

1988

# Joan E. Davis v. The State of Utah : Reply Brief

Utah Supreme Court

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CKET NO. **880282**

IN THE SUPREME COURT OF THE STATE OF UTAH

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JOAN E. DAVIS, et al.,	:	
Appellant,	:	
vs.	:	No. 88-282
STATE OF UTAH,	:	Priority 14(b)
Respondent.	:	

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REPLY BRIEF OF APPELLANT

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Appeal from the final judgment and order of the Third  
Judicial District Court in and for Salt Lake County, State of  
Utah, the Honorable J. Dennis Frederick presiding.

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## ISSUES PRESENTED FOR REVIEW

### Issues Presented in Appellant's Brief in Chief

1. Is the statute on takings, Utah Code Annotated Section 58-37-13 (1953 as amended) as applied to this case unconstitutional under both the State and Federal Constitutions because the results are grossly disproportionate to the crime?

2. Is the taking and subsequent sale of the 1987 Dodge Caravan supported by the facts of this case and the plain intent of Utah Code Ann. § 58-37-13?

3. Is there a security interest that prohibits forfeiture in this case?

4. May Officer William McCarthy's testimony be accepted in civil proceedings if the State relies on statements made during criminal custody but before a Miranda warning was issued?

5. Does the warrantless seizure of the 1987 Dodge Caravan invalidate the proceedings below?

### Issues Presented in Respondent's Brief

1. Is there a security interest in the van that prohibits forfeiture in this case?

2. Do the facts support a forfeiture of the van?

## TEXT OF STATUTORY PROVISIONS

### **Utah Rule of Evidence 103. Rulings on evidence.**

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.



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Respondent.	:	

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SUMMARY OF THE ARGUMENT

The issues that Appellant Joan Davis has raised on appeal are properly before this Court. Respondent contends, however, that the record does not support the issues raised. In fact, contrary to the State's assertion, specific trial objections, counsel's arguments, the face of the record, and plain error sufficiently support all issues raised by Ms. Davis on appeal. The record also evidences that the State was aware of all of the issues raised on appeal and should have addressed these issues in its brief in chief.

First, L. Bruce Larsen, Joan Davis's attorney at the forfeiture proceedings specifically objected to the use of statements taken in violation of Ms. Davis's Miranda Rights. Despite Mr. Larsen's timely objection, the trial judge nevertheless permitted officer McCarthy's testimony in which he overheard Ms. Davis make incriminating statements regarding the Dodge Van ownership. Second, trial counsel specifically questioned Officer McCarthy about the lack of a seizure warrant; Officer McCarthy conceded that no warrant was ever issued to

justify the Van's seizure. This line of questioning was objected to by the State. Mr. Larsen offered proof as required by Rule 103.<sup>1</sup> The State now claims it lacked sufficient notice of this issue even though an offer of proof was presented by trial counsel.<sup>2</sup> Even if the court finds Ms. Davis's offer of proof inadequate, the seizure, without first obtaining a warrant from an independant magistrate, still qualifies as plain error.

The record also demonstrates that it was plain error and a violation of the Utah and United States Constitutions for forfeiture to take place in this case. The nature of the transaction, the amount involved and the absence of any other transaction or acknowledgement of the State's alleged transaction should have indicated to the trial judge that it was error for the van to be forfeited. The plain error test is met because the trial judge should have identified that forfeiture of the van under these circumstances was grossly disproportionate to the

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<sup>1</sup> In his questions directed to Officer McCarthy, Mr. Larsen attempted to establish that Metro Narcotics Agents failed to follow appropriate procedures in executing the forfeiture process (R. 53). Mr. Skordas objected on the basis of relevancy (R. 53). The trial judge rejected a generalized inquiry into Metro Narcotics procedures, but allowed trial counsel to ask questions pertaining to inappropriate seizure in the present case (R. 54). As part of the inappropriate procedure line of questions, Mr. Larsen asked Officer McCarthy if a warrant had been issued for the seizure of Ms. Davis's Van. Officer McCarthy knew of no warrant, he simply confiscated the Van on his belief that it was "common procedure".

<sup>2</sup> Mr. Larsen's line of questioning and offer of proof was based on inappropriate procedures followed by Metro Narcotic's agents when executing the forfeiture process. One question asked was whether it was proper procedure to take Ms. Davis's vehicle without a search warrant.

crime itself and a violation of the eighth amendment of the United States Constitution and Article I Section 9, of the Utah Constitution.

Finally, the trial record indicates that the penalty is simply inconsistent with the plain intent of Utah's forfeiture statute, Utah Code Ann. § 58-37-13. The facts of the instant case must be considered in the context of the intent of the statute. Should this Court determine that the facts and plain intent of the statute are to be considered separately, the record demonstrates that it was plain error for the trial judge to order forfeiture in the proceeding below.

#### ARGUMENT

I. THE ISSUES THAT APPELLANT RAISES IN HER BRIEF IN CHIEF ARE PROPERLY RAISED ON APPEAL.  
(In reply to Respondent's Point I.)

The State of Utah argues that the issues raised by the Ms. Davis are improper because they were not appropriately raised with the trial court. (Resp. at 4). Specifically, the State argues that Appellant's issues I (forfeiture is unconstitutional because it is grossly disproportionate to crime), II (forfeiture of Ms. Davis's Van violates plain intent of section 58-37-13), IV (evidence in violation of Miranda is inadmissible in civil proceeding), and V (warrantless seizure invalidates proceedings below), supra, are improper for appeal. The State of Utah states that the sole issue was determined by Judge Frederick. Judge

Frederick framed the issue as "whether claimants Gerald Davis or his wife Joan Davis was the owner of the vehicle in question and whether or not the claimant Rosalee Hansen possessed a bona fide security interest precluding forfeiture at least to the extent of her, Rosalee Hansen's claimed interests." (Resp. Brief at 4-5 citing R.38 p.4).

The State's sweeping argument suggests that an appellate court must ignore objections or sub-issues raised during a judicial proceeding but not directly related to the primary issue in a case. There is no law to support such a proposition. Ms. Davis's issues are supported in the record by direct objections, or alternatively, as plain error.

**A. THE ISSUE OF WHETHER A STATEMENT MADE WHILE IN CRIMINAL CUSTODY, BEFORE A MIRANDA WARNING IS GIVEN, IS ADMISSIBLE IN A CIVIL PROCEEDING WAS PROPERLY RAISED IN THE TRIAL COURT.**

(In reply to Respondent's Point I and in support of Appellant's Point IV)

The State, in its Brief, states that Ms. Davis did not properly object to all the issues raised on appeal. It therefore contends that the appellate court cannot address these issues. On the issue of whether testimony given in a civil proceeding may be relied on in a forfeiture proceeding, the State's brief has not addressed this issue beyond saying that the issue was not raised with the trial court.

The State's argument on this point is inconsistent with

the trial record. Indeed, Mr. Larsen specifically objected to the admission of Ms. Davis's statement taken while she was in police custody. During the trial, when Officer McCarthy was asked about his conversation with Ms. Davis regarding ownership of the van, the following discussion took place:

Q: [By Mr. Skordas to Officer McCarthy] What did she say to you and what did you say to her?

MR. LARSEN: I'm going to object, your Honor, and the basis for the objection is that I believe at this point in time she's [Joan Davis] in custody and being asked questions. I don't think they're admissible in court based on the Miranda decision.

THE COURT: Well, this is a civil procedure, is it not, Counsel?

MR. LARSEN: It is.

THE COURT: I'm not following your objection.

MR. LARSEN: Submit it.

(R.II 49-50).

Trial counsel timely objected in a clear and definite manner to the use of testimony based on statements made in custody, without a Miranda warning. Officer McCarthy's statements were allowed into the forfeiture proceedings unlawfully as pointed out in Point IV of appellant's brief.<sup>3</sup> The trial judge thereafter relied on Officer McCarthy's statements in finding that the testimony of Ms. Davis lacked credibility.

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<sup>3</sup> In United States v. U.S. Coin and Currency, 401 U.S. 715 (1971), cited in Point IV of Ms. Davis's brief, the United States Supreme court held that the Fifth Amendment privilege against self-incrimination applied with equal force in civil forfeiture proceedings. Id. at 718.

Indeed, the use of this incriminating statement materially affected the trial's outcome in two ways. First, the trial court found that Ms. Davis's custodial admission supported the state's theory of ownership. Second, the trial court found that Ms. Davis's custodial admission was inconsistent with her testimony at the forfeiture hearing and materially affected her credibility.<sup>4</sup> The State has failed to address the merits of whether Officer McCarthy's testimony was properly allowed into the proceedings.

**B. THE RECORD SUPPORTS THAT THE WARRANTLESS SEIZURE OF THE 1987 DODGE CARAVAN SHOULD INVALIDATE THE PROCEEDINGS BELOW** (In response to the State's Point I and in further support of Ms. Davis's Point V).

1. The trial record demonstrates that the van was taken without a valid seizure warrant; that the issue is not new on appeal.

The State's noncompliance with Utah's forfeiture statute is clear and definite from a reading of the record in relation to the statute. During the trial proceedings the following colloquy took place:

Q [By Mr. Larsen, Joan Davis' attorney at the lower court to Officer William McCarthy]: You've been in Metro Narcotics. Isn't it a fact that many of the officers that are involved in that are always talking about -- bragging about picking up these vehicles and getting

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<sup>4</sup> Judge Frederick, in ruling that Ms. Davis's testimony was not credible and therefore did not support a security interest in either Mr. Davis or Rosalie Hanson, relied on Ms. Davis's statements made to Officers McCarthy and Lewellyn while she was in custody. See Reporter's Transcript of Judge Frederick's Ruling, at 3 (April 12, 1988).

them forfeited?

MR. SKORDAS: Objection, your Honor. That's not relevant.

MR. LARSEN: I think it is relevant, your Honor. I think the posture that the case is finding itself in is that there's a reason for the officer wanting to get that vehicle. The reason is because he wanted to go through the forfeiture process and this is some of the things that go on with the people in the Metro Narcotics, how they are always talking about and bragging about picking up certain vehicles and obtaining certain vehicles.

I think it goes to the intent and credibility on that aspect.

THE COURT: Well, Mr. Larsen, what these members of the Metro Strike Force do on a general basis, what they talk about on a general basis, I am inclined to think, is not relevant.

If, on the contrary, you're able to establish that there is something less than a straightforward, appropriate attitude in the seizure of this particular vehicle, that is definitely an area of inquiry which I'll allow.  
(emphasis added)

. . . .

Q: Did you have a warrant to seize the vehicle?

A: I don't know if he did or not.

Q: In fact, there was no warrant.  
Do you know of anything, even today are you aware of any warrant that there was to seize that vehicle?

MR. SKORDAS: Objection, it's been asked and answered.

THE COURT: Well, the witness has testified, as I recall, that he didn't know if there was a warrant or not for the seizure or an order for seizure.

You've stated, Counsel, that there was no warrant.

Q (By Mr. Larsen to Officer McCarthy): In reviewing this matter with Mr. Olson today, did that give you any other information about whether or not there was a warrant for the seizure of the vehicle?

A: I don't have any knowledge of one.

Q: Do you have any idea of the grounds why they took the vehicle?

A: Only that it's common procedure. That's the way I've done it. (emphasis added)

(R.II 53-55).

Further, the preliminary hearing transcript of Officer Olson (entered as an exhibit during the proceedings below) reads:

Q (By Mr. Larsen): Do you recall any other time you were in her [Ms. Davis] van?

A: Only when it was seized to search it.

Q: And this was on what day?

A: I think it was the 19th. The 19th of Jan. 1988.

Q: Did you have a search warrant for the van at that time?

A: No.

(Preliminary hearing transcript of State v. Joan Davis, Officer Olson's testimony at 14).

After Mr. Skordas's objection to Mr. Larsen's line of questioning, Mr. Larsen continued. Judge Frederick allowed the offer of testimony provided that there must be "something less than a straightforward, appropriate attitude in the seizure of this particular vehicle." (R.II 54). Indeed, Mr. Larsen's continued questioning, revealed that the Van was confiscated by Metro Narcotics without first complying with the warrant requirement expressed in the forfeiture statute. The issue is



not being raised for the first time on appeal. Mr. Larsen questioned both Officers Olson and McCarthy in an effort to establish whether the officer's procedures complied with statutory requirements.

Utah Code Ann. § 58-37-13 reads in pertinent part:

(2) Property subject to forfeiture under this act may be seized by any peace officer of this state upon process issued by any court having jurisdiction over the property. (emphasis added) However, seizure without process may be made when:

(a) the seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant;

(b) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this act;

(c) the peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) the peace officer has probable cause to believe that the property has been used or intended to be used in violation of this act. . . .

(Emphasis added).

The evidence presented at the forfeiture proceeding established that no warrant was issued for forfeiture of the 1987 Dodge Van (R.II. 54; Preliminary Hearing Transcript of Joan Davis, Officer Olson's testimony at 14). Seizure of a vehicle can only be "upon process issued by any court having jurisdiction over the property." Utah Code Ann. § 58-37-13 (1988 crim. supp.)

(emphasis added).<sup>5</sup>

Officer William McCarthy was not aware of any warrant to seize the vehicle and that it was not seized upon process issued. (R.II. 54). The grounds for taking the vehicle were stated by Officer McCarthy as "common procedure". (R.II. 55). This State action violated Joan Davis's fourth amendment rights, her Article I and 14 Utah Constitutional rights and Utah Code Ann. § 58-37-13.<sup>6</sup>

Judge Frederick heard testimony of the officers' failure to produce a seizure warrant and their failure to seize the Van in accordance with process issued in compliance with applicable Utah law. Nevertheless, the judge did not consider this evidence; he instead framed the issue as whether Mr. Davis or Ms. Hansen maintained a security interest in the Van. See Transcript of Judge Frederick's Ruling (April 12, 1988).

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<sup>5</sup> The state contends that the improper procedure issue was neither raised by the pleadings nor addressed by the trial court, but is instead raised for the first time on appeal. Lane v. Messer, 731 p.2d 488, 491 (Utah 1986). Mr. Larsen raised the issue of inappropriate procedure through cross-examination of Officers McCarthy and Olson. Trial counsel did not, however, specifically raise the Fourth Amendment warrant issue in any pre-trial or post-trial motion as would be appropriate in a criminal proceeding pursuant to Utah R. Crim. P. 12(g), 23 (Arrest of judgment), or 24 (New trial).

<sup>6</sup> Both the United States Supreme Court and the Utah Supreme Court recognize a requirement that police officers first demonstrate to a magistrate the existence of probable cause to support issuance of a search and seizure warrant. See Illinois v. Gates, 462 U.S. 213, 287, n. 10 (1983), State v. Hygh, 711 P.2d 264, 267 (Utah 1985), State v. Hansen, 732 P.2d 127, 129 (Utah 1987). A reviewing court should pay great deference to a magistrate's determination of probable cause. State v. Miller, 740 P.2d 1363, 1364 (Utah App. 1987).

**2. Even if the Court Finds Trial Counsel Did Not Correctly Raise the Warrant Issue During the Forfeiture Proceedings, the Doctrine of Plain Error Supports Reversal on this Point.**

The Utah Supreme Court's recent decisions in State v. Eldredge, 101 Utah Adv. Rep. 15 (Utah 1989) and State v. Verde, 101 Utah Adv. Rep. 37 (1989) set out plain error standards. Plain error consists of errors that this Court deems harmful and, although not properly preserved below, their erroneous character is obvious. Verde, 101 Utah Adv. Rep. at 39.

In Eldredge this court stated:

the premise of rule 103(a) is assured because of the severe sanction that follows noncompliance: a refusal by the appellate court to consider the issue. However, the premise of rule 103(d) is that the ends of justice must not be lost sight of in the pursuit of procedural regularity and that when an error is plain, a trial court can legitimately be said to have had a reasonable opportunity to address and correct it, even in the absence of an objection.

Eldredge, 101 Utah Adv. Rep. at 18. Justice Stewart's dissent explained:

All that our cases have required by way of standards for invoking the doctrine is the rather general requirement that the error must be palpable and 'made to appear on the face of the record and to the manifest prejudice of the accused. . . .'

Id. at 24 (citing State v. Cobo, 90 Utah 898, 102, 60 P.2d 952, 958 (1936)). The opinion in Verde further explained:

First, the error must be 'plain' or 'manifest.' This is sometimes termed an

'obviousness' requirement. After examining the record, an appellate court must be able to say 'that it should have been obvious to a trial court that it was committing error.' Second, the error must be of sufficient magnitude that it affects the substantial rights of a party. In other words, applying the standard we explained in State v. Knight, 734 P.2d at 919, the appellant must show a reasonable likelihood that absent the error, the outcome below would have been more favorable.

Verde, 101 Utah Adv. Rep. at 40 (citations omitted).

In the instant case, it should have been obvious to the trial court that the police committed error by not obtaining a warrant from a neutral magistrate before seizing Ms. Davis's van. The trial judge was aware that the seizure was done three months after the one alleged transaction involving the van. Furthermore, the trial judge was aware that the seizure was done without any warrant and without process. He heard testimony from two police officers that no warrant was issued before the Van was seized. He also had the opportunity to correct such error by addressing this issue in his Findings of Fact. In this case, the error of allowing forfeiture is plain, manifest, and appears clearly on the record. The first requirement of the plain error test is satisfied.

The second prong of the plain error test - whether there is a reasonable likelihood that, absent the error, the outcome would have been more favorable is also met. Indeed, the purpose of the warrant requirement is to have an independent magistrate objectively review the facts and determine whether

probably cause justifies seizure. See Supra Note 6. Police officers lack justification to seize property without a warrant. Merely because it is the "customary" practice, as described by Officer McCarthy, of police officers to seize a vehicle in a forfeiture proceeding without subscribing to the requirements of the statute does not constitutionally justify such behavior.

The failure of the court to address the Miranda issue also materially affected the outcome of the forfeiture proceedings in two crucial aspects. First, the trial judge found that Ms. Davis's custodial admission supported his finding of ownership.<sup>7</sup> Second, the judge found that the statement negatively affected Ms. Davis's credibility.<sup>8</sup> Absent this error, the trial outcome would have been more favorable to Ms. Davis. The trial judge was incorrect in allowing admission of this

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<sup>7</sup> Judge Frederick specifically stated that Ms. Davis's statement made while in the custody of Officers McCarthy and Lewellyn supported the State's theory of ownership. See Reporter's transcript of Judge Frederick's ruling, at 4.

<sup>8</sup> The credibility issue was material to Ms. Davis's case. Mr. Larsen established on cross-examination that the credibility of Officer Olson was also in question. There were several inconsistencies between Officer Olson's testimony at trial and his prior statements and reports. Judge Frederick resolved the credibility issue in favor of officer Olson and against Ms. Davis. Judge Frederick stated as follows: "This court views the testimony of Officer Steve Olsen as more credible than the testimony of Ms. Joan Davis . . ." Reporter's Transcript of Judge Frederick's Ruling, p. 3. The judge further stated: "The testimony of the petitioners in this case, in the Court's judgment, was not credible in certain critical particulars." Id. at 4. One of the critical areas affecting credibility was where "Joan Davis told the seizing officers, McCarthy and Lewellyn, [before being read Miranda Rights] that the vehicle was hers and that it was paid for. Yet she testified in court at trial that the vehicle belonged to her husband and that there were sums owed on the vehicle." Id. at 4.

statement. See U.S. Coin and Currency, 401 U.S. 715.

**C. THE RECORD SUPPORTS THAT THE RESULT IN THIS CASE IS UNCONSTITUTIONAL.** (In reply to Respondent's Point I and in support of Appellant's Point I).

Applying the plain error standard, above, it is clear that the Constitutions of the United States and Utah have been violated.

In addition to the Constitutional error of searching and seizing Ms. Davis' van without a warrant, the trial judge acted erroneously by allowing a sentence grossly disproportionate to the crime committed.

The nature of the error was manifest or obvious. The facts of the case, see Point I in Appellant's Brief in Chief, support that this was not a case that the Utah forfeiture statute was intended to include. In addition to the nature of the transaction, the amount involved and the fact that there was never any other transaction or acknowledgement of the State's alleged transaction should have indicated to the trial judge that it was error for the van to be forfeited. The first prong of the plain error test is met because the trial judge should have identified that forfeiture of the van under these circumstances was grossly disproportionate to the crime itself in violation of the eighth amendment of the United States Constitution and Article I Section 9, of the Utah Constitution.

Furthermore, Ms. Davis' Fourth and Fifth Amendment rights were violated. Recognition of such a violation would have provided a much more favorable outcome to Ms. Davis at the

forfeiture proceeding. The disproportionate nature of the punishment considering the circumstances of the crime does not justify forfeiture.

**D. FORFEITURE WAS INAPPROPRIATE UNDER THE FACTS OF THIS CASE AND VIOLATES THE PLAIN INTENT OF UTAH'S FORFEITURE STATUTE (In reply to Respondent's Points I and II and in support of Appellant's Point II)**

The State's Brief in Chief divides Appellant's Point II into two separate issues. Ms. Davis's issues presented for review reads: "Is the taking and subsequent sale of the 1987 Dodge Caravan supported by the facts of this case and the plain intent of Utah Code Ann. § 58-37-13?" (App. Brief in Chief at vii). The issue as presented in the State's Point I for dismissal reads: "Is the taking and subsequent sale of the 1987 Dodge Caravan supported by the plain intent of Utah Code Ann. § 58-37-13?" (Resp. at 4).

The State does not provide a reason why the facts should not be discussed in the context of the purpose and plain intent of the statute. Ms. Davis's trial counsel at the lower court made a complete record of the factual problems in the context of Utah's forfeiture statute. The facts, testimony, and objections made and cited to in Ms. Davis's Brief in Chief on this point do not go to the question of whether there was a security interest on the vehicle, but rather go to the very facts in the context of the plain intent of Utah's forfeiture statute.

The State addresses the question of forfeiture being

appropriate under the state's version of the facts only (Resp. Brief at 5-6) but does not address the factual issues in the context of Utah Code Ann. § 58-37-13 and the plain intent of that statute.

Ms. Davis would ask this Court to view the facts in the complete context of the proceedings below, according to whether the facts in this case justify forfeiture under the plain intent of Utah Code Ann. § 58-37-13. While Ms. Davis acknowledges that the facts as presented by her witnesses are not always identical with the State's primary witness, Officer Olson, she would emphasize to the Court that either view of the facts of this case do not support forfeiture pursuant to the purpose and plain intent of Utah Code Ann. § 58-37-13.

Ms. Davis has detailed the facts as presented by both the State and Appellant, and has provided this Court with current research and law regarding the purpose and intent of Utah's forfeiture statute in Point II of Appellant's Brief in Chief at 13-20. There is no fact to support that Joan Davis purchased, sold, distributed, or transported marijuana for purposes of the statute on forfeiture as this Court and the Utah legislature have defined those terms.

If this Court should sever the issue of whether forfeiture is supported by the facts of this case in the context of the plain intent of Utah's forfeiture statute, then Ms. Davis would ask this court to apply a plain error analysis.

Ms. Davis has been accused of committing a crime which



has resulted in a civil forfeiture proceeding against her and her family's property. The facts as detailed in her Brief in Chief support manifest error. Ms. Davis's Constitutional rights were violated; the facts in this case when viewed in the context of Utah's Forfeiture statute do not rise to the plain intent of the statute as identified and defined by this Court and the Utah legislature.

II.        **A SECURITY INTEREST FOR PURPOSES OF REGISTRATION WITH THE DEPARTMENT OF MOTOR VEHICLES AND A SECURITY INTEREST FOR PURPOSES OF FORFEITURE BY POLICE SEIZURE ARE NOT SYNONYMOUS. (In reply to Respondent's Points III, IV, and V VI and in support of Appellant's Point III.)**

The State's Points III, IV, V, and VI go to the issue of the existence of a security interest and what is required for a security interest under Utah law. In support of its interpretation Respondent has not cited a single Utah case.<sup>9</sup> The State's heading makes the argument that "Certificate of Title is Absolute Evidence of Ownership" (emphasis added). The State has given no authority for such a proposition.

The State uses the Oregon case of French v. Barrett, 733 P.2d 89 (Or. 1987) for the proposition that "in applying the Family Purposes doctrine, the certificate of title constitutes prima facie evidence of ownership." (Resp. Brief at 7). The

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<sup>9</sup> The State cites to French v. Barrett, 733 P.2d 89 (Or. 1987), and also cites to Kovacich v. Norgaard, 716 P.2d 633, 634 (Mont. 1986) another non-binding opinion.

family purpose doctrine provides that "[a]n owner who maintains an automobile for the pleasure or convenience of his family is liable if a member of the family negligently uses the car for pleasure or convenience with the knowledge and consent of the owner." French, 733 P.2d at 91. The family purpose doctrine is not at issue in the instant case.

French makes clear, however, that such prima facie evidence may be rebutted and overcome. See French, 733 P.2d at 92. Ms. Davis provided rebuttable evidence at trial. She would ask this Court to review the rebuttable evidence presented in Point III of Appellant's Brief in Chief. Furthermore, the Utah Code does not require a perfected security interest, but only a bona fide interest and permits anyone that claims an interest in the vehicle to petition the Court for a release of that interest.

When Ms. Davis submitted her initial brief, she was unaware of Utah Case Law on the issue of whether an unperfected security interest constitutes a bona fide security interest under Utah's forfeiture statute. On March 15, 1989, the Utah Court of Appeals decided State v. One 1979 Pontiac Trans Am, 771 P.2d 682 (Utah App. 1989). The issue presented in that case, as in the present case, was whether an unperfected security interest in a forfeited automobile could be recovered by the third persons holding the interest. In the Pontiac Trans Am case, the state seized defendant's Trans Am after arresting him for possession of cocaine with intent to distribute. The State subsequently initiated forfeiture proceedings.

In One 1979 Pontiac Trans Am, the Lauritos, defendant's grandparents, loaned defendant money to purchase the Trans Am. At the trial, the Lauritos produced an unperfected security document evidencing the loan. The trial court held that even though the Lauritos did not have a perfected security interest in the Trans Am, the grandparents still nevertheless believed they had a lien against the auto to secure their loan. Accordingly, the trial court ordered forfeiture subject to the Lauritos's \$3,883 interest. The Court of Appeals affirmed the trial court's decision. 771 P.2d at 686.

The Court of Appeals stated as follows:

There is nothing in the context of § 58-37-13 suggesting the Legislature intended "bona fide" to be interpreted other than according to its plain meaning, and we, therefore, reject the State's argument that the forfeiture statute should be interpreted as recognizing only perfected security interests as "bona fide". The Utah Legislature did not specify that a security interest must be perfected before it is protected under the criminal forfeiture statute, rather the Legislature merely stated it must be "bona fide." (emphasis added)

Id. 771 P.2d at 685


The Court of Appeals held that a security interest is "bona fide" under the forfeiture statute if a third party can establish an "actual, good faith interest in the property not derived by fraud or deceit." Id. In the instant case, Rosalee Hanson loaned Mr. & Mrs. Davis \$10,000 to purchase the Dodge Van. Ms. Hanson and Mr. Davis executed a written agreement in which Mr. Davis agreed to make monthly payments to Ms. Hansen. As in

the Pontiac Trans Am case, Ms. Hansen failed to properly perfect her security interest. She believed, however, as did the Lauritos, that the Davis's would repay the loan and that she had a valid lien against the Van to secure the loan. Furthermore, the State does not claim that either Mr. Davis or Rosalee Hansen knew of the alleged illegal use of the Van for transportation of drugs. Under the facts presented in the instant case, the Court should conclude that Ms. Hanson maintained a bona fide security interest within the meaning of section 58-37-13. See One Pontiac Trans Am, 771 P.2d at 685.

#### CONCLUSION

For any and all of the foregoing reasons and reasons stated in Appellant's Brief in Chief, Appellant respectfully requests that this Court reverse the opinion of the lower court allowing for forfeiture of the 1987 Dodge Van and remand the case to the district court for either dismissal with return of the van (or its approximate value) or a new hearing.

Respectfully submitted this 20 day of June, 1989.

  
L. Charles Spafford  
Attorney for Appellant

Certificate of Delivery

I, L. Charles Spafford, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, State Capitol, Salt Lake City, Utah 84114, and four copies to the County Attorney's Office, 2001 South State, #S 3400, Salt Lake City, Utah 84114, this 21 day of June 1989.

  
L. Charles Spafford

DELIVERED by \_\_\_\_\_ this \_\_\_\_\_  
day of June, 1989.

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