minimal deterrence benefits, if any, in this context, because application of the exclusionary rule in the criminal trial context already provides significant deterrence of unconstitutional searches. *See State v. Martin*, 595 N.W.2d 214, 219 (Minn. 1999) (citing *Pennsylvania Bd. Of Parole & Probation v. Scott*, 524 U.S. 357 (1998) (exclusionary rule not expanded to apply in parole and probation revocation hearings because it would provide only minimal, additional deterrence)).

Even if this Court sees a need for expanding application of the rule, it is not necessary given that the Minnesota Legislature has already provided victims of unlawful searches with a statutory exclusionary rule under Minn. Stat. § 626.21. (*See* Argument II of this Brief). As long as this statutory exclusionary rule is in effect, no additional exclusionary remedy need be considered.

### **CONCLUSION**

Both because Appellant lacks standing to claim the forfeited property and because the issue upon which review was granted is not supported by the record, the Petition should be dismissed as being providently granted. If the merits of the petition are considered, there is no need to reach the issue pertaining to the application of the federal constitutional exclusionary rule since: there already exists a broad statutory

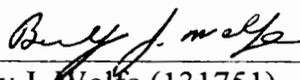
exclusionary rule; the relevant facts and law show that the search and seizure at issue was in conformance with applicable Fourth Amendment law; and even if the rule is applied and evidence is suppressed, Appellant's guilty plea provides a separate factual basis justifying the grant of summary judgment. If this Court does reach the merits of the Petition, it is submitted that the applicable decisions by the U.S. Supreme Court do not support extending the constitutional exclusionary rule to civil *in rem* remedial forfeitures.

Therefore, it is respectfully requested that this Court affirm the district court's order granting summary judgment to Respondent.

Respectfully submitted,

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Dated: April 2, 2014

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A13-445  
STATE OF MINNESOTA  
IN COURT OF APPEALS

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Daniel Garcia-Mendoza,  
a/k/a Ricardo Cervantes-Perez,  
Appellant,

vs.

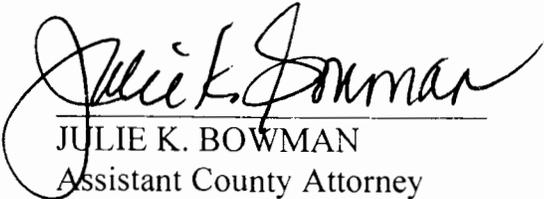
**CERTIFICATION OF BRIEF  
LENGTH**

2003 Chevy Tahoe, VIN:  
Plate #235JB, \$611.00 in U.S. Currency  
Respondent.

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,030 words. This brief was prepared using Microsoft Word 2010, Times New Roman font face size 13.

Dated: April 2, 2014

  
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No. A13-445

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***STATE OF MINNESOTA  
IN SUPREME COURT***

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Daniel Garcia-Mendoza,  
a/k/a Ricardo Cervantes-Perez,

Appellant,

vs.

2003 Chevy Tahoe, VIN: 1GNEC13V23R143453  
Plate #235JB, \$611.00 in U.S. Currency

Respondent.

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***RESPONDENT'S APPENDIX***

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## APPENDIX INDEX

	Page
Notice of Seizure and Intent to Forfeit Property.....	1
United States v. Ricardo Cervantes-Perez Indictment.....	2
United States v. Ricardo Cervantes-Perez Plea Agreement and Sentencing Stipulations.....	5
Memorandum of Law in Opposition to Summary Judgment.....	11
Transcript of Proceedings from November 15, 2012 Summary Judgment Motion.....	19
Akkouche v. 1999 Chrysler Concorde, No. A06-1333, 2007 WL 2600861 (Minn. Ct. App. Sept. 11, 2007).....	28
Backstrom v. One Freightliner Semitractor, No. C7-92-2222, 1993 WL 139539 (Minn. Ct. App. May 4, 1993).....	31
Brosnahan v. 1572 Naples Street, No. A12-0659, 2013 WL 491517 (Minn. Ct. App. Feb. 11, 2013).....	33
Burton v. Minneapolis, No. A06-546, 2007 WL 968778 (Minn. Ct. App. Apr. 3, 2007).....	36
Freeman v. 1215 East 21st Street, No. CX-94-484, 1994 WL 440263 (Minn. Ct. App. August 16, 1994).....	40
Gallagher v. 1989 Lincoln Mark VII-MN License 828-JDV, No. C6-92-1997, 1995 WL 81375 (Minn. Ct. App. Feb. 28, 1995).....	44
Gordon v. \$1,171.90, No. CX-96-2322, 1997 WL 406648 (Minn. Ct. App. July 22, 1997).....	47
Jackson v. One Yellow Necklace with Medallion, Nos. C3-92-1567, C6-92-1594, 1993 WL 140775 (Minn. Ct. App. May 4, 1993).....	49
Johnson v. One 1994 Honda Civic, Nos. A06-2430, A07-0255, 2007 WL 4472480 (Minn. Ct. App. Dec. 24, 2007).....	52

Johnson v. 6508 Hodgson Road, No. C9-93-2362, 1994 WL 323366 (Minn. Ct. App. July 5, 1994).....	56
O'Brien v. 1991 Pontiac Bonneville, No. A05-1802, 2006 WL 2347999 (Minn. Ct. App. Aug. 15, 2006).....	59
Rosenow v. Commissioner of Revenue, No. 5236, 1991 WL 227915 (Minn. Tax Ct., Oct. 15, 1991).....	62
State v. Greer, No. C8-99-1796, 2000 WL 781298 (Minn. Ct. App. June 20, 2000).....	67
Theiler v. Chevy Avalanche, No. A06-1604, 2007 WL 2177882 (Minn. Ct. App. July 31, 2007).....	69
Thompson v. State, No. 49F07-0808-CM-202690, 2009 WL 1704357 at * 3 (Ind. App., June 18 2009).....	73
Valley Oil, Inc. v. 2002 Chevy Tahoe, No. A08-0338, 2009 WL 66965 (Minn. Ct. App. Jan. 13, 2009).....	77
Voraveth v. \$68,514 in U.S. Currency, Nos. A04-1818, A04-1820, 2005 WL 1021763 (Minn. Ct. App. May 3, 2005).....	83
United States v. \$304,980.00, 2013 WL 54005 at *7 (N.D. Ill, Jan. 3, 2013).....	87
United States v. Cervantes-Perez, No. 12cr122 (DSD/TNL), 2011 WL 3288674 at * * 4-5 (D. Minn. July 23, 2012).....	101
United States v. Cervantes-Perez, No. 12cr133 (DSD/TNL), 2011 WL 3288946 (D. Minn. August 10, 2012).....	108

NOTICE OF SEIZURE AND INTENT TO FORFEIT PROPERTY CONTROLLED SUBSTANCE CRIME

TO: Ricardo Cervantes Perez 11/01/1982 AKA Daniel Garcia Mendoza  
(Name of person given notice)  
3334 Bloomington Ave #714 Minneapolis, 55408  
(Address)

YOU ARE NOTIFIED THAT pursuant to Minnesota Statutes Section 609.5314, on 03/19/2012 (yr), the following property was seized by the undersigned law enforcement agency at: (location of seizure) 3400 Plymouth Blvd Plymouth MN in Hennepin County, and is being held for forfeiture: 611 US Currency and 2003 Chev Tahoe MN 735 GBM VIN 1GNEC13V23R143453 235JBM RKF #11 3-20-1

(Include plate number and VIN number for vehicles; attach Property Receipt)

Forfeiture of this property is automatic unless within 60 days of receipt of this form you demand a judicial determination of this matter, as described on the reverse side.

La confiscación de esta propiedad es automática, a menos que dentro de los 60 días de haber recibido esta formulario, usted demande una determinación judicial en este caso, como se describe al reverso.

Qhov yuav poob lub tsev no yeej poob yam tsis muaj kev txwv txav hlo yuav tsum yog hais tias koj thov kom tus naeg txlav txim los nrog soj ntsuam xyuas yam tsis pub dhau 60 hnub tom qab koj tau txais daim ntauwv no, raws li nyob piav nyob sab nraum daim ntauwv no.

Hantidan oo lala wareegaa waa mid markiiba dhagan galeysa haddii aadan muddo lixdan 60 maalmood gudahood ah laga bilaabo maalinta aad toomkan hesho aadan ku codsan in maxkamaddu go'aan ka gaarto arrintan sida bogga dambe (dhabarka) lagu faahfaahiyey.

If you do not demand judicial review exactly as prescribed in Minnesota Statutes, section 609.5314, subdivision 3, you lose the right to a judicial determination of this forfeiture and you lose any right you may have to the above described property. You may not have to pay the filing fee for the demand if determined you are unable to afford the fee. If the property is worth \$15,000 or less, you may file your claim in conciliation court. You do not have to pay the conciliation court filing fee if the property is worth less than \$500.

Si usted no demanda una revisión judicial exactamente como lo indica la sección 609.5314, subdivisión 3 de los Estatutos de Minnesota, usted perderá el derecho a una determinación judicial por esta confiscación, y perderá cualquier derecho que pueda tener en la propiedad descrita con anterioridad. Puede ser que usted no tenga que abonar las tasas por presentación de una instancia de demanda, si se determina que usted no puede costearla. Si la propiedad vale \$15,000 o menos, usted puede entablar su reclamo en el tribunal de conciliación. Usted no tiene que abonar las tasas por presentación de una instancia en el tribunal de conciliación, si la propiedad vale menos de \$500.

Yog hais tias koj tsis thov kom tus naeg txlav txim los soj ntsuam xyuas raws li txoj kev txoj cai hauv lub lav Minnesota, section 609.5314, subdivision 3, ces koj yuav tsis muaj cal los kom tus naeg txlav txim los pab soj ntsuam xyuas thlab koj yuav poob tag rho koj cov cal ua koj yeej muaj txog lub tsev ntauwv. Koj tsis tas them nqi ntauwv yog hais tias koj them tsis taus tus nqi ntauwv. Yog hais tias koj lub tsev ntauwv muaj nqis li \$15,000 los yog tsawg tshaj, koj muaj cal coj mus rau hauv tsev hais plaub conciliation. Koj yuav tsis tau them nqi ntauwv hauv tsev hais plaub conciliation yog hais koj lub tsev muaj nqis tsawg tshaj \$500.

Haddii aadan codsan in maxkamaddu ay arrintan dib u eegto sida lagu faahfaahiyey Xeerka Minnesota ee lambarkisu yahay 609.5314, ee qeyb hoosaadka 3, waxa aad waayaysaa xaqa aad u leedahay in maxkamaddu go'aan ka gaarto hantida lala wareegay ee kor ku xusan. Waxa suurto gal ah in aan lagaa dooneyn in aad bixiso lacagta aad codsigaaga kaga dilwaangelin lahayd maxkamadda haddii aadan awoodi karin. Haddii hantida qiimaha ay u dhiganto uu gaarayo \$15,000 ama ka yar, waxa aad dacwadaada ka dilwan gelin kartaa maxkamadaha dhageysta dacwadaha dhexdhexaadinta. Lagaama doonayo in aad bixiso lacagta dilwaan gellinta maxkamadda haddii qiimaha ay u dhiganto hantida uu ka yar yahay \$500.

Certificate of Service

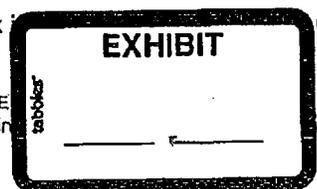
I certify that on Mar 19th, 2012 (yr), I gave a true copy of this notice to the person named above at 3400 Plymouth Blvd and have seized the above described property for forfeiture. Ryan Fisher 113 3-19-12 Plymouth PD  
Signature of Officer Badge No. Date Law Enforcement Agency

Notice of Seizure Received by: Ricardo Cervantes Perez Check

ORIGINAL to COUNTY ATTORNEY I.C.R. 12012399

PINK COPY to LAW ENFORCEMENT AGENCY

YE 8/2010 Min tabber ilon



UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

CR 12-133 DSD/TNL

UNITED STATES OF AMERICA,	)	INDICTMENT
	)	
Plaintiff,	)	(21 U.S.C. § 841)
	)	(21 U.S.C. § 853)
v.	)	
	)	
RICARDO CERVANTES-PEREZ,	)	
a/k/a Daniel Garcia-Mendoza,	)	
	)	
Defendant.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1

(Distribution of Methamphetamine)

On or about November 3, 2011, in the State and District of Minnesota, the defendant,

**RICARDO CERVANTES-PEREZ,**  
a/k/a Daniel Garcia-Mendoza,

knowingly and intentionally distributed and possessed with the intent to distribute 50 grams or more of methamphetamine (actual), a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

COUNT 2

(Distribution of Methamphetamine)

On or about December 22, 2011, in the State and District of Minnesota, the defendant,

**RICARDO CERVANTES-PEREZ,**  
a/k/a Daniel Garcia-Mendoza,

knowingly and intentionally distributed and possessed with the intent to distribute 50 grams or more of methamphetamine (actual), a controlled substance, in violation of Title 21, United States

SCANNED  
MAY 21 2012  
U.S. DISTRICT COURT MPLS

FILED MAY 21 2012  
RICHARD D. SLETTEN  
JUDGMENT ENTD \_\_\_\_\_  
DEPUTY CLERK \_\_\_\_\_

U.S. v Ricardo Cervantes-Perez

Code, Sections 841(a)(1) and 841(b)(1)(A).

COUNT 3

(Distribution of Methamphetamine)

On or about February 1, 2012, in the State and District of Minnesota, the defendant,

RICARDO CERVANTES-PEREZ,  
a/k/a Daniel Garcia-Mendoza,

knowingly and intentionally distributed and possessed with the intent to distribute 5 grams or more of methamphetamine (actual), a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B).

COUNT 4

(Possession With Intent to Distribute Methamphetamine)

On or about March 19, 2012, in the State and District of Minnesota, the defendant,

RICARDO CERVANTES-PEREZ,  
a/k/a Daniel Garcia-Mendoza,

possessed with intent to distribute 50 grams or more of a mixture and substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

FORFEITURE ALLEGATIONS

Counts 1 through 4 of this Indictment are hereby realleged and incorporated as if fully set forth herein by reference, for the purpose of alleging forfeitures pursuant to Title 21, United States

U.S. v Ricardo Cervantes-Perez

Code, Section 853(a).

If convicted of any Count of this Indictment, the defendant shall forfeit to the United States, pursuant to Title 21, United States code, Section 853(a), any and all property constituting or derived from any proceeds the defendant obtained, directly or indirectly as a result of said violation(s), and any and all property used or intended to be used in any manner or part to commit or facilitate the commission of such violation(s).

If any of the above-described forfeitable property is unavailable for forfeiture, the United States intends to seek the forfeiture of substitute property as provided for in Title 21, United States Code, Section 853(p).

A TRUE BILL

UNITED STATES ATTORNEY

FOREPERSON

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Criminal No. 12-133 DSD/TNL

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, ) PLEA AGREEMENT AND  
 ) SENTENCING STIPULATIONS  
 v. )  
 )  
 RICARDO CERVANTES-PEREZ, )  
 a/k/a Daniel Garcia-Mendoza, )  
 )  
 Defendant. )

The United States of America and Ricardo Cervantes Perez (hereinafter referred to as "Defendant") agree to resolve this case on the terms and conditions that follow. This Plea Agreement binds only Defendant and the United States Attorney's Office for the District of Minnesota. This Agreement does not bind any other United States Attorney's Office or any other federal or state agency.

1. **Charges.** Defendant agrees to plead guilty to Count 2 of the Indictment, which charges Defendant with distribution of 50 grams or more of actual methamphetamine, a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(A). The Government agrees to dismiss all remaining Counts of the Indictment at the time of sentencing.

2. **Factual Basis.** From on or about November 3, 2011 through on or about March 19, 2012, in the State and District of Minnesota, Defendant distributed approximately 180 grams of actual methamphetamine. Additionally, from on or about November 3, 2011 on or about March 19, 2012, Defendant possessed with the intent to

distribute said 180 grams of actual methamphetamine, as well as an additional 162 grams of actual methamphetamine.

Defendant admits, for relevant conduct purposes, that he is responsible for distributing and possessing with an intent to distribute between 150 and 500 grams of actual methamphetamine. Defendant agrees that he acted voluntarily and that he knew his actions violated the law.

3. Statutory Penalties. The Parties agree that Count 2 of the Indictment carries statutory penalties of:

- a. a mandatory minimum of 10 years imprisonment;
- b. a maximum of life imprisonment;
- c. a supervised release term of at least 5 years;
- d. a fine of up to \$10,000,000;
- e. a mandatory special assessment of \$100;
- f. the assessment to Defendant of the costs of prosecution, imprisonment, and supervision; and
- g. the possible loss of eligibility for federal benefits.

4. Immigration Status. Defendant also recognizes that pleading guilty may have consequences with respect to his immigration status, including removal or deportation, if he is not a citizen of the United States. Defendant understands that no one, including his attorney, the Assistant U.S. Attorney or the district court, can predict with certainty the effect of his conviction on his immigration status. Regardless of any immigration consequences

that may follow from his guilty plea, even automatic removal or deportation from the United States, Defendant still wishes to plead guilty as set forth in this Agreement.

5. Revocation of Supervised Release. Defendant understands that if Defendant were to violate any condition of supervised release, Defendant could be sentenced to an additional term of imprisonment up to the length of the original supervised release term.

6. Guideline Calculations. The Parties acknowledge that Defendant will be sentenced in accordance with 18 U.S.C. § 3551, et seq. Nothing in this Plea Agreement should be construed to limit the Parties from presenting any and all relevant evidence to the Court at sentencing. The Parties also acknowledge that the Court will consider the United States Sentencing Guidelines in determining the appropriate sentence and stipulate to the following guideline calculations:

- a. Base Offense Level. The Parties agree that pursuant to U.S.S.G. § 2D1.1 the base offense level for the violation noted in Count 2 of the Indictment is 34 because the Defendant distributed and possessed with the intent to distribute between 150 and 500 grams of actual methamphetamine
- b. Specific Offense Characteristics. The Parties also agree that no specific offense characteristics apply.
- c. Chapter 3 Adjustments. The Parties agree that other than as provided for in the paragraph below, no Chapter 3 adjustments apply.

- d. Acceptance of Responsibility. The Government agrees to recommend that Defendant receive a 3-level reduction for acceptance of responsibility and to make any appropriate motions with the Court. However, Defendant understands and agrees that this recommendation is conditioned upon the following: (i) Defendant testifies truthfully during the change of plea hearing, (ii) Defendant cooperates with the Probation Office in the pre-sentence investigation, and (iii) Defendant commits no further acts inconsistent with acceptance of responsibility. U.S.S.G. § 3E1.1.
- e. Criminal History Category. Based on information available at this time, the Parties believe that Defendant's criminal history category is a Category II. This does not constitute a stipulation, but a belief based on an assessment of the information currently known. Defendant's actual criminal history will be determined by the Court based on the information presented in the Presentence Report and by the Parties at the time of sentencing.
- f. Guideline Range. If the applicable offense level is 31, and the Criminal History Category is II, the applicable guideline range of imprisonment is 121-150 months. (34-3=31; statutory minimum of 120 months).
- g. Fine Range. The applicable fine range is \$15,000.00 to \$150,000.00 per U.S.S.G. § 5E1.2(c).
- h. Supervised Release. A term of supervised release of at least 5 years is required by 21 U.S.C. § 841(b)(1)(A) and U.S.S.G. § 5D1.2(c).
- i. Sentencing Recommendation and Departures. The Parties reserve the right to make a motion for departures from the applicable Guidelines range and to oppose any such motion made by the opposing party. The Parties reserve the right to argue for a sentence outside the applicable Guidelines range.

7. Discretion of the Court. The foregoing stipulations are binding on the Parties, but do not bind the Court. The Parties understand that the Sentencing Guidelines are advisory and their

application is a matter that falls solely within the Court's discretion. The Court may make its own determination regarding the applicable guideline factors and the applicable criminal history category. The Court may also depart from the applicable guidelines. If the Court determines that the applicable guideline calculations or Defendant's criminal history category are different from that stated above, the Parties may not withdraw from this Agreement, and Defendant will be sentenced pursuant to the Court's determinations.

8. **Forfeiture.** Pursuant to 21 U.S.C. § 853(a), the Defendant agrees to forfeit any and all property constituting, or derived from, any proceeds the Defendant obtained, directly or indirectly, as the result of the Defendant's violation, as well as any and all of Defendant's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the Defendant's violation.

10. **Special Assessments.** The Guidelines require payment of a special assessment in the amount of \$100.00 for the felony conviction relating to Count 2. U.S.S.G. § 5E1.3. Defendant understands that this special assessment is due and payable at sentencing.

11. Complete Agreement. This is the entire agreement and understanding between the United States and Defendant. There are no other agreements, promises, representations, or understandings.

Date: \_\_\_\_\_

B. TODD JONES  
United States Attorney

BY: Surya Saxena  
Assistant U.S. Attorney

Dated: \_\_\_\_\_

\_\_\_\_\_  
Ricardo Cervantes-Perez  
Defendant

Dated: \_\_\_\_\_

\_\_\_\_\_  
Manvir Atwal  
Attorney for Defendant

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

Daniel Garcia-Mendoza,  
Petitioner,

Court File No. 27-CV-12-10889  
Hon. Thomas Sipkins

v.

**MEMORANDUM OF  
LAW IN OPPOSITION TO  
SUMMARY JUDGMENT.**

2003 Chevy Tahoe, et al.,  
Respondent.

**INTRODUCTION**

This is Petitioner Daniel Garcia-Mendoza's ("Petitioner") memorandum of law in opposition to motion for summary judgment.

**UNDISPUTED FACTS**

Petitioner is the sole owner of the Respondent vehicle. On March 19, 2012, Petitioner was stopped by the Plymouth Police Department, in Minneapolis, MN, while driving the Respondent vehicle. Officer Ryan Peterson's police report describes the stop as follows:

I first noticed [the Respondent vehicle] traveling in the Left lane (Lane 1) of Southbound I-94 traffic. I was traveling in lane 3 and then moved to lane 2. At this time, I noticed the vehicle went past me. I noticed there were two occupants in the vehicle and neither of the occupants were looking at me. I noticed the driver had both hands on the steering wheel and was looking straight ahead. I performed a registration check on the vehicle. The check came back to a registered owner listed as Ricardo Cervantes Perez DOB 11/01/1982. There was no driver's license information associated with the registration check.

[Report attached as Exhibit A to Affidavit of Kirk M. Anderson]. Based upon these this, Off. Peterson believed that Petitioner 'may' not have a valid driver's license, so he initiated the stop.

Conversely, in his affidavit, Off. Peterson testified that the reason Petitioner was stopped was because a registration check showed that Petitioner did not have a valid driver's license. [Affidavit of Officer Ryan Peterson at ¶ 2]. Off. Peterson's testimony here is in direct conflict with his police report. The registration check did not reveal that Petitioner's license was invalid, suspended or revoked. In fact, it did not reveal anything.

Off. Peterson then stopped Petitioner's vehicle and then learned that Petitioner did not have a Minnesota driver's license. Off. Peterson also made several observations that he claims raised suspicions, such as the fact that the vehicle was clean, that there was only 1 key in the ignition, and air freshners. [Peterson Report].

After Petitioner could not produce a MN driver's license, Off. Peterson issued a citation and decided to tow the vehicle because the passenger did not have a driver's license either. [Peterson Report]. However, prior to making this decision, Officer Casey Landherr of the Northwest Drug Task Force had already initiated a warrantless search of Petitioner's vehicle and found signs of criminal activity. [Peterson Report]. Off. Peterson then says that he asked Petitioner for consent to search the vehicle. However, Off. Landherr states in his report that he did not search the vehicle until after receiving the consent to search. [Exhibit B attached to Affidavit of Kirk M. Anderson].

Upon searching the vehicle, Off. Landherr found the suspected methamphetamine. Petitioner was arrested and was later issued a Notice of Intent to Seize and Forfeit Vehicle for the Respondent vehicle.

Petitioner was initially charged criminally in State court, then was indicted in U.S. District Court – Minnesota. On August 8, 2012, Petitioner entered a guilty plea and he is awaiting sentencing. This motion follows.

### ISSUES TO BE DETERMINED ON SUMMARY JUDGMENT

I. Whether Respondent is entitled to summary judgment?

### STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 of the Minnesota Rules of Civil Procedure, a court may grant summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Summary judgment is a “blunt instrument to be employed only where it is perfectly clear that no issue of fact is involved.” Poplinski v. Gislason, 397 N.W.2d 412, 414 (Minn. Ct. App. 1986).

Summary judgment is inappropriate when reasonable jurors might draw different conclusions from the evidence presented. See, e.g., City of Willmar v. Short-Elliott-Hendrickson, Inc., 475 N.W.2d 73, 77 (Minn. 1991); Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978). A party which moves for summary judgment has the burden of proving the absence of any genuine issue of material fact. Ritter v. M.A. Mortenson Co., 352 N.W.2d 110, 112 (Minn. Ct. App. 1984). When deciding a summary judgment motion, the Court’s function is not to weigh the evidence, but to determine whether there is a genuine issue for trial. See Vacura v. Haar’s Equip., Inc., 364 N.W.2d 387, 391 (Minn. 1985); Costilla v. State, 571 N.W.2d 587, 595 (Minn. Ct. App. 1997). In doing so, the Court must view all evidence in the light most favorable to the non-moving party (here, Petitioner). Vacura, 364 N.W.2d at 391; Nord v. Herreid,

305 N.W.2d 337, 339 (Minn. 1981). Further, “if any doubt exists as to the existence of a genuine issue as to a material fact, the doubt must be resolved in favor of finding that the fact issue exists.” Rathbun v. W.T. Grant Co., 219 N.W.2d 641, 646 (Minn. 1974).

#### ARGUMENT

I. **RESPONDENT’S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A QUESTION AS TO WHETHER THE STOP OF PETITIONER’S VEHICLE AND SUBSEQUENT SEARCH WAS LAWFUL.**

“The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.” James Madison, Speech in the Virginia Constitutional Convention, (Dec. 2, 1829), in 9 *The Writings of James Madison* 358, 361 (Gaillard Hunt ed. 1910).

Vehicle forfeiture is a civil *in rem* action, independent of any criminal prosecution. Minn.Stat. § 169A.63, subd. 9(a). Our Supreme Court has long recognized that civil *in rem* forfeiture is at least in part a penalty, and accordingly is disfavored and should be strictly construed. Torgelson v. Real Property known as 17138 880<sup>th</sup> Ave., Renville County, 749 N.W.2d 24, 26-27 (Minn. 2008); Jacobson v. \$55,900 in U.S. Currency, 728 N.W.2d 510, 521 (Minn. 2007); see also Austin v. United States, 509 U.S. 602, 621-22 (1993) (holding that forfeitures of real property pursuant to federal law are fines that fall within the scope of the Excessive Fines Clause of the United States Constitution); Riley v. 1987 Station Wagon, 650 N.W.2d 441, 443 (Minn. 2002) (“[T]o the extent that the forfeiture law at issue here is, in part, “punishment” and, therefore, disfavored generally, we strictly construe its language and resolve any doubt in favor of the party challenging it.”).

Both the U.S. Constitution and the Minnesota Constitution protect individuals

from being deprived of their property without due process of law. U.S. Const. Amend. V, XIV; Minn.Const. Art. I § 7. As stated above, our Supreme Court has consistently held for years that civil forfeiture is a penalty, is disfavored, and is to be strictly construed in favor of the party challenging the forfeiture. Torgelson, 749 N.W.2d at 26-27; Jacobson, 728 N.W.2d at 521; see also Austin, 509 U.S. at 621-22; Riley, 650 N.W.2d at 443. Civil forfeitures are quasi-criminal, therefore the exclusionary rule applies. United States v. \$7,850.00 in U.S. Currency, 7 F.3d 1355, 1357 (8th Cir. 1993).

The Fourth Amendment to the United States Constitution, and article I of the Minnesota Constitution, proscribe unreasonable searches and seizures by the government of "persons, houses, papers and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Subject to only a few exceptions, searches conducted outside the judicial process are *per se* unreasonable. Katz v. United States, 389 U.S. 347, 357 (1967).

A limited investigative stop is lawful if the state can show the officer to have had a "particularized and objective basis for suspecting the particular person stopped of criminal activity." U.S. v. Cortez, 449 U.S. 411, 417-18 (1981). A brief investigatory stop requires only reasonable suspicion of criminal activity, rather than probable cause. Terry v. Ohio, 392 U.S. 1, 21-22 (1968). To effectuate the stop of a motor vehicle, law enforcement must have a reasonable articulable suspicion that the motorist is violating the law. State v. Henning, 666 N.W.2d 379, 385 (Minn. 2003). Absent reasonable suspicion, stopping a motorist to check whether he is properly licensed is prohibited by the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979).

In this case, it is undisputed that the reason Petitioner's vehicle was stopped was because no information came back on the owner of the vehicle when Off. Peterson ran

the vehicle's plates. However, this does not create a reasonable articulable suspicion that the driver was engaged in illegal activity.

First, the registration check did not reveal that the owner's driving privileges were revoked or suspended. Had this been the case, the stop of Petitioner's vehicle may have been legitimate assuming the driver matched the physical description of the owner. However, the registration check simply revealed that there was no information on file for the owner of the vehicle.

This did not mean that the owner did not have a driver's license or that his license was revoked, it simply meant that there was no information on file. The owner could very well have been licensed in a different state and his information may not have necessarily been in the Minnesota system.

Further, Off. Peterson was able to determine the name of the owner, but there was no way for him to determine at that time if the driver was in fact the owner. Off. Peterson did not even mention in his report whether he was able to determine if the driver was a Hispanic male. He simply said he noticed that there were 2 occupants in the vehicle. Thus, at the time of the stop, law enforcement did not have a reasonable, articulable suspicion to believe that the driver was engaged in illegal activity.<sup>1</sup> Prouse, 440 U.S. at 653-54. (absent reasonable articulable suspicion, stopping a vehicle to check whether the driver is properly licensed violates the 4<sup>th</sup> Amendment).

---

<sup>1</sup> The State may argue that Petitioner was stopped for speeding. However, it is clear from Off. Peterson's report that the reason he stopped Petitioner was to check his driving status. Additionally, Off. Peterson does not say in his report that Petitioner was speeding, it just simply states that the vehicle went past the officer's vehicle. There is nothing contained in the report that says how fast the officers were going, or if they were able to radar what speed Petitioner was going.

Further, even if the stop was sufficient, law enforcement did not have an objective basis to expand the scope of the stop beyond what the initial stop was for. Once Off. Peterson issued Petitioner a citation for driving without a driver's license, the basis for the stop was over and there was no need to search the vehicle, or even to ask Petitioner for his consent to search the vehicle. See State v. Askerooth, 681 N.W.2d 353, 365 (Minn. 2004) (under the Minnesota Constitution each incremental intrusion during a traffic stop must be tied to and justified by either (1) the original legitimate purpose for the stop; (2) independent probable cause; or (3) reasonableness as defined in Terry).

The State may argue that it was going to tow the vehicle therefore the search was an inventory search. However, law enforcement did not even give Petitioner the option to call a third-party to see if a licensed driver could come drive the car, and the passengers away. Off. Peterson simply decided he wanted to tow the vehicle thus an inventory search was necessary.<sup>2</sup>

Since there is a question of fact as to whether or not the stop of Petitioner's vehicle was unlawful, the State's motion for summary judgment must be denied.

### CONCLUSION

For the reasons stated above, Petitioner requests the State's motion for summary judgment be denied.

---

<sup>2</sup> Based upon Off. Peterson's report, he made several observations that he considered to be suspicious of narcotics activity, however he knew that he did not have probable cause to support a search warrant at that time. Thus, Off. Peterson's decision to tow the vehicle was likely just a pretext to conduct a warrantless search of the vehicle under the guise of an inventory search.

Dated: November 6, 2012

Anderson Law Firm, PLLC

/s/ Kirk M. Anderson

Kirk M. Anderson (#338175)  
7000 Flour Exchange Building  
310 Fourth Avenue South  
Minneapolis, MN 55415  
(612) 355-2723

STATE OF MINNESOTA

COPY

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

-----  
Daniel Garcia-Mendoza,

Plaintiff,

-vs-

2003 Chevy Tahoe; VIN#  
1GNEC13V23R143453;  
Plate #235JBM;  
\$611.00 in U.S. Currency,

) Court File 27-CV-12-10889

)

)

)

) TRANSCRIPT OF PROCEEDINGS

)

)

) Appellate Court File:

) A13-0445

)

Defendant.  
-----

The above-entitled matter came duly on for hearing before the Honorable Thomas M. Sipkins, Judge of Hennepin County District Court, on November 15, 2012 at the Hennepin County Government Center, Minneapolis, Minnesota.

**APPEARANCES:**

KIRK M. ANDERSON, Esq. appeared for and on behalf of the Plaintiff.

CHRISTOPHER T. TOLBERT, Esq. appeared for and on behalf of the Defendant.

COURT REPORTER: Stephen R. Gill

1 WHEREUPON the following proceedings were duly held on  
2 November 15, 2012 and entered of record, to wit:

3 THE COURT: Would you note your  
4 appearances for the record, please.

5 MR. ANDERSON: Kirk Anderson on behalf of  
6 the Petitioner, Daniel Garcia-Mendoza.

7 MR. TOLBERT: Chris Tolbert on behalf of  
8 Hennepin County.

9 THE COURT: Mr. Tolbert you were about 30  
10 seconds away from having this dismissed.

11 MR. TOLBERT: I know, I apologize, Your  
12 Honor. I mistakenly went over to Conciliation Court.  
13 It's my mistake and I apologize.

14 THE COURT: It's your motion.

15 MR. TOLBERT: Yes, this is a motion for  
16 summary judgment. It's based on forfeiture of the  
17 vehicle and \$611.00. It came out of a stop and arrest  
18 for the sale of drugs.

19 Police officers seized the vehicle and the \$611.00;  
20 they also found methamphetamines in the car; they issued  
21 the administrative forfeiture and they forfeited the  
22 vehicle.

23 The Plaintiff pled to one count of Distributing  
24 Methamphetamines and that's where we are today. They  
25 brought forth a petition to -- against the administrative

1 forfeiture and we brought forth the summary judgment.

2 The only thing the Plaintiff seemed to bring forth  
3 was a question of the stop; that in forfeiture loss is  
4 irrelevant.

5 He pled guilty to the criminal activity out of the  
6 forfeiture. It was a designated offense under the law.  
7 He owned the vehicle, there's no question about that.  
8 There were drugs found in the car and that was used as  
9 part of the criminal activity. It happened in Hennepin  
10 County and there was proper notice.

11 As far as any argument in response to the motion  
12 for summary judgment, there has been no argument on the  
13 dispute of the facts and, therefore, this is ripe for  
14 summary judgment and it should be granted on behalf of  
15 the Plaintiff [sic].

16 THE COURT: Mr. Anderson.

17 MR. ANDERSON: Thank you, Your Honor.

18 First with regards the factual disputes, there is  
19 one thing I would like to point out to the Court. Take a  
20 look at the indictment—he's charged with four counts.

21 One is a general conspiracy but - actually all four  
22 are from four separate incidents of alleged arrest or  
23 activity on his part.

24 Part of the plea agreement—he pled guilty to Count  
25 II, which relates to an incident that happened on

1 December 22<sup>nd</sup> of 2011; not the one that happened here,  
2 which is March 19<sup>th</sup> of 2012; therefore, he didn't plead  
3 guilty to anything with regard to the incident that  
4 happened in this matter.

5 Additionally, Mr. Garcia-Mendoza still has not been  
6 sentenced yet; therefore, there is not a judgment of  
7 conviction, so no res judicata applies.

8 Additionally, this is now a judicial determination  
9 and not an administrative determination.

10 So the assumptions don't apply yet until there is  
11 actually a conviction, but since he isn't being convicted  
12 for the offense, even based upon the plea agreement there  
13 is going to have to be a finding - or a determination for  
14 a court trial.

15 Additionally, we are in State court and the State  
16 law applies. The State charge was dismissed by the  
17 County Attorney's Office when he was indicted. That's  
18 also an issue the Court should look at.

19 And as far as whether there's any relevance as to  
20 the search of his vehicle, there certainly is relevance.  
21 It is an issue. If the stop and search of his vehicle  
22 was illegal, then they should not be able to take his  
23 vehicle. That would open a slippery slope that would  
24 basically allow officers to just walk into people's  
25 homes, pull people over and do warrantless and illegal

1 searches whenever they want and if, yeah, they happen to  
2 find something—"well, we may not be able to prosecute you  
3 criminally, we'll just take your property from you"—  
4 whether it be cash, whether it be a vehicle, whether it  
5 be even a home or whatever.

6 So there is certainly a relevance here. When we  
7 take a look at State law, it gives more - the Minnesota  
8 State Constitution gives more protections to individuals  
9 during search seizures than does the U.S. Constitution as  
10 determined by the Supreme Court.

11 So since we're dealing here in State Court—we're  
12 not dealing with the federal issue—we're dealing with the  
13 State law that applies and I think based upon - there's a  
14 serious question as to whether or not under State law  
15 whether the stop was legitimate and whether the search  
16 was legitimate. If those are not constitutional, then  
17 they don't have the right to take his vehicle.

18 So based upon that, Your Honor, I would argue that  
19 summary judgment is premature and that we should have a  
20 court trial to determine whether or not the search was  
21 appropriate or not.

22 THE COURT: Mr. Tolbert, do you want to  
23 respond to that?

24 MR. TOLBERT: Well, first of all, the  
25 first issue, if he's claiming that because he hasn't been

1 sentenced that this can't go forward, then we would have  
2 to continue this matter and rehave [sic] this hearing  
3 because under State law if the Defendant doesn't feel the  
4 criminal action has been finished, then - or the  
5 Plaintiff, excuse me - then we can't have this hearing.  
6 I believe we can have this hearing. It has been fairly  
7 adjudicated--all but the sentence.

8 It's pretty clear under Minnesota State law. "A  
9 claimant rebuts the statutory resumption of forfeitability  
10 --

11 REPORTER: Slow down, counsel.

12 MR. TOLBERT: I apologize. - "by  
13 producing evidence sufficient to justify a finding that  
14 (1) he or she owns Defendant property; and (2) the  
15 Defendant is not connected to drug trafficking."

16 The Plaintiff has not shown this; the Defendant in  
17 this matter, Hennepin County, and police department have  
18 shown that they've met all elements for a forfeiture and  
19 there's no disputed facts on this. It's clearly a matter  
20 of law and the summary judgment should be granted.

21 THE COURT: I'll take it under  
22 advisement.

23  
24 (Whereupon the hearing was concluded.)

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STATE OF MINNESOTA

SS.

COUNTY OF HENNEPIN

I, Stephen R. Gill, Official Court Reporter in and for the Fourth Judicial District, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes taken at the time and place indicated.

Dated: 4/10/13



Stephen R. Gill

Official Court Reporter

C-10 Government Center

Minneapolis, MN 55487

(612) 348-8790

stephen.gill@courts.state.mn.us

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

Daniel Garcia-Mendoza,  
Appellant-Petitioner,

Court File No. 27-CV-12-10889  
Appellate Court No. A13- 0445

v.

**CERTIFICATE AS  
TO TRANSCRIPT.**

2003 Chevy Tahoe, et al.,  
Respondent-Respondent.

**TO: CLERK OF APPELLATE COURT, MINNESOTA COURT OF APPEALS,  
25 REV. DR. MARTIN LUTHER KING JR. BLVD., ST. PAUL, MN 55102.**

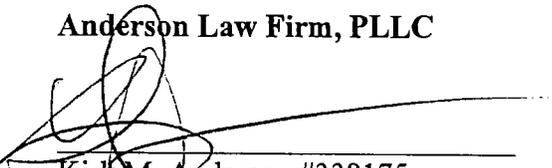
A transcript of the proceedings held on November 15, 2012, in the above-entitled case was requested by counsel for the Appellant on March 18, 2013, in accordance with Rule 110.02, subd. 2, of the Rules of Civil Appellate Procedure. The estimated number of pages is 10 and the estimated date of completion is 4/10/13 2013, a date not to exceed sixty (60) days from the date of request.

~~Appellant is *In Forma Pauperis* on appeal.~~

Dated: 4/10/13

  
\_\_\_\_\_  
Court Reporter

Dated: March 18, 2013

  
\_\_\_\_\_  
Anderson Law Firm, PLLC

Kirk M. Anderson #338175  
7000 Flour Exchange Building  
310 Fourth Avenue South  
Minneapolis, MN 55415  
(612) 355-2723

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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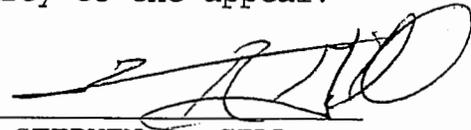
In Re the Matter of:	)	TRIAL COURT CASE
	)	NUMBER: 27-CV-12-10889
Daniel Garcia-Mendoza,	)	
	)	
Plaintiff,	)	
	)	
-v-	)	APPELLATE COURT
	)	NUMBER: A13-0445
2033 Chevy Tahoe; VIN #	)	
1GNEC13V23R143453;	)	
Plate #235JBM;	)	
\$611.00 in U.S. Currency	)	
	)	<u>CERTIFICATE OF DELIVERY</u>
Defendant.	)	

-----

TO: Clerk of the Appellate Courts  
 25 Dr. Martin Luther King, Jr. Blvd.  
 St. Paul, MN 55155-6102

An original and one copy of the transcript in the above-entitled matter, as requested by Plaintiff, on or about March 18, 2013 in accordance with Rule 110.02, Subdivision 2(b) of the Rules of Civil Procedure, was filed with the clerk of the trial court on April 10, 2013 and a copy transmitted promptly to each party to the appeal.

METHOD OF DELIVERY: U.S. Mail



STEPHEN R. GILL  
 Official Court Reporter  
 C-10 Government Center  
 Minneapolis, MN 55487  
 (612) 348-8790

Dated: April 10, 2013

cc: Kirk M. Anderson, Esq.  
 County Attorney  
 Trial Court

Not Reported in N.W.2d, 2007 WL 2600861 (Minn.App.)  
 (Cite as: 2007 WL 2600861 (Minn.App.))

## H

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.  
 Michael AKKOUCHE, Appellant,  
 v.  
 1999 CHRYSLER CONCORDE, 4 DOOR, VIN NO.  
 2C3HD46J9XH620614, Respondent.

No. A06-1333.  
 Sept. 11, 2007.  
 Review Denied Dec. 11, 2007.

Anoka County District Court, File No. CX-05-7718.  
 Stan Nathanson, Scottsdale, AZ, for appellant.

Lori Swanson, Attorney General, St. Paul, MN; and  
 Robert M.A. Johnson, Anoka County Attorney, Kristin  
 Larson, Assistant County Attorney, Anoka, MN,  
 for respondent.

Considered and decided by WORKE, Presiding  
 Judge; STONEBURNER, Judge; and DIETZEN,  
 Judge.

### UNPUBLISHED OPINION

WORKE, Judge.

\*1 On appeal from an order dismissing a complaint challenging the drug-related forfeiture of his vehicle, appellant argues that he had a Fifth Amendment privilege to not respond to the state's discovery requests and that the agency failed to prove a sufficient connection between the vehicle and the drug activity to support forfeiture. We affirm.

### DECISION

Appellant Michael Akkouche argues that the district court abused its discretion by dismissing his complaint for judicial determination of forfeiture for failing to respond to discovery because he had a Fifth Amendment right to not respond. The district court dismissed appellant's complaint under Minn. R. Civ. P. 41.02(a), which states that "[t]he court may upon its own initiative, or upon motion of a party, and upon such notice as it may prescribe, dismiss an action or claim for failure to prosecute or to comply with these rules or any order of the court." Appellate courts will reverse an involuntary dismissal under Minn. R. Civ. P. 41.02(a) when the district court abused its discretion. *Bonhiver v. Fugelso, Porter, Simich Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn.1984).

Appellant was pulled over in his vehicle while in possession of methamphetamine and pleaded guilty to fifth-degree controlled-substance crime. Appellant was served with notice of forfeiture of the vehicle and filed a complaint demanding a judicial determination regarding the forfeiture. "[A]ll conveyance devices containing controlled substances with a retail value of \$100 or more if possession or sale of the controlled substance would be a felony under chapter 152" are subject to administrative forfeiture. Minn.Stat. 609.5314, subd. 1(a)(2) (Supp.2005). The forfeiture action in this case "is a civil in rem action and is independent of any criminal prosecution." Minn.Stat. § 609.531, subd. 6a (2004). Proceedings in a judicial forfeiture determination are governed by the Minnesota Rules of Civil Procedure. Minn.Stat. § 609.5314, subd. 3(a) (2004).

Parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of

Not Reported in N.W.2d, 2007 WL 2600861 (Minn.App.)  
 (Cite as: 2007 WL 2600861 (Minn.App.))

any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Minn. R. Civ. P. 26.02(a). A party upon whom discovery requests are served shall serve a written response within 30 days. Minn. R. Civ. P. 33.01(b) (interrogatories), 34.02 (production of documents), 36.01 (admissions).

On September 15, 2005, the county served discovery requests. Under the rules, appellant's discovery responses were due on or before October 18, 2005. On October 21, the county called appellant's attorney, who failed to return the call. In December, the county received appellant's answers to the requests for admissions and a letter from appellant's attorney indicating that the remaining discovery would be provided "by the end of next week." Appellant failed to complete the requests for discovery. The county moved to compel discovery or dismiss. Appellant failed to appear at the hearing, and the district court granted the motion to dismiss. Because appellant failed to respond to discovery, the district court was within its discretion to dismiss appellant's complaint.

\*2 Appellant also argues that the district court erred in determining that the vehicle was subject to forfeiture, contending that there was no connection between the vehicle and the criminal activity. Determining whether the district court erred in ordering the forfeiture of the vehicle requires review of the forfeiture statute. "Statutory construction is a question of law, which this court reviews de novo." *Wolf Motor Co. v. One 2000 Ford F-350*, 658 N.W.2d 900, 902 (Minn.App.2003). This court's "primary objective in interpreting statutory language is to give effect to the legislature's intent as expressed in the language of the statute." *Pususta v. State Farm Ins. Cos.*, 632 N.W.2d 549, 552 (Minn.2001). The drug-forfeiture statute must be liberally construed to effectuate its remedial purposes, including reducing the economic incentives for engaging in crime and increasing the pecuniary

loss resulting from the detection of criminal activity. Minn.Stat. 609.531, subd. 1a (2004).

Under the forfeiture statute, all property "that has been used, or is intended for use, or has in any way facilitated, in whole or in part, the ... delivering, ... transporting, or exchanging of contraband or a controlled substance" is subject to forfeiture. Minn.Stat. § 609.5311, subd. 2(a) (Supp.2005). A motor vehicle "containing controlled substances with a retail value of \$100 or more," if the sale or possession of the controlled substances would constitute a felony, is "presumed to be subject to administrative forfeiture." Minn.Stat. § 609.5314, subd. 1(a)(2). The claimant of the property bears the burden to rebut the presumption. *Id.*, subd. 1(b) (Supp.2005).

Here, the county's request for admissions included the following: admit that (1) appellant was pulled over while driving his vehicle; (2) officers found methamphetamine on appellant; (3) the vehicle was used, intended for use, or facilitated the transporting of a controlled substance; (4) the controlled substance had a value of \$100 or more; and (5) appellant pleaded guilty to fifth-degree controlled-substance crime. A matter is deemed admitted unless the person upon whom the request is served responds within 30 days. Minn. R. Civ. P. 36.01. Appellant failed to respond; therefore, it is deemed admitted that appellant was stopped while driving the vehicle, that he had methamphetamine, that he used the vehicle to transport the methamphetamine, and that the methamphetamine had a value of \$100 or more. The district court did not err in determining that the vehicle was subject to forfeiture.

**Affirmed.**

Minn.App.,2007.

Akkouche v.1999 Chrysler Concorde, 4 door, VIN No. 2C3HD46J9XH620614

Not Reported in N.W.2d, 2007 WL 2600861

Not Reported in N.W.2d, 2007 WL 2600861 (Minn.App.)

**(Cite as: 2007 WL 2600861 (Minn.App.))**

(Minn.App.)

END OF DOCUMENT

Not Reported in N.W.2d, 1993 WL 139539 (Minn.App.)  
(Cite as: 1993 WL 139539 (Minn.App.))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.  
James C. BACKSTROM, Dakota County Attorney,  
Appellant,  
v.  
ONE FREIGHTLINER SEMITRACTOR, FLORIDA  
LICENSE NO. A3018P, VIN #  
1FUPYDYBXFP245157, and One Utility Trailer,  
Florida License No. T4584F, VIN #  
VYBS2480FV274801, Respondents.

No. C7-92-2222.  
May 4, 1993.

Appeal from District Court, Dakota County; Thomas Murphy, Judge.  
James C. Backstrom, Dakota County Atty., Margaret J. Westin, Asst. County Atty., Hastings, for appellant.

John G. Westrick, Walsh & Westrick, St. Paul, for respondents.

Considered and decided by PARKER, P.J., and FORSBERG and KLAPHAKE, JJ.

UNPUBLISHED OPINION  
PARKER, Judge.

\*1 Appealing from trial court's judgment vacating forfeiture, Dakota County argues the trial court erred in requiring proof of grounds for forfeiture by clear and convincing evidence. We affirm.

DECISION

In May 1991, Charles Swenson and James Hickman drove a semitractor and trailer from Rochester, Minnesota, to a motel in Hampton, Minnesota. Later that night, the county sheriff arrested them and two other men for controlled substance crimes and seized the semitractor and trailer. Swenson pled guilty to a felony count of possessing a controlled substance with intent to sell. Dakota County filed a complaint for forfeiture of the semitractor and trailer. The district court denied the county's forfeiture claim on the basis that the county failed to prove, by clear and convincing evidence, that Swenson had used the semitractor-trailer to facilitate the crime.

A reviewing court upholds findings of fact unless they are clearly erroneous. Minn.R.Civ.P. 52.01. Statutory construction is a question of law that this court reviews independently. *In re M.J.M.*, 416 N.W.2d 142, 146 (Minn.App.1987).

The county was required to prove a causal connection between the tractor/trailer and the crime, namely, that it

has been used, or is intended for use, or has in any way facilitated \* \* \* delivering, importing, cultivating, exporting, transporting, or exchanging of contraband or a controlled substance.

Minn.Stat. § 609.5311, subd. 2 (1992). The county challenges the trial court's conclusion that the statute requires proof by clear and convincing evidence that the semitractor-trailer facilitated Swenson's controlled substance crime.

In regard to the burden of proof, the statute provides that the county

bears the burden of proving the act or omission

Not Reported in N.W.2d, 1993 WL 139539 (Minn.App.)  
(Cite as: 1993 WL 139539 (Minn.App.))

*giving rise to* the forfeiture by clear and convincing evidence, except that in cases arising under section 609.5312, the designated offense may only be established by a felony level criminal conviction.

Minn.Stat. § 609.531, subd. 6a(a) (1992) (emphasis added).

The county argues that only the underlying crime must be proved by clear and convincing evidence and that the nexus between the property and the crime requires proof by only a preponderance of the evidence. We disagree.

The statutory language, “act or omission giving rise to the forfeiture,” indicates that both the crime and its nexus to the property must be proved by clear and convincing evidence. “To give rise to” is to cause or occasion. American Heritage Dictionary 558 (New College ed. 1982). The crime alone does not cause the forfeiture. Rather, the crime and the “facilitating” use of the property together cause, or “give rise to,” the forfeiture. Accordingly, the standard of proof to show use of the subject property to facilitate the commission of the crime is “clear and convincing evidence.”

The parties also dispute whether the county proved, with clear and convincing evidence, the nexus between the crime and the semitractor/trailer. We believe the trial court did not clearly err in concluding that the county failed to prove that Swenson drove the truck with the contraband or that he intended to drive it to a drug sale in Hampton.

\*2 There is little evidence that the tractor/trailer transported the methamphetamine. No drugs were found in it; no witnesses testified it was used for transporting drugs; and no one testified to having seen drugs being taken into or out of the rig. Swenson could have bought the drugs from the other three men in the motel room or could have bought them during his visit to a restaurant in town.

The trial court concluded the county had not proved that Swenson drove to the motel with an intent to sell drugs. Although there is some evidence from which an inference might be drawn that Swenson drove his tractor/trailer to the motel with the intent to sell drugs, for example, the discovery in the trailer of a scale used for measuring controlled substances, this evidence does not compel the conclusion. Accordingly, the trial court's finding cannot be said to be clearly erroneous. Given our scope of review, the district court's order must be affirmed.

Affirmed.

Minn.App., 1993.  
Backstrom v. One Freightliner Semitractor, Florida License No. A3018P, VIN #1FUPYDYBXFP245157  
Not Reported in N.W.2d, 1993 WL 139539 (Minn.App.)

END OF DOCUMENT

Not Reported in N.W.2d, 2013 WL 491517 (Minn.App.)  
(Cite as: 2013 WL 491517 (Minn.App.))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS  
UNPUBLISHED AND MAY NOT BE CITED EX-  
CEPT AS PROVIDED BY MINN. ST. SEC.  
480A.08(3).

Court of Appeals of Minnesota.  
Amy R. BROSNAHAN, Kanabec County Attorney,  
Appellant,  
v.  
1572 NAPLES STREET, MORA, MN, KANABEC  
COUNTY, Respondent.

No. A12-0659.  
Feb. 11, 2013.

Kanabec County District Court, File No.  
33-CV-10-155.

Barbara McFadden, Assistant Kanabec County At-  
torney, Mora, MN, for appellant.

Beverly O. Dravis, Mora, MN, pro se respondent.

Considered and decided by CONNOLLY, Presiding  
Judge; WORKE, Judge; and CRIPPEN, Judge.<sup>FN\*</sup>

FN\* Retired judge of the Minnesota Court of  
Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

#### UNPUBLISHED OPINION

CONNOLLY, Judge.

\*1 Appellant, a county attorney, brought a for-  
feiture action under Minn.Stat. § 609.5311, subd. 2(a)  
(2012) (providing that real property used in the man-  
ufacture of controlled substances is subject to forfei-  
ture). The action was dismissed on the ground that  
respondent property (the property) was subject to the

homestead exemption provided by Minn.Stat. §  
510.01 (2012). Appellant challenges the dismissal.  
Because the property was not the owner's homestead,  
either when the act leading to the forfeiture occurred  
or when the forfeiture action was brought, we reverse  
the dismissal and remand the matter back to the dis-  
trict court for trial.

#### FACTS

In May 2010, appellant Amy Brosnahan, the  
Kanabec County Attorney, filed a complaint seeking  
the forfeiture of residential non-homestead property  
owned by respondent Beverly Dravis and occupied by  
her son, Darin Anderson. The complaint alleged that  
Anderson had used the property to facilitate the man-  
ufacture of marijuana with Dravis's knowledge and  
consent, and it was therefore subject to forfeiture.<sup>FN1</sup>

FN1. The complaint also stated that another  
of Dravis's sons, Roger Anderson, is a  
co-owner of the property who knew of and  
consented to its use in the manufacture of  
marijuana. Roger Anderson takes no part in  
this appeal.

In a handwritten answer, Dravis stated that “[t]he  
illegal activity that took place at my farm was con-  
cealed from my knowledge.” Later, through counsel,  
she filed a motion to dismiss the complaint on the  
ground that appellant had presented no facts showing  
that Dravis knew of the illegal activity.

In November 2011, Dravis began living at the  
property. Her counsel then moved to dismiss on the  
basis of the homestead exemption, arguing that “the  
house occupied by Dravis ... is absolutely immune  
from this action.” The county moved for a temporary  
injunction, ordering Dravis to either leave the property  
or provide security of \$114,000.

Not Reported in N.W.2d, 2013 WL 491517 (Minn.App.)  
(Cite as: 2013 WL 491517 (Minn.App.))

In January 2012, a hearing was held on these two motions. The district court noted that the hearing had been made “[p]ending a final evidentiary hearing on the [the county’s] forfeiture [action] and [Dravis’s] innocent owner defense.” The district court granted Dravis’s motion to dismiss based on the homestead exemption and declined to address the county’s motion for a temporary injunction.

The county challenges the dismissal, arguing that the homestead exemption does not apply to property used in the manufacture of a controlled substance when the owner does not begin living on the property until after a forfeiture action is brought. The county seeks reversal and a remand for litigation of its forfeiture action.

#### DECISION

This court reviews questions of law, including constitutional issues, de novo. *Torgelson v. Real Property Known as 17138 880th Ave., Renville County*, 749 N.W.2d 24, 26 (Minn.2008).

*Torgelson* holds that “the Minnesota Constitution’s homestead exemption, as implemented by Minn.Stat. § 510.01 (2006), exempts homestead property from forfeiture.” *Id.* at 25. In so holding, *Torgelson* reconciled a conflict between two statutes: Minn.Stat. § 609.5311, subd. 2(a) (2012) (“*All property, real and personal, that has been used, or is intended for use, or has in any way facilitated, in whole or in part, the manufacturing ... of contraband or a controlled substance ... is subject to forfeiture under this section ...*” (emphasis added)) and Minn.Stat. § 510.01 (2012) (“*The house owned and occupied by a debtor as the debtor’s dwelling place, together with the land upon which it is situated ... shall constitute the homestead of such debtor ... and be exempt from seizure ... under legal process ...*” (emphasis added)). Concluding that “[t]he application of *Torgelson* to this case is dispositive,” the district court dismissed the

forfeiture action.

\*2 But *Torgelson* is distinguishable because, in that case, “the parties agreed that the property was homestead property within the meaning of Minn.Stat. § 510.01.” 749 N.W.2d at 25. Here, the property was not Dravis’s homestead as defined in Minn.Stat. § 510.01 (*i.e.*, a “house owned and occupied ... as the ... dwelling place”) when the forfeiture summons and complaint were served because Dravis did not then occupy the house on the property as her dwelling place. Therefore, *Torgelson’s* holding that a homestead is not subject to forfeiture is irrelevant.<sup>FN2</sup>

FN2. The district court also relied on *O’Brien v. Johnson*, 275 Minn. 305, 309, 148 N.W.2d 357, 360 (1967) (holding that a tortfeasor who owns multiple residential properties may shield any one such property from creditors by moving into it) to conclude that a non-resident owner of property used in the manufacture of a controlled substance may shield that property from forfeiture by moving into it. But *O’Brien* upholds the right of property owners to decide which one of their residential properties shall be exempt from creditors; it has no application in the context of property subject to forfeiture for the manufacture of controlled substances.

By the time Dravis moved into the property, she had lost the right to do so. *See* Minn.Stat. § 609.531, subd. 5 (2012) (“All right, title, and interest in property subject to forfeiture under sections 609.531 to 609.5318 vests in the appropriate agency upon commission of the act ... giving rise to the forfeiture.”) Because the property was used for the manufacture of marijuana before March 2010, the county’s right to it had vested long before Dravis moved there in November 2011. Dravis cannot invoke the homestead exemption because she was not occupying the property as her dwelling place when it became subject to forfeiture.

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(Cite as: 2013 WL 491517 (Minn.App.))

Moreover, preventing the seizure of property used in the manufacture of a controlled substance defeats a stated purpose of the forfeiture statute, i.e., reducing the economic incentive to engage in crime, because it provides an economic incentive for owners to permit illegal activity on non-occupied property if they can then avoid forfeiture by moving onto the property. *See* Minn.Stat. § 609.531, subd. 1a(3) (2012) (listing purpose of the forfeiture statute). Nor does preventing the forfeiture of property *not* used as the owner's homestead serve the purpose of the homestead exemption, i.e., "preserv [ing] the homestead as a dwelling for the debtor and his or her ly." *Eustice v. Jewison*, 413 N.W.2d 114, 121 (Minn.1987). An owner not occupying the property used for the manufacture of a controlled substance presumably has a homestead elsewhere, and that homestead is not threatened by the forfeiture.

Because the property was not the Dravis's homestead, either when the act leading to the forfeiture occurred or when the forfeiture action was brought, the homestead exemption does not apply. We reverse the district court's dismissal and remand for further proceedings in the forfeiture action, including but not limited to a trial where respondent may assert an innocent-owner defense.

**Reversed and remanded.**

Minn.App.,2013.

Brosnahan v. 1572 Naples Street, Mora, MN, Kanabec County

Not Reported in N.W.2d, 2013 WL 491517  
(Minn.App.)

END OF DOCUMENT

Not Reported in N.W.2d, 2007 WL 968778 (Minn.App.)  
(Cite as: 2007 WL 968778 (Minn.App.))

**C**

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480A.08(3).

Court of Appeals of Minnesota.  
Darryl BURTON, Appellant,  
v.  
CITY OF MINNEAPOLIS, Respondent.

No. A06-546.  
April 3, 2007.

Hennepin County District Court, File No. 05-3544.  
Shawn L. Pearson, Steven H. Silton, Jamie R. Pierce,  
Andrew T. Jackola, Mansfield, Tanick & Cohen, P.A.,  
Minneapolis, MN, for appellant.

Jay M. Heffern, Minneapolis City Attorney, Charles J.  
Brown Jr., Assistant City Attorney, Minneapolis, MN,  
for respondent.

Considered and decided by KLAPHAKE, Presiding  
Judge; WILLIS, Judge; and SHUMAKER, Judge.

**UNPUBLISHED OPINION**

WILLIS, Judge.

\*1 Appellant seeks the return of cash that was seized by the police when they arrested him for a controlled-substance offense. He challenges the district court's determination on summary judgment that the statute of limitations bars his negligence, conversion, and unjust-enrichment claims. We affirm.

**FACTS**

On September 1, 1994, police officers from re-

spondent City of Minneapolis arrested appellant Darryl Burton for possession of cocaine and seized \$22,072 in cash, which was inventoried and stored in the department's property room. On March 31, 1995, Burton pleaded guilty to federal drug charges and was sentenced to 151 months' imprisonment.

On January 17, 1995, Stanley Capistrant, then a Minneapolis police officer, fraudulently signed out the \$22,072 as part of a larger scheme in which Capistrant absconded with more than \$390,000 from the Minneapolis police department. Capistrant was ultimately convicted on federal charges in connection with the scheme. As part of his sentence, Capistrant was ordered to make restitution to the city, and in January 2004, Capistrant made his final restitution payment. The city did not notify Burton of the loss of the \$22,072 or of the payment of restitution.

On September 19, 2000, Burton served a complaint against the city, alleging negligence and conversion, and demanding the return of the \$22,072 under Minn.Stat. § 626.04 (2000), which allows a property owner to petition the court for an order requiring the return of property seized by the police. Burton served the police chief instead of the city clerk. In November 2005, conceding that the 2000 service of process was ineffective, Burton served and filed an amended complaint against the city. In his amended complaint, Burton alleges (1) that the city had "no legal claim to the portion of [Capistrant's] restitution" that is attributable to the \$22,072 and that the city's failure to pay those funds to Burton constitutes conversion; (2) that because the city did not follow statutory forfeiture procedures, it had no right to the \$22,072 and that allowing it to keep that portion of Capistrant's restitution attributable to the \$22,072 constitutes unjust enrichment; and (3) that the city negligently failed in its duties to notify Burton of its intent to seek forfeiture of the \$22,072 and to pay over

Not Reported in N.W.2d, 2007 WL 968778 (Minn.App.)  
(Cite as: 2007 WL 968778 (Minn.App.))

to Burton that portion of the restitution attributable to the \$22,072.

The city moved for summary judgment, arguing that Burton's claims are time-barred. The district court granted the city's motion, determining that Burton's claims were a "creative recharacterization" of his earlier claims seeking the return of the \$22,072 because of an alleged improper forfeiture and are therefore subject to the same limitations period. The district court then determined that although the city failed to give Burton proper notice of forfeiture, Burton became "aware of the forfeiture" on the date of his federal conviction, March 31, 1995, and, the district court concluded, the statute of limitations ran from that date. Applying a six-year statute of limitations, the district court ruled that the limitations period expired on March 31, 2001, and that, therefore, Burton's claims are barred as a matter of law. This appeal follows.

### DECISION

\*2 Burton argues that the district court erred by determining that the claims asserted in his 2005 complaint are time-barred. On review of a grant of summary judgment, this court considers the record as a whole and determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990). The construction and the applicability of a statute of limitations is a question of law, which we review de novo. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn.1988).

The district court determined that Burton's 2005 claims were a "creative recharacterization" of his earlier claims and therefore the same limitations period applied to both his 2000 and his 2005 claims, and that because the claims that Burton attempted to make in his 2000 complaint are now time-barred, so also are the 2005 claims. In Minnesota, a claim may fail if that claim depends on an interest that can no longer be established because any claim arising from that in-

terest is time-barred. *See Wild v. Rarig*, 302 Minn. 419, 447, 234 N.W.2d 775, 793 (1975). In *Wild*, the defendant argued that the plaintiff's claim of wrongful interference with business relationships was "simply another label for" the plaintiff's time-barred defamation claim because the wrongful interference alleged was defamation. *Id.* at 443, 234 N.W.2d at 790-91. Although a claim of wrongful interference with business relationships was generally subject to a six-year limitations period, the supreme court determined that the two-year limitations period for defamation claims applied. *Id.* at 446-47, 234 N.W.2d at 793. As the court explained, the interference-with-business-relationships claim was barred because "regardless of what the suit is labeled, the thing done to cause any damage to [the plaintiff] eventually stems from and grew out of the defamation." *Id.* Thus, because the plaintiff's defamation claim was barred, he could not establish a wrongful-interference claim that was based on an allegedly defamatory act.

Burton argues that his 2005 claims are different from his 2000 claims, arguing that the claims in his 2000 complaint sought to recover the wrongfully forfeited \$22,072 but that his 2005 claims are based on an "equitable claim" to the restitution of the \$22,072. Although Burton uses different labels for the claims made in his two complaints, he seeks to vindicate the same interest-his claimed ownership of the seized \$22,072. Burton's 2005 unjust-enrichment and conversion claims rest on the allegation that the city failed to follow statutory forfeiture procedures and that, therefore, it has no right to that portion of the restitution attributable to the \$22,072. And Burton's negligence claim rests on the allegation that the city negligently failed in its duties to notify Burton of its intent to seek the forfeiture of the \$22,072 and, later, to pay to him the portion of the restitution attributable to the \$22,072. Thus, regardless of whether Burton seeks the return of the original \$22,072 in cash, as he attempted to do in his 2000 complaint, or seeks that portion of the restitution attributable to the \$22,072, as he does

Not Reported in N.W.2d, 2007 WL 968778 (Minn.App.)  
(Cite as: 2007 WL 968778 (Minn.App.))

now, each of Burton's claims rests on his allegations that the city failed to follow statutory forfeiture procedures and that, consequently, it is not entitled to the \$22,072.

\*3 We conclude that Burton's claim that the city is not entitled to the \$22,072 is time-barred. Minn.Stat. § 541.05(4) (2006) establishes a six-year limitations period for claims of "taking, detaining, or injuring personal property, including actions for the specific recovery thereof." The limitations period begins when a cause of action "accrues." *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 150, 158 N.W.2d 580, 583 (1968). A cause of action accrues when it could survive a motion to dismiss. *Noske v. Friedburg*, 670 N.W.2d 740, 742 (Minn.2003).

Property seized as part of a criminal investigation and subject to forfeiture is governed by a series of statutes that delay the beginning of the limitations period. Minn.Stat. § 626.04(a) (2006) provides that property seized shall be "safely kept by direction of the court as long as necessary for the purpose of being produced as evidence on any trial." Section 626.04(a) authorizes the property owner to make a written demand for the return of the property, and, if the demand does not result in recovery of the property, to seek a district court order requiring its return. But the statute provides that the court shall not order the return of the property if it "may be subject to forfeiture proceedings." *See also* Minn.Stat. § 609.531, subd. 5 (2006) (providing that a replevin action is not available to recover property subject to forfeiture).

Burton does not dispute that the \$22,072 was subject to forfeiture. *See* Minn.Stat. § 609.5311, subd. 2(a) (2006) (establishing that property connected with the manufacturing, distribution, or use of controlled substances is subject to forfeiture). In *State v. \$6,276 in U.S. Currency*, the defendant was convicted of gambling offenses in January 1987. 478 N.W.2d 333, 334 (Minn.App.1991), *review denied* (Minn. Jan. 30, 1992). In March 1990, the state brought a forfeiture

action against the currency seized during the investigation. *Id.* at 335. After determining that a two-year limitations period applied to the state's forfeiture complaint and that the period expired, this court determined that the money was no longer "subject to detention" after the statute of limitations had expired and affirmed the district court's order requiring the return of the funds. *Id.* at 337. We have also held that the statute of limitations on a forfeiture claim expires two years after the date on which the owner's conviction is final—that is, the date on which any appeal rights are exhausted. *Humphrey v. \$1109 in U.S. Currency*, 539 N.W.2d 1, 4 (Minn.App.1995), *review denied* (Minn. Dec. 20, 1995).

Applying these principles to the facts here, because the \$22,072 was subject to forfeiture until two years after Burton's conviction became final, Burton's claim that the \$22,072 was improperly forfeited would have been premature and, therefore, could not have survived a motion to dismiss until that date. Thus, the earliest that any claim to recover the \$22,072 or seeking damages on account of the continued detention of the funds could have been brought was March 31, 1997. Applying the six-year statute of limitations to a claim seeking the return of the \$22,072, the statute of limitations expired on March 31, 2003. Although Burton attempted to bring suit in 2000, he admits that the service of process was ineffective. Applying *Wild*, because Burton's 2005 claims "stem[ ] from and grew out" of his time-barred claim that the city is not entitled to the \$22,072, his 2005 claims are time-barred as well. To use the district court's words, Burton's "creative recharacterization" of his earlier time-barred claims cannot save his 2005 claims.

**\*4 Affirmed.**

Minn.App.,2007.  
Burton v. City of Minneapolis  
Not Reported in N.W.2d, 2007 WL 968778  
(Minn.App.)

Not Reported in N.W.2d, 2007 WL 968778 (Minn.App.)  
(Cite as: 2007 WL 968778 (Minn.App.))

END OF DOCUMENT

Not Reported in N.W.2d, 1994 WL 440263 (Minn.App.)  
(Cite as: 1994 WL 440263 (Minn.App.))

**H**

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

Michael O. FREEMAN, Hennepin County Attorney,  
Appellant,  
v.

RESIDENCE LOCATED AT 1215 EAST 21ST STREET, MINNEAPOLIS, HENNEPIN COUNTY, MINNESOTA [Owner: Russell Marvin Swart]; et al.,  
Respondents.

No. CX-94-484.  
Aug. 16, 1994.

Hubert H. Humphrey III, Atty. Gen., St. Paul, Michael O. Freeman, Hennepin County Atty., Gayle C. Hendley, Asst. County Atty., Minneapolis, for appellant.

Barry V. Voss, Timothy J. Hickman, Voss and Goetz, P.A., Minneapolis, for respondents.

Hubert H. Humphrey, III, Atty. Gen., James B. Early, Asst. Atty. Gen., St. Paul for amici curiae Atty. Gen. and Urban County Attys. Ass'n.

Considered and decided by DAVIES, P.J. and SHORT and HARTEN, JJ.

## UNPUBLISHED OPINION

DAVIES, Judge.

\*1 The Hennepin county attorney appeals dismissal of forfeiture action against real and personal

property. We affirm the dismissal against the personal property, but reverse with respect to the real property and remand for the district court to consider whether forfeiture would violate either the Excessive Fines Clause or the Double Jeopardy Clause of the U.S. Constitution.

## FACTS

Minneapolis police executed a search warrant for Russell Swart's home, recovering heroin and methadone with a street value in excess of \$12,000. Swart pleaded guilty to a third degree sale of a controlled substance offense (possession with intent to distribute).

The police seized from Swart three vehicles and three coats as proceeds of illegal drug trafficking. (No drugs were found in the vehicles or coats.) Forfeiture proceedings were also initiated against Swart's home, which was titled solely in his name. Swart's mother, Ruth Klahr, and her husband had executed a warranty deed to Swart for the property and the deed had been properly recorded. Klahr and Swart claimed, however, that she owned the real property because she gave it to him with the expectation that he would reconvey it to her.

The court ruled that the real property was not subject to forfeiture because it was owned by Klahr, not Swart, and that the personal property was not subject to forfeiture as drug proceeds. This appeal followed.

## DECISION

Construction of a statute is a question of law and thus fully reviewable. *Hibbing Educ. Ass'n v. Public Emp. Rel. Bd.*, 369 N.W.2d 527, 529 (Minn.1985).

## I. Personal Property

Not Reported in N.W.2d, 1994 WL 440263 (Minn.App.)  
(Cite as: 1994 WL 440263 (Minn.App.))

Property that represents proceeds of illegal drug trafficking is subject to forfeiture. Minn.Stat. § 609.5311, subd. 4(b) (1992). At issue on appeal are two vehicles—a 1981 car and a 1973 MG—and three coats. The county attorney does not challenge the court's decision to dismiss forfeiture with respect to the third vehicle, a truck Klahr bought for Swart with her own funds.

Swart testified that he acquired the 1981 car in 1990 or 1991 from a former tenant in lieu of rent; he estimated the value of that car at \$200. Swart also testified that he bought the MG in 1987 or 1988 with \$2,800 he earned from contracting jobs.

Appellant county attorney identifies no evidence to the contrary, but contends that Swart's failure to provide any documentation of these transactions undermines his testimony. Appellant also contends that Swart's legitimate income was insufficient to afford these items of property. But appellant did not establish the value of the property at issue. Thus, we cannot conclude that Swart could not have legitimately afforded this property, particularly where Swart had no rent or mortgage obligation, and when Klahr regularly gave Swart cash. Finally, with respect to the MG, appellant has failed to produce any evidence that Swart was obtaining illegal income prior to the time he purchased the car in 1987 or 1988. Thus, we affirm the trial court ruling that the personal property was not shown to be proceeds subject to forfeiture under Minn.Stat. § 609.5311, subd. 4(b).

## II. REAL PROPERTY

\*2 The government may initiate forfeiture proceedings against

[a]ll property, real and personal, that has been used, or is intended for use, or has in any way facilitated, in whole or in part, the \* \* \* delivering, importing, \* \* \* transporting, or exchanging of [illegal drugs].

Minn.Stat. § 609.5311, subd. 2. (1992). The property owner must have been “privity to” the unlawful use of the property, or the unlawful use must have “otherwise occurred with the owner’s knowledge or consent.” *Id.*, subd. 3(d) (1992). There was no allegation that Klahr was privity to or had knowledge of Swart's illegal drug activities. Thus, the issue is whether Swart owned the property, thereby subjecting it to forfeiture. The forfeiture statute does not provide any general definition of “owner.” The statute expressly provides, however, that it must be liberally construed in favor of forfeiture. Minn.Stat. § 609.531, subd. 1a (1992).

Klahr stated that she had transferred the real property to Swart for two reasons: because he was an alcoholic and unable to support himself, and to obtain lower homestead property taxes on the property (she owned and resided in another homestead). Although she claimed that she considered herself the owner of the real property, she conceded there was no written agreement regarding any future reconveyance.

The trial court found that the deed indicated that “Russell Swart is the owner of record.” Nevertheless, the trial court ruled that the property was not subject to forfeiture because Klahr transferred the home to Swart without consideration.

In general, an owner “is the person in whom is vested the ownership, dominion or title of property.” *Atwater v. Spalding*, 86 Minn. 101, 102, 90 N.W. 370, 371 (1902). An owner is “one who has the legal or rightful title.” *Id.*

Words and phrases which have acquired an established meaning by judicial construction are deemed to be used in the same sense in a subsequent statute relating to the same subject matter.

*Minnesota Wood Spec. v. Mattson*, 274 N.W.2d

Not Reported in N.W.2d, 1994 WL 440263 (Minn.App.)  
(Cite as: 1994 WL 440263 (Minn.App.))

116, 119 (Minn.1978) (undefined statutory reference to “owner” must be interpreted in conformance with case law).

Title is not always the sole and exclusive indicia of ownership. Thus, actual possession may indicate ownership. *See Witzig v. Philips*, 274 Minn. 406, 413, 144 N.W.2d 266, 271 (1966) (actual possession of realty is prima facie evidence of ownership as against those not showing better title). But here Swart had both title and possession.

The trial court relied on the fact that Klahr transferred the home to Swart for nominal or no consideration and maintained the home after she gave it to Swart. But no consideration is required to validate a deed. *Bowen v. Willard*, 203 Minn. 289, 294, 281 N.W. 256, 259 (1938). “A party may give away his property.” *Id.*<sup>FN1</sup>

FN1. The same principles govern the effect of Klahr having paid for the taxes on, and maintenance of, the property. These payments simply constituted additional gifts to Swart.

Respondent argues that forfeiture is precluded by this court's decision in *Rife v. One 1987 Chev. Cav.*, 485 N.W.2d 318 (Minn.App.1992), *pet. for rev. denied* (Minn. Jun. 30, 1992). But *Rife* holds that the titled owner is not necessarily the “owner” for purposes of forfeiture where another had the use and possession of a vehicle. *Id.* at 321. Here, Swart had both title and possession.

\*3 More on point, we believe, is *Hennepin Cty. Sheriff v. \$5,500*, 355 N.W.2d 768 (Minn.App.1984).

[O]ne who freely surrenders the use of money to another cannot claim to own the money and is not entitled to protection from forfeiture.

*Id.* at 769. Not only did Klahr surrender the use of the real property, she deeded it to Swart and the deed was recorded. Accordingly, we conclude that the deed transferred ownership to Swart.

The purported oral agreement to transfer the property back to Klahr does not diminish Swart's ownership. An agreement to transfer property in the future does not establish the prospective transferee's present legal ownership. Nor has Swart raised any equitable argument that would negate his ownership.

We therefore reverse the trial court and hold that Swart is the “owner” of the real property for purposes of forfeiture under Minn.Stat. § 609.5311, subd. 2.<sup>FN2</sup>

FN2. Accordingly, we need not address appellant's argument that the trial court erred by granting Swart's rule 15 motion to amend his pleadings to add Klahr as a party.

### III. Excessive Fine and Double Jeopardy

The federal constitution may prohibit forfeiture under either the Excessive Fines Clause or the Double Jeopardy Clause. In rem forfeiture statutes are subject to the Eighth Amendment's Excessive Fines Clause. *Austin v. United States*, 509 U.S. 602, ---, 113 S.Ct. 2801, 2812 (June 28, 1993). One measure of an in rem forfeiture's excessiveness might be the relationship between the offense and the forfeited property, but other factors may also be considered. *Id.* at --- n. 15, 113 S.Ct. at 2812 n. 15. “Prudence dictates that we allow the lower courts to consider that question in the first instance.” *Id.* at ---, 113 S.Ct. at 2812.

Additionally, the Fifth Amendment's Double Jeopardy Clause prohibits both a second prosecution for the same offense after conviction and multiple punishments for the same offense. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, --- n. 1, 114 S.Ct. 1937, 1941 n. 1 (June 6, 1994). Thus,

Not Reported in N.W.2d, 1994 WL 440263 (Minn.App.)  
(Cite as: 1994 WL 440263 (Minn.App.))

[a] defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding.

*Id.* at ---, 114 S.Ct. at 1945. Although *Kurth Ranch* concerned a tax on illegal drug possession, the court noted that civil forfeitures may also violate the Fifth Amendment if imposed after a criminal conviction has already been obtained. *Id.* at ---, 114 S.Ct. at 1945. Swart has been convicted in a separate criminal proceeding. Thus, forfeiture might violate the Double Jeopardy Clause unless it reflects no more than the actual costs to the state due to his criminal conduct. *Id.* at ---, 114 S.Ct. at 1948. On this issue, too, “prudence dictates that we allow the lower courts to consider that question in the first instance.” *Austin*, 509 U.S. at ---, 113 S.Ct. at 2812.

Accordingly, we remand for a determination of these two constitutional issues.

Affirmed in part, and reversed and remanded in part.

Minn.App., 1994.

Freeman v. Residence Located at 1215 East 21st Street, Minneapolis, Hennepin, Minn.  
Not Reported in N.W.2d, 1994 WL 440263  
(Minn.App.)

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480A.08(3).

Court of Appeals of Minnesota.

Robert Brian GALLAGHER, d/b/a Present Moment,  
Herbs and Books, Appellant,

v.

1989 LINCOLN MARK VII-MN LICENSE 828  
JDV, et al., Respondents.

C5-94-1848.

Feb. 28, 1995.

Appeal from District Court, Ramsey County; Edward  
S. Wilson, Judge.  
Phillip S. Resnick, Minneapolis, for appellant.

Hubert H. Humphrey, III, Atty. Gen., and Susan  
Gaertner, Ramsey County Atty., Harry McPeak, Asst.  
County Atty., St. Paul, for respondent.

Considered and decided by CRIPPEN, P.J., and PE-  
TERSON and MANSUR, <sup>FN\*</sup> JJ.

#### UNPUBLISHED OPINION

CRIPPEN, Judge.

\*1 This case concerns the seizure of \$34,000  
currency by law enforcement officials during the ex-  
ecution of a search warrant. Appellant seeks an order  
for return of the currency under the forfeiture statutes.  
No forfeiture action having been commenced by the  
public authorities, the trial court held that it lacked  
subject matter jurisdiction to order return of the cur-  
rency. We affirm.

#### FACTS

On September 9, 1993, Hennepin County sheriff's  
officers executed a warrant to search appellant's per-  
son, car and business premises for evidence that ap-  
pellant was selling marijuana. During the search, of-  
ficers seized appellant's 1989 Lincoln automobile,  
business records and over \$34,000 in cash.

No criminal charges were filed against appellant  
but he was served with notice of administrative for-  
feiture of the automobile pursuant to Minn.Stat. §  
609.5314 (Supp.1993). No administrative or judicial  
forfeiture proceedings were initiated for the business  
records or currency.

Appellant filed a civil complaint and then made a  
motion for summary judgment, requesting an order for  
the return of the automobile, currency and business  
records.<sup>FN1</sup> As the basis for this plea, the complaint  
alleges that the property is not subject to forfeiture  
under the forfeiture statutes. The trial court held that it  
lacked subject matter jurisdiction over the currency  
because no forfeiture action had been commenced.  
The court denied appellant's motion for summary  
judgment and did not order return of the currency.<sup>FN2</sup>

#### DECISION

Subject matter jurisdiction is the authority of the  
court to hear and decide the cause of action before it.  
*Robinette v. Price*, 214 Minn. 521, 526, 8 N.W.2d 800,  
804 (Minn.1943). The existence of subject matter  
jurisdiction is a question of law subject to de novo  
review on appeal. *See Neighborhood Sch. Coalition v.*  
*Independent Sch. Dist. No. 279*, 484 N.W.2d 440, 441  
(Minn.App.1992) *pet. for rev. denied* (Minn. June 30,  
1992).

The jurisdiction of the court is tested by the nature  
of the cause of action, as determined by the complaint,  
and the relief sought. *Norris Grain Co. v. Nordaas*,

Not Reported in N.W.2d, 1995 WL 81375 (Minn.App.)  
(Cite as: 1995 WL 81375 (Minn.App.))

232 Minn. 91, 97-98, 46 N.W.2d 94, 106 (Minn.1950). Where jurisdiction is conferred by statute, the statute limits the power of the court to act and the court cannot exercise jurisdiction unless the terms of the statute have been satisfied. *Land O'Lakes Dairy Co. v. Hintzen*, 225 Minn. 535, 538, 31 N.W.2d 474, 476 (Minn.1948).

There are several legal theories that might be applicable where an owner seeks the return of property that has been seized by public authorities without the initiation of forfeiture proceedings. The owner may be entitled to return of the property under Minn.Stat. § 626.04 (1992). *State v. Sutterfield*, 347 N.W.2d 295, 296 (Minn.App.1984). The owner may bring a motion for the return of property that has been unlawfully seized under Minn.Stat. § 626.21 (1992), even if no criminal complaint has been filed. *Bonyng v. City of Mpls.*, 430 N.W.2d 265, 266 (Minn.App.1988). A trial court that issues a search warrant has inherent authority to order the return of any property seized incident to the execution of that warrant. *In re Death of VanSlooten*, 424 N.W.2d 576, 578 (Minn.App.1988) *pet. for rev. denied* (Minn. July 28, 1988). Although property seized for forfeiture purposes is not subject to replevin, Minn.Stat. § 609.531, subd. 5 (Supp.1993), the owner may be able to replevin the property when forfeiture jurisdiction has not been invoked.

\*2 But appellant's complaint states no claim for relief under any of these theories. Rather, it states singularly a claim for return of the currency under the forfeiture statutes. Minn.Stat. §§ 609.531-.5318 (Supp.1993). An owner may file suit under the forfeiture statutes if the state has served notice of administrative forfeiture. Minn.Stat. § 609.5314, subd. 3. The owner also has the right to litigate the ownership of the seized property in a civil forfeiture action under Minn.Stat. § 609.531, subd. 6a, if the county attorney files a forfeiture complaint under Minn.Stat. § 609.5313. But the forfeiture statutes state no authority for a claimant to bring suit under the statutes if the state has not commenced a forfeiture proceeding.

Because no forfeiture proceedings have been commenced against the currency, the trial court did not err in finding that it lacked subject matter jurisdiction to grant the relief requested in appellant's complaint.

We have also examined appellant's complaint to determine whether it can be construed broadly to request relief under some other theory. *See Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn.1963) (function of pleadings is simply to give adverse party fair notice of factual basis for suit and theory on which claim for relief is sought); *Basich v. Board of Pensions*, 493 N.W.2d 293, 295 (Minn.App.1992) (pleadings should be liberally construed and judged by substance not form). But the complaint does not purport to seek relief under any theory except the forfeiture statutes and it cannot fairly be read to give notice that relief is sought under a different theory. *See id.* Appellant knew the state claimed he had no recourse under the forfeiture statutes but did not take advantage of ample opportunity to bring a motion to amend his complaint. On appeal, this case must be considered on the theory on which it was deliberately pled. *LaPanta v. Heidelberger*, 392 N.W.2d 254, 257 (Minn.App.1986).

Affirmed.

FN\* Retired judge of the district court, serving as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

FN1. This complaint was originally filed in Hennepin County but appellant's brother works for the Hennepin County Attorney so the file was transferred to Ramsey County.

FN2. The county attorney acknowledged that the notice of administrative forfeiture of the automobile was served by mistake and offered to release the automobile from forfei-

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(Cite as: 1995 WL 81375 (Minn.App.))

ture. It is unclear from the record whether the automobile has been returned to appellant. The record and the trial court's order are also silent as to the fate of appellant's business records.

Minn.App.,1995.

Gallagher v. 1989 Lincoln Mark VII - MN License  
828 JDV

Not Reported in N.W.2d, 1995 WL 81375  
(Minn.App.)

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UNPUBLISHED AND MAY NOT BE CITED EX-  
CEPT AS PROVIDED BY MINN. ST. SEC.  
480A.08(3).

Court of Appeals of Minnesota.  
Elizabeth Rose GORDON, Appellant,  
v.  
\$1,171.90 IN CASH, Respondent.

No. CX-96-2322.  
July 22, 1997.

St. Louis County District Court, File No.  
C395601464.

Robert A. O'Malley, Indian Legal Assistance Pro-  
gram, 107 W. First St., Duluth, MN 55802 (for ap-  
pellant).

Alan L. Mitchell, St. Louis County Attorney, Malcolm  
B. Davy, Assistant County Attorney, 100 N. Fifth  
Ave. W., # 501, Duluth, MN 55802-1298 (for re-  
spondent).

Considered and decided by PARKER, Presiding  
Judge, TOUSSAINT, Chief Judge, and HARTEN,  
Judge.

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge.

\*1 In June 1995, the St. Louis County police de-  
partment executed a search warrant at the residence of  
appellant Elizabeth Rose Gordon and seized 164  
grams of marijuana, drug distribution equipment, and  
\$1,171.90 in cash. <sup>FN1</sup> Following a forfeiture trial, the  
court ordered \$18.90 of the cash returned to appellant  
and the remaining \$1,153 forfeited as money found in

proximity to a controlled substance.

FN1. Gordon subsequently pleaded guilty to  
possession of marijuana with intent to sell.

Gordon challenges the forfeiture of \$1,000 of the  
seized money, arguing that (1) proof of a legitimate  
source for the money was sufficient to rebut the pre-  
sumption that the money was forfeitable, and (2) St.  
Louis County did not prove by clear and convincing  
evidence that the money was associated with facili-  
tating controlled substances crimes. Because Gordon  
failed to rebut the presumption that the money was  
forfeitable, we affirm.

DECISION

In an appeal from a judgment, where no motion  
for a new trial was made, our review is limited to  
"whether the evidence sustains the findings of fact and  
whether such findings sustain the conclusions of law  
and the judgment." *Gruenhagen v. Larson*, 310 Minn.  
454, 458, 246 N.W.2d 565, 569 (1976) (citing *Potrin*  
*v. Potrin*, 177 Minn.Stat. § 177 Minn. 53, 224 N.W.  
461 (1929)).

Minn.Stat. § 609.5314, subd. 1 (1996), states in  
part:

(a) The following are presumed to be subject to  
administrative forfeiture under this section:

(1) all money \* \* \* found in proximity to:

(i) controlled substances;

\* \* \*

(b) A claimant of the property bears the burden to  
rebut this presumption.

Not Reported in N.W.2d, 1997 WL 406648 (Minn.App.)  
(Cite as: 1997 WL 406648 (Minn.App.))

Here, the parties have stipulated that the \$1,171.90 in seized cash was found “in proximity” to the controlled substance and is presumed forfeitable. The county returned \$18.90 found in a coin purse found in one pocket of a pair of jeans belonging to Gordon. The remainder of the money consisted of two bundles of cash found in another pocket of the same jeans. One bundle contained \$153, of which \$60 was admitted to be controlled substance buy money. Gordon does not challenge the forfeiture of this money. The other bundle contained \$1,000, the forfeiture of which Gordon now appeals.

Gordon claims, and the county does not dispute, that the \$1,000 represents money she won playing bingo the day before the money was seized. She argues that this proof of a “legitimate source” is sufficient to destroy the presumption of forfeitability. We disagree. The forfeiture statute is to be “liberally construed” so as to deter crime and reduce the economic incentive to participate in criminal activities. Minn.Stat. § 609.531, subd. 1a (1996); *see also State v. Rosenfeld*, 540 N.W.2d 915, 921 (Minn.App.1995) (one goal of forfeiture is to protect the public by preventing continued drug trafficking). Further, all real or personal property used, or “intended for use,” in a drug crime is subject to forfeiture. Minn.Stat. § 609.5311, subd. 2 (1996). Gordon must also show that the money was not associated with her use and sale of illegal drugs.

\*2 The evidence in the record as to Gordon's intended use of the \$1,000 in bingo winnings is conflicting. In answer to interrogatories, Gordon stated that she was being evicted from her apartment for non-payment of rent and that the money would have “caught [her] up.” At trial, she testified that she had the rent money and that she was being asked to leave her apartment because the landlord's daughter was moving back to town. She also testified that the bingo winnings were intended to buy a headstone for her daughter's grave. She offered, however, no corroborating

testimony or proof to support these claims that the bingo winnings were to be spent on rent or a headstone.

Gordon admitted that (1) she used “bingo winnings to purchase marijuana in the past,” (2) she smoked “a lot of marijuana,” and (3) that her legal income was limited to social security disability benefits and income from gambling. The record supports the trial court's conclusion that Gordon (1) sold marijuana on a regular basis, and (2) failed to rebut the statutory presumption that the \$1,000 was associated with her use and sale of illegal drugs.

Affirmed.

Minn.App.,1997.

Gordon v. \$1,171.90

Not Reported in N.W.2d, 1997 WL 406648  
(Minn.App.)

END OF DOCUMENT

Not Reported in N.W.2d, 1993 WL 140775 (Minn.App.)  
(Cite as: 1993 WL 140775 (Minn.App.))

**H**

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.  
Maurice Darnell JACKSON, Appellant,  
v.  
ONE YELLOW NECKLACE WITH MEDALLION,  
et al., Respondents (C3-92-1567),  
Two Thousand Four Hundred Seven (\$2,407.00)  
Dollars, Respondent (C6-92-1594).

Nos. C3-92-1567, C6-92-1594.  
May 4, 1993.  
Review Denied June 22, 1993.

District Court, Hennepin County; Harry S. Crump,  
Judge.  
Barry V. Voss, Timothy J. Hickman, Minneapolis, for  
appellant.

Hubert H. Humphrey, III, Atty. Gen., St. Paul, and  
Michael O. Freeman, Hennepin County Atty., Linda  
M. Freyer, Asst. County Atty., Minneapolis, for re-  
spondent.

Considered and decided by FORSBERG, P.J., and  
PARKER and KALITOWSKI, JJ.

## UNPUBLISHED OPINION

FORSBERG, Judge.

\*1 Darnell Jackson was arrested twice, on drug related charges, within approximately six weeks in 1990. In each case, large amounts of cash were found in proximity to drugs and subjected to forfeiture.

Jackson instituted the present in rem action for the recovery of currency as well as certain jewelry confiscated during the searches. The district court found the currency properly confiscated, but ordered the jewelry returned to Jackson. Jackson appeals from entry of judgment. We affirm.

## DECISION

This appeal is from a judgment. Where there has been no motion for a new trial, the only questions for review are whether the evidence sustains the findings of fact and whether the findings sustain the conclusions of law and judgment. *Erickson v. Erickson*, 434 N.W.2d 284, 286 (Minn.App.1989). This case was tried by the court without a jury.

In all actions tried upon the facts without a jury \* \*, the court shall find the facts specially and state separately its conclusions of law thereon \* \* \*. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Minn.R.Civ.P. 52.01. However, “[o]n appeal, this court need not defer to the trial court’s conclusion when reviewing questions of law.” *County of Lake v. Courtney*, 451 N.W.2d 338, 340 (Minn.App.1990), *pet. for rev. denied* (Minn. Apr. 13, 1990).

1. Jackson was stopped for speeding in a car owned by a third party. He was unable to produce identification, and a pat search revealed \$2,407 on his person. The police also found \$22,000 under the seat of the car, which Jackson disclaimed at the time of arrest, but initially claimed ownership of at trial. The rubber gloves used to count the money found on Jackson showed traces of cocaine.

Not Reported in N.W.2d, 1993 WL 140775 (Minn.App.)  
(Cite as: 1993 WL 140775 (Minn.App.))

All money found in proximity to controlled substances is presumed to be subject to administrative forfeiture. Minn.Stat. § 609.5314, subd. 1(1)(i) (1990). Jackson attacks the evidentiary basis of the court's finding that the money was found in proximity to drugs. He notes testimony by the state's expert who performed the test that "I would assume that every major city in the United States has controlled substances on their money." Thus, Jackson argues there is insufficient evidence to form a nexus between drugs, Jackson, and the money.

The state's expert testified that the test for cocaine used in this case typically produces a negative result. Here, there was direct evidence of the presence of cocaine on the bills. While Jackson may have, to a limited extent, impeached the expert's testimony, this was clearly insufficient to rebut the evidentiary presumption. Under the limited standard of review this court applies to a trial court's findings of fact, we find no clear error. The judgment is therefore affirmed as to the forfeiture of \$2,407.

2. Within a month of the seizure of the \$2,407, the police obtained a warrant and searched Jackson's domicile. As a result of this search, the police seized a quantity of jewelry and \$12,000 in cash. In a second in rem action, the court ordered forfeiture of the cash, but return of the jewelry. The state has not filed a notice of review as to the jewelry.

\*2 As to the cash, the trial court found Jackson adequately rebutted the presumption that the \$12,000 was derived from the manufacture and distribution of drugs. The court nevertheless ruled for forfeiture, finding the state introduced clear and convincing evidence to show the drugs were in fact subject to the following statutory provision:

All property, real and personal, that has been used, or is intended for use, or has in any way facili-

tated, in whole or in part, the manufacturing, compounding, processing, delivering, importing, cultivating, exporting, transporting, or exchanging of contraband or a controlled substance that has not been lawfully manufactured, distributed, dispensed, and acquired is subject to forfeiture under this section.

Minn.Stat. § 609.5311, subd. 2 (1990).

Jackson points to *State v. Valento*, 405 N.W.2d 914 (Minn.App.1987), as authority that lack of probable cause showing the \$12,000 was received from the sales of narcotics requires return of the money to Jackson. In *Valento*, a search warrant was executed, trace amounts of cocaine and records of narcotic sales were found in Valento's domicile. Valento arrived at his home during the search and \$892 was confiscated from his pocket. This court held the trial court erred in allowing postconviction forfeiture when the facts were insufficient to establish probable cause, and the forfeiture order failed to comply with the requirement of Minn.Stat. § 152.19 (1986). *Valento*, 405 N.W.2d at 921.

The present case is distinguishable from *Valento*. This is a separate in rem proceeding under a different statute: unlike the statute involved in *Valento*, a felony conviction is not required here. In addition, probable cause *is* present based upon these facts and federal case law. The Eighth Circuit has described the process for determining probable cause sufficient to uphold forfeiture.

Probable cause must be judged not with clinical detachment but with a common sense view to the realities of normal life. The evidence of drugs, handguns, and drug paraphernalia linking the currency to illegal drug activity, as well as the irregularity of storing over \$12,000 in one's coat pocket, results in sufficient probable cause to find the entire \$12,585 is subject to forfeiture.

Not Reported in N.W.2d, 1993 WL 140775 (Minn.App.)  
**(Cite as: 1993 WL 140775 (Minn.App.))**

*United States v. Premises Known as 3639-2nd St., N.E., Minneapolis, Minn.*, 869 F.2d 1093, 1097 (8th Cir.1989) (citations omitted).

Not Reported in N.W.2d, 1993 WL 140775  
 (Minn.App.)

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In this case, Jackson was found passed out on the floor of his apartment at midday and crack cocaine was found in his closet. Triple beam scales, glassine envelopes and cocaine cutting agents were found on the premises. Although Jackson claimed the cash was received from his music production company, his tax returns indicate that prior to the time of the search he never made more than \$20,000 in any year from that endeavor. Likewise, Jackson was unable to show any records, such as vendor receipts or bank withdrawal slips, indicating how he came to have \$12,000 in cash in his possession. Finally, in addition to the \$12,000, Jackson was earlier found with over \$2,000 in cash on his person and claimed possession at trial of the \$22,000 found under the seat during the first confiscation. We are confident that these facts establish probable cause.

\*3 Jackson claims the district court's order should be reversed because it failed to make a finding as to the money's illegal use or status as proceeds from an illegal transaction. He also claims error in a lack of findings that he was privy to the unlawful use or intended use of the money.

Since the money is presumed forfeitable under Minn.Stat. § 609.5311 or § 609.5314, findings are unnecessary. In any event, the court did make findings as to Jackson's reported income in relation to the amount of cash he had on hand in April 1990; the implication of the money as proceeds of illegal activity is amply clear. We therefore affirm the judgment as to the \$12,000.

Affirmed.

Minn.App.,1993.  
 Jackson v. One Yellow Necklace with Medallion

Not Reported in N.W.2d, 2007 WL 4472480 (Minn.App.)  
**(Cite as: 2007 WL 4472480 (Minn.App.))**

## H

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.  
 Doug JOHNSON, Washington County Attorney,  
 Respondent,  
 v.  
 ONE 1994 HONDA CIVIC Serial #  
 1HGEJ1124RL003666, License Plate # KND039, et  
 al., Defendants (A06-2430),  
 One 1996 Chevrolet Blazer, Serial #  
 1GNDDT13W5T2170630, License Plate # LLP307, et  
 al., Defendants (A07-255)  
 Soua Vang, Appellant.

Nos. A06-2430, A07-0255.  
 Dec. 24, 2007.  
 Review Denied March 18, 2008.

Washington County District Court, File No.  
 C5-04-7180.

Doug Johnson, Washington County Attorney, James  
 C. Zulegor, Assistant County Attorney, Stillwater,  
 MN, for respondent.

Bradford Colbert, Legal Assistance to Minnesota  
 Prisoners, Benjamin Loetscher, Certified Student  
 Attorney, St. Paul, MN, for appellant.

Considered and decided by HUDSON, Presiding  
 Judge; WILLIS, Judge; and MINGE, Judge.

### UNPUBLISHED OPINION

MINGE, Judge.

\*1 In this consolidated appeal from the judicial forfeiture of a 1996 Chevrolet Blazer and a 1994 Honda Civic, appellant Soua Vang contends that because the mere presence of controlled substances in an automobile is not sufficient to associate a vehicle with criminal activity, the district court erred in granting respondent's summary judgment motion. Because we conclude that the Blazer and Civic were used to transport controlled substances, in violation of Minn.Stat. § 609.5311, we affirm the forfeiture of the Civic and affirm the forfeiture of appellant's ownership interest in the Blazer. But because the district court found that there may be another person with a partial ownership interest in the Blazer who has not been notified of the forfeiture of that vehicle, we remand the Blazer forfeiture.

### FACTS

These are in rem proceedings to forfeit two vehicles for transporting methamphetamine. The vehicle is denominated the defendant in each proceeding.

#### 1996 Chevrolet Blazer

In August 2004, while appellant Soua Vang was driving the Blazer, he was stopped by Woodbury police for a routine traffic violation. Before reaching the vehicle, the officer smelled a strong chemical odor consistent with methamphetamine emanating from the open driver's-side window. Appellant claimed ownership of the Blazer, but was unable to produce proof of insurance, stating that he had just bought the vehicle. Appellant and one other companion were removed from the Blazer and interviewed. A search of the vehicle revealed about 14.82 grams of methamphetamine with a retail value of at least \$100, ziplock bags often used to package drugs-some containing methamphetamine residue-a digital scale, a beaker and flask with a rubber stop, several inches of plastic tubing, and a pair of tube socks with \$1,000 in cash rolled inside.

Not Reported in N.W.2d, 2007 WL 4472480 (Minn.App.)  
(Cite as: 2007 WL 4472480 (Minn.App.))

Respondent Doug Johnson, Washington County Attorney, initiated a judicial-forfeiture action against the Blazer in September 2004. More than a year later, appellant pleaded guilty to one count of felony controlled-substance crime in the second degree <sup>FN1</sup> for the events arising out of the stop of the Blazer. A year after that, in October 2006 in this forfeiture proceeding, the district court found that the Blazer was property associated with a controlled-substance offense and granted the respondent's motion for summary judgment. But because of uncertainty over ownership, the district court delayed entry of the forfeiture order on the Blazer until assurance was provided that the registered owner was notified of the action.

FN1. Minn.Stat. § 152.022, subd. 2(1), (3) (2004).

#### 1994 Honda Civic

In October 2004, Oak Park Heights police stopped appellant while he was driving the Honda Civic. During questioning, the officers noticed that appellant appeared to be hiding something in his lap and under his coat. Appellant was unable to produce identification or proof of insurance. When the officer asked him to get out of the vehicle, appellant shoved the object he was hiding between the driver's seat and the center console. The officer conducted a pat-down search of the appellant and found a methamphetamine pipe and digital scale. The officer then searched the center console and found a black and orange vinyl bag containing approximately 24 grams of methamphetamine with a retail value of at least \$100.

\*2 After the stop of the Honda Civic, appellant was arrested and charged with one count of felony controlled-substance crime in the second degree. Respondent initiated a judicial-forfeiture action against the Civic in late 2004, and the district court granted respondent's motion for summary judgment in October 2006.

This appeal followed the entry of judgment on the summary judgment orders. Because of appellant's identification with both vehicles and because appellant had the same objection to each forfeiture, the appeals were consolidated.

#### DECISION

The issue in this consolidated appeal is whether the district court erred in determining that both vehicles were property associated with controlled substances and subject to forfeiture pursuant to Minn.Stat. § 609.5311, subd. 2(a). On an appeal from summary judgment, the court asks whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990). We view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993).

Statutory construction is a question of law, which this court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn.1998). The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Minn.Stat. § 645.16 (2006). When interpreting a statute, this court first looks to see whether the statute's language, on its face, is clear or ambiguous, and a statute is ambiguous only when the language therein is subject to more than one reasonable interpretation. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn.2000). In adopting the forfeiture law, the legislature included the following guidance regarding their application:

[S]ections 609.531 to 609.5318 must be liberally construed to carry out the following remedial purposes: (1) to enforce the law; (2) to deter crime; (3) to reduce the economic incentive to engage in criminal enterprise; (4) to increase the pecuniary loss resulting from the detection of criminal activi-

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ty; and (5) to forfeit property unlawfully used or acquired and divert the property to law enforcement purposes.

Minn.Stat. § 609.531, subd. 1a. However, we also recognize that, to the extent that forfeiture laws are, in part, punishment, statutes must be strictly construed. *Riley v.1987 Station Wagon*, 650 N.W.2d 441, 443 (Minn.2002).

In providing for the judicial forfeiture of property associated with controlled substances, the legislature drafted with a broad pen: “All property, real and personal, that has been used, or is intended for use, or *has in any way facilitated*, in whole or *in part*, the ... delivering ... *transporting*, or exchanging of contraband or a controlled substance ... is subject to forfeiture under this section....” Minn.Stat. § 609.5311, subd. 2(a) (2006) (emphasis added).<sup>FN2</sup> A motor vehicle is subject to forfeiture under section 609.5311 if the retail value of the controlled substance is \$25 or more and the vehicle is “associated with” a felony-level controlled-substance crime. *Id.*, subd. 3(a).

FN2. Because it does not appear that any of the amendments to sections 609.531-.5318, effective in 2005, changes the analysis in these appeals, all references to the forfeiture statutes are to the 2006 edition of the Minnesota statutes.

\*3 A separate section of the statutes establishes a *presumption* of forfeiture for a motor vehicle “*containing* controlled substances with a retail value of \$100 or more if possession or sale of the controlled substance would be a felony under [Minn.Stat.] chapter 152.” Minn.Stat. § 609.5314, subd. 1(a)(2) (emphasis added). Although the presumption is found in the administrative-forfeiture statute, an appropriate agency seeking judicial forfeiture under section 609.5311 is entitled to the presumption as well. *Id.*, § 609.531, subd. 6a(a). A claimant of the property bears

the burden of rebutting the presumption (Minn.Stat. § 609.5314, subd. 1(b)), but the agency must otherwise prove the act giving rise to the forfeiture by clear and convincing evidence. *Id.*, § 609.531, subd. 6a(a).

Appellant complains that the methamphetamine was simply passively present in the vehicle while the vehicles were being driven for innocent, legal purposes. Appellant claims there is no evidence that the vehicles were “associated with” the methamphetamine crimes as required by Minn.Stat. § 609.5311, subd. 3(a). Because the forfeiture of property is also pursuant to Minn.Stat. § 609.5311, subd. 2(a), the question is whether the defendant vehicles “*in any way facilitated, in whole or in part, the ... transporting*” of methamphetamine. *Id.* (emphasis added). The verb “facilitate” means to “make easy or easier,” and the verb “transport” means “[t]o carry from one place to another; convey.” *The American Heritage College Dictionary* 498; 1461 (4th ed.2002). Forfeiture is appropriate if the defendant vehicles made it easier, in any way, to carry or convey controlled substances from one place to another.

Here, the officers involved with the vehicle stops provided affidavits stating that the Blazer and Civic carried 14 and 24 grams of methamphetamine, respectively, and both of those amounts had a retail value of at least \$100. Furthermore, appellant pleaded guilty to a felony violation of Minn. ch. 152 following the recovery of drugs from the Blazer. Also, the sale or possession of the 24 grams of methamphetamine found in the Civic constituted a felony under Minn. ch. 152.<sup>FN3</sup> Appellant did not provide anything more than a bald assertion that the vehicles were innocent conveyances.

FN3. We note that at the time of the district court action, appellant had apparently not pleaded guilty or been convicted of a felony controlled-substance offense for the events arising out of the search of the Civic. Forfeiture of the Civic may therefore have been

Not Reported in N.W.2d, 2007 WL 4472480 (Minn.App.)  
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premature under Minn.Stat. § 609.531, subd. 6a(b) (2006). Neither of the parties raised this issue before the district court or in this appeal, and we therefore decline to address the issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988) (stating that this court will generally not consider matters not argued and considered in the district court); *see also Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn.1982) (stating that issues not briefed on appeal are waived).

Appellant cites *Riley*, 650 N.W.2d at 445, for the proposition that neither the Blazer nor the Civic was directly and substantially connected with appellant's felony drug-possession offenses. Appellant's claims would be more persuasive if, like the court in *Riley*, we were considering the forfeiture of a vehicle for its role in the commission of certain "designated offenses" pursuant to Minn.Stat. § 609.5312, subd. 1. But we are not. Controlled-substance crimes are not encompassed in the definition of the phrase "designated offense." *See* Minn.Stat. § 609.531, subd. 1(f). The *Riley* court held that "the term 'facilitate,' as used in section 609.5312, subdivision 1," requires a direct and substantial connection between the vehicle and the designated offense. *Riley*, 650 N.W.2d at 445 (emphasis added). But the supreme court carefully noted that the "legislature did not precede the term 'facilitate' ... with phrases such as 'in any way' or 'in whole or in part' as it did in section 609.5311." *Id.* at 444.

\*4 We are cognizant of appellant's argument that forfeiture statutes must be strictly construed. However, based on our careful reading of Minn.Stat. §§ 609.531, .5311, .5312, and .5314, because the plain language of the applicable statutes requires only that the controlled substance be transported, because there is a presumption of forfeiture, and because appellant has not overcome the presumption; we conclude that the Blazer and the Civic facilitated such transport here and that the district court did not err in granting respondent's motions for summary judgment.

The district court stated that further proceedings were necessary to determine whether there were persons in addition to appellant with an interest in the Blazer. Accordingly, that proceeding is remanded.

**Affirmed in part and remanded.**

Minn.App.,2007.  
 Johnson v. One 1994 Honda Civic  
 Not Reported in N.W.2d, 2007 WL 4472480  
 (Minn.App.)

END OF DOCUMENT

Not Reported in N.W.2d, 1994 WL 323366 (Minn.App.)  
(Cite as: 1994 WL 323366 (Minn.App.))

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480A.08(3).

Court of Appeals of Minnesota.  
Robert M.A. JOHNSON, Anoka County Attorney,  
Respondent,  
v.  
The REAL PROPERTY LOCATED AT 6508  
HODGSON ROAD, LINO LAKES, Minnesota, et al.,  
Appellants.

No. C9-93-2362.  
July 5, 1994.  
Review Denied Sept. 28, 1994.

Appeal from District Court, Anoka County; Spencer J.  
Sokolowski, Judge.

Robert M. Johnson, Anoka County Atty., M. Katherine Doty, Asst. County Atty., Anoka, for respondent.

David DeSmidt, Rapoport, Wylde & DeSmidt, Minneapolis, for appellants.

Considered and decided by SHORT, P.J., and  
SCHUMACHER and HARTEN, JJ.

## UNPUBLISHED OPINION

HARTEN, Judge.

\*1 Steven Michael Kaiser challenges the forfeiture of his house in a civil action by Anoka County, following his guilty plea to third and fifth degree controlled substance possession. We affirm.

## FACTS

On December 15, 1989, the police executed a search warrant at Kaiser's house in Lino Lakes and seized 12.1 grams of cocaine, 87.4 grams of marijuana, and \$4,756 in currency. Six "bundles," each containing a half-gram of cocaine, were included in the cocaine seizure. A cutting substance in excess of 100 grams also was seized. Drug paraphernalia was confiscated, including three scales, spoons with cocaine and marijuana residue, marijuana smoking devices, razor blades, and a straw and glass.

In April 1990, Kaiser pleaded guilty to one count of third degree controlled substance possession and one count of fifth degree controlled substance possession, respectively, in violation of Minn.Stat. §§ 152.023, subd. 2(2) and 152.025, subd. 2(1). Thereafter, in December 1989, Anoka County commenced a forfeiture action against Kaiser's house. In a pre-trial deposition, Kaiser admitted selling and using drugs in his house with friends.

At a bench trial in April 1993, the parties submitted stipulated facts. Testimony was presented on the sole issue of the value of the controlled substances. A narcotics investigator testified that the retail value of cocaine seized from Kaiser's house was approximately \$1,200. He also testified that the marijuana had a retail value of approximately \$400. The trial court found that the value of the drugs was \$1,600. The trial court also found that Kaiser had purchased his house for \$30,000 and added \$23,000 in improvements. In August 1993, the trial court adjudged Kaiser's house forfeited. Kaiser appeals from the trial court judgment entered in August 1993.

## DECISION

1. In an appeal of a judgment, where no motion for a new trial was made, appellate review is limited to "whether the evidence sustains the findings of fact and whether [the] findings sustain the conclusions of law

Not Reported in N.W.2d, 1994 WL 323366 (Minn.App.)  
(Cite as: 1994 WL 323366 (Minn.App.))

and the judgment.” *Gruenhagen v. Larson*, 310 Minn. 454, 459, 246 N.W.2d 565, 569 (1976). A forfeiture action is a civil in rem proceeding independent from a criminal prosecution; the state bears the burden of proving a basis for forfeiture of property by clear and convincing evidence. Minn.Stat. § 609.531, subd. 6a (1988); see *Rife v. One 1987 Chevrolet Cavalier*, 485 N.W.2d 318, 321-22 (Minn.App.1992), *pet. for rev. denied* (Minn. June 30, 1992).

Minn.Stat. § 609.5311 (Supp.1989) governs the forfeiture of real property:

Subd. 2. Associated property. All property, real and personal, that has been used, or is intended for use, or has in any way facilitated, in whole or in part, the manufacturing, compounding processing, delivering, importing, cultivating, exporting, transporting, or exchanging of contraband or a controlled substance \* \* \* is subject to forfeiture under this section.

Subd. 3. Limitation on forfeiture of certain property associated with controlled substances. \* \* \* (b) Real property is subject to forfeiture under this section only if the retail value of the controlled substance or contraband is \$1,000 or more.

\*2 Kaiser argues that the evidence does not clearly support the trial court's finding that he utilized his house for distribution of controlled substances. We disagree. In his deposition, Kaiser admitted selling drugs out of his house to friends “somewhat” in 1989. Kaiser explained “wanting to use [drugs]. \* \* \* I'd get some, and then I would sell it to different friends.” Kaiser admitted purchasing cocaine in half-ounce quantities, taking it home, and “when the weekends came around, that's when we'd use it.” The evidence supports the trial court's finding that Kaiser sold cocaine from his house. The relationship required under section 609.5311, subd. 2, between the real property and the offense, is clearly met.

Kaiser argues that the evidence does not support the trial court's finding that the retail value of the cocaine was \$1,200. An experienced narcotics investigator testified that the marijuana was worth \$400 to \$420, and the cocaine was worth \$1,200 (he had “never seen cocaine go for less than \$100 a gram”). Kaiser's own testimony supports the \$1,200 value of the 12 grams, because he admitted selling half-gram bindles for \$50. The trial court found that Kaiser's admission that he purchased a half-ounce of cocaine for \$600 reflected only a wholesale value. The evidence supports the trial court's findings that the value of the drugs seized exceeded \$1,000.

2. In 1989, section 609.5311, subdivision 3 was amended to reduce the drug value threshold for forfeiture of real estate from \$5,000 to \$1,000. 1989 Minn.Laws ch. 290, art. 3, § 30. The amendment was effective August 1, 1989. 1989 Minn.Laws ch. 290, art. 3, § 38. In his deposition, Kaiser admitted to drug transactions occurring between June and October 1989, and the seizure occurred in December 1989. Therefore, we reject Kaiser's argument that the \$1,000 threshold does not apply.

3. Kaiser argues that the forfeiture is excessive. In *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801 (1993), the Supreme Court held that Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. § 881(a)(4) and (a)(7). The Supreme Court reversed the Eighth Circuit's conclusion that it was “foreclosed from engaging in the inquiry” of proportionality, and remanded, holding that the question of “what factors should inform such a decision” was for “the lower courts to consider \* \* \* in the first instance.” *Id.* at ----, 113 S.Ct. at 2812.

In section 609.5311, subd. 3, the Minnesota legislature has provided significant protection from excessive forfeitures by requiring a \$1,000 controlled substance threshold for real property forfeitures, and a

Not Reported in N.W.2d, 1994 WL 323366 (Minn.App.)  
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level of drug activity connected to the real property that exceeds individual usage. Here, the trial court considered the statutory factors, compared Kaiser's \$53,000 investment in the real property to the \$250,000 maximum fine for the applicable crimes, and found that the forfeiture was not excessive. *See* Minn.Stat. § 152.023, subd. 3 (Supp.1989). Given the requisite findings on the statutory factors and the trial court's further proportionality inquiry which compared Kaiser's property investment to the maximum statutory fine, we need not discuss the various proportionality analyses employed in the federal cases cited by the parties. We agree with the trial court that the forfeiture was not unconstitutionally excessive.

\*34. Kaiser argues that under a strict construction of section 609.5311, a nexus between the house and drug activity has not been shown. *See City of Faribault v. One 1976 Buick LeSabre*, 408 N.W.2d 584, 588 (Minn.App.1987) (quasi-penal statutes strictly construed in favor of defendant). Subsequent to *Faribault*, however, the legislature declared that the forfeiture provisions "must be liberally construed to carry out \* \* \* remedial purposes." Minn.Stat. § 609.531, subd. 1a (1988). *Faribault* also is distinguishable: it addressed the clarity of the statutory language regarding the sequence of forfeiture proceedings. *See id.* at 588. Here, no challenge to the particular language of the statute is made, and we have determined that the statutory factors are clearly satisfied.

Affirmed.

SHORT, Judge (concurring specially).

I concur in the judgment, but write separately to express concern with the analysis used in *in rem* forfeitures associated with trafficking controlled substances.

Real and personal property used to commit or facilitate drug crimes is subject to forfeiture under

Minn.Stat. § 609.5311, subd. 2 (1992). The statute is liberally construed to effectuate several remedial purposes established by the legislature. Minn.Stat. § 609.531, subd. 1a (Supp.1993). But the initial statutory inquiry must be whether the confiscated property was tainted due to its close relationship to the offense, not the proportionality of the property to the offense. *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 2815 (1993) (Scalia, J., concurring). In a case involving the forfeiture of a home, courts should carefully determine the extent of the use of the house in the drug operations. *See United States v. Myers*, 21 F.3d 826, 831 (8th Cir.1994) (farmland, barn and railroad car forfeited because purchased with laundered money and integral part of marijuana-growing operation). Only if the requisite nexus is established does the factfinder determine whether forfeiture would constitute an excessive fine in violation of the Eighth Amendment. *United States v. Premises Known as RR No. 1*, 14 F.3d 864, 876 (3rd Cir.1994).

Minn.App.,1994.

Johnson v. real property located at 6508 Hodgson Road, Lino Lakes  
Not Reported in N.W.2d, 1994 WL 323366 (Minn.App.)

END OF DOCUMENT

Not Reported in N.W.2d, 2006 WL 2347999 (Minn.App.)  
(Cite as: 2006 WL 2347999 (Minn.App.))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.  
Rachel Paula O'BRIEN, Respondent,  
v.  
1991 PONTIAC BONNEVILLE, Appellant.

No. A05-1802.  
Aug. 15, 2006.

**Background:** After defendant was convicted of a controlled substance sale crime, the State sought forfeiture of car. The District Court determined that the car was not subject to forfeiture. The State appealed.

**Holdings:** The Court of Appeals, Kalitowski, J., held that:

- (1) defendant's drug sale offense could trigger the forfeiture of property, and
- (2) vehicle facilitated defendant's drug sale offense.

Reversed.

West Headnotes

[1] Controlled Substances 96H  169

96H Controlled Substances  
96HV Forfeitures  
96Hk168 Grounds  
96Hk169 k. In general. Most Cited Cases

Defendant's drug sale offense could trigger the

forfeiture of property; forfeiture statute was to be liberally construed, and forfeiture statute's reference to "exchanging of contraband or a controlled substance" included drug sale activity. M.S.A. §§ 609.531, subd. 1a, 609.5311, subd. 2.

[2] Controlled Substances 96H  165

96H Controlled Substances  
96HV Forfeitures  
96Hk164 Property Subject to Forfeiture  
96Hk165 k. In general. Most Cited Cases

Defendant's vehicle facilitated defendant's drug sale offense, and thus the vehicle was subject to forfeiture; the vehicle provided transportation to and from the drug sale. M.S.A. § 609.5311, subd. 2.

Kandiyohi County District Court, File No. 34-CV-04-98.Sergio Andrade, Minneapolis, MN, for respondent.

Boyd Beccue, Kandiyohi County Attorney, Dain Olson, Assistant County Attorney, Willmar, MN, for appellant.

Considered and decided by WORKE, Presiding Judge; KALITOWSKI, Judge; and HUDSON, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge.

\*1 Appellant State of Minnesota challenges the district court's order in a judicial forfeiture action, arguing that the court erred in determining that respondent's 1991 Pontiac Bonneville is not subject to forfeiture under Minn.Stat. § 609.5311, subd. 2 (2002). We reverse.

DECISION

Not Reported in N.W.2d, 2006 WL 2347999 (Minn.App.)  
(Cite as: 2006 WL 2347999 (Minn.App.))

“Statutory construction is a question of law, which this court reviews *de novo*.” *Wolf Motor Co. v. One 2000 Ford F-350*, 658 N.W.2d 900, 902 (Minn.App.2003). A court’s “primary objective in interpreting statutory language is to give effect to the legislature’s intent as expressed in the language of the statute.” *Pususta v. State Farm Ins. Cos.*, 632 N.W.2d 549, 552 (Minn.2001).

Minn.Stat. § 609.5311, subd. 2 (2002), provides:

All property, real and personal, that has been used, or is intended for use, or has *in any way facilitated, in whole or in part*, the manufacturing, compounding, processing, delivering, importing, cultivating, exporting, transporting, or *exchanging of contraband or a controlled substance* that has not been lawfully manufactured, distributed, dispensed, and acquired is subject to forfeiture under this section, except as provided in subdivision 3.

(Emphasis added.)

Here, respondent’s acquaintance drove respondent in the 1991 Pontiac Bonneville to a location to meet with a man, who, unbeknownst to respondent, was working as an informant for law enforcement. The informant and respondent then drove to another location and respondent’s acquaintance followed them in the 1991 Pontiac Bonneville. Respondent agreed to purchase methamphetamine for the informant and the informant gave respondent \$250. Respondent then entered the building, but left the scene in the 1991 Pontiac Bonneville without delivering methamphetamine to the informant. Respondent was later convicted of a controlled-substance sale crime in violation of Minn.Stat. § 152.023, subs. 1(1), 3(a) (2002).

Subsequently, the district court concluded that respondent’s 1991 Pontiac Bonneville is not subject to forfeiture under Minn.Stat. § 609.5311, subd. 2. The district court determined that because the word “sell-

ing” is not included in the forfeiture statute, selling contraband or a controlled substance cannot trigger forfeiture. We disagree.

[1] Minn.Stat. § 609.531, subd. 1a (2002), states that

[s]ections 609.531 to 609.5318 must be liberally construed to carry out the following remedial purposes:

- (1) to enforce the law;
- (2) to deter crime;
- (3) to reduce the economic incentive to engage in criminal enterprise;
- (4) to increase the pecuniary loss resulting from the detection of criminal activity; and
- (5) to forfeit property unlawfully used or acquired and divert the property to law enforcement purposes.

Thus, in *Borgen v. 418 Eglon Ave.*, 712 N.W.2d 809, 813 (Minn.App.2006), this court recognized that “forfeiture is appropriate when real property is used to facilitate the *sale* or possession of drugs.” (Emphasis added.) In that case, this court interpreted “exchanging of contraband or a controlled substance” to include drug-sale activity. *See Borgen*, 712 N.W.2d at 811, 813 (upholding the forfeiture of appellant’s home and drug-related money where appellant was selling cocaine out of his house). Thus, we conclude that the district court erred in determining that respondent’s drug-sale offense could not trigger the forfeiture of property.

\*2 [2] Next, we must determine if the 1991 Pontiac Bonneville “in any way facilitated” the drug-sale

Not Reported in N.W.2d, 2006 WL 2347999 (Minn.App.)  
(Cite as: 2006 WL 2347999 (Minn.App.))

offense. "A vehicle used to provide transportation to or from the crime scene has been used to commit or facilitate the crime." *City of Worthington Police Dep't v. One 1988 Chevrolet Barreta*, 516 N.W.2d 581, 584 (Minn.App.1994). Here, respondent used the 1991 Pontiac Bonneville as transportation to and from the drug sale. Thus, we conclude that the vehicle facilitated the "exchange" of contraband under Minn.Stat. § 609.5311, subd. 2. Therefore, the district court erred in determining that the 1991 Pontiac Bonneville is not subject to forfeiture.

**Reversed.**

Minn.App.,2006.  
O'Brien v.1991 Pontiac Bonneville  
Not Reported in N.W.2d, 2006 WL 2347999  
(Minn.App.)

END OF DOCUMENT

1991 WL 227915

(Cite as: 1991 WL 227915 (Minn.Tax))

**C**

Only the Westlaw citation is currently available.

Minnesota Tax Court,  
Fourth Judicial District, Hennepin County, Regular  
Division.

James Mark ROSENOW, Appellant,

v.

COMMISSIONER OF REVENUE, Appellee.

No. 5236.  
Oct. 15, 1991.

The above-entitled matter came on for hearing before the Honorable Earl B. Gustafson, Judge of the Minnesota Tax Court, on August 12, 1991, at the at the Courtroom of the Tax Court, 520 Lafayette Road, St. Paul, Minnesota, upon the parties' cross-motions for summary judgment.

Daniel Guerrero, of the law firm of Meshbesher and Spence, Ltd., appeared on behalf of appellant.

Steven H. Alpert, Special Assistant Attorney General, appeared on behalf of appellee.

\*1 The Court, having heard and considered the arguments of counsel and upon all of the files and records herein, now makes the following:

*ORDER FOR SUMMARY JUDGMENT*

EARL B. GUSTAFSON, Judge.

*ORDER*

1. Summary judgment is hereby granted in favor of the appellee and against the appellant.

2. The Order of the Commissioner of Revenue dated November 4, 1988, assessing controlled substance tax and penalty in the amount of \$31,752, is hereby affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

*MEMORANDUM*

This is an appeal from a tax assessment by the Commissioner of Revenue made pursuant to Minn.Stat. ch. 297D, known as the marijuana and controlled substance tax.

The chapter 297D tax is intentionally harsh in taxing those the statute defines as "dealers." Attempts to enforce these tax assessments have generated numerous taxpayer appeals. Many constitutional challenges have been raised but, to date, none have been successful. The Minnesota Supreme Court, in *Sisson v. Triplett, et al*, 428 N.W.2d 565 (Minn.1988), upheld the constitutionality of the tax against claims that it violated the Fifth Amendment rights against self incrimination as well as the constitutional guarantees of substantive and procedural due process.

Appellant was assessed a controlled substance tax in the amount of \$15,876 plus \$15,876 in penalties, for a total of \$31,752, by Order of the Commissioner of Revenue dated November 4, 1988. This total assessment was based on two separate tax events: (1) On January 20, 1988, appellant was stopped for a DWI offense and 6.9 pounds of marijuana contained in a plastic garbage bag were subsequently seized from the trunk of his vehicle. No tax stamps had been purchased or affixed. The amount of the total assessment attributable to this tax event, calculated on 3,184 grams, was \$11,144 tax plus \$11,144 in penalties, or \$22,288. (2) On November 2, 1988, appellant was found to be in possession of 1,352 grams of marijuana. Again, no tax stamps had been purchased or affixed. The amount of the total assessment attributable to this second tax event was \$4,732 tax plus \$4,732 in penalties, or \$9,464.

1991 WL 227915

(Cite as: 1991 WL 227915 (Minn.Tax))

Appellant filed an appeal setting out separate grounds for appealing each assessment. Next, appellant pleaded guilty in district court to criminal charges arising out of the November 2, 1988 event. Apparently, as part of a plea bargain, charges arising from the January, 1988 event were dropped.

After this appeal was given a March 4, 1991 trial date, appellant filed a motion to amend the notice of appeal, seeking to add a defense of illegal search and seizure related to the first event's assessment and a double jeopardy claim related to the second event's assessment. The motion to amend was granted by the Court and because the double jeopardy claim raised a constitutional issue, it was referred to district court. See *Erie Mining Company v. Commissioner of Revenue*, 343 N.W.2d 261 (Minn.1984); *In re McCannel*, 301 N.W.2d 910 (Minn.1980); *Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138 (Minn.1980). The matter was retransferred from district court, conveying jurisdiction upon the Tax Court to determine the constitutional issue, and cross motions for summary judgment were argued August 12, 1991.

\*2 We will first discuss the double jeopardy claim which relates solely to the tax arising from the second event, which occurred on November 2, 1988.

#### DOUBLE JEOPARDY DEFENSE

Appellant makes the claim that, having been criminally prosecuted for possession of drugs, the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article I of the Minnesota Constitution bar a civil assessment for controlled substance tax arising out of the same circumstances.

It is clear that a person cannot constitutionally be criminally prosecuted twice for the same conduct. The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution states: “[N]or shall any person

be subject for the same offense to be twice put in jeopardy of life or limb.” The Fifth Amendment is enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). In addition, Minnesota Constitution, Article I, Section 7, has a similar provision which reads: “[N]o person shall be put twice in jeopardy of punishment for the same offense.”

The question raised by the cross motions for summary judgment is whether a tax assessment arising out of the same conduct that gave rise to a criminal prosecution is void because it constitutes a “double punishment” prohibited by the U.S. and Minnesota Constitutions.

In 1938 the United States Supreme Court held that collection of a tax together with a civil fraud penalty does not constitute “double punishment.” In *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630 (1938), the taxpayer was prosecuted for willful evasion of federal income taxes and was acquitted. Next, the Commissioner of Internal Revenue brought a civil action to collect the delinquent taxes plus a 50 percent fraud penalty. The taxpayer argued that this second action subjected him to double jeopardy because the 50 percent civil penalty was intended as a punishment and the tax assessment proceeding was actually a second criminal prosecution based on a single course of conduct. The Court held this 50 percent penalty was not a criminal sanction but a civil penalty remedial in nature and not prohibited by the federal Double Jeopardy Clause.

The case at hand is nearly identical. The criminal prosecution and the tax assessment arise out of the same fact situation. The civil tax assessment followed the criminal prosecution. Rather than a 50 percent penalty, a 100 percent penalty is sought in the civil tax collection action. Minnesota statutes provide a variety of similar penalties where there has been a deliberate failure to pay. Minn.Stat. § 289.60.

1991 WL 227915

(Cite as: 1991 WL 227915 (Minn.Tax))

In *Anderson v. Lappegaard*, 302 Minn. 266, 224 N.W.2d 504 (1974), the Minnesota Supreme Court ruled that a tax statute was not a penalty or punishment for Double Jeopardy purposes.

Appellant, however, relies upon the recent U.S. Supreme Court case of *U.S. v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), to support his argument that the tax assessment in this case constitutes “double punishment.”

\*3 We agree that the *Halper* case holds that a civil penalty or sanction can be so divorced from any remedial goal that it constitutes “punishment” prohibited by the Fifth Amendment even though it may not specifically be denominated a criminal sanction. We do not, however, find that the ruling in *Halper* applies to the tax assessment in this case.

In *Halper*, the manager of a company which provided medical services for patients eligible for federal Medicare benefits was convicted of submitting 65 false claims for government reimbursement. He was sentenced to prison and fined \$5,000. The government then sought damages exceeding \$130,000, which included a civil penalty of \$2,000 on each of the 65 false claims, as well as twice the amount of the government's actual damages and costs. The actual damages directly attributed to the false claims amounted to a total of \$585 and the government's total expenses were approximately \$16,000. The federal district court found that the statutorily authorized recovery of more than \$130,000 bore no “rational relation” to the sum of the government's actual loss and, therefore, respondent was being punished a second time for the same conduct for which he had been criminally prosecuted.

On appeal, the United States Supreme Court agreed to decide “whether and under what circumstances a civil penalty may constitute ‘punishment’ for

the purposes of Double Jeopardy analysis.” *Id.* at 1895.

The Court held that in rare cases even a civil sanction might violate the Double Jeopardy Clause if the civil sanction, in application, is so divorced from any remedial goal that it constitutes “punishment.”

We therefore hold that under the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, and only as a deterrent or retribution.

*Id.* at 1902 (citation omitted). The Court went on to explain:

What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the government for its loss, but rather appears to qualify as “punishment” in the plain meaning of the word, then the defendant is entitled to an accounting of the government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

In other words, the only proscription established by our ruling is that the government may not criminally prosecute a defendant and impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the government whole.

\*4 *Id.* at 1903 (citations omitted).

1991 WL 227915

(Cite as: 1991 WL 227915 (Minn.Tax))

Justice Kennedy, in his concurring opinion, stressed:

Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes it may be thought to lie behind a given judicial proceeding. Such an inquiry would be amorphous and speculative, and would mire the courts in a quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name. It would also breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands. In approaching the sometimes difficult question of whether an enactment constitutes what must be deemed a punishment, we have recognized that a number of objective factors bear on the inquiry.

*Id.* at 1903 (citations omitted).

We find that appellant has failed to establish the grossly disproportionate "punishment" found in *Halper*. Even though a tax may be substantial, as it is in this case, the Commissioner is entitled to attempt collection of a delinquent tax without running afoul of a double jeopardy prohibition. The only question is whether the penalty of 1-to-1 constitutes an overwhelming disproportionate sanction similar to the 8-to-1 sanction prohibited in *Halper*.

This is a close question. In our opinion the 1-to-1 penalty for failure to pay the tax on time is a reasonable penalty that is rationally related to the state's loss of revenue caused by the taxpayer's failure to pay the tax and is remedial in nature. In reaching this decision we are giving the controlled substance tax statutes the presumption of constitutionality we must give to any regularly enacted statute. *Reed v. Bjornsen*, 191 Minn.

254, 253 N.W. 102 (1934); *Kaufman v. Swift County*, 225 Minn. 169, 30 N.W.2d 34 (1947); *In re Cold Spring Granite Co.*, 271 Minn. 460, 136 N.W.2d 782 (1965).

#### ILLEGAL SEARCH AND SEIZURE DEFENSE

The claim of illegal search and seizure relates solely to the tax arising from the first event, which occurred on January 20, 1988. Appellant was stopped and arrested for driving while under the influence of alcohol. A search of his automobile was conducted at the scene and an officer found the marijuana which resulted in a portion of the tax assessment being appealed.

Appellee has moved for summary judgment and appellant has submitted nothing that creates a disputed fact issue. Appellant also moves for summary judgment, contending that the search and seizure of the marijuana was illegal and appellant is therefore entitled to judgment as a matter of law.

This is a civil action. We will not address the question of whether evidence that might be excluded in criminal prosecutions must necessarily be excluded in civil actions. That issue was not raised. Although there was ample opportunity, appellant did not move the district court under Minn.Stat. § 626.21 to suppress evidence of the marijuana found in the trunk of his car.

\*5 Based upon the return filed by the appellee, Commissioner of Revenue,<sup>FN1</sup> and the affidavits on file, the undisputed relevant facts regarding the search and seizure are as follows:

1. Appellant was placed under arrest for DWI on January 20, 1988. His automobile was impounded and a tow was requested.

2. A Minnesota Highway Patrol officer entered the interior of the vehicle to look for an open bottle

1991 WL 227915

(Cite as: 1991 WL 227915 (Minn.Tax))

which another officer had seen.

3. In executing the standard inventory search policy of the Minnesota State Patrol, the officer opened the trunk of the car to inventory its contents and at that time smelled the strong odor of marijuana.

4. After smelling the marijuana odor, the officer opened a plastic bag in the trunk and found the marijuana in question.

Based upon these facts we find no violation of the constitutional prohibitions against illegal search and seizure. *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632 (1990); *State v. Rodewald*, 376 N.W.2d 416 (Minn.1985).

Summary judgment is ordered in favor of appellee affirming the tax assessment.

FN1. Minn.Stat. § 297D.12, subd. 3 provides as follows:

The tax and penalties assessed by the commissioner are presumed to be valid and correctly determined and assessed. The burden is upon the taxpayer to show their incorrectness or invalidity. Any statement filed by the commissioner with the court administrator, or any other certificate by the commissioner of the amount of tax and penalties determined or assessed is admissible in evidence and is prima facie evidence of the facts it contains.

Minn.Tax,1991.

Rosenow v. Commissioner of Revenue

1991 WL 227915

END OF DOCUMENT

Not Reported in N.W.2d, 2000 WL 781298 (Minn.App.)  
(Cite as: 2000 WL 781298 (Minn.App.))

**H**

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS  
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CEPT AS PROVIDED BY MINN. ST. SEC.  
480A.08(3).

Court of Appeals of Minnesota.  
STATE of Minnesota, Respondent,

v.

Dale GREER a/k/a D'Leuchi Morris, Appellant.

No. C8-99-1796.

June 20, 2000.

Mike Hatch, Attorney General; and Susan Gaertner,  
Ramsey County Attorney, Jeanne L. Schleh, Assistant  
Ramsey County Attorney, St. Paul, MN, for re-  
spondent.

Bradford Colbert, Assistant State Public Defender, St.  
Paul, MN, for appellant.

Considered and decided by HARTEN, Presiding  
Judge, LANSING, Judge, and DAVIES, Judge.

## UNPUBLISHED OPINION

DAVIES.

\*1 Appellant challenges a provision in a court  
order that makes a defective forfeiture refund subject  
to his payment of a restitution obligation. We reverse.

## FACTS

On July 10, 1997, appellant Dale Dewayne Greer  
was convicted of second-degree assault and terroristic  
threats, sentenced to 65 months in prison, and ordered  
to pay \$925 in restitution. When appellant was ar-  
rested, he had in his possession \$1,149.88 in cash,

which was seized under an administrative forfeiture.

Appellant moved to recover those funds. The  
district court found that the administrative forfeiture  
had been improperly served on appellant and ordered  
the money returned to him. But the court made the  
return subject to payment of his restitution obligation.  
This appeal follows.

## DECISION

"The trial court has broad discretion in imposing  
restitution." *State v. Olson*, 381 N.W.2d 899, 900  
(Minn.App.1986). Restitution is docketed as a civil  
judgment. Minn.Stat. § 611A.04, subd. 3 (1998). A  
restitution order "may be enforced by any person  
named in the order to receive the restitution \* \* \* in  
the same manner as a judgment in a civil action." *Id.*

The district court ordered that funds required to  
be returned to appellant after a defective administra-  
tive forfeiture proceeding were to be applied to pay  
appellant's unsatisfied restitution obligation.

The only property a district court is specifically  
authorized to seize to enforce restitution is a convicted  
defendant's bail deposit. Minn.Stat. § 629.53 (1998)  
("judge may order the money bail deposit to be ap-  
plied to any fine or restitution imposed on the de-  
fendant"). Otherwise, restitution is to be enforced as a  
civil judgment. Minn.Stat. § 611A.04, subd. 3.

The forfeiture proceeding finally determined ap-  
pellant's right to the money. There is no provision in  
the forfeiture statute for an offset against a restitution  
obligation. *See* Minn.Stat. §§ 609.5311, 609.5312,  
609.5314, subd. 3 (1998). The district court abused its  
discretion when it used an enforcement mechanism  
not authorized by statute to pay restitution.

Not Reported in N.W.2d, 2000 WL 781298 (Minn.App.)  
(Cite as: 2000 WL 781298 (Minn.App.))

Reversed.

Minn.App.,2000.

State v. Greer

Not Reported in N.W.2d, 2000 WL 781298  
(Minn.App.)

END OF DOCUMENT

Not Reported in N.W.2d, 2007 WL 2177882 (Minn.App.)  
**(Cite as: 2007 WL 2177882 (Minn.App.))**

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS  
 UNPUBLISHED AND MAY NOT BE CITED EX-  
 CEPT AS PROVIDED BY MINN. ST. SEC.  
 480A.08(3).

Court of Appeals of Minnesota.  
 Patrick THEILER, Appellant,  
 v.

CHEVY AVALANCHE, MN License # GWG 178,  
 VIN # 3GNGK23G82G162395, Respondent.

No. A06-1604.  
 July 31, 2007.

Freeborn County District Court, File No.  
 24-C9-04-001352.

Kassius O. Benson, Law Offices of Kassius O. Ben-  
 son, P.A., Minneapolis, MN, for appellant.

Lori Swanson, Attorney General, St. Paul, MN, and  
 Craig S. Nelson, Freeborn County Attorney, Erin M.  
 O'Brien, Assistant County Attorney, Albert Lea, MN,  
 for respondent.

Considered and decided by PETERSON, Presiding  
 Judge; ROSS, Judge; and HARTEN, Judge.<sup>FN\*</sup>

FN\* Retired judge of the Minnesota Court of  
 Appeals, serving by appointment pursuant to  
 Minn. Const. art. VI, § 10.

#### UNPUBLISHED OPINION

ROSS, Judge.

\*1 This appeal arises from a judgment of forfei-  
 ture of a vehicle seized pursuant to the drug-forfeiture  
 statute. Patrick Theiler owned the seized vehicle but  
 was not present when state police stopped it and dis-

covered drugs inside a hidden panel. Theiler argues  
 that he rebutted the statutory presumption that his car  
 is subject to administrative forfeiture by establishing  
 the innocent-owner defense. Because Theiler con-  
 ceded that his car contained \$100 or more in illegal  
 drugs when police stopped it, he failed to rebut the  
 evidentiary presumption of forfeiture. And because he  
 also failed to produce objectively credible evidence to  
 carry his burden of proof to support the inno-  
 cent-owner defense, we affirm.

#### FACTS

A Minnesota trooper stopped Patrick Theiler's  
 2002 Chevrolet Avalanche in September 2004, sus-  
 pecting the windows were illegally tinted. Theiler was  
 not in the Avalanche. His "good friend," Anthony  
 Skrivanek, was driving the vehicle. Theiler occasion-  
 ally allowed Skrivanek to borrow the Avalanche for  
 up to two weeks even though Skrivanek owned other  
 vehicles. At the time of the stop, Skrivanek had pos-  
 sessed the car for at least two weeks, though he  
 claimed that he borrowed it only to go camping for the  
 weekend and "for moving things." Skrivanek later  
 testified that he was on his way to a concert when the  
 police stopped him, but he could not recall who was  
 performing.

The trooper determined that the window tint ex-  
 ceeded the maximum shading permitted. He also no-  
 ticed that Skrivanek and his passenger had bloodshot  
 eyes and that a strong odor of marijuana emanated  
 from within the vehicle. The trooper saw marijuana on  
 the console and fragments of green leaves on  
 Skrivanek's and the passenger's clothes, which they  
 began brushing off after the trooper mentioned it. The  
 trooper also perceived that the Avalanche had a  
 lived-in appearance. Skrivanek admitted that he had a  
 "quarter" of marijuana in a backpack. A  
 drug-detection dog alerted near the driver's-side door  
 to indicate the presence of illegal drugs.

Not Reported in N.W.2d, 2007 WL 2177882 (Minn.App.)  
(Cite as: 2007 WL 2177882 (Minn.App.))

The troopers conducted a search. They removed the backpack, which contained approximately 32 grams of high-quality marijuana. They also discovered hallucinogenic mushrooms inside the center console. One trooper, experienced in vehicular drug concealment, noticed that the passenger's-side air vent appeared to have been altered. He discovered that the air bag had been replaced with an electronically operated drawer. Two buttons near the driver's-side fuse panel opened and closed the drawer. Inside the drawer, troopers found hashish, five vials containing hashish oil, and 43 additional grams of marijuana that alone was estimated to be worth \$2,000. Troopers also found several documents bearing Skrivanek's name but a proof-of-insurance card bearing Theiler's name.

The police arrested Skrivanek and his passenger, seized the car, and served Skrivanek with notice of seizure and intent to seek administrative forfeiture of the car. Police also served Theiler with a seizure notice, and he demanded a judicial determination of forfeiture.

\*2 At the forfeiture trial in May 2006, Theiler testified that he had occasionally worked part-time at a friend's restaurant but that his primary income was poker winnings, estimating that he garnered more than \$10,000 playing poker in 2004. He lived with his parents. He testified that he purchased the Avalanche from the original owners in April 2004 for \$27,000 cash. Theiler claimed that he bought the car with gambling proceeds, but he could not document his earnings and they were not traceable. Skrivanek was with him when he bought the car. When the police stopped and seized it five months later, its odometer indicated 65,471 miles, almost 22,800 more than when Theiler bought the car. Theiler did not obtain a Minnesota driver's license until six months after police seized his car, and although he once lived in Montana, he did not know whether his Montana driver's license was valid from the time he bought the car until its seizure.

The Avalanche's original owners testified that they purchased it in standard factory condition and made no modifications. Skrivanek testified that he paid an unidentified "random guy" to remove the air bag and install the electronic drawer in the week before the stop, but he could not recall how much he paid. He claimed that he had not told Theiler about the secret drawer and that he was undecided whether he would. Skrivanek also alleged that he had the drawer installed to transport drugs only during that weekend. Despite claiming sole responsibility for having the drawer installed in the car and for the drugs discovered in it, Skrivanek testified that he was unaware that the vials contained hashish oil.

Theiler denied modifying the car beyond adding CD and DVD players, or authorizing Skrivanek to do so. Theiler and Skrivanek both denied having the windows illegally tinted, but Theiler acknowledged that the car had legal, factory tinting when he purchased it.

Following trial, the district court found that Theiler provided no credible evidence to support his asserted innocent-owner defense, and it entered judgment of forfeiture. This appeal follows.

#### DECISION

Theiler challenges the forfeiture of his vehicle. He claims that he rebutted the statutory presumption of administrative forfeiture by asserting the innocent-owner defense. He also contends that the state failed to show by clear and convincing evidence that he committed any unlawful act to justify forfeiture. But he appears to confuse the concept of rebutting the presumption of forfeiture with the innocent-owner affirmative defense, and he also fails to account for the district court's finding that the testimony supporting his innocent-owner defense was simply not credible. We affirm the forfeiture.

Not Reported in N.W.2d, 2007 WL 2177882 (Minn.App.)  
(Cite as: 2007 WL 2177882 (Minn.App.))

All property “that has been used, or is intended for use, or has in any way facilitated in whole or in part,” the delivering, transporting, or exchanging of controlled substances is subject to forfeiture. Minn.Stat. § 609.5311, subd. 2(a) (Supp.2005). A motor vehicle “containing controlled substances with a retail value of \$100 or more,” when the sale or possession of the controlled substances would constitute a felony, is presumed to be subject to forfeiture. *Id.* § 609.5314, subd. 1(a)(2) (Supp.2005). The claimant of the property bears the burden to rebut the presumption. *Id.*, subd. 1(b) (Supp.2005). The presumption of administrative forfeiture aids the state only in meeting “its initial burden to produce evidence in a judicial proceeding commenced by a claimant under Minn.Stat. § 609.5314, subd. 3.” *Rife v. One 1987 Chevrolet Cavalier*, 485 N.W.2d 318, 322 (Minn.App.1992), *review denied* (Minn. June 30, 1992). The state “otherwise bears the burden of proving the act or omission giving rise to the forfeiture by clear and convincing evidence.” Minn.Stat. § 609.531, subd. 6a (2004).

\*3 Although the forfeiture statute does not specify the weight to be given to the presumption of forfeiture, the supreme court recently construed the statute to require the claimant to bear the burden of production rather than persuasion. *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 519-20 (Minn.2007). A claimant therefore rebuts the statutory presumption of forfeiture by producing sufficient evidence to justify a finding that he owns the subject property and that “the property is not connected to drug trafficking.” *Id.* at 522.

But rebutting the presumption of forfeiture should not be confused with the separate concept of the innocent-owner defense. Property is subject to forfeiture “only if its owner was privy to the [unlawful] use or intended use ... or the unlawful use or intended use of the property otherwise occurred with the owner's knowledge or consent.” Minn.Stat. § 609.5311, subd. 3(d) (Supp.2005). As the title of this affirmative de-

fense implies, the owner may avoid forfeiture by proving that he was unaware of the property's illegal use. *Jacobson*, 728 N.W.2d at 520. And unlike the showing necessary to rebut the presumption of forfeiture, the innocent-owner defense “is an affirmative defense which must be proven by the claimant.” *Blanche v. 1995 Pontiac Grand Prix*, 599 N.W.2d 161, 167 (Minn.1999). The claimant must establish the innocent-owner defense by a preponderance of the evidence. *Jacobson*, 728 N.W.2d at 520-21 & n. 6.

Theiler contends that his and Skrivanek's testimony was sufficient to rebut the presumption that the car was subject to forfeiture. But he concedes that the car contained at least \$100 in controlled substances and offered no evidence that the car was not connected to drug trafficking. Rather than to address the elements necessary to rebut the presumption, Theiler's testimony represented almost exclusively his efforts to prove his asserted affirmative defense as an innocent owner. And even if Theiler had produced sufficient evidence to rebut the presumption, this alone would not defeat the forfeiture, because the state could nevertheless prevail if it proves that forfeiture was appropriate. *See Jacobson*, 728 N.W.2d at 522 (explaining that once claimant produces sufficient evidence to rebut presumption, state may obtain forfeiture with clear and convincing evidence that property is connected to drug trafficking). The state did not need to overcome any rebuttal because, as the district court correctly determined, Theiler failed to rebut the presumption of forfeiture.

Theiler also failed to prove his affirmative defense that he was an innocent owner of the car. The district court found Theiler's and Skrivanek's testimony concerning Theiler's lack of awareness of drug trafficking to be incredible. Theiler's purported ignorance that his friend Skrivanek had installed the drug drawer is facially suspect. The district court also doubted Theiler's claim that he lent the car to Skrivanek without Theiler's suspicion, and it doubted Skrivanek's claimed lack of memory concerning

Not Reported in N.W.2d, 2007 WL 2177882 (Minn.App.)  
(Cite as: 2007 WL 2177882 (Minn.App.))

memorable factual events. The court had significant reason to doubt the notion that Skrivanek was solely responsible for the drugs and the trafficking-related modifications to the car. Given the deference that we afford a district court's credibility determinations, the finding that Theiler failed to prove that he was an innocent owner is not clear error. *See Rife*, 485 N.W.2d at 321 (noting that appellate court gives due regard to district court's opportunity to judge witness credibility).

\*4 Theiler also argues that the state did not prove by clear and convincing evidence that he knew about the drug trafficking. The argument overlooks that Theiler failed to rebut the presumption of forfeiture or to prove that he is an innocent owner. And the argument is simply unpersuasive on this record. A person's knowledge is seldom susceptible to proof by direct evidence. The circumstantial evidence supports the finding that Theiler knew of the unlawful use of his car: he bought the car for \$27,000 cash with untraceable funds; he willingly lent his first and only car to his car-owning friend for weeks at a time; this friend, Skrivanek, deals drugs; Skrivanek was with Theiler when Theiler bought the car; Theiler and Skrivanek offered incredible testimony; someone logged nearly 23,000 miles on the car during the five months that Theiler owned it; while in Theiler's ownership, the car was modified for concealment and secrecy. We hold that the district court did not err by finding that the Avalanche is subject to forfeiture.

**Affirmed.**

Minn.App.,2007.  
Theiler v. Chevy Avalanche  
Not Reported in N.W.2d, 2007 WL 2177882  
(Minn.App.)

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908 N.E.2d 1278, 2009 WL 1704357 (Ind.App.)  
 (Table, Text in WESTLAW), Unpublished Disposition  
 (Cite as: 908 N.E.2d 1278, 2009 WL 1704357 (Ind.App.))

► Only the Westlaw citation is currently available. (The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Disposition of Cases by Unpublished Memorandum Decision in the Court of Appeals of Indiana." Indiana provides by rule that "unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case." Indiana Rules of Appellate Procedure 65(D).

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

Court of Appeals of Indiana.  
 Charles THOMPSON, Appellant/Defendant,  
 v.  
 STATE of Indiana, Appellee/Plaintiff.

No. 49A05-0811-CR-674.  
 June 18, 2009.

Appeal from the Marion Superior Court; The Honorable William J. Nelson, Judge; Cause No. 49F07-0808-CM-202690.  
 William F. Thoms, Jr., Thoms & Thoms, Indianapolis, IN, Attorney for Appellant.

Gregory F. Zoeller, Attorney General of Indiana, Angela N. Sanchez, Deputy Attorney General, Indianapolis, IN, Attorneys for Appellee.

**MEMORANDUM DECISION—NOT FOR PUBLICATION**

BRADFORD, Judge.

\*1 Appellant/Defendant Charles Thompson appeals from his conviction for Class A misdemeanor Marijuana Possession,<sup>FN1</sup>

contending that the search that yielded the contraband was improper. We affirm.

FN1. Ind.Code § 35-48-4-11 (2008).

**FACTS AND PROCEDURAL HISTORY**

At approximately 5:50 p.m. on August 28, 2008, Indianapolis Metropolitan Police Sergeant Sandra Storkman noticed Thompson's car southbound on Adams Street. (Tr. 4). Sergeant Storkman could not read the temporary plate in Thompson's rear window due to its "slant[,]," so she stopped the car. Tr. p. 4. As Sergeant Storkman approached, she noticed that the date on the temporary plate had been altered. Sergeant Storkman determined that Thompson had purchased the car on "July 15th or 18th" and told him that she would have to have the car towed because it was not properly plated. While waiting for a wrecker, Sergeant Storkman conducted an inventory search of the car. Sergeant Storkman detected the odor of marijuana when she began the search and found a plastic bag containing a leafy green substance in the center console. The plastic bag was later determined to contain 0.92 grams of marijuana.

On August 29, 2008, the State charged Thompson with Class A misdemeanor marijuana possession. On October 23, 2008, the trial court found Thompson guilty as charged. On that day, the trial court sentenced Thompson to one year of incarceration with 267 days suspended.

**DISCUSSION AND DECISION**

Thompson contends that the trial court abused its discretion in admitting any evidence regarding the marijuana found in his car because it was not discovered during a valid inventory search. Although Thompson frames the issue as a challenge to the denial of a motion to suppress evidence, he actually appeals from the allegedly erroneous admission of evidence at trial. The admissibility of evidence is within the sound discretion of the trial court. *Curley v. State*, 777 N.E.2d 58, 60

908 N.E.2d 1278, 2009 WL 1704357 (Ind.App.)  
 (Table, Text in WESTLAW), Unpublished Disposition  
 (Cite as: 908 N.E.2d 1278, 2009 WL 1704357 (Ind.App.))

(Ind.Ct.App.2002), *trans denied*. We will reverse a trial court's decision on the admissibility of evidence only upon a showing of an abuse of that discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.* The Court of Appeals may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court. *Moore v. State*, 839 N.E.2d 178, 182 (Ind.Ct.App.2005), *trans denied*. We do not reweigh the evidence, and consider the evidence most favorable to the trial court's ruling. *Hirsey v. State*, 852 N.E.2d 1008, 1012 (Ind.Ct.App.2006), *trans denied*.

The Fourth Amendment, as applied to the States through the Fourteenth Amendment,<sup>FN2</sup> generally requires a warrant for a search to be considered reasonable. *Taylor v. State*, 842 N.E.2d 327, 331 (Ind.2006). There are exceptions to this requirement, and the State bears the burden of proving that one of them applies. *Id.* One well-recognized exception to the warrant requirement is a valid inventory search. *Id.* The underlying rationales for the inventory exception are (1) protection of private property in police custody, (2) protection of police against claims of lost or stolen property, and (3) protection of police from possible danger. *Id.* at 330–31. The threshold question in determining the propriety of an inventory search is whether the impoundment itself was proper. *Id.* at 331. An impoundment is proper when it is either part of the routine administrative caretaking functions of the police or when it is authorized by statute. *Id.*

FN2. Although Thompson mentions Article 1, Section 11 of the Indiana Constitution, he does not develop a separate argument based on its provisions.

#### A. Whether the Impoundment was Proper

\*2 Here, the impoundment of Thompson's car was authorized by Indiana Code section 9–18–2–43

(a) (2008), which provides in relevant part as follows:

[A] law enforcement officer authorized to enforce motor vehicle laws who discovers a vehicle required to be registered under this article that does not have the proper certificate of registration or license plate:

(1) shall take the vehicle into the officer's custody; and

(2) may cause the vehicle to be taken to and stored in a suitable place until:

(A) the legal owner of the vehicle can be found; or

(B) the proper certificate of registration and license plates have been procured.

Sergeant Storkman testified that Thompson's car bore an expired temporary license plate that had been altered. The fact that Thompson told Sergeant Storkman that the seller had given him the plate in that condition is immaterial, as our standard of review demands that we view conflicting evidence which is most favorable to the trial court's ruling. In the end, there was evidence that the license plate on the car was invalid, and the controlling statute authorized, if not required, Sergeant Storkman to impound the car. *See Widduck v. State*, 861 N.E.2d 1267, 1270 (Ind.Ct.App.2007) (concluding that Indiana Code section 9–18–2–43(a) required police to take into custody vehicle which had neither license plate nor registration).

Thompson seems to argue on appeal, as he did below, that the impoundment was improper because he was not actually charged with the crime of altering a temporary license plate and the allegedly altered plates were not introduced at his trial. *See* Ind.Code § 9–18–26–13 (2008). Thompson, however, provides us with no authority that a subsequent decision not to charge a defendant with the crime or infraction giving rise to an impoundment renders the impoundment invalid,

908 N.E.2d 1278, 2009 WL 1704357 (Ind.App.)  
 (Table, Text in WESTLAW), Unpublished Disposition  
 (Cite as: 908 N.E.2d 1278, 2009 WL 1704357 (Ind.App.))

and we are aware of none. We conclude that Sergeant Storkman's impoundment of Thompson's car was proper on the basis that it was not properly plated.

#### B. Whether the Inventory Search was Proper

Even if, as here, there is a proper and lawful custodial impoundment of the vehicle, the constitutional requirement of reasonableness requires that the inventory search itself must be conducted pursuant to standard police procedures. *Combs v. State*, 878 N.E.2d 1285, 1290 (Ind.Ct.App.2008). This requirement ensures that the inventory search is not a pretext for a general rummaging in order to discover incriminating evidence. *Id.*

In order to perform this function, the procedures must be rationally designed to meet the objectives that justify the search in the first place, and must sufficiently limit the discretion of the officer in the field. Searches in conformity with such regulations are reasonable under the Fourth Amendment. Thus, to defeat a charge of pretext the State must establish the existence of sufficient regulations and that the search at issue was conducted in conformity with them.

\*3 *Fair v. State*, 627 N.E.2d 427, 435 (Ind.1993) (citations omitted).

Although Thompson contends on appeal that the State failed to establish that the search was conducted in conformity with sufficient regulations, he failed to object on this basis below.

To preserve a suppression claim a defendant must make a contemporaneous objection that is sufficiently specific to alert the trial judge fully of the legal issue. *Smith v. State*, 565 N.E.2d 1059 (Ind.1991). Where a defendant fails to object to the introduction of evidence, see *Lindsey v. State*, 485 N.E.2d 102 (Ind.1985), makes only a general objection, see *Riley v. State*, 427 N.E.2d 1074 (Ind.1981), or objects only on other grounds, see *Schweitzer v. State*, 531

N.E.2d 1386 (Ind.1989), the defendant waives the suppression claim.

*Moore v. State*, 669 N.E.2d 733, 742 (Ind.1996).

Although Thompson made a contemporaneous and specific objection to the admission of the evidence seized from his car, it was only on the basis that the impoundment,<sup>FN3</sup> and not the subsequent inventory search, was improper. As previously mentioned, these are two completely different questions. See *Combs*, 878 N.E.2d at 1290. At no point did Thompson claim in the trial court that Sergeant Storkman failed to conform with sufficient regulations regarding inventory searches. Put another way, Thompson complains of this alleged deficiency only now, when it is too late for the State to cure it.

FN3. We acknowledge that Thomson's trial counsel did argue that there "was no basis for an inventory search[.]" but only on the ground that "without the [charge for altering a temporary license plate] the basis for an inventory search does not exist." Tr. pp 9-10. This argument could speak only to the propriety of the impoundment and not the subsequent search.

This scenario is analogous to the ones we addressed in two similar cases, *Rembusch v. State*, 836 N.E.2d 979 (Ind.Ct.App.2005), *trans. denied*, and *Purifoy v. State*, 821 N.E.2d 409 (Ind.Ct.App.2005), *trans. denied*. In *Rembusch*, the defendant claimed on appeal that the State had failed to lay the proper foundation for the admission of a breath test instrument certification document. *Rembusch*, 836 N.E.2d at 982. In concluding that *Rembusch* had waived the issue, we noted that his failure to object denied "the State [the] opportunity to cure any alleged deficiencies" and that he had "failed to show that the State could not have provided the required foundation had a proper objection been lodged." *Id.* at 983.

908 N.E.2d 1278, 2009 WL 1704357 (Ind.App.)  
 (Table, Text in WESTLAW), Unpublished Disposition  
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In *Purifoy*, the defendant failed to object at trial to testimony regarding a computerized pawnshop database that he claimed on appeal was hearsay and violated the “best evidence” rule. *Purifoy*, 821 N.E.2d at 412. We noted that “the purpose of the contemporaneous objection rule ‘is to promote fair trial by precluding a party from sitting idly by and appearing to assent to an offer of evidence or ruling by the court only to cry foul when the outcome goes against him.’” *Id.* (quoting *Stewart v. State*, 567 N.E.2d 171, 174 (Ind.Ct.App.1991)). “The rule requires parties to voice objections in time so that harmful error may be avoided or corrected and a fair and proper verdict will be secured.” *Id.* In concluding that Purifoy had waived the issue, we noted that if he “had objected to this evidence at trial, the State might have been able to present sufficient preliminary evidence to satisfy an exception or exceptions to the hearsay rule or to produce a computer printout of the database” and that “[o]n appeal, the State has no opportunity to present such evidence.” *Id.* at 412–13. We concluded that “[w]e are reluctant to say the State could not have satisfied the hearsay rules or the ‘best evidence’ rule when the State had no opportunity to litigate those issues before the trial court.” *Id.* at 413.

\*4 Here, Thompson's failure to object on the ground that the inventory search was invalid for failing to satisfy sufficient standards denied the State the opportunity to litigate the issue.<sup>FN4</sup> Thompson has not established that the State could not have satisfied this requirement had a proper objection been lodged, and, as in *Rembusch* and *Purifoy*, we are unprepared to penalize the State when it had no opportunity to litigate the question in the trial court. Because Thompson advances a different ground now than the one he argued below, we conclude that he has waived any challenges to the conduct of the inventory search for appellate review.

FN4. We recognize that in *Rembusch* and *Purifoy*, no objections were made on any

basis to the allegedly inadmissible evidence. We conclude, however, that the logic of those cases applies with equal force where, as here, an objection was made, but on a different ground than that advanced on appeal. It seems to us that an objection made on a ground different than that advanced on appeal denies the opposing party the opportunity to litigate the issue to the same degree as no objection at all.

The judgment of the trial court is affirmed.

CRONE, J., and BROWN, J., concur.

Ind.App.,2009.  
 Thompson v. State  
 908 N.E.2d 1278, 2009 WL 1704357 (Ind.App.)

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Not Reported in N.W.2d, 2009 WL 66965 (Minn.App.)  
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**H**

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS  
UNPUBLISHED AND MAY NOT BE CITED EX-  
CEPT AS PROVIDED BY MINN. ST. SEC.  
480A.08(3).

Court of Appeals of Minnesota.  
VALLEY OIL, INC., Respondent,  
v.  
2002 CHEVY TAHOE, VIN: 1GNEK13212J222521,  
MN License Plate # NUW688, Appellant.

No. A08-0338.  
Jan. 13, 2009.  
Review Denied Mar. 31, 2009.

**Background:** City brought forfeiture action against vehicle, which employee of corporation was driving when he was arrested for possession of controlled substance. Following a bench trial, the District Court dismissed action. City appealed.

**Holdings:** The Court of Appeals, Halbrooks, J., held that:

- (1) evidence supported trial court's finding that corporation, not employee, was owner of vehicle;
- (2) corporation was entitled to innocent-owner defense; and
- (3) shareholder was entitled to innocent-owner defense if piercing of the corporate veil were warranted.

Affirmed.

West Headnotes

[1] Controlled Substances 96H  184

96H Controlled Substances  
96HV Forfeitures  
96Hk176 Proceedings  
96Hk184 k. Evidence. Most Cited Cases

Evidence supported trial court's finding that corporation, not corporation's employee, was owner of vehicle that was subject of forfeiture action, which arose from employee's conviction for possession of controlled substance, though employee used vehicle for his personal benefit; evidence indicated that corporation was registered owner of vehicle, corporation purchased vehicle, corporation paid to maintain vehicle, and vehicle was used, at least in part, for business purposes. M.S.A. §§ 168A.05, subd. 6, 609.531, subd. 6a(b), 609.5314, subd. 1(a)(2).

[2] Controlled Substances 96H  174

96H Controlled Substances  
96HV Forfeitures  
96Hk172 Defenses  
96Hk174 k. Lack of knowledge or consent.  
Most Cited Cases

Corporation was entitled to innocent-owner defense in forfeiture action involving corporation's vehicle and arising from its employee's conviction for possession of controlled substance; because employee was acting outside scope of his employment when he was arrested while driving vehicle, employee's knowledge of illegal use of vehicle could not be imputed to corporation. M.S.A. § 609.5314, subd. 1(a)(2).

[3] Controlled Substances 96H  174

96H Controlled Substances

Not Reported in N.W.2d, 2009 WL 66965 (Minn.App.)  
(Cite as: 2009 WL 66965 (Minn.App.))

96HV Forfeitures

96Hk172 Defenses

96Hk174 k. Lack of knowledge or consent.

Most Cited Cases

Corporation's shareholder was entitled to innocent-owner defense if piercing of the corporate veil were warranted in forfeiture action involving corporation's vehicle and arising from its employee's conviction for possession of controlled substance; shareholder had no knowledge of employee's illicit activities. M.S.A. § 609.5314, subd. 1(a)(2).

Michael W. McDonald, Prior Lake, MN, for respondent.

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Special Assistant County Attorney, Shakopee, MN, for appellant.

Considered and decided by KALITOWSKI, Presiding Judge; HALBROOKS, Judge; and HARTEN, Judge.<sup>FN1</sup>

FN1. Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

#### UNPUBLISHED OPINION

HALBROOKS, Judge.

\*1 Appellant City of New Prague (the city) challenges the district court's dismissal of its forfeiture action. The city argues that the district court erred in finding that respondent Valley Oil, Inc. is the owner of the 2002 Tahoe and that Valley Oil is entitled to an innocent-owner defense. We affirm.

#### FACTS

Valley Oil is a small family-owned company that was incorporated in 1975. Valley Oil is an independent gas station with a bulk fueling plant, a truck that makes bulk-oil deliveries, a convenience store, and an

area leased to mechanics. Valley Oil was originally owned by Cheryl Hotzler's father; but in 1974, Valley Oil was purchased by Cheryl and her husband, Calvin Hotzler. At the time of the incorporation, Calvin was the president and treasurer, and Cheryl was the vice-president and secretary. Calvin and Cheryl were the only shareholders.

Calvin ran Valley Oil until his death in 2004. Since then, no one has been elected president or treasurer, as required by the corporate bylaws, and Cheryl is the sole shareholder and officer. After Calvin died, Cheryl decided that their son, Jason Hotzler, who graduated from high school in 2002, should begin training to manage the company. By November 2005, Jason was working as the general manager. Jason was supervised by Cheryl; he was not an officer, shareholder, or director. Valley Oil had seven employees in 2005, most of whom were family members.

Valley Oil is the registered owner of a number of vehicles, including a pickup truck, a bulk truck, and a 2002 Chevrolet Tahoe that is at issue here. The 2002 Tahoe was purchased by Valley Oil in April 2005. Jason was the primary user of the 2002 Tahoe, and he used it for both personal and business purposes. In addition, other employees would occasionally use the 2002 Tahoe to run errands and make deliveries on a weekly basis.

On September 23, 2005, while driving the 2002 Tahoe, Jason was cited for possession of an open bottle of alcohol. Jason later pleaded guilty to the open-bottle charge. On November 25, 2005, Jason was stopped while driving the 2002 Tahoe for personal use and arrested for possession of 3.6 grams of psychedelic mushrooms, which had a retail value of more than \$100. Jason testified that he never told Cheryl of the open-bottle conviction arising out of the September 23, 2005 incident before the November 25, 2005 arrest. Jason subsequently pleaded guilty to felony possession of a controlled substance and misdemeanor driving while impaired (DWI) related to the Novem-

Not Reported in N.W.2d, 2009 WL 66965 (Minn.App.)  
(Cite as: 2009 WL 66965 (Minn.App.))

ber 25, 2005 incident.

Pursuant to Minn.Stat. § 609.5314 (2004 & Supp.2005), the city instituted a forfeiture action against the 2002 Tahoe. Valley Oil contested the forfeiture, asserting that it was the owner of the 2002 Tahoe and that it had an innocent-owner defense under Minn.Stat. § 609.5311 (2004 & Supp.2005). At trial, it was undisputed that Jason had used the 2002 Tahoe on November 25, 2005, to transport a controlled substance with a retail value in excess of \$100.

\*2 The district court dismissed the forfeiture action, finding that Valley Oil was the owner of the 2002 Tahoe and that Valley Oil was entitled to the innocent-owner defense. In support of its decision, the district court noted that Jason was not a shareholder, officer, or director of Valley Oil. The district court also found that Valley Oil purchased the 2002 Tahoe and that there was no evidence that Jason paid for the insurance or maintenance for the vehicle and that the 2002 Tahoe was used for both business and personal purposes. Finally, the district court ruled that Valley Oil was entitled to the innocent-owner defense because there was no evidence that Valley Oil knew that the 2002 Tahoe was being used or intended to be used illegally.

The city moved for a new trial or amended findings. In addition to its arguments concerning the ownership and innocent-owner issues, the city argued that Valley Oil was a sham corporation. The district court denied the city's motion. This appeal follows.

### DECISION

The city contends that the district court erred in finding that Valley Oil was the owner of the 2002 Tahoe for purposes of the forfeiture, that Valley Oil was entitled to the innocent-owner defense, and that piercing Valley Oil's corporate veil cannot eliminate the innocent-owner defense for Valley Oil. When reviewing a district court's findings of fact, the ap-

pellate court shall not set such findings aside unless they are clearly erroneous and “due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01. But “[t]he appellate courts need not give deference to the [district] court's decision on a purely legal issue.” *King v. One 1990 Cadillac DeVille*, 567 N.W.2d 752, 753 (Minn.App.1997). “Statutory construction is a question of law, which this court reviews de novo.” *In re Kleven*, 736 N.W.2d 707, 709 (Minn.App.2007) (citing *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn.1998)).

Under Minnesota law, “all conveyance devices containing controlled substances with a retail value of \$100 or more if possession or sale of the controlled substance would be a felony” are presumed to be subject to forfeiture. Minn.Stat. § 609.5314, subd. 1(a)(2). But under the innocent-owner defense, “[p]roperty is subject to forfeiture ... only if its owner was privy to the [unlawful] use or intended use ..., or the unlawful use or intended use of the property otherwise occurred with the owner's knowledge or consent.” Minn.Stat. § 609.5311, subd. 3(d); see *Blanche v. 1995 Pontiac Grand Prix*, 599 N.W.2d 161, 166-67 (Minn.1999) (incorporating the innocent-owner defense into cases where the forfeiture is initiated under Minn.Stat. § 609.5314 (1998) and a claimant demands a judicial determination of the forfeiture). An individual claiming the property bears the burden to rebut the presumption of forfeiture. Minn.Stat. § 609.5314, subd. 1(b).

#### A. The district court did not err in finding that Valley Oil was the owner of the 2002 Tahoe.

\*3 [1] For purposes of a motor-vehicle forfeiture proceeding, “the alleged owner is the registered owner according to records of the Department of Public Safety.” Minn.Stat. § 609.531, subd. 6a(b) (2004). “A certificate of title issued by the [Department of Public Safety] is prima facie evidence of the facts appearing on it.” Minn.Stat. § 168A.05, subd. 6 (2004). In *Rife v.*

Not Reported in N.W.2d, 2009 WL 66965 (Minn.App.)  
(Cite as: 2009 WL 66965 (Minn.App.))

*One 1987 Chevrolet Cavalier*, this court concluded that use of the word “alleged” in section 609.531, subdivision 6a(b) (1988), indicates that registration is prima facie evidence of ownership but that the presumption is rebuttable. 485 N.W.2d 318, 321 (Minn.App.1992), *review denied* (Minn. June 30, 1992).

Because Valley Oil was the registered owner of the 2002 Tahoe, it was the presumptive owner. Although the city emphasizes Jason's personal use of the vehicle to argue that the presumption of Valley Oil's ownership has been rebutted, on this record, the district court did not clearly err in its finding that the company owned the vehicle. Valley Oil purchased the 2002 Tahoe. Valley Oil paid to maintain the 2002 Tahoe, and the vehicle was used, at least in part, for business purposes. While it is undisputed that Jason also used the 2002 Tahoe for his personal benefit, as evidenced by his installation of a stereo system and his keeping a shotgun in the 2002 Tahoe, Jason's personal use of the 2002 Tahoe was authorized by Cheryl, the sole shareholder, director, and officer of Valley Oil.

**B. The district court did not err in finding that Valley Oil was entitled to the innocent-owner defense.**

[2] The city argues that because knowledge of Jason's illicit activities should be imputed to Valley Oil, the district court erred in finding that Valley Oil was entitled to the innocent-owner defense. “[A] corporation is charged with constructive knowledge ... of all material facts of which its officer or agent ... acquires knowledge while acting in the course of employment within the scope of his or her authority.” *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895-96 (Minn.2006) (alterations in original) (quoting 3 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 790 (2002)); see also *Brooks Upholstering Co. v. Aetna Ins. Co.*, 276 Minn. 257, 262, 149 N.W.2d 502, 506 (1967).

The city contends that Valley Oil is not entitled to assert an innocent-owner defense because Jason was a “high-ranking corporate employee” who knew of his own illegal use of the Tahoe. At some time after his November 25, 2005 arrest, Jason represented in a conciliation court document that he was president of Valley Oil and represented to the secretary of state that he was CEO of Valley Oil. It is undisputed that there was no factual basis for these representations. And Cheryl testified that she never authorized Jason to represent that he was an officer of the company.

The record supports the district court's finding that Valley Oil had no knowledge of Jason's illicit activities. Both Jason and Cheryl, Valley Oil's sole shareholder, director, and officer, testified that Cheryl had no knowledge of Jason's September 23, 2005 citation for open bottle. Further, the evidence supports the finding that Jason was not acting within the scope of his employment when he was arrested on November 25, 2005. Jason testified, and the city does not contest, that Jason was not working when he was arrested. Thus, Jason's knowledge cannot be imputed to Valley Oil.

\*4 The city cites this court's unpublished opinion of *Fred's Tire Co. v. 2002 Chevrolet Silverado*, No. A04-563, 2004 WL 2711022 (Minn.App. Nov.30, 2004), *review denied* (Minn. Feb. 23, 2005), and the dissent from *United States v. 7326 Highway 45 N.*, 965 F.2d 311, 320-23 (7th Cir.1992) (Posner, J., dissenting), to support its argument that because Jason was the general manager of Valley Oil, his knowledge of the illegal conduct should be imputed to the company. This court in *Fred's Tire Co.*, 2004 WL 2711022, at \*4, and Judge Posner in the dissent from *7326 Highway 45 N.*, 965 F.2d at 321-22, allowed an individual's knowledge to be imputed to the corporation in a forfeiture proceeding. The unpublished case from this court is not precedential. See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn.App.1993).

Further, while the city also relies on the dissent

Not Reported in N.W.2d, 2009 WL 66965 (Minn.App.)  
(Cite as: 2009 WL 66965 (Minn.App.))

from 7326 Highway 45 N., the majority in that case held that, in a forfeiture case, the knowledge of an agent of the corporation could only be imputed to the corporation if the agent was acting within the scope of his employment. 965 F.2d at 315-16. The majority concluded that the knowledge of the corporate officer/shareholder could not be imputed to the corporation because he was acting outside the scope of his employment when he sold illegal drugs. *Id.* at 313, 315-17.

Regardless, both cases are distinguishable because they involved the imputation of the knowledge of a corporate officer/shareholder and a registered agent to the corporation, rather than an employee with no official corporate status, as is the case here. *See id.* at 312; *Fred's Tire Co.*, 2004 WL 2711022, at \*2, \*4. In addition, the Minnesota Supreme Court has expressly rejected the argument that a person's status in a corporation should automatically operate to impute knowledge to the corporation. *See Travelers Indem. Co.*, 718 N.W.2d at 895-96, 895 n. 5 (analyzing the issue in the context of exclusions from insurance coverage for intentional acts). Instead, the supreme court utilized a more nuanced approach by examining whether the individual was acting within the scope of his employment. *Id.* Because Jason was acting outside the scope of his employment when he was arrested, his knowledge of illegal use is not imputed to Valley Oil, and the district court did not err in finding that Valley Oil was entitled to the innocent-owner defense.

**C. The district court did not err by denying the city's request to pierce the corporate veil.**

[3] Under a piercing-the-corporate-veil theory, the city argues that Valley Oil is a sham corporation that is not entitled to the innocent-owner defense. The city cites a number of non-Minnesota cases to support its argument that non-shareholders can be reached by piercing the corporate veil. *See Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1051 (2d Cir.1997); *Laborers' Pension Fund v. Lay-Com, Inc.*, 455 F.Supp.2d 773, 786 (N.D.Ill.2006); *Angelo Tomasso,*

*Inc. v. Armor Constr. & Paving, Inc.*, 187 Conn. 544, 447 A.2d 406, 411-12 (Conn.1982); *Fontana v. TLD Builders, Inc.*, 362 Ill.App.3d 491, 298 Ill.Dec. 654, 840 N.E.2d 767, 776 (Ill.App.Ct.2005); *Lally v. Catskill Airways Inc.*, 198 A.D.2d 643, 603 N.Y.S.2d 619, 621 (N.Y.App.Div.1993). But none of these cases are applicable here because each case involved piercing the corporate veil to hold a non-shareholder liable for corporate debt; not to impute knowledge or to reach a non-shareholder for purposes of a forfeiture.

\*5 The city also cites a number of non-Minnesota cases in its reply brief that allow other remedies, such as forfeiture, when piercing the corporate veil. *See United States v. 51 Pieces of Real Property, Roswell, New Mexico*, No. 97-1440, 1998 WL 440439, at \*1 (10th Cir. July 17, 1998); *Newton Lake Estates, Inc. v. United States*, No. 97-5137, 1998 WL 165156, at \*3 (Fed.Cir. Apr.10, 1998); *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625, 627-28, 632 (11th Cir.1986); *Schaefer v. Cybergraphic Sys., Inc.*, 886 F.Supp. 921, 927 (D.Mass.1994). But in each of those cases, the owner of either the corporation or forfeited property was involved in the activity at issue.

In its order denying the city's motion for a new trial or amended findings, the district court noted that the city provided no legal authority for its assertion that an alter ego of the corporation is not entitled to an innocent-owner defense. Further, the district court stated that piercing the corporate veil is an equitable concept. *See Roepke v. W. Nat'l Mut. Ins. Co.*, 302 N.W.2d 350, 352 (Minn.1981). Even if the corporate veil were pierced in this instance, it would result in disregarding the corporate structure and assessing the personal liability of Cheryl. Because Cheryl had no knowledge of Jason's illicit activities, she would be entitled to the innocent-owner defense, and the forfeiture would still fail.

**Affirmed.**

Not Reported in N.W.2d, 2009 WL 66965 (Minn.App.)  
(Cite as: 2009 WL 66965 (Minn.App.))

Minn.App.,2009.

Valley Oil, Inc. v.2002 Chevy Tahoe, VIN:  
??1GNEK13212J222521, MN License Plate  
|NUW688

Not Reported in N.W.2d, 2009 WL 66965  
(Minn.App.)

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(Cite as: 2005 WL 1021763 (Minn.App.))

**C**

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NOTICE: THIS OPINION IS DESIGNATED AS  
UNPUBLISHED AND MAY NOT BE CITED EX-  
CEPT AS PROVIDED BY MINN. ST. SEC.  
480A.08(3).

Court of Appeals of Minnesota.  
Vong VORAVETH, Respondent,  
v.  
\$68,514 in U.S. Currency, Appellant (A04-1818),  
and  
Anh Phuc Nguyen, Respondent,  
v.  
\$87,654 in U.S. Currency, Appellant (A04-1820).

Nos. A04-1818, A04-1820.  
May 3, 2005.

Anoka County District Court, File Nos. CX-03-537;  
C6-03-552.

Morgan Greenwood Smith, Minneapolis, MN, for  
respondents.

Robert M.A. Johnson, Anoka County Attorney,  
Thomas G. Haluska, Assistant County Attorney,  
Anoka, MN, for appellants.

Considered and decided by SHUMAKER, Presiding  
Judge; DIETZEN, Judge; and PORITSKY, Judge.<sup>FN\*</sup>

FN\* Retired judge of the district court,  
serving as judge of the Minnesota Court of  
Appeals by appointment pursuant to Minn.  
Const. art. VI, § 10.

**UNPUBLISHED OPINION**

DIETZEN, Judge.

\*1 This consolidated administrative forfeiture proceeding involves an appeal by appellants \$68,514 and \$87,654 (rem), represented by the Anoka County Attorney's Office, from a grant of summary judgment in favor of respondents Vong Voraveth and Anh Phuc Nguyen. Because we conclude that there are genuine issues of material fact making summary judgment inappropriate, we reverse and remand.

**FACTS**

On November 7, 2002, members of the Anoka-Hennepin Drug Task Force (AHDTF), through an informant, arranged a controlled buy of marijuana with Alex Chayananh, a suspected drug dealer. The informant was given \$300 of "buy money," which was previously marked by the AHDTF. After the buy was completed, Chayananh drove back to his house in Brooklyn Park. A short time later, Chayananh drove to a house in Fridley. The AHDTF subsequently obtained search warrants for the houses in Brooklyn Park and Fridley.

On November 13, 2002, the AHDTF seized approximately two grams of marijuana and appellants rem at the Fridley house. The \$300 "buy money" was found to be commingled with the seized currency. A drug canine was present during the search and sensed trace amounts of narcotics on the seized currency. The canine's handler submitted an affidavit stating that the dog is trained to detect the odor of controlled substances on currency and can distinguish between money contaminated with drug odors and money that is not contaminated. Additionally, a police officer counting the currency at the scene observed that the money carried the smell of marijuana.

The residents of the Fridley house, respondents Vong Voraveth and Anh Phuc Nguyen, filed complaints seeking return of \$68,514 and \$87,654 of the seized currency, respectively. The county argued that

Not Reported in N.W.2d, 2005 WL 1021763 (Minn.App.)  
 (Cite as: 2005 WL 1021763 (Minn.App.))

the seizure was lawful because (1) marijuana was found in proximity to the currency; (2) the drug canine indicated that all of the currency had been associated with controlled substances; (3) the police officer noticed the smell of marijuana on the currency; and (4) the \$300 “buy money” from the earlier drug transaction was commingled with the seized currency.

The county introduced a written receipt prepared by the AHDTF agents that listed the items seized from the house to prove that the marijuana was in proximity to the seized currency. The receipt indicated that currency was taken from respondents' pants pockets, a living room couch, a bedroom safe, the floor in an upstairs bedroom, the top shelf of a closet, and a bedroom air duct. It listed marijuana as the fifth item found at the house and cataloged it adjacent to the various amounts of currency on the list.

Respondents claimed they were the innocent owners of the seized currency, which had been accumulated through years of saving, family loans, and gambling winnings. Voraveth submitted interrogatory answers stating that he received loans from his parents and a friend for \$30,000 and \$12,000, respectively, and that he won \$7,000 at a casino. Similarly, Nguyen testified that he accumulated the money through employment with American Express, where he earned an annual income of \$54,000 for two-and-one-half years. Both respondents testified that they do not trust banks with their money. Finally, respondents explained that the “buy money” was commingled with the seized currency because Voraveth had received \$300 from Chayananh arising out of Voraveth's sale of a car stereo to Chayananh.

\*2 The district court granted summary judgment for respondents, concluding that the county did not prove that the seized currency was in proximity to the marijuana, which, according to the court, “is an essential element of justifiable seizure.” The district court also concluded that respondents had lawfully accumulated the large amount of cash that they kept in

the house. On September 21, 2004, the district court entered an amended summary judgment ordering the county to return the seized cash to respondents along with interest and filing fees. After the county appealed, we consolidated the cases.

#### DECISION

Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. No genuine issue of material fact exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn.1997) (alteration in original) (quotation omitted). “On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993). Finally, “[a]ppellate courts do not resolve or decide issues of fact but only determine whether there are issues of fact to be tried.” *Jonathan v. Kvaal*, 403 N.W.2d 256, 259 (Minn.App.1987), review denied (Minn. May 20, 1987).

In administrative forfeiture proceedings, all money found “in proximity to” controlled substances is presumed to be subject to forfeiture. Minn.Stat. § 609.5314, subd. 1(a)(1)(i) (2004). One who contests the forfeiture bears the burden to rebut the presumption. *Id.*, subd. 1(b). A forfeiture proceeding is an in rem action, and “[t]he appropriate agency handling the forfeiture has the benefit of the evidentiary presumption of section 609.5314, subdivision 1, but otherwise bears the burden of proving the act or omission giving rise to the forfeiture by clear and convincing evidence[.]” Minn.Stat. § 609.531, subd. 6a(a) (2004). Finally, property is subject to forfeiture “only if its owner was privy to the [unlawful] use or intended use ... or the unlawful use or intended use of the property otherwise occurred with the owner's knowledge or

Not Reported in N.W.2d, 2005 WL 1021763 (Minn.App.)  
(Cite as: 2005 WL 1021763 (Minn.App.))

consent.” Minn.Stat. § 609.5311, subd. 3(d) (2004). Therefore, if a claimant was unaware of or did not consent to the unlawful use of the property, the claimant may take advantage of an “innocent owner defense.” *Blanche v. 1995 Pontiac Grand Prix*, 599 N.W.2d 161, 166 (Minn.1999).

## I.

### *Proximity*

The county contends that the evidence presented establishes a genuine issue of material fact as to whether the seized currency was found “in proximity to” the marijuana and therefore is presumed to be subject to forfeiture. The county relies on the receipt categorizing the marijuana with the seized currency, the canine evidence, and the police officer's observations of the smell of the marijuana on the seized currency. Respondents argued, and the district court agreed, that a showing of proximity required more than the bare allegation that marijuana was located in the same house with the seized currency. In that regard, the district court faulted the county for not providing additional information as to where the marijuana was located in the house.

\*3 The statutory phrase “in proximity to” is not defined by statute. Proximity is colloquially defined as “the state, quality, sense, or fact of being near or next; closeness.” *American Heritage Dictionary*, 1412 (4th ed.2000). By its very nature, then, proximity is a question of fact. Viewing the evidence in the light most favorable to the county, we conclude that a genuine issue of material fact exists because proximity may include money located within a few feet, in the same room, or in the same house in which the marijuana was found. The district court's conclusion is erroneous because it determined as a matter of law that the marijuana was not found in proximity to the currency.

The district court also found that the canine evidence was entitled to marginal consideration because the “buy money” was tainted with drugs after passing

through the hands of Chayananh. But the canine evidence indicated the marijuana scent was present on *all* the seized currency, not just the “buy money.” Additionally, the police report stated that a police officer at the scene detected the odor of marijuana while counting the seized currency. In summary, the remainder of the county's evidence raises questions of fact as to whether any of the seized currency was in proximity to the drugs, which could trigger the statutory presumption that the currency is forfeitable.

## II.

### *Innocent Owner Defense*

Respondents argue that they presented sufficient evidence to establish the “innocent owner” defense. See Minn.Stat. § 609.5311, subd. 3(d) (stating that property is subject to forfeiture only if owner “was privy to” or consented to unlawful activities). The “innocent owner” defense essentially rebuts the presumption that money found in proximity to drugs is forfeitable as a matter of law, because respondents were unaware of or did not consent to the unlawful use of the property. The district court concluded that respondents were entitled to the “innocent owner” defense primarily on the basis that the seized money was commingled with \$300 that Voraveth received from Chayananh for the purchase of a car stereo and that respondents lawfully accumulated the rest of the currency.

Based on our review of the record, we conclude that the district court erred when it determined that respondents were entitled to the “innocent owner” defense as a matter of law. For example, Chayananh's testimony is conflicting as to when the alleged car stereo with Voraveth occurred. In his deposition Chayananh stated twice that the transaction occurred well before the seizure, but later in the deposition he stated that the transaction occurred in November, which may have been before or after the seizure. The date of the alleged lawful stereo transaction and, therefore, the availability of the “innocent owner” defense, is a fact issue for a jury.

Not Reported in N.W.2d, 2005 WL 1021763 (Minn.App.)  
(Cite as: 2005 WL 1021763 (Minn.App.))

Additionally, while Voraveth claimed \$68,514 of the seized currency, the record reveals that the most annual income he has ever received (\$13,192.89) was from working for a vending service in 2000. Similarly, Nguyen claimed \$87,654 of the seized currency but only earned a maximum annual salary of \$54,000. Based on this record, fact issues exist regarding how respondents acquired the seized money. Therefore, we conclude the district court's holding that respondents are entitled to the defense as a matter of law is erroneous.

\*4 Because the county has presented evidence that raises genuine issues of material fact and because the district court did not view the evidence in the light most favorable to the county, we reverse the district court's grant of summary judgment in favor of respondents and remand for proceedings not inconsistent with this opinion. We also deny respondents' renewed motions for attorney fees.

**Reversed and remanded; motion denied.**

Minn.App.,2005.

Voraveth v. Sixty-Eight Thousand Five Hundred and Fourteen Dollars

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(Minn.App.)

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(Cite as: 2013 WL 54005 (S.D.Ill.))



Only the Westlaw citation is currently available.

United States District Court,  
S.D. Illinois.  
UNITED STATES of America, Plaintiff,  
v.  
\$304,980 IN U.S. CURRENCY, One 2006 Peterbilt  
Semi Tractor-Trailer (Model 379), and One 2004  
Great Dane Refrigerated Semi Trailer (Model SE),  
Defendants.

No. 12-cv-0044-MJR-SCW.  
Jan. 3, 2013.

Michael Thompson, Assistant U.S. Attorney, Fair-  
view Heights, IL, for Defendants.

*MEMORANDUM AND ORDER*

REAGAN, District Judge.

*A. Introduction and Procedural History*

\*1 In January 2012, the United States of America (“the Government”) filed a verified complaint in this Court seeking the civil forfeiture of \$304,980 in United States currency plus a tractor-trailer with all attachments and components. The funds and vehicle were seized during an August 2011 traffic stop in Madison County, Illinois.

The Government alleges that the currency was furnished or intended to be furnished in exchange for a controlled substance, or proceeds traceable to such an exchange, or property used to facilitate a violation of 21 U.S.C. 801, et seq., and thus subject to forfeiture under 21 U.S.C. 881(a)(6). The Government alleges that the tractor-trailer is “a conveyance which was used or intended to be used to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance”

(Complaint, Doc. 2, p. 3), rendering the tractor-trailer forfeitable under 21 U.S.C. 881(a)(4).

Two claims were filed to contest the forfeiture—one by Randy Davis, a commercial truck driver who was the sole occupant of the truck when it was stopped on Highway 70; the other by Randy's wife, Delores Davis. The Davises claim that they lawfully own the tractor-trailer and the money found inside the sleeping compartment of the truck. The Davises filed a verified answer with their claims on February 2, 2012. Discovery proceeded, and a bench trial is scheduled to commence on April 8, 2013, following a March 22, 2013 final pretrial conference.

In September 2012, the Davises filed a motion to suppress evidence.<sup>FN1</sup> After the motion was fully briefed, the undersigned Judge conducted an evidentiary hearing on December 19, 2012. Analysis of the motion begins with an overview of the key facts, as taken from the record before the court, including the exhibits to Doc. 21 (filed under seal) and the evidence adduced at the hearing.

FN1. The Davises' motion (filed as a combined motion and supporting memorandum) does not specifically identify the evidence sought to be suppressed, i.e., the currency, the tractor-trailer, or both. The arguments contained in the motion and the arguments/evidence presented by the Davises at the December 19, 2012 hearing focused on suppression of the currency.

*B. Summary of Facts*

Around 2:15 pm on August 26, 2011, two Task Force Officers (TFOs) with the United States Drug Enforcement Administration (DEA)—Kevin Thebeau and Derek Hoelscher—were patrolling Interstate 70 in unincorporated Madison County, Illinois, as part of a

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

drug interdiction detail. Thebeau has worked as a DEA TFO for five years and has 24 years of experience in law enforcement, the bulk of which was as a patrol officer for the Granite City (Illinois) Police Department. Hoelscher has been a TFO for four and a half years and served as a police officer with the O'Fallon (Illinois) Police Department prior to being deputized as a DEA TFO.

On August 26, 2011, Officer Thebeau was driving a white Ford Expedition and had parked the vehicle in the highway median near the 24-mile marker of I-70, facing east, from which vantage point Thebeau and Hoelscher could watch both eastbound and westbound traffic. Thebeau saw a blue 2006 Peterbilt tractor-trailer about a quarter of a mile to the east of his spot. The Peterbilt was headed westbound, appearing to travel the speed limit. At some point shortly thereafter, the officers pulled out and began driving the same direction.

\*2 Meanwhile, in the 2006 Peterbilt, Randy Davis had heard radio chatter indicating that an "SUV cop" was "on the roll" and "wanted to get by." Davis activated his turn signal to move his rig to the right. The truck to his right opened a gap allowing Davis to move into the lane to his right. Davis slid his Peterbilt into the space between the other vehicles and continued driving.

Both Thebeau and Hoelscher observed that the blue Peterbilt was following quite closely behind another Peterbilt tractor-trailer in the driving or slow lane. The officers made this determination visually and using the "three-second rule" (a standard they typically used when gauging whether a vehicle was traveling at a safe distance behind other vehicles). As Thebeau described it, he picked a fixed point, watched the blue Peterbilt pass that point, and counted using 1000s (i.e., one-thousand-one, one-thousand-two, et seq.), to see how quickly the vehicle passed the fixed spot. Using this method, Thebeau calculated that the blue tractor-trailer was following in less than a

two-second interval. From his training and experience, Thebeau concluded that Thebeau was following the semi in front of him too closely. This conclusion was buttressed by Hoelscher, who visually observed that the distance between the two vehicles was too short to allow the blue Peterbilt to safely stop, given the speed of the vehicles and the traffic conditions.

The officers activated their lights and stopped the blue Peterbilt near mile marker 21 (actually pulling over on the westbound ramp of I-70, a safer spot for the traffic stop). The name on the truck cab said Randy Davis. The officers ran the information through a computerized law enforcement database, and the tractor came back registered to Delores Davis.

Thebeau approached the passenger side of the Peterbilt with Hoelscher directly behind him. Stepping up on the stair of the rig, Thebeau spoke to the driver through the passenger window, which the driver had lowered. Thebeau advised the driver (Randy Davis) the reason for the traffic stop and requested a driver's license and vehicle documents, including a log book and bill of lading. Davis said he was the owner of the trucking company, and this was his only truck. When asked how business was going, Davis responded that it was not very good due to the fuel prices. When asked what he was hauling, Davis said he was empty, because he had just dropped off a load in Vandalia, Illinois. When asked for the bill of lading, Davis said he left it in Vandalia (or mailed it back to the shipper from Vandalia) and was en route to St. Louis, Missouri to pick up a load.

Officer Thebeau advised Davis that he would be issued a warning citation for the traffic violation of following another vehicle too closely. Taking the documents, Thebeau returned to the squad car to write the warning. Thebeau reviewed the log book. It showed Davis traveling between Nogales, Arizona and Chicago, Illinois. The logbook also showed Davis had dropped off a load in Chicago on August 24, 2011, then traveled empty to Dearborn, Michigan where he

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

picked up a load headed to Missouri. What he was hauling on that trip was not listed, and the log book became illegible after that point. The log book indicated that Davis had been off work 24 days in July 2011 and another 15 days so far in August 2011.

\*3 The significant amount of time off work struck the officers as suspicious for a truck driver who earns money only when hauling a load, especially a one-man trucking operation. Also perceived as odd was the fact that Davis had talked about business being bad, but his truck had brand new tires and expensive chrome parts. The officers' records query had not located any criminal history on Randy Davis, but Hoelscher learned from EPIC (El Paso Intelligence Center in Texas) that Davis' truck was on a "watch," and that he had been involved in criminal activity in the past. The officers decided to seek consent to search the tractor-trailer.

The officers re-approached the Peterbilt and asked Davis to exit the vehicle. Davis complied, climbed out of the vehicle, and (out of habit) locked the tractor-trailer as he walked around the front and joined the officers on the passenger side. The officers gave Davis the traffic citation and explained it did not require a court appearance, and no "points" would appear on Davis' driving record, as the ticket was simply a warning. They then asked Davis several additional questions. Davis denied carrying anything illegal in the truck, such as marijuana or cocaine. When asked whether there was a large amount of money in the truck, Davis also said no.

While Hoelscher, Thebeau, and Davis were standing together next to the passenger door of the tractor, Thebeau asked Davis if he would consent to a search of the vehicle. Davis flatly denies this, but according to both Thebeau and Hoelscher (whose testimony the Court credits), Davis readily agreed. Thebeau testified that he could not recall the precise words Davis used, but Thebeau only asked once, and Davis immediately and unequivocally said yes or "go

ahead." Thebeau then handed Davis a written consent-to-search form, the top half of which was completed (*see* Doc. 15-1). Thebeau asked Davis to read and sign the form. Thebeau turned to enter the cab.

Davis tried to manually open the passenger door for Thebeau, to allow Thebeau to get in the cab. The door was locked. Thebeau either said he would go around to the driver's side or started to walk around to the driver's side, at which time Davis used the keyless remote and unlocked the door for Thebeau. Thebeau entered the cab of the tractor-trailer and began searching.

Standing outside the passenger side of the cab with Davis, Officer Hoelscher watched Davis reading the written consent-to-search form. According to Hoelscher, Davis' demeanor changed as he read the form. He asked Hoelscher what the officers were looking for; Hoelscher said large quantities of illegal drugs or U.S. currency. Davis then looked at Hoelscher's badge, which said O'Fallon Police Department. Davis asked Hoelscher about O'Fallon being in Missouri (puzzled as to why Hoelscher would be patrolling an *Illinois* highway). Hoelscher explained that he was an O'Fallon *Illinois* officer but was deputized to work with the DEA Task Force. Hoelscher produced his Task Force credentials for Davis. Davis asked what would happen if he did not sign the form. Hoelscher indicated they would probably radio for a narcotics detection K9 unit.

\*4 Because Davis still had not signed the written form and appeared reluctant to do so, Hoelscher asked Davis if he was having trouble understanding the form. Davis did not answer. Hoelscher (who wanted to be sure everyone was "on the same page") yelled to Thebeau to stop searching, because "Mr. Davis doesn't want to sign the form."

Thebeau stopped searching. Thebeau stuck his head out of the window of the cab. Thebeau asked

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(Cite as: 2013 WL 54005 (S.D.Ill.))

Davis if they still had his oral consent to search. Davis did not say yes or no, but he immediately “grabbed” the form from Hoelscher (“ripped the paper” out of Hoelscher’s hands by one account), signed two words on the signature line, initialed beneath the signature line, and returned the form to Hoelscher. (Both Thebeau and Hoelscher testified that Davis also said “I’ll sign it” as he snatched the consent form from Hoelscher’s hands. Davis denies saying “I’ll sign it.”) The officers did not scrutinize the form, assuming Davis signed his name. Hoelscher put the form away. It is undisputed that the officers did not again look at the form for several days.

Although the officers thought Davis had signed his first and last name, he had actually signed the words “*Under Protest*” on the signature line and initialed below it. He did not advise the officers that he was signing under protest, did not tell them to *not* search, and did not say he was withdrawing his oral consent or limiting the scope of his oral consent. He did not try to block or prevent any part of the search.

Significantly, when Thebeau resumed the search, Davis exhibited normal demeanor and engaged in friendly conversation with Officer Hoelscher. At some point standing outside the tractor-trailer, Davis told Hoelscher that years earlier he had been stopped in Texas and wrongfully arrested for possessing 200 pounds of marijuana.<sup>FN2</sup> Davis thought the officers already knew that he had “been in trouble” before.

FN2. Testimony at the suppression hearing varied as to the chronological sequence reflected in Officer Hoelscher’s Declaration provided in response to the suppression motion (Doc. 21–25, p. 3). *When* Davis told the officers about the Texas traffic stop and seizure is irrelevant to the Court’s analysis and resolution of the suppression motion.

Thebeau had searched other Peterbilt tractors and

was familiar with the layout of the typical sleeping area. The sleeping area of Davis’ tractor was inconsistent with other Peterbilt tractors he had seen. Thebeau lifted the mattress and saw a large piece of plywood covered in black material. When Thebeau lifted the plywood, which was hinged on the back, he saw Ziploc freezer bags full of large stacks of United States currency, rubber-banded together.<sup>FN3</sup>

FN3. The currency was found to total \$304,980.

Thebeau described the space under the plywood (which was surrounded by aluminum tubing rails installed on the sheet metal at the base of the bed) as a “non-factory void between the bottom of the mattress and the floor of the tractor which could conceal large amounts of currency [or] illegal narcotics” (Doc. 21–23, p. 5).

Davis was taken into custody and later released. The tractor-trailer and currency were seized. The Government filed this civil forfeiture proceeding, and the Davises filed claims, asserting that the currency and tractor-trailer belong to them.

\*5 The Government served special interrogatories upon Randy and Delores Davis (“Claimants”), pursuant to Rule G(6)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Claimants responded. Claimants also filed the suppression motion now before the Court.

In their suppression motion, Claimants deny that Randy Davis committed any traffic violation, deny that Randy consented to the search of the truck, argue that Randy actively resisted the search, and argue that Officer Thebeau “dismantled” the bed to find the currency (*see, e.g.*, Doc. 15, p. 4 and p. 15), thereby exceeding the scope of any consent given. As explained below, the evidence belies this characterization and fails to support Claimants’ suppression ar-

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

guments. The Court finds that the officers conducted a proper traffic stop, that Davis provided valid oral consent to search, that Thebeau merely raised the plywood sheet and saw the currency in the bin under the mattress, and this did not exceed the scope of the consent Davis voluntarily, knowingly gave.

### C. Overview of Civil Forfeiture

Civil forfeiture proceedings are governed by statute, by the Federal Rules of Civil Procedure, and by the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the latter referred to in this Order simply as “Supplemental Rules”). 21 U.S.C. 881 declares certain property subject to forfeiture by the United States. The United States Attorney General may elect to seek criminal forfeiture under 18 U.S.C. 982 or civil forfeiture under 18 U.S.C. 983. *See United States v. \$133,420 in U.S. Currency*, 672 F.3d 629, 634 (9th Cir.2012).

Criminal forfeitures operate *in personam* against the defendant and serve as a penalty upon conviction. By contrast, civil forfeitures operate *in rem* against the property itself, “under the theory that the property is guilty of wrongdoing.” *See U.S. v. Duboc*, 694 F.3d 1223, 1228 (11th Cir.2012). As one treatise summarized: “civil forfeiture is an *in rem* proceeding directed against the property itself..., while criminal forfeitures are *in personam*.... [I]n a civil forfeiture proceeding, the property owner's culpability is not considered in determining whether the property should be forfeited. *U.S. v. Cherry*, 330 F.3d 658 (4th Cir.2003); *Vereda, Ltda. v. U.S.*, 271 F.3d 1367 (Fed.Cir.2001). While a conviction is necessary to uphold a criminal forfeiture, conviction is irrelevant in a civil forfeiture proceeding. *U.S. v. One Piper Aztec F De Lux Model 250 PA 23 Aircraft*, 321 F.3d 355 (3d Cir.2003).” 3 *Crim. Prac. Manual* § 107.4 (2012).

21 U.S.C. 881 provides, *inter alia*, for the forfeiture to the United States of property used in the commission of federal controlled substance violations punishable by more than one year in prison. *See*

*United States v. Real Property Located at 15324 County Hwy. E*, 332 F.3d 1070, 1072 (7th Cir.2003). One subsection, § 881(a)(6), provides for forfeiture of money or things of value furnished or intended to be furnished in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys used or intended to be used “to facilitate any violation of this subchapter.” In other words, § 881(a)(6) authorizes the civil forfeiture of any property derived from the proceeds of a drug transaction, traceable to the transaction, or intended to be used to facilitate a controlled substance offense. Another subsection, § 881(a)(4), authorizes forfeiture of vehicles used or intended for use to transport or conceal controlled substances.

\*6 In a civil forfeiture proceeding, the government bears the burden of establishing by a *preponderance of the evidence* that the property is subject to forfeiture. If the government's theory is that the property was used to commit or facilitate the commission of a criminal offense, the government must establish that there was a substantial connection between the property and the offense.

The Seventh Circuit has explained the civil forfeiture provision of the Controlled Substances Act, 21 U.S.C. 881(a)(6), as follows:

Civil forfeiture standards are now subject to the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), 18 U.S.C. § 983(c)(1). CAFRA heightens the government's evidentiary burden in civil forfeitures—the government must demonstrate by a preponderance of the evidence that the property sought is subject to forfeiture. *See id.*... Furthermore, § 983(c)(3) provides that “if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.” *Id.*

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

*United States v. Tunds in Amount of Thirty Thousand Six Hundred Seventy Dollars*, 403 F.3d 448, 454 (7th Cir.2005). So, the Court pointed out in *Thirty Thousand Six Hundred Seventy Dollars*, a claimant's "cash hoard may be subject to forfeiture if the currency at issue represents the proceeds of an illegal drug transaction or was intended to facilitate such a transaction." *Id.*, 403 F.3d at 454.

District Courts enjoy original subject matter jurisdiction over civil forfeiture proceedings via 28 U.S.C. 1345 and 1355. *See, e.g., United States v. Marrocco*, 578 F.3d 627, 632 n. 3 (7th Cir.2009); *United States v. Tit's Cocktail Lounge*, 873 F.2d 141, 142 (7th Cir.1989) (*per curiam*). Venue lies, *inter alia*, under 28 U.S.C. 1395, which includes "any district where such property is found."). *See* 21 U.S.C. 881(j).

#### D. Analysis of Suppression Motion

##### PRELIMINARY ISSUE

One issue not briefed by the parties but bearing mention is the preliminary question of whether a Fourth Amendment-based suppression motion is proper in an *in rem* civil forfeiture proceeding like the case at bar. The federal courts have not answered this question uniformly. Some Courts of Appeal have held that since civil forfeiture proceedings are quasi-criminal in nature, the exclusionary rule applies, and suppression motions may be filed. *See, e.g., U.S. v. \$291,828.00 in U.S. Currency*, 536 F.3d 1234, 1236–38 (11th Cir.2008) ("The Fourth Amendment exclusionary rule applies to civil forfeiture actions."); *U.S. v. \$493,850.00 in U.S. Currency*, 518 F.3d 1159, 1164 (9th Cir.2008) ("The exclusionary rule applies in civil forfeiture cases.... It bars the admission of evidence obtained in violation of the U.S. Constitution, as well as 'fruits of the poisonous tree'"). Other courts have voiced uncertainty

about the use of suppression motions in civil forfeiture actions. A 2009 Seventh Circuit case furnishes an example.

\*7 In *United States v. Marrocco*, 578 F.3d 627, 631 n. 5 (7th Cir.2009), the Court of Appeals for the Seventh Circuit sidestepped the potential obstacle, because the Government had not argued that the remedy of suppression is unavailable in forfeiture proceedings under 21 U.S.C. 881. However, in his concurring opinion, Judge Easterbrook expressed concern with the assumption that suppression motions are appropriate in *civil* forfeitures:

**All parties assume that the exclusionary rule applies to forfeiture, so that the *res* must be returned if it was improperly seized. Yet the Supreme Court has twice held that the exclusionary rule is *not* used in civil proceedings.** *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 ... (1984) (deportation); *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 ... (1976) (taxation). *See also Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 ... (1998) (rule inapplicable to probation revocation). Although *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), suppressed evidence in a forfeiture, *Janis* stated that this was because that forfeiture was intended as a criminal punishment. 428 U.S. at 447 n. 17.... The forfeiture in our case is civil. It is farther from a criminal prosecution than is a probation-revocation proceeding.

Suppressing the *res* in a civil proceeding, even though the property is subject to forfeiture, would be like dismissing the indictment in a criminal proceeding whenever the defendant was arrested without probable cause. The Supreme Court has been unwilling to use the exclusionary rule to "suppress" the body of an improperly arrested defendant.... Why then would it be sensible to sup-

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

press the *res*?

***Marocco*, 578 F.3d at 642 (emphasis added).**

Similarly, the District Court for Northern District of Illinois has pointed out:

The Supreme Court has suggested that, barring “egregious” Fourth Amendment violations, the exclusionary rule does not apply in civil proceedings. *See Krasilych v. Holder*, 583 F.3d 962, 967 (7th Cir.2009) (citing *INS v. Lopez–Mendoza*, 468 U.S. 1032, 1050–51, 104 S.Ct. 3479, 82 L.Ed.2d 778 ... (1984)). The primary purpose of the exclusionary rule is to deter unlawful police conduct. Courts have generally held that application of the exclusionary rule to criminal trials alone creates an adequate deterrent; any marginal benefit gained by extending the exclusionary rule to civil proceedings tends to be outweighed by the social cost of losing probative evidence. *See generally United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 ... (1976).

The exclusionary rule seems particularly ill-suited to civil forfeiture proceedings, where it is a physical object, not a person, that is the defendant.

***United States v. Funds in the Amount of \$239,400*, — F.Supp.3d —, 2012 WL 2007025, \*6 (N.D.Ill.2012).**

The undersigned shares Judge Easterbrook's reservations regarding the use of exclusionary rule-based suppression motions in civil forfeiture proceedings. However, here, as in *Marocco*, the Government has not argued that suppression motions are unavailable in civil forfeitures. And the Seventh Circuit has not squarely held the exclusionary rule inapplicable to such proceedings. So the undersigned will reach the merits of Claimants' Fourth Amendment challenge, analyzing the three components of the challenge (the traffic stop, the existence of a consent,

and the scope of the consent) after addressing whether Claimants have standing to contest the seizure of the *res* herein.

#### THE DAVISES HAVE STANDING

\*8 In a civil forfeiture proceeding, a claimant must satisfy two separate thresholds of standing: (1) statutory standing, and (2) constitutional standing. *See, e.g., United States v. U.S. Currency in the Amount of \$103,387.27*, 863 F.2d 555, 561 n. 10 (7th Cir.1988). To have statutory standing, a claimant must file a verified claim outlining his interest in the property within certain specified time limits. The filing of a proper claim is “an essential element of ... standing to contest [a] forfeiture.” *United States v. U.S. Currency in the Amount of \$2,857.00*, 754 F.2d 208,215 (7th Cir.1985).

As the Third Circuit succinctly stated:

In order to stand before a court and contest a forfeiture, a claimant must meet both Article III and statutory standing requirements. To establish statutory standing in a forfeiture case, the claimant must comply with the procedural requirements set forth in Rule C(6)(a) and § 983(a)(4)(A)... The most significant requirement is that the claimant must timely file a verified statement of interest, as required by Rule C(6)(a).

***United States v. \$487,825.00 in U.S. Currency*, 484 F.3d 662, 664 (3rd Cir.2007).**

Constitutional or “Article III” standing requires an individual to have a sufficient interest in the property to contest the forfeiture. *United States v. Stokes*, 191 Fed. Appx. 441, 444 (7th Cir.2006). Under Article III of the United States Constitution, federal judicial power extends only to cases or controversies. Generally, to establish standing, plaintiffs must show (a) they suffered an injury in fact, (b) there is a causal connection between the injury and the conduct com-

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

plained of, and (c) it is likely the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). See also *G & S Holdings, LLC v. Continental Cas. Co.*, 697 F.3d 534, 540 (7th Cir.2012) (To establish a case or controversy, the party seeking relief in federal court must demonstrate “a personal injury fairly traceable to the ... allegedly unlawful conduct and likely to be redressed by the requested relief.”).

Claimants in civil forfeiture actions “can satisfy this test by showing that they have ‘a colorable interest in the property,’ ... which includes an ownership interest or a possessory interest.” *United States v. \$133,420 in U.S. Currency*, 672 F.3d 629, 637–38 (9th Cir.2012). “Article III’s standing requirement is thereby satisfied because an owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property.” *Id.*, quoting *United States v. \$515,060.42*, 152 F.3d 491, 497 (6th Cir.1998). See also *United States v. 5 South 351 Tuthill Road, Naperville, Illinois*, 233 F.3d 1017, 1023 (7th Cir.2000) (claimant in a civil forfeiture proceeding has constitutional standing if he as an actual stake in the outcome of the proceedings).

\*9 In other words, to demonstrate Article III standing in a civil forfeiture action, “a claimant must have ‘a sufficient interest in the property to create a case or controversy.’ ” *United States v. Real Property Located at 475 Martin Lane, Beverly Hills, CA*, 545 F.3d 1134, 1140 (9th Cir.2008). This is not a heavy burden at the initial or pretrial stage of a civil forfeiture action. The claimant need only demonstrate a colorable interest in the property, for instance, by showing actual possession, control, title, or financial stake. *Id.*

Here, Randy and Delores Davis have shown constitutional (Article III) standing. They meet the test of possession of the currency at the time of the seizure,

plus a claim of ownership of the currency.<sup>FN4</sup> This is sufficient to establish Article III standing at this stage of the proceedings. See *\$133,420 in U.S. Currency*, 672 F.3d at 638 (“The fact that property was seized from the claimant’s possession, for example, may be sufficient evidence, when coupled with a claim of ownership, to establish standing” at the pretrial motion phase).

FN4. Again, the Court notes that although Claimants’ arguments center on standing to contest seizure of *the currency* and do not directly address the tractor-trailer and its components, the undersigned’s standing analysis applies to all property seized.

The Court also finds that Claimants have satisfied the requirements of statutory standing. Their judicial claims sufficiently comply with the Supplemental Rules. Randy and Delores Davis assert that they are the owners of the tractor-trailer and seized currency. These items were seized from Randy Davis, who at all times told the police he was the owner of the property. Randy Davis’ name was painted on the cab of the tractor-trailer. Delores Davis is the registered owner of the tractor-trailer. Both Randy and Delores Davis assert that they are owners, not just possessors, of the currency. Although the Government contests whether the Davises have fully and thoroughly responded to discovery requests, the record indicates that the Davises have participated in discovery, have responded to interrogatories, and have not invoked the Fifth Amendment in response to any inquiries. Finding that Claimants have shown both constitutional and statutory standing, the Court turns to the merits of the suppression motion.

#### THE TRAFFIC STOP WAS PROPER

Claimants argue that there was no actual traffic violation and thus no reason to support the traffic stop in the first instance. This argument is a nonstarter.

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

An officer has probable cause for a traffic stop whenever he has an objectively reasonable basis to believe a traffic law has been breached. *United States v. Dowthard*, 500 F.3d 567, 569 (7th Cir.2007). Even a minor violation of a traffic law suffices, and the actual motivation of the police officer generally bears no weight on the constitutional reasonableness of the stop. *United States v. Smith*, 668 F.3d 427, 430 (7th Cir.), *cert. denied*, — U.S. —, 132 S.Ct. 2409, 182 L.Ed.2d 1044 (2012), *citing Whren v. United States*, 517 U.S. 806, 819, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). *Accord United States v. Garcia-Garcia*, 633 F.3d 608, 612 (7th Cir.2011) (“When a police officer reasonably believes that a driver has committed even a minor traffic offense, probable cause supports the stop;” and the “officer’s subjective beliefs are largely irrelevant to the probable cause inquiry.”); *United States v. Taylor*, 596 F.3d 373, 377 (7th Cir.) (“Under current Supreme Court law, then, the subjective motivations of the agents are irrelevant to the Fourth Amendment analysis.”), *cert. denied*, — U.S. —, 130 S.Ct. 3485, 177 L.Ed.2d 1076 (2010).

\*10 The officer’s belief that a law has been broken must be reasonable. *Smith*, 668 F.3d at 430. The evidence before this Court amply supports the conclusion that Officers Thebeau and Hoelscher *reasonably* believed Davis had violated a traffic law, specifically that he had been following another vehicle too closely—a violation of 625 ILCS 5/11–710(a), which prohibits following “another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.” Thus, probable cause supported the traffic stop of Davis’ 2006 Peterbilt tractor-trailer, and Claimants’ first argument for suppression fails.

#### **RANDY DAVIS ORALLY CONSENTED TO THE SEARCH**

Claimants’ next argument for suppression—that Randy Davis never consented to the search of the

tractor-trailer—fares no better.

The Fourth Amendment protects individuals against unreasonable searches and seizures. *United States v. Jackson*, 598 F.3d 340, 346 (7th Cir.), *cert. denied*, — U.S. —, 131 S.Ct. 435, 178 L.Ed.2d 338 (2010). As a general rule, a search or seizure is per se unreasonable within the meaning of the Fourth Amendment unless it is supported by a warrant. *Id.* One well-recognized exception to this general rule applies when a person consents to a search. *Id.*, *citing United States v. James*, 571 F.3d 707, 713 (7th Cir.2009). The Government bears the burden of proving consent by a preponderance of the evidence. *Jackson*, 598 F.3d at 346, *citing Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Of course, consent must be voluntarily given, a determination which depends on the totality of the circumstances. *United States v. Hicks*, 650 F.3d 1058, 1064 (7th Cir.2011), *citing Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Here, Claimants (at least as to their primary argument presented in the motion and at the hearing) do not assert that consent was involuntary. Rather, they maintain that Randy Davis never consented to the search of his vehicle at all. However, the record before the Court (including the documentary evidence, and the in-court testimony of Randy Davis, TFO Hoelscher, and TFO Thebeau) plainly contradict this contention.

Having observed and heard all three witnesses’ accounts of the traffic stop, the Court credits the officers’ testimony that Randy Davis, after being issued a traffic warning and denying that he was carrying any illegal drugs or large amounts of currency, orally consented to a search of his tractor-trailer.<sup>FNS</sup> Both officers recalled that oral consent was readily and quickly given, after Davis was asked only one time. Neither officer remembered the exact wording, but both described it as verbal consent given with no

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

hesitation, something along the lines of “yes” or “yes, go ahead.”

FN5. The Court finds the testimony of Officers Thebeau and Hoelscher credible. Each officer's testimony was consistent with the other's, and they were sequestered during the hearing. Their testimony did not appear rote or rehearsed. The officers made direct eye contact with the undersigned Judge, exhibited no furtive conduct while testifying, did not “over sell” their account of events, did not engage in guess, speculation or conjecture, and were forthright about details they could *not* recall. Moreover, their testimony made sense when considered in the context of all the surrounding circumstances and evidence.

The oral consent was freely and voluntarily given. Davis was not in custody when he consented. The consent was given during an amenable, conversational exchange. The officers never harangued, threatened, or badgered Davis; nor did they draw their weapons or intimidate him to obtain the consent. Thebeau asked if he could search, and Davis immediately answered in the affirmative.

\*11 Randy Davis' other actions are consistent with consent having been given. He attempted to manually open the door for Thebeau. When that failed, Davis used his keyless remote to unlock the door for Thebeau. While Thebeau was searching the vehicle, Davis never spoke up to say he had changed his mind, that he wanted the search to stop, or that he was withdrawing the oral consent to search. In fact, when Officer Hoelscher observed non-verbal reluctance or indecision on Davis' part as to signing the written consent form Davis had been asked to sign, it was *Hoelscher* (not Davis) who asked Thebeau to stop the search so they could be sure they were all still “on the same page.”

Moreover, when Thebeau flatly asked if he still had Davis' consent to search, Davis grabbed the written consent form from Hoelscher's hands, signed two words on the signature line in cursive, initialed beneath those two words, and gave the paper back to Hoelscher—another indication that he agreed to the search of his rig. If Davis truly wanted to revoke his initial oral consent, it makes no sense that he failed to avail himself of the multiple opportunities he was given to do so. All he had to do was speak up, *clarify* that there was a misunderstanding and he had never really consented, *tell* the officers he had changed his mind and wanted to withdraw his consent, or *alert* the officers that he had written *Under Protest* on the signature line, not his name.

Instead, he pretended to sign the form and then stood by as the search resumed. That is not consistent with withdrawing or revoking a consent. The consent was valid.

#### **THE SEARCH DID NOT EXCEED THE SCOPE OF DAVIS' CONSENT**

As the United States Supreme Court has held: “The scope of a search is generally defined by its expressed object.” *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). Therefore, when a person with actual or apparent authority consents to a general search, “Law enforcement may search anywhere within the general area where the sought-after item could be concealed.” *Jackson*, 598 F.3d at 348–49.

In the case sub judice, Claimants contend that *if* Randy Davis orally consented to the search, then his signing of the written form “*Under Protest*” limited the scope of the permitted search, because it constituted an express rejection of the language on the form permitting the search of “constructed compartments.” Claimants also suggest that the search exceeded the scope of any oral consent because “the discovery of

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

the currency required the dismantling of the bed compartment, ‘a vehicle component’ as contemplated in the language of the rejected consent form” (Doc. 15, pp. 10–11). These arguments are wholly devoid of merit.

The Court has found that Randy Davis voluntarily and knowingly furnished oral consent to search the tractor-trailer. Nothing in the record before the Court supports the conclusion that Davis attempted to limit the scope of the search (or withdrew his consent to search). When Davis hesitated to sign the written consent form, Officer Hoelscher advised Officer Thebeau that Davis had not signed the form. Officer Thebeau then stopped the search and point-blank asked if he still had Davis’ verbal consent. Davis’ response was to grab the form and pretend to sign it. By Davis’ own account, he never declared that he was signing under protest, never told them to stop searching, never said he was withdrawing his consent, and never set the officers straight if (as he claimed) he had never consented in the first place. He signed the form on the signature line and stood by, chatting with Officer Hoelscher, while Officer Thebeau resumed the search. This does not constitute a limitation on the *scope* of the search to which Davis consented.

\*12 That is especially true here, where Davis had been expressly told that the officers were looking for drugs or currency. The compartment under his mattress (accessed by simply lifting up the plywood, without any “dismantling,” without the use of tools, and without destroying or damaging the structure) obviously could hold drugs or money. Indeed, it held nearly \$305,000 in currency, which the record suggests Davis knew was there and likely gambled or hoped the officers would not discover.

Five months ago, the Seventh Circuit upheld against a constitutional challenge a much more intrusive search in *United States v. Saucedo*, 688 F.3d 683 (7th Cir.2012), a case with striking factual similarities to the case now before this Court. In *Saucedo*, the

Illinois State Police had stopped a Peterbilt tractor-trailer for a traffic violation (the registration plate appeared to have expired). A trooper advised the driver of the Peterbilt (Saucedo) of the reason for the traffic stop, asked for his paperwork (logbook, driver’s license, etc.), and ultimately asked Saucedo whether he had any weapons, marijuana or cocaine in the tractor-trailer. Saucedo said he did not. The trooper asked if he could search the tractor-trailer, and Saucedo replied, “yes.”

Spotting what he thought was an alteration to a small alcove that housed a compartment in the bunk area behind the driver’s seat, the trooper used a flashlight and a screwdriver to remove one screw and pull back the plastic molding around the alcove. When he peered inside, the trooper saw a hidden compartment. The trooper then removed the 3 remaining screws from the molding, took out the hidden compartment from the alcove, opened it, and found 10 kilograms of cocaine. Seeking to suppress the cocaine, Saucedo claimed that the trooper had exceeded the scope of the consent given. The Seventh Circuit rejected this argument and affirmed the denial of the suppression motion.

The Court reiterated the standard for measuring the scope of a consent under the Fourth Amendment—an objective standard which asks what a typical reasonable person would have understood by the exchange by the police officer and the person who consented. *Saucedo*, 688 F.3d at 865. The Seventh Circuit then emphasized:

“When a person is informed that an officer is looking for drugs in his car and he gives consent without explicit limitation, the consent permits law enforcement to search inside compartments and containers within the car, so long as the compartment or container can be opened without causing damage.” *United States v. Calvo-Saucedo*, 409 Fed. Appx. 21, 24 (7th Cir.2011). And as the Supreme Court explained, “[a] reasonable person may

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

be expected to know that narcotics are generally carried in some form of container. Contraband goods rarely are strewn across the trunk or floor of a [vehicle.]" *Jimeno*, 500 U.S. at 252....

So Saucedo was well aware that [Trooper] Miller was looking for drugs. And Saucedo gave his consent to search without any express limitation. Thus, his consent allowed Miller to search inside compartments in the tractor-trailer, including in the sleeper area, where drugs could be concealed. This necessarily included the hidden compartment, which one could reasonably think might, and in fact did, contain drugs.

**\*13 Saucedo, 688 F.3d at 866.**

Applying the same rationale to the facts before this Court, the undersigned Judge concludes that Randy Davis' general oral consent to search, given without any express restriction or limitation, given when Davis knew the officers were looking for currency, allowed TFO Thebeau to search under the mattress of the sleeping/bunk area of the 2006 Peterbilt tractor-trailer. There is no evidence whatsoever that Davis ever articulated a limitation on the extent of the search. Even Davis himself concedes that he stood by while Thebeau searched the sleeping compartment and did not instruct the officer to stop searching. If Davis really intended to revoke his consent or limit the scope of his consent, he could and should have said so. He was not locked in a squad car; he was standing by his tractor-trailer right next to Hoelscher and within earshot of Thebeau. He had opened the door for Thebeau, and signed a form and handed it to Hoelscher without saying anything to indicate a limitation on the consent.

The Court rejects outright the idea that signing the form with the words *Under Protest* in cursive on the signature line (but never alerting anyone to the fact he had done so) effectively limited the scope of the

search. A reasonable person would have believed that Randy Davis, knowing full well that the officers were searching for currency, had consented to the search of his tractor-trailer, including the bunk area and compartment under the mattress. Simply put, officers conducting a consent search "may search anywhere within the general area where the sought-after item could be concealed." *Jackson*, 598 F.3d at 348–49. Thebeau's search did not exceed the scope of the general consent he had been given, and the search does not run afoul of the Fourth Amendment. Suppression is not warranted.

#### E. Motion to Strike

Also before the Court is the Government's motion to strike claims and for judgment on the pleadings or summary judgment. That motion became ripe with the filing of a reply brief on December 14, 2012. The Government contends: (1) the Davises' claims are inadequate to establish statutory standing to contest the forfeiture, so the Court should strike the claims and answers filed by the Davises and award judgment on the pleadings to the Government; or (2) if the Court finds that Claimants have shown statutory standing, summary judgment in favor of the Government is appropriate, because Claimants lack Article III standing to challenge this forfeiture.

As the Court explained in its analysis above, statutory standing requires compliance with Supplemental Rule G(5)(a) and 18 U.S.C. 983(a)(4)(A). A claimant must file a proper claim on a timely basis, and the claim must identify the property claimant, identify the claimant's interest in the property, be signed by the claimant under penalty of perjury, and be served on the Government in the manner set forth in the Supplemental Rules. Here, the Government concedes that Claimants filed their claims on a timely basis (Doc. 25, pp. 8–9) but insist that the claims set forth only bald assertions that the Davises are the lawful owners of the property. The Government also takes issue with the Davises' dodgy and incomplete responses to interrogatories tailored to probe the spe-

Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)  
(Cite as: 2013 WL 54005 (S.D.Ill.))

cific details of the sources of the funds discovered in the tractor-trailer.

\*14 The undersigned District Judge understands the Government's frustration with the discovery responses, but a discovery-based motion is not before the Court, and this Judge has concluded that the Davises' claims comply with the Rules and statute. Plus, the record contains more than a mere assertion of a possessory interest. The Davises themselves allege that they are the owners of the truck and the seized currency. It is undisputed that the items were seized from Randy Davis, that Randy Davis' name was painted on the side of the truck, that the truck was registered to Delores Davis, and that the currency was in the exclusive possession of Randy Davis when seized. The Davises have statutory standing, and the Court declines to strike their claims and award judgment to the Government on this basis.

Additionally, as explained in the analysis in Section D above, the Court has found that the Davises have shown constitutional or "Article III" standing. At this stage in the proceedings, a claimant satisfies this case-or-controversy requirement by demonstrating an unequivocal assertion of ownership of the property, such as the Davises have asserted here.

Stated another way, the Davises meet the test of possession of the res at the time of seizure plus a claim of ownership of the currency, which generally suffices for Article III standing at the pretrial phase in a civil forfeiture case. *See \$133,420 in U.S. Currency*, 672 F.3d at 638 ("The fact that property was seized from the claimant's possession, for example, may be sufficient evidence, when coupled with a claim of ownership, to establish standing" at the pretrial motion phase). Summary judgment, partial summary judgment, or judgment on the pleadings in favor of the Government is not appropriate on the record now before the Court.<sup>FN6</sup>

FN6. The undersigned Judge is cognizant that discovery has not been completed herein, and in fact has been stayed pending resolution of the suppression motion. This case is procedurally unlike cases where summary judgment was properly granted in civil forfeiture proceedings after discovery was complete, a full record was before the court, and the claimant did not dispute the material facts presented by the Government in support of summary judgment. *See, e.g., Thirty Six Thousand Six Hundred Seventy Dollars*, 403 F.3d at 452–55.

What the evidence at trial establishes as to the true source and proper disposition of the property is another issue entirely. The Davises appear to have dramatic financial problems, meager assets, and staggering liabilities post-bankruptcy, raising commonsense questions as to how they could have accumulated \$305,000 in cash as of the date of the traffic stop (and be the lawful owners of the currency and tractor-trailer). But the Court finds that the Davises have standing to contest the forfeiture, and thus the Court **DENIES** the Government's motion to strike, for judgment on the pleadings, or for summary judgment.

#### F. Conclusion

For all the reasons delineated above, the Court **DENIES** Claimants' motion to suppress (Doc. 15) and **DENIES** the Government's motion to strike, for judgment on the pleadings, or for summary judgment (Doc. 24). Bench trial remains set April 8, 2013, with a final pretrial conference on March 22, 2013. Resolution of the suppression motion triggers the lifting of the discovery stay, pursuant to the terms of Magistrate Judge Williams' Order (Doc. 20).

One other matter requires attention—the *deadline for dispositive motions*. A Scheduling and Discovery Order was not entered in this case originally. In its September 2012 Order staying discovery, Magistrate Judge Williams set broad parameters for a schedule,

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(Cite as: 2013 WL 54005 (S.D.Ill.))

giving the parties 30 days to complete discovery and 60 days to file dispositive motions after the suppression motion was decided (*see* Doc. 20, p. 2). Five weeks later, the Government filed a dispositive motion, after which the undersigned District Judge entered a November 1, 2012 Order explaining that the Government's motion rendered the January 2013 trial date then in place unworkable. The undersigned Judge continued the final pretrial and trial to the March 22, 2013 and April 8, 2013 dates, respectively, but pointed out that all dispositive motions typically must be filed 100 days prior to the commencement of trial, and thus (technically) the dispositive motion deadline had expired.

\*15 In a brief supporting the Government's motion to strike or for judgment on the pleadings/summary judgment, counsel declares that the "United States is ... reserving ... the right to file at a later date and after the completion of discovery, additional dispositive motions" (Doc. 25, p. 20). The problem is that such dispositive motions would not be able to be briefed and ruled on sufficiently in advance of the March final pretrial conference and April trial date, given this Judge's docket. The undersigned District Judge, who sets and enforces firm trial dates, continued the trial once to permit a dispositive motion to be filed and does not intend to continue the trial a second time.

Accordingly, the Court **CLARIFIES that all dispositive motions** must be filed no later than January 15, 2013, with responses filed by February 15, 2013. (The Clerk's Office shall reflect this deadline in the cm/ecf system.) A 20-page limit applies to briefs supporting and opposing dispositive motions, no reply briefs will be permitted, and no extensions of these deadlines will be granted. This will barely give the Court time to rule on any motion prior to the March final pretrial conference.

If the parties find this timeline burdensome and, understandably, wish to complete additional discovery

prior to filing later dispositive motions, they are encouraged to consent to trial before the Magistrate Judge assigned to this case. Magistrate Judges typically enjoy a more flexible trial docket and can accommodate motions to continue trial much more easily than the undersigned. Consent forms may be obtained from the Clerk's Office, found on the Court's web page, or provided by Courtroom Deputy Debbie DeRousse at 618-482-9298. This option is offered only as an alternative. No adverse consequences will result from any party's decision to decline to consent to trial before a Magistrate Judge.

Finally, the undersigned hereby **DIRECTS** the parties to contact Judge Williams on or before January 18, 2013, to schedule a settlement conference sometime prior to the March final pretrial conference herein.

IT IS SO ORDERED.

S.D.Ill.,2013.  
U.S. v. \$304,980 in U.S. Currency  
Not Reported in F.Supp.2d, 2013 WL 54005 (S.D.Ill.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2012 WL 3288674 (D.Minn.)  
(Cite as: 2012 WL 3288674 (D.Minn.))

**H**

Only the Westlaw citation is currently available.

United States District Court,  
D. Minnesota.  
UNITED STATES of America, Plaintiff,  
v.  
Ricardo CERVANTES-PEREZ, Defendant.

No. 12cr133 (DSD/TNL).  
July 23, 2012.

**Andrew R. Winter** and Surya Saxena, Assistant  
United States Attorneys, United States Attorney's  
Office, Saint Paul, MN, for The United States of  
America.

Manvir K. Atwal, Office of the Federal Defender,  
Minneapolis, MN, for Defendant.

**REPORT & RECOMMENDATION**

TONY N. LEUNG, United States Magistrate Judge.

**I.**

\*1 This matter is before the Court, United States Magistrate Judge Tony N. Leung, on Defendant's Motion to Suppress Evidence Obtained as a Result of Search and Seizure (Docket No. 14). This matter has been referred to the Court for report and recommendation. On June 20, 2012, a hearing was held on the motion. Officer Ryan Peterson testified and the following Government Exhibits were offered and received: Exhibit 1 is a DVD video recording of the stop that occurred on March 19, 2012; Exhibit 2 is a copy of the State of Minnesota Traffic Citation issued to Defendant on February 17, 2011; and Exhibit 3 is the Policy and Operating Procedure Manual of the Plymouth Police, Chapter 600, Policy 603: Impounding and Release of Vehicles. Assistant United States Attorney Surya Saxena appeared at the hearing on behalf of the United States of America (the Government). Manvir K. Atwal appeared on behalf of Defendant.

**II.**

Based upon the file and documents contained therein, along with the testimony and exhibits presented at hearing, the undersigned magistrate judge makes the following:

**FINDINGS**

On March 19, 2012, Officer Ryan Peterson, a licensed peace officer with five years of experience with the Plymouth Police Department, was performing patrol duties traveling eastbound on Interstate Highway 94 when he notice a white Chevrolet Tahoe with two occupants pass on the left side of his vehicle. Tr. 7:3–8:21, 9:25. Office Peterson testified that he looked at his calibrated speedometer and saw that his squad car was traveling at 60 miles per hour when the Tahoe passed him. Tr. 9:4–7. Officer Peterson testified that the Tahoe was traveling in excess of the posted speed limit, by his estimate traveling 62 or 63 miles per hour.<sup>FN1</sup> Tr. 8:25. Officer Peterson also testified that the Tahoe was “very clean” and that “it had very fancy rims and the tires looked almost brand new.” Tr. 8:25–9:3.

FN1. Officer Ryan Peterson's squad car is equipped with a video recorder and this device produced Government Exhibit 1, i.e., a video recording of the traffic stop in this matter. Tr. 12:1–6; see Gov't Ex. 1. This Court has reviewed Government Exhibit 1. During the first portion of the recording, the camera is facing forward, looking out the front of the squad car. During the second portion of the recording—beginning at approximately five minutes into the recording—the camera faces the interior of the squad car and records Officer Peterson's interaction with Defendant. Government Exhibit 1 is consistent with Officer Peterson's testimony.

Officer Peterson pulled behind the Tahoe and

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ran a query of the license plates. Tr. 10:13–16. Officer Peterson testified about the query as follows:

It's called a QMW, and that's just a query of the motor vehicle. The information that came back to me, typically when you do a query on a vehicle, you get two pieces—multiple pieces of information, but the two primary pieces are who the registered owner of the vehicle is and also what their driving status is and you also get hits whether it's a stolen vehicle or not.

Tr. 10:15–22. Officer Peterson further testified that when he ran the query on Defendant's vehicle the first thing that it told me was that the registered owner was [Defendant] and that it was the correct vehicle. I checked to make sure that is the case. The second part of the information which normally would tell me the driver's license name and their status, that came back as what—it's called a no DL hit and it just says no driver's license information.

Tr. 11:3–9. Officer Peterson testified that, in his experience, a failure to return driver's license information is an indication that the owner possibly does not possess a valid driver's license. Tr. 11:11–19. After receiving the results of the query, Officer Peterson initiated a traffic stop. Tr. 11:18–21.

\*2 The Tahoe initially pulled over in an area between two lanes of traffic. Gov't Ex. 1 Officer Peterson then directed Defendant's vehicle to another location because of safety concerns. Tr. 11:23–25; 13:13–25. Once the Tahoe pulled over again, Officer Peterson approached the vehicle and noticed some features he believed were of significance. Tr. 13:13–14:5. He testified that the interior of the vehicle was “particularly well kept”; there was a single key in the ignition; multiple air fresheners were visible; and a card depicting “Santa Muerte” was also visible. Tr. 14:7–11. Officer Peterson testified that “Santa Muerte” is a religious icon that depicts a skull and a sickle. Tr. 15:7–14.

He testified that “Santa Muerte” is often related drug activity. Tr. 15:7–14. He testified that based on his training and experience all of these characteristics are indications of possible criminal activity. Tr. 14:12–15:14; *see also* Tr. 9:10–13.

Officer Peterson testified that Defendant was driving; therefore, Officer Peterson requested Defendant's license and insurance information. Tr. 15:21–22. Defendant provided Officer Peterson with a Mexican identification and two insurance cards. Tr. 15:24–25. Officer Peterson testified that the photo on the Mexican identification card appeared to be Defendant, and the name listed on the identification card was Ricardo Cervantes–Perez. Tr. 16:15–21. Defendant did not provide Officer Peterson with proof that he possessed a valid driver's license. Tr. 15:24–25 and 16:15–21.

Officer Peterson testified that he asked Defendant to accompany him to his squad car. Tr. 17:6–8. Officer Peterson stated that he often separates multiple occupants of a vehicle if he feels they might be engaged in criminal activity. Tr. 17:10–15. Officer Peterson also testified that he brought Defendant to his squad car because he did not want to make multiple trips back and forth between the two vehicles in close proximity to traffic. Tr. 17:16–22.

Officer Peterson seated himself in the driver's seat of his squad car and Defendant in the front passenger seat. Tr. 17:6–8, 18:1–3. Officer Peterson testified that he ran further queries to determine if Defendant had a valid driver's license. Tr. 18:6–9. The queries produced two addresses for Defendant, and Defendant stated that he recognized both. Tr. 18:12–13. Officer Peterson testified that Defendant had difficulty supplying his current address, which was atypical. Tr. 18:25–9:4. Officer Peterson noticed that Defendant “seemed to be nervous,” that he saw Defendant's “chest rising up and down a little bit.” Tr. 18:24–25. Officer Peterson testified that during their conversation, Defendant offered a state patrol ticket he had been recently issued for

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driving without a Minnesota driver's license. Tr. 19:5–9, 19–20; *see* Gov't Ex. 2. Officer Peterson confirmed the accuracy of this citation. Tr. 19:21–20:4. Officer Peterson then issued a new traffic citation to Defendant for driving without a license. Tr. 21:8–9; 17:2–4.

\*3 Officer Peterson testified that while he spoke with Defendant, Officer Peterson's partner spoke to the passenger of the Tahoe to determine if he possessed a valid driver's license. Tr. 20:9–14. The passenger produced only a Texas identification card and a U.S. passport card, neither of which authorized the passenger to drive. Tr. 20:15–21:6.

Officer Peterson decided to tow the Tahoe. Tr. 21:11–12. Officer Peterson offered two reasons for his decision: First, the vehicle was a safety hazard in its present location. Tr. 21:14–16. Second, failing to tow the vehicle would permit further criminal activity, i.e., driving without a valid license. Tr. 22:12–24. Plymouth Police Department Policy 603 states: “The policy of Plymouth Police is to impound all vehicles parked upon any street or highway when such vehicles constitute a hazard to the public.” Gov't Ex. 3. The policy further states that “[a] Plymouth Police Officer will impound any motor vehicle which is ... [d]riven by a person that is likely to commit further criminal activity, demonstrated by prior record of similar offenses....” *Id.*

Officer Peterson testified that it is the policy of the Plymouth Police Department to perform an impound search of a vehicle prior to towing. Tr. 21:23–22:3; 23:2–5; *see also* Gov't Ex. 3. The policy states: “When a vehicle is impounded for other than evidentiary purposes, a cursory examination of the interior of the vehicle, including the glove compartment, unlocked containers and trunk shall be made.” Gov't Ex. 3. The policy also states: “Closed containers will be opened to determine if they contain items of value.” *Id.* The policy also states: “Locked or sealed containers, including but not limited to the trunk and storage compartments, will be checked to determine if they

contain items of value provided that the method used to gain access can be accomplished without causing damage.” *Id.*

Officer Peterson informed Defendant that he was going to tow the Tahoe, Gov't Ex. 1 (16:00–17:00), and Defendant was asked if there was anything of value in the Tahoe. Gov't Ex. 1 (17:00–17:20). Defendant indicated that his clothes were in the Tahoe. Gov't Ex. 1 (17:00–17:20). Thereafter, Officer Peterson and another officer began to search the Tahoe, and noted a hidden compartment in the passenger-side door. Tr. 23:20; 33:22–25. When asked how the compartment opened, Officer Peterson testified that “you could see, like, it was loose and you could lift up the—like the arm rest part .” Tr. 34:1–3. Thereafter, Officer Peterson requested Defendant sit in the squad car again. Gov't Ex. 1. Once they were both inside the squad car again, Officer Peterson and Defendant had the following exchange:

OFFICER: Okay, I was just going to ask you, um, do you mind if we search your vehicle? I mean we're searching it anyways. But, I'm just wondering if you're okay with that. We're searching it because we're inventorying it for when we tow it. Do you mind if we search it just to look through it? Do you have a problem with that?

\*4 DEFENDANT: No problem.

Gov't Ex. 1 (32:30–35:55). Officer Peterson then provided Defendant with a consent form that was written in English and Spanish. Tr. 24:7–11. Defendant looked at the form approximately 20 seconds. Gov't Ex. 1. Defendant then gave a verbal indication that he finished reviewing the form. *Id.* Officer Peterson handed Defendant a pen with which to sign and date the form, and Defendant did so. *Id.*; *see also* Tr. 24:12–13. The form signed by Defendant was not offered into evidence.

The officers resumed their search. Tr. 25:1–2. Near the back seat of the Tahoe, the officers

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(Cite as: 2012 WL 3288674 (D.Minn.))

discovered a laundry basket filled with clothes. Tr. 25:4–6. Beneath six inches of clothing, the officers discovered a can of Pringles potato chips that “weighed a lot.” Tr. 25:6–11. The officers opened the can and found “a gallon plastic bag filled with a white sharded (sic) crystal substance.” Tr. 25:10–15. Officer Peterson suspected that the bag contained methamphetamine. Tr. 25:18. Defendant was then arrested. Tr. 36:20–21.

### III.

Based upon the foregoing Findings, the undersigned magistrate judge makes the following:

#### CONCLUSIONS OF LAW

Defendant moves to suppress the evidence found during the search of the Chevrolet Tahoe, arguing (1) the police lacked probable cause to stop his vehicle; and (2) even if the stop of his vehicle was valid, the subsequent search was illegal. For the reasons set forth herein, this Court recommends that Defendant's motion be denied.

#### A. The Stop of the Tahoe

“Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion.” *Segura v. United States*, 468 U.S. 796, 804 (1984). “A traffic stop is reasonable under the Fourth Amendment ‘if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred.’ “ *United States v. Herrera–Gonzalez*, 474 F.3d 1105, 1109 (8th Cir.2007) (quoting *United States v. Washington*, 455 F.3d 824, 826 (8th Cir.2007)). A traffic violation is not a necessary predicate of a traffic stop; only “reasonable suspicion supported by articulable facts that criminal activity may be afoot” is needed. *United States v. Robinson*, 670 F.3d 874, 876 (8th Cir.2012). When reviewing a police officer's decisions to stop a vehicle based on a reasonable suspicion, a court

must determine whether the facts collectively provide a basis for reasonable suspicion, rather than determine whether each fact separately establishes such a basis. To be reasonable,

suspicion must be based on specific and articulable facts that are taken together with rational inferences from those facts—that is, something more than an inchoate and unparticularized suspicion or hunch.

*Id.* (internal quotes and citations omitted).

This Court concludes that the stop of the Tahoe was reasonable because it was supported by specific and articulable facts to support that traffic violations had occurred. First, Officer Peterson had a reasonable, articulable basis for suspecting that Defendant, who was driving, was violating the posted speed limit. Officer Peterson's credible testimony, which is corroborated by Government Exhibit 1, supports that Defendant's vehicle was exceeding the posted speed limit. Defendant's arguments that he was “going with the flow of traffic,” and that there “was no testimony about the alleged speeding being tagged on the radar” are immaterial. Docket No. 28 at 7. “[A]n officer's observation of a traffic violation, however minor, gives the officer probable cause to stop a vehicle, even if the officer would have ignored the violation but for a suspicion that greater crimes are afoot.” *United States v. Luna*, 368 F.3d 876, 878 (8th Cir.2004).

\*5 Second, Officer Peterson had a reasonable, articulable basis for suspecting the driver of the vehicle did not have a valid driver's license. Officer Peterson testified that his query returned a report that had no driver's license information associated with the vehicle. See *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir.2006) (objectively reasonable suspicion existed where officer relied on fact that the squad car computer indicated owner's license was suspended). Driving without a valid license is a violation of Minn.Stat. § # 171.02(1).

#### B. The Search of the Tahoe

##### 1. Inventory Search

In the context of the Fourth Amendment, the

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(Cite as: 2012 WL 3288674 (D.Minn.))

Supreme Court “has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents.” *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976); *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (stating “inventory searches are now a well-defined exception to the warrant requirement of the Fourth Amendment”).

Officer Peterson's decision to impound Defendant's vehicle was consistent with the written policy of the Plymouth Police Department. First, Defendant's vehicle constituted a public safety hazard because it was pulled over on the right shoulder of an interstate highway at mid-afternoon. See Gov't Ex. 1. Second, Officer Peterson had reason to believe that not impounding the vehicle would result in the continued violation of law. Neither Defendant nor his passenger possessed a driver's license which would enable them to remove lawfully the vehicle to a safe location. Moreover, Defendant had been previously ticketed for driving without a valid license.

When a vehicle is lawfully impounded, “[a] warrantless inventory search must be done pursuant to standard police procedures and for the purpose of protecting the car and its contents.” *United States v. Betterton*, 417 F.3d 826, 830 (8th Cir.2005). The three primary reasons for an inventory search are “the protection of the owner's property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger. *Opperman*, 428 U.S. at 369. The Eighth Circuit Court of Appeals has explained as follows:

[t]he search of a vehicle to inventory its contents must [ ] be reasonable under the totality of the circumstances, and may not be a ruse for a general rummaging in order to discover incriminating evidence. The reasonableness requirement is met when an inventory search is conducted according to standardized police

procedures, which generally remove the inference that the police have used inventory searches as a purposeful and general means of discovering evidence of a crime.

*United States v. Taylor*, 636 F.3d 461, 464 (8th Cir.2011) (internal quotes and cites omitted).

This Court concludes that, based on the totality of the circumstances, the search of the Tahoe constituted a reasonable inventory search. Defendant makes two arguments in opposition to the search. First, Defendant contends that the inventory search was unreasonable because the officers searched the “hidden compartment” in the passenger-side door. But, in the present case, the “hidden compartment” was not actually hidden. The “hidden compartment” was noticed because there was a crack in the passenger door. Tr. 34:2–3; 36:7–12. The compartment was loosely closed and could be lifted up to reveal its contents. The compartment was not sealed. It did not require tools to open. It did not require dismantling the door. Thus, looking into a loosely closed compartment is not beyond the “ cursory” search described in written policy.

\*6 Second, Defendant contends that the search of laundry basket and of the Pringles can exceeded the “ cursory examination” anticipated by the policy of the Plymouth Police Department. This Court disagrees. The Plymouth Police Department's policy described the places to be searched in a vehicle and the methods to be employed. The opening of the unusually heavy Pringles fell well within the parameters of the policy. Cf. *Florida v. Wells*, 495 U.S. 1, 4 (1990) (stating “[a] police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself”). Defendant indicated that his clothing constitute items of value; therefore, the officers were right to go through all of the clothing.

## 2. Probable Cause

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(Cite as: 2012 WL 3288674 (D.Minn.))

The Government argues in the alternative that after the officers discovered the hidden compartment, the officers had probable cause to search the vehicle for contraband. This Court agrees.

“As long as the law enforcement officials have probable cause, they may search an automobile without a warrant under the automobile exception. Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place.” *United States v. Fladten*, 230 F.3d 1083, 1085 (8th Cir.2000).

In the present case, the following facts amount to probable cause to believe that contraband or evidence would be found in the Tahoe: First, the officers observed an exposed hidden compartment during the start of their inventory search. *See United States v. Mercado*, 307 F.3d 1226, 1230 (10th Cir.2002) (holding that “[i]t is well established that evidence of a hidden compartment can contribute to probable cause to search”); *United States v. Martel–Martins*, 988 F.2d 855, 858–59 (8th Cir.1993) (finding probable cause based upon inconsistent statements to routine questions and the presence of a sealed hidden compartment). Second, the vehicle was extremely clean, had expensive rims, a single ignition key, two air fresheners, and Santa Muerte card. *See United States v. Calvo–Saucedo*, 409 F. App'x 21, 25 (7th Cir.2011) (finding probable cause based in part on single ignition key); *United States v. McCoy*, 200 F.3d 582, 584 (8th Cir.2000) (finding probable cause based in part on air freshener). Officer Peterson testified that all of these facts are associated with illegal narcotics activity. *See United States v. Cortez–Palomino*, 438 F.3d 910, 913 (8th Cir.2006) (“In determining probable cause, law enforcement officers may draw inferences based upon their experience.”). Third, there were two separate insurance cards, and neither individual in the Tahoe had a valid driver's license. Finally, Defendant had

difficulty supplying a current address and “seemed to be nervous.” *United States v. Mayo*, 627 F.3d 709, 713 (8th Cir.2010) (finding probable cause where the defendant's “extreme nervousness, include[ed] heavy breathing, sweating, a visible pulse in his neck, and avoidance of eye contact”).

### C. Consent Search

\*7 The Government also argues in the alternative that the search of the Tahoe was reasonable based upon Defendant's free and voluntary consent. The Eighth Circuit Court of Appeals has explained:

The test applied to determine if consent is free and voluntary is whether, in light of the totality of the circumstances, consent was given without coercion, express or implied. The government bears the burden of showing consent was freely and voluntary given and not a result of duress or coercion, and the burden cannot be discharged by showing mere acquiescence to a claim of lawful authority. Rather, the government must show that a reasonable person would have believed that the subject of a search gave consent that was the product of an essentially free and unconstrained choice, and that the subject comprehended the choice that he or she was making.

*United States v. Sanders*, 424 F.3d 768, 773 (8th Cir.2005).

There are certainly facts that weigh in favor of finding that a reasonable person would have believed that Defendant gave free and voluntary consent. For example, Defendant is 29 years old; Defendant was presented with, and signed, a consent form, which was written in both Spanish and English; Defendant was sober; Defendant was not threatened or intimidated by officers; Defendant was not under arrest; and consent was sought during the day, along a public freeway. *See United States v. Chaidez*, 906 F.2d 377, 381–82 (8th Cir.1990) (holding that consent was voluntary in part where the record supported that the defendant had sufficient comprehension of English; was a

Not Reported in F.Supp.2d, 2012 WL 3288674 (D.Minn.)  
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sober adult with a previous conviction; was questioned only briefly; was not threatened, physically intimidated, or punished; did not rely upon any promises or misrepresentations; was sitting in a squad car parked on the shoulder of public highway during the day).

Notwithstanding the aforementioned facts, Officer Peterson's request came after Defendant was already informed that his vehicle was getting towed and after a search was already underway. Moreover, the consent form was not offered into evidence such that this Court is able to review what Defendant considered and signed. Finally, Defendant was told that the search would occur regardless of whether he consented or not. *Cf. United States v. Yousif*, 308 F.3d 820, 831 (8th Cir.2002) (finding that consent was not voluntary where the officer's statement to the defendant could be interpreted as "if [the defendant] refused to consent to the search, the officers would search the vehicle anyway"); *United States v. Morgan*, 270 F.3d 625, 631 (8th Cir.2001) (stating that the defendant did not voluntarily consent to a search of the van where officer stated if defendant withheld his consent, officer would conduct a dog sniff of the van). Based upon the totality of circumstances, this Court concludes that the Government has not shown by a preponderance of the evidence that a reasonable person would have believed that Defendant gave free and voluntary consent.

#### IV.

\*8 Based on the foregoing Findings and Conclusions, the undersigned magistrate judge makes the following:

#### RECOMMENDATION

For the reasons set forth herein, **IT IS HEREBY RECOMMENDED** that Defendant's Motion to Suppress Evidence Obtained as a Result of a Search and Seizure (Docket No. 14) be **DENIED**.

D.Minn.,2012.

U.S. v. Cervantes-Perez  
Not Reported in F.Supp.2d, 2012 WL 3288674  
(D.Minn.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2012 WL 3288946 (D.Minn.)  
(Cite as: 2012 WL 3288946 (D.Minn.))

**H**

Only the Westlaw citation is currently available.

United States District Court,  
D. Minnesota.  
UNITED STATES of America, Plaintiff,  
v.  
Ricardo CERVANTES-PEREZ, Defendant.

Criminal No. 12-133(DSD/TNL).  
Aug. 10, 2012.

Andrew R. Winter, Surya Saxena, United States  
Attorney's Office, Minneapolis, MN, for Plaintiff.

that:

1. The objection [ECF No. 34] is overruled; and
2. The report and recommendation [ECF No. 31] is adopted in full.

D.Minn.,2012.  
U.S. v. Cervantes-Perez  
Not Reported in F.Supp.2d, 2012 WL 3288946  
(D.Minn.)

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**ORDER**

DAVID S. DOTY, District Judge.

\*1 This matter is before the court upon the objection of defendant Ricardo Cervantes-Perez to the report and recommendation of United States Magistrate Judge Tony N. Leung. Defendant moves to suppress evidence obtained as a result of search and seizure, arguing that police lacked reasonable suspicion to initiate the traffic stop and that the inventory search was illegal. The magistrate judge recommends denying the motion. Defendant now "objects to the factual findings and legal conclusions contained in Magistrate Judge Leung's Report and Recommendation" and "requests the Court to review the motion hearing transcript and the officer's squad recording (Govt. Exhibit 1)." Def.'s Objection 1.

The court reviews the report and recommendation of the magistrate judge de novo. See 28 U.S.C. § 636(b)(1)(C); D. Minn. LR 72.2(b). Following a careful review of the file, record and proceedings herein, including review of the suppression hearing and the squad-car video, the court concludes that the well-reasoned report and recommendation correctly disposes of defendant's motion.

Accordingly, **IT IS HEREBY ORDERED**

R-App. 10



OFFICE OF THE HENNEPIN COUNTY ATTORNEY  
MICHAEL O. FREEMAN COUNTY ATTORNEY

OFFICE OF  
APPELLATE COURTS

APR 04 2014

FILED

April 2, 2014

AnnMarie O'Neill  
Clerk of Appellate Courts  
305 Minnesota Judicial Center  
25 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul, MN 55155-6102

Re: Daniel Garcia-Mendoza, a/k/a Ricardo Cervantes-Perez v. 2003 Chevy Tahoe,  
VIN: 1GNEC13V23R143453, Plate #235JB, \$611.00 in U.S. Currency  
Court Case No. A13-445

Dear Ms. O'Neill:

Enclosed for filing please find Respondent's Supreme Court Brief and Appendix (12 bound and 2 unbound) and the original Affidavit of Service.

Very truly yours,

A handwritten signature in cursive script that reads "Julie K. Bowman".

JULIE K. BOWMAN  
Assistant Hennepin County Attorney  
Telephone: (612) 348-7051  
Fax: (612) 348-8299

JKB/dkl

Enclosures

C: Kirk M. Anderson, Esq.  
Scott A. Hersey, Esq.  
Max A. Keller, Esq.  
Katelynn McBride, Esq.  
Peter M. Routhier, Esq.

APR 04 2014

STATE OF MINNESOTA )  
 )  
COUNTY OF HENNEPIN ) ss.

AFFIDAVIT OF SERVICE **FILED**

Re: Daniel Garcia-Mendoza, a/k/a Ricardo Cervantes-Perez  
v. 2003 Chevy Tahoe, \$611.00 in U.S. Currency  
Court Case No. A13-445

Document(s) served:

1. Respondent's Brief and Appendix.

Donna LaCombe, being first duly sworn on oath, deposes and says:

That on April 2, 2014, she served the above-listed document(s) on the following by mailing two (2) copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the Hennepin County mail system, in Minneapolis, Minnesota, through U.S. Postal Service, directed to their last known address.

Kirk M. Anderson  
Anderson Law Firm, PLLC  
7000 Flour Exchange Building  
310 Fourth Avenue South  
Minneapolis, MN 55415

Max A. Keller  
Keller Law Offices  
The Flour Exchange, Suite 1130  
310 4<sup>th</sup> Avenue South  
Minneapolis, MN 55415

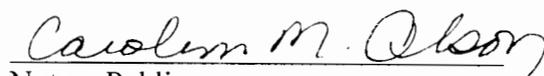
Peter M. Routhier  
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2200 Wells Fargo Center  
90 South Seventh Street  
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Katelynn McBride  
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527 Marquette Avenue  
Minneapolis, MN 55402

Scott A. Hersey  
MN County Attorney's Association  
100 Empire Drive, Suite 200  
St. Paul, MN 55103

  
Donna LaCombe

Subscribed and sworn to before me  
on April 2, 2014.

  
Notary Public

