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☞ Details: Complaint.

(FORM UPDATED: 08/11/2010)

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2007-08
(session year)

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- Miscellaneous ... **Misc**

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14 July 2008

VIA FACSIMILE (608.935.0386)
AND U.S. MAIL

Clerk of Circuit Court
Iowa County Courthouse
222 North Iowa Street
Dodgeville, WI 53533

RE: State of Wisconsin v. Richard J. Limmex
Iowa County Case Nos. 07-FO-046, 07-FO-047, 07-FO-048, 07-FO-049, 07-FO-050, and 07-FO-051

Dear Clerk:

Enclosed please find Defendant's Brief in Further Support of Suppression and Dismissal for filing in the above matters.

Very truly yours,

Matthew D. Moeser

MDM:lah
060776
Clerk 071408
Enclosure
cc: District Attorney Larry E. Nelson (w/enc.)
Attorney General J.B. Van Hollen (w/enc)
Representative Daniel LeMahieu (w/enc.)
Senator Robert Jauch (w/enc.)
Mr. Richard J. Limmex (w/enc.)
Attorney Stephen L. Morgan (w/o enc.)

STATE OF WISCONSIN **CIRCUIT COURT** **IOWA COUNTY**
BRANCH 1

STATE OF WISCONSIN,

Plaintiff, Case No. 2007 FO 46, 47, 48, 49, 50, and 51

v.

RICHARD J. LIMMEX, Unclassified: 30703

Defendant.

DEFENDANT'S BRIEF IN FURTHER SUPPORT OF SUPPRESSION AND DISMISSAL

INTRODUCTION

"Seek and ye shall find" is a biblical phrase of positive exhortation to mankind.[1] The phrase, however, provides no assistance or direction to law enforcement officers who base a forfeiture prosecution on a warrantless, non-exigent, non-plain view, non-consent search. Seeking and finding evidence without a warrant or an exception to a warrant requirement is a clear violation of the Fourth Amendment of the U.S. Constitution and Article 1, Section 8 of the Wisconsin Constitution, and all fruits obtained by an improper search, such as a defendant's statements and subsequently obtained evidence, must be suppressed.

This case began with an anonymous telephone tip to the Department of Natural Resources ("DNR") on February 1, 2007, and was followed, two days after the tip, by two wardens and an Iowa County deputy sheriff deciding to forego the need for a search warrant

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[1] Matthew 7:7; Luke 11:9.

and followed further by the officers' mistaken assumption that they could simply drive onto property that was not identified in the tip and conduct a general search on this property.

That the wardens were on a path to have Richard J. Limmex ("Limmex") prosecuted and punished is clear. In November 2006, the wardens conducted long interviews of several hunters in hopes of finding some evidence that would cause a federal court to revoke Limmex's probation. In disturbing comments, the wardens told hunters that Limmex had gotten off too easy in the 2006 federal prosecution and they would get him on new violations. This effort failed when the U.S. Attorney declined to pursue revocation. But the desire to prosecute remained in the wardens' minds and eyes. A few weeks after the U.S. Attorney declined to pursue revocation, the wardens got the February 1, 2007 tip that Limmex had placed a bale of hay in a field east of the Limmex home to feed deer.

Unlike many cases coming before the Court, this case lacks any material dispute of the facts. The State tries to justify the search as conducted under the doctrine of exigent circumstances when, as argued below, that is not an available exception to the warrant requirement. Concerning the motive for prosecution, the State does not say the hunter witnesses are wrong. Instead, DNR Warden David Youngquist ("Youngquist") says only: "I may have made some comment like that, but I don't recall any specific instances." (T.19).

There is very little for this Court to seek or to find from the testimony. Youngquist carefully avoids an admission of wrongdoing but also does not deny making the statements. It is the attitude, the intent, the plan, the goal – all point to one clear conclusion: The DNR, by Youngquist and Warden Joe Frost ("Frost"), were out to get Dick Limmex and they

would seek and find evidence to support their goal without regard to constitutional prerequisites.

STATEMENT OF RELEVANT FACTS

There are three significant categories of facts in this case: (i) facts related to an illegal warrantless non-consensual search of Limmex's curtilage, (ii) facts related to the selective enforcement of Wis. Admin. Code § NR. 19.60 ("NR 19.60") to Limmex by the DNR, and (iii) facts that demonstrate the absurdity of applying NR. 19.60 to a farmer for having bales of hay and small quantities of corn on his farm.

FACTUAL BACKGROUND

I. Facts Regarding the Illegal Search.

- Youngquist and Frost, accompanied by Iowa County Deputy Sheriff Lin Gunderson ("Gunderson"), went to Limmex's farm on February 3, 2007, following an anonymous tip that Limmex was feeding deer. (T.4-5).
- The anonymous tip related solely to a bale of hay placed on the east side of Lower Wyoming Road, on the other side of the road from Limmex's house and farm buildings. (T.31-32).
- The anonymous tip was received via voicemail on or about February 1, 2007, but appeared to be information from earlier. (T.33-34).
- On or about February 1, 2007, Youngquist and Frost were also aware that other DNR staff were reporting a decrease in deer feeding on bait piles on adjacent land where the DNR was shooting deer. (T.35-36).

- Youngquist and the DNR were aware that there were large numbers of deer in the area in which Limmex's farm is located. (T.36).
- Younguist and Frost did not stop on their way to Limmex's house to make any examination of the reported hay bale to the east of the Limmex home, and only noted what appeared to be truck or skid steer tracks from the road to that bale. (T.6, 33).
- Before arriving at the Limmex home, Youngquist and Frost were driving north on Lower Wyoming Road and passed Limmex who was driving south on Lower Wyoming Road and away from his homestead. (T.5).
- Youngquist and Frost pulled into the driveway of Limmex's home and Limmex pulled in behind them. (T.5-6).
- Upon arrival, Younguist and Frost engaged in conversation with Limmex and also searched the area in and around Limmex's farm buildings. (T.6-7).
- The area searched in and around Limmex's farm buildings is contained within the yellow circle imposed on Hearing Exhibits 3 and 3A. (T.31; Exh. 1, 2, 3A).
- Neither the DNR nor the Iowa County Sheriff's Office obtained any warrant or court order allowing them to search the area in and around Limmex's farm buildings. (T.13).
- Any statements attributed to Limmex in connection with this matter occurred during and after the search. (Exh. 1).
- Any search or inspection of any other property owned or controlled by Limmex occurred after the search. (Exh. 1).

II. Facts Involving Selective Enforcement.

- As of the time Limmex received his citations in the instant matter, no farmer in the State of Wisconsin had received a citation or been prosecuted under NR 19.60 for leaving hay in a field. (T.19-20).
- At the hearing on June 18, 2008, the DNR claimed it had previously 45 citations under NR 19.60(1) for feeding alone in counties impacted by Chronic Wasting Disease. (T.19, 61).
- Previously, in response to an open records request, the DNR had disclosed records regarding 13 individuals who received citations between September 1, 2005 and October 15, 2007 for violations of NR 19.60(1). (*See* January 25, 2008, Affidavit of Matthew D. Moeser ("Moeser Aff.")).
- Of those 13 individuals who received citations, none related to a farmer leaving bales of hay in his fields or on his property or having small quantities of grain located in and around buildings on his property. (*See* Moeser Aff.).
- Subsequent to Limmex's open records request, Youngquist issued a citation to a farmer, identified as Gerald Hodgson ("Hodgson"), leaving hay in a field for deer.[2] (T.20).
- In Hodgson's case, Youngquist claimed that Hodgson admitted to seeing an injured or sick doe in his field and deposited two 45 pound bales of hay for that deer (and others) to feed on. (T.20).

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[2] Younguist identified the recipient of this citation as Gerald Hodgson. The Wisconsin Circuit Court Access website indicates that Hodgson received a citation from Younguist for violating NR 19.60(1) for a violation occurring on December 15, 2007. Hodgson was prosecuted under Iowa County Case Number 2008 FO 13 and did not contest the citation. This Court entered judgment on February 11, 2008, against Hodgson.

- Although Youngquist claimed that Limmex made an admission he was placing feed out for deer, that alleged statement is not contained on either a video recording or separate audio recording of Limmex's contact with Youngquist and Frost. (T.64-65).
- Younguist was aware that Limmex had been prosecuted in federal court for Limmex's involvement with an illegal hunting operation and of Limmex's sentence. (T.21-22, 23-25, 43-46).
- Youngquist conceded that both he and Frost may have said that Limmex got off "too light" in connection with that federal prosecution, including making that statement to Tom Arndt ("Arndt") who testified on June 18, 2008. (T.43-44, 49-51).
- Youngquist was instructed by Rick Badger, Limmex's federal probation officer, through U.S. Fish and Wildlife Service Special Agent Ed Spoon that Limmex could not allow hunting on land owned by Limmex. (T.21-28, 47-48).
- Based on a September 8, 2006, electronic mail message, Youngquist felt he was being asked to monitor Limmex for federal probation violations. (T.48).
- On November 4 2006, Younguist and Frost detained a group of four hunters from Florida for three-and-a-half to four hours after locating them hunting on Limmex's property. (Exh. 10).
- Clyde Keen ("Keen"), one of the Florida hunters, estimated that Youngquist and Frost needed about five to ten minutes to determine if all the hunters were appropriately licensed and had registered their deer. (Exh. 10, p.10-11).

- Youngquist and Frost spent the remainder of the three-and-a-half to four hours talking about Limmex. (Exh. 10, p.11-13).
- Either Youngquist or Frost stated that there had not been enough punishment of Limmex and they didn't think it was fair. (Exh. 10, p.12).
- Youngquist and Frost refused to believe that Keen and his group were hunting on the land for free and kept asking the same question over and over again. (Exh. 10, p.13).
- Keen stated, "They wasn't hearing what they wanted to hear." (Exh. 10, p.14).
- Also on November 4, 2006, Youngquist and Frost detained a group of hunters that included Arndt for approximately 45 minutes on Limmex's property. (T.98-99).
- Arndt expected a three to five minute conversation to inspect his hunting license. (T.98).
- Instead, Arndt was questioned "to a great severity" about whether he was paying to hunt or obtaining guiding services. (T.98).
- Arndt was asked about Limmex charging a fee for hunting or for guiding services four to five times. (T.98).
- Frost told Arndt that Limmex's conduct (resulting in his federal conviction) was totally unlawful, that Limmex should be in jail, and that Limmex did not get enough punishment for what occurred. (T.99).
- Youngquist submitted reports regarding his contacts with Keen and Arndt to Limmex's federal probation officer and was notified around Christmas 2006 that nothing gleaned from those reports constituted a probation violation. (T.25).

- Prior to Limmex's sentencing in July 2006, Nancy Hylbert ("Nancy") and Jasen Hylbert ("Jasen") submitted electronic mail messages to Judge Barbara B. Crabb asking that Judge Crabb impose a harsh sentence on Limmex. (T.119, 132; Exh. 7-8).
- Both Nancy and Jasen attributed several statements to Youngquist regarding Limmex's bad character and alleged penchant for violence and drunkenness. (Exh. 7-8).

III. Facts Involving Absurd Application of NR 19.60.

- There is no legal prohibition of a farmer leaving a bale of hay in his fields that is accessible to deer. (T.83-84, 88, 89, 92).
- Limmex raises hay to sell. (T.91-92).
- There is no law in the State of Wisconsin that regulates or restricts the manner in which a farmer stores hay. (T.63-64, 66, 67-69).
- It is not unusual for a farmer to leave a bale of hay in a field. (T.87, 93, 110-11).
- Deer will feed on hay despite precautions a farmer might take. (T.87, 92; Exh. 4).
- During winters, it is not uncommon for deer to search for food sources on farms, including entering buildings. (T.67-69; Exh. 4).

ARGUMENT

I. The Warrantless Non-Consensual Search of Limmex's Curtilage Was Illegal.

A. An Illegal Search Results in Suppression of Evidence.

The actions of Youngquist and Frost (and Gunderson) violated Limmex's rights under the United States Constitution and the Wisconsin Constitution to be free from unreasonable searches and seizures. When a search is conducted in violation of constitutional prohibitions

against unreasonable searches and seizures, the evidence must be suppressed. *See State v. Phillips*, 218 Wis. 2d 180, 204-05, 577 N.W.2d 794, 805 (1998). "The exclusionary rule applies to both tangible and intangible evidence and also excludes derivative evidence under certain circumstances, if such evidence is obtained 'by exploitation of that illegality.'" *State v. Knapp*, 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899 *citing Wong Sun v. United States*, 371 U.S. 471, 485-88 (1963); *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970). "Statements subsequently made based upon any unlawfully obtained evidence are also inadmissible unless they are sufficiently attenuated so as to be independently admissible." *State v. Wilson*, 229 Wis. 2d 256, 263, 600 N.W.2d 14 (Ct. App. 1999).

B. The Facts Do Not Justify the Search.

The undisputed facts leading up to the search is that the DNR had received an anonymous tip that there was a bale of hay across the road from Limmex's house and buildings. The information in the tip itself was several days old prior to even being called in to the DNR and the DNR did not act on the tip for two days after receiving it. The only other facts, as Youngquist testified, were that the DNR was feeding and baiting deer on a farm adjoining Limmex's, and that the number of deer in the area was high, although fewer deer were showing up at the DNR feeding areas to be shot. (T.35-36, 128-29).

Under no circumstances can an anonymous tip constitute probable cause to search an area entitled to Fourth Amendment protection. At best, and only in limited circumstances, an anonymous tip can supply reasonable suspicion to perform a temporary investigative stop. *See State v. Rutzinski*, 2001 WI 22, ¶¶ 18-25, 241 Wis. 2d 729, 623 N.W.2d 516.

Youngquist and Frost are not barred from conducting an investigation based on anonymous information, but they are also not relieved of their burden to conduct their investigation in a legal and constitutional manner. Even construing the stale tip in the light most favorable to the DNR, at most, the tip suggested that there was a single bale of hay in an open field unconnected to Limmex's house and buildings. Rather than search that field (or any other field), Youngquist and Frost proceeded full throttle past the Limmex truck to arrive at the Limmex house and buildings, thereby creating any alleged exigency. *See State v. Smith*, 131 Wis. 2d 220, 234, 388 N.W.2d 601 (1986)("police cannot themselves create the exigency.").

C. Discussion of Curtilage.

It is well-settled law that a person's curtilage is entitled to the same protections against search and seizure as the home. "The protection provided by the Fourth Amendment to a home also extends to the curtilage of a residence." *State v. Martwick*, 2000 WI 5, ¶ 26, 231 Wis. 2d 801, 604 N.W.2d 552 *citing Oliver v. U.S.*, 466 U.S. 170, 180 (1984). "The curtilage is actually 'considered part of [the] home itself for Fourth Amendment purposes.'" *Id.*

In the instant case, the crucial question is what area constitutes curtilage. In *U.S. v. Dunn*, 480 U.S. 294, 301 (1987), the Supreme Court identified four factors to consider in determining curtilage: (i) proximity of area to home, (ii) whether area is within an enclosure surrounding house, (iii) nature of uses to which area is put, and (iv) steps taken to prevent observation from passers by. These factors bear on the "centrally relevant consideration –

whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

In applying the *Dunn* factors, the Supreme Court of Wisconsin has held, in a rural setting, the area extending to outbuildings is within the curtilage. *See State v. O'Brien,* 223 Wis. 2d 303, 316, 604 N.W.2d 552 (1999). In *O'Brien,* the Court made this ruling in the context of determining whether a search warrant authorizing the search of the premises authorized the search of a vehicle 200 feet away from a farmhouse near an outbuilding. The Court said that area around the outbuildings was within the curtilage and was part of the farm complex. *See id.* at 303, 310. This holding was cited with approval in *Martwick,* at which time the Court also justified the *O'Brien* decision by noting that, at the time of *Dunn*, many state and federal courts hold that, in the context of a farm, the curtilage often extends to barns and outbuildings. *See Martwick,* 2000 WI 5, ¶ 35 *citing Dunn,* 480 U.S. at 307-09 (Brennan, J., joined by Marshall, J., dissenting).

The yellow circle imposed on Exhibit 3 and 3A is a clear application of this precedent to Limmex's property. It encompasses Limmex's house and his buildings and represents the area so intimately tied to the home that it is off limits to outsiders, trespassers and law enforcement officers acting without legal authority. Although the southern portion of Limmex's driveway leading up to his house is obviously held open to the public, the idea that having a driveway is a wholesale invitation to invade his privacy is nonsense.

D. Does the Doctrine of Exigent Circumstances Apply?

To avoid suppression, the State argues that Youngquist and Frost acted under the doctrine of exigent circumstances premised on the risk that the evidence would be destroyed.

Exigent circumstances cannot, however, be invoked in connection with preventing the destruction of evidence in a non-criminal case. In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), which involved a non-criminal charge of Operating a Motor Vehicle While Intoxicated as a First Offense, the Court held that "application of the exigent circumstance exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense such as the kind at issue in this case has been committed." *Id.* at 753. This was despite the Supreme Court of Wisconsin's holding justifying home entry based on the need to prevent the destruction of evidence. *See id.* at 748. No reported Wisconsin case has ever allowed exigent circumstances to be used as the basis for a warrantless entry into the home or curtilage context of a non-criminal violation which could not result in jail time. "*Welsh* essentially holds that the less significant the offense, the more significant the exigent circumstances must be in order to justify a warrantless home entry under the Fourth Amendment." *See State v. Hughes*, 2000 WI 24, ¶ 30, 233 Wis. 2d 280, 607 N.W.2d 621.

In *Hughes*, the Court did uphold a warrantless home entry under the doctrine of exigent circumstances because even first time possession of marijuana (the suspected offense) was punishable by up to six months in jail. *See id.* at ¶ 37. The Court notes that "particularly in the drug context, officers are called upon to make rapid decisions balancing the risk of intentional evidence destruction against the seriousness of what may be a variety of potentially chargeable offenses." *See id.* at ¶ 34. The Court noted that possession of marijuana, for even a small amount, "is treated significantly more seriously than the noncriminal, nonjailable first offense drunk driving violation involved in *Welsh*." *See id.* at

¶ 39. The Court did note that a warrantless entry is presumptively unlawful. *See Hughes*, 2000 WI 24, ¶ 17. Even after *Hughes*, Wisconsin courts have continued to bar warrantless entries premised on exigent circumstances in cases involving criminal charges, such as Obstructing an Officer, contrary to Wis. Stat. § 946.41(1), an offense that carries a penalty of 9 months in jail and a $10,000 fine. *See State v. Sanders,* 2007 WI App 174, 304 Wis. 2d 159, 737 N.W.2d 44.

E. Plain View Does Not Apply.

The superfluous issue of so-called "plain view" has entered this case. Plain view is a doctrine that allows for seizure, not for warrantless searches. For the plain view doctrine to apply, however, the object must be in plain view, the police officers seizing it must have a lawful right of access to the object and the incriminating character of the object must be immediately apparent. *See State v. Guy*, 172 Wis. 2d 86, 101, 492 N.W. 2d 311 (1992). In the context of curtilage, however, the doctrine of plain view only allows police to seize evidence in plain view in the areas of curtilage "impliedly open to use by the public." *See State v. Edgeberg*, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994). The question, therefore, when invoking the plain view doctrine is whether the officer had prior justification for his presence or, in other words, had a right to be where he was. *See id.* at 346.

Applied to the instant case, the portion of Limmex's driveway up to the access to his house might well be deemed impliedly open to the public. Therefore, had a warden observed something at his feet in that driveway which was immediately incriminating (such as controlled substances or a bloody knife) the warden could legitimately have seized it.

The plain view doctrine did not and could not have permitted Youngquist and Frost to wander around Limmex's property in and amongst his buildings looking at hay or corn.

F. This Court Must Suppress All Evidence Obtained During and Derived From the Illegal Search.

As indicated above, the State has introduced no evidence that Younquist and Frost had consent to enter onto Limmex's curtilage or that Youngquist and Frost acted pursuant to any warrant or legal authority that absolved them of obtaining a warrant. Therefore, any and all evidence obtained as a result of the illegal search of Limmex's property must be suppressed. This includes evidence obtained from observations occurring in what might otherwise be considered open fields because that evidence is itself tainted by the illegal search. "The exclusionary rule applies to both tangible and intangible evidence and also excludes derivative evidence under certain circumstances, if such evidence is obtained 'by exploitation of that illegality.'" *State v. Knapp,* 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899 *citing Wong Sun v. United States,* 371 U.S. 471, 485-88 (1963); *State v. Schneidewind,* 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970). "Statements subsequently made based upon any unlawfully obtained evidence are also inadmissible unless they are sufficiently attenuated so as to be independently admissible." *State v. Wilson,* 229 Wis. 2d 256, 263, 600 N.W.2d 14 (Ct. App. 1999).

II. Limmex is the Victim of Selective Enforcement.

The prosecution of the instant matters is a result of "persistent, selected and intentional discrimination in the enforcement" of the violations charged "in the absence of a valid exercise of prosecutorial discretion." *See State v. Johnson*, 74 Wis. 2d 169, 172, 246 N.W.2d 503 (1976). This is in violation of Limmex's rights under the Fourteenth

Amendment of the United States Constitution and Article 1, Section 1 of the Wisconsin Constitution. Specifically, this is in violation of Limmex's rights to equal protection under the law. *See State v. Kramer*, 2001 WI 132, ¶ 15, 248 Wis. 2d 1009, 637 N.W.2d 35. This prosecution is occurring as a result of "the government's discriminatory selection [of Limmex] for prosecution and is based on a desire to prevent the exercise of constitutional rights or **motivated by personal vindictiveness on the part [of the] responsible member of the administrative agency recommending prosecution.**" *See Sears v. State,* 94 Wis. 2d 128, 135, 287 N.W.2d 785 (1980) (**emphasis added**). Because Limmex, in his pre-hearing submissions, established a *prima facie* case to support his motion, the burden shifted to the State to put forth compelling evidence at an evidentiary hearing to meet its burden of demonstrating a reasonable basis exists to justify the prosecution. *See State v. Kramer*, 2001 WI 132, ¶ 25.

The prosecution of Limmex in the instant matters is without precedent. Unlike similarly situated farmers, Limmex is being prosecuted for having hay, baled or otherwise, and corn in a gravity box on his property. There is overwhelming evidence to suggest that this is the result of personal vindictiveness on the part of the DNR; through its wardens who filed these charges, which, pursuant to *Sears*, operates to bar this prosecution. Limmex therefore respectfully requests dismissal of all charges in the instant matters.

Prior to Limmex's federal sentencing, Nancy and Jasen Hylbert both sent electronic mail messages to Judge Crabb. Nancy and Jasen wrote their electronic mail messages to Judge Crabb independently. (T.123, 125). Nancy and Jasen told Judge Crabb that certain negative information about Limmex was given to them by Youngquist. (Exh. 7-8).

Both Nancy and Jasen first agreed their electronic mail messages were true. (Nancy: T.120; Jasen: T.132). After realizing their electronic mail messages made Youngquist look bad, however, Nancy and Jasen tried to retract with a series first of denials, then admissions and then a strained explanation. (Nancy: T.123-24, 126; Jasen: T.133, 140-52). The question is: Why is a DNR warden providing information about Limmex to the Hylberts? The answer says a great deal about Youngquist's strong dislike of Limmex. The demeanor and behavior of both Hylberts on the witness stand is clear evidence of their total antipathy toward Limmex, rendering incredible their recantation regarding their statements to Judge Crabb. Part of this antipathy is clearly the result of statements made to them by Youngquist. The Court should also consider Younguist's own testimony in which he indicated he did not recall telling the Hylberts whether Limmex had run people off of the road but did deny discussing with Jasen whether Limmex was involved in fighting or was known for his drunkenness.

After Limmex was placed on federal probation, it is undeniable that Youngquist, in concert with other law enforcement or corrections officials, determined that he would monitor Limmex in the hopes of obtaining evidence of that would result in the revocation of Limmex's federal probation and his return to federal court. This is the only apparent explanation for Younquist and Frost detaining Keen and Arndt collectively for between four and five hours in two separate contacts on November 4, 2007. As with the Hylberts, Youngquist does not deny that he or Frost made the statements recounted by Keen and Arndt about the wardens' unhappiness with Limmex's sentence or the warden's belief that Limmex should be in jail. Indeed, Youngquist tiptoes around the issue. When asked if, in general, he

had stated Limmex "got off too light," Youngquist stated, "I may have said that, but I don't recall." (T.43). When asked specifically about making that statement to Arndt, Youngquist stated, "Not that I remember, but I may have." (T.51).

In response to the question, "Is it part of the DNR training and manual of wardens to issue opinions about whether a person has been sentenced properly or not," Youngquist testified, "Well, I'm not saying that I did say that. I just don't recall." (T.51). This begs the question of why a DNR warden could not unequivocally deny that, while on duty, acting in an official capacity, and having contact with members of the public he knew or considered to be potential witnesses about Limmex's activities, he made several inflammatory statements regarding Limmex and the outcome of Limmex's case. Does Youngquist avoid unequivocally denying making statements attributed to him by Keen, Arndt, and the Hylberts because he made them and hopes his non-denial/non-admission stance will somehow prevent this Court from finding he did make those statements? Does Younquist further believe that the personal consequences of a half-truth admitting to the possibility he made such statements are less than the personal consequences of the whole truth admitting to actually making the statements?

The courts and the Constitution have drawn and must continue to draw a line that separates legitimate law enforcement activities from activities pursued out of misplaced personal animosity that impacts professional judgment. The statements to which Youngquist, for all practices, admits are not statements made to friends, to family members, or to co-workers under circumstances where we would expect a person (no matter what their occupation) to feel free to complain or comment on their work. They are statements made to

Limmex's neighbors and to persons accosted and detained by the DNR for the purpose of investigating Limmex. They are statements that cross the line of acceptable conduct and demonstrate a clear motivation emanating from the DNR's frustration with Limmex's federal sentencing to the instant arbitrary prosecution of Limmex.

Limmex was not engaging in any improper conduct connected with Keen or Arndt and the U.S. Attorney declined prosecution. Unsatisfied with this outcome, and shortly after learning there would be no federal prosecution arising out of information gathered in November 2006, Youngquist and Frost seized upon a stale anonymous tip regarding a singe bale of hay in an open field to trample on Limmex's constitutional rights. Despite the undisputed fact that bales of hay dot the fields of Iowa County, NR 19.60(1) had never been applied to a farmer for having a bale of hay in his field as of February 2007. There is no explanation for why a tip about a non-violation should or would provoke any response other than the explanation advanced by Limmex and supported by the evidence: Youngquist and Frost were determined to get Limmex to make up for what they, for whatever reason, believed to be an insufficient federal sentence. The only remedy for this violation of Limmex's rights is dismissal of all charges.

III. NR 19.60 Should Not be Applied to Limmex.

Although Wis. Admin Code Chapter NR 19 does not define "normal agricultural or gardening practices," the Wisconsin Legislature has provided a definition of "agricultural practice" which clearly exempts Limmex from prosecution in the instant matters. Wisconsin Right to Farm Law defines "agricultural practice" as, "Any activity associated with an

agricultural use." Wis. Stat. § 823.08(2)(a). "'Agricultural use' has the meaning given in [Wis. Stat. §] 91.01(1)." Wis. Stat. § 823.08(2)(b). That definition provides:

> "Agricultural use" means beekeeping; commercial feedlots; dairying; egg production; floriculture; fish or fur farming; forest and game management; grazing; livestock raising; orchards; plant greenhouses and nurseries; poultry raising; **raising of grain, grass, mint and seed crops**; raising of fruits, nuts and berries; sod farming; placing land in federal programs in return for payments in kind; owning land, at least 35 acres of which is enrolled in the conservation reserve program under 16 USC 3831 to 3836; participating in the milk production termination program under 7 USC 1446 (d); and vegetable raising.

Wis. Stat. § 91.01(1) (**emphasis added**).

Within the State of Wisconsin, there is no law regulating the manner in which farmers store hay. There is no law requiring hay to be stored in a manner inaccessible to deer or that single solitary bales of hay be removed from fields. Nor does NR 19.60 itself distinguish between farmers who have livestock and farmers who do not and only sell hay, or farmers who are lazy and farmers who are industrious. If the plain language of NR 19.60(3)(a)3 does not apply to protect all of these farmers, in other words if leaving bales of hay in fields is not a "normal agricultural ... practice" no matter who the farmer is, then all farmers are subject to citations for engaging in what is undisputed to be common occurrence: hay and other feed left in fields and by buildings that is eaten by hungry deer.

The State has previously alleged that NR 19.60 is a penal statute meaning that "the rule of lenity" should be applied to interpret the statute in the light most favorable to defendants. (*See* State's Brief Opposing Defendant's Motion to Dismiss on Statutory and Constitutional Grounds, p. 9). "This venerable rule .... vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are

uncertain, or subjected to punishment that is not clearly prescribed." *U.S. v. Santos,* 128 S. Ct. 2020, 2025 (2008). No one disputes that, through it rule-making power, the State of Wisconsin could have chosen to adopt by statute or regulation a provision of NR 19.60 that would grant to the DNR (or other unit of government) the authority to issue citations to farmers who had bales of hay or seed crops on their farms and the authority to issue citations if those farmers did not remove those bales or crops, but the State has not done so. Instead, the State has chosen to exempt from regulation any hay or corn that occurs as a result of normal agricultural practices. Therefore, applying "the rule of lenity," this Court should dismiss the instant charges against Limmex.

IV. Application of NR 19.60 to Limmex is Unconstitutional.

It is clear that the State, specifically Youngquist and Frost, has singled Limmex out as an individual for intentional discrimination by attempting to enforce an administrative regulation that has been filed in this Court as a result of the personal animus of Youngquist and Frost. "Under the Equal Protection Clause of the Fourteenth Amendment, a state may not deny 'any person within its jurisdiction the equal protection of the laws.' States, therefore, must treat all similarly situated persons alike." *Penterman v. Wisconsin Elec. Power Co.,* 211 Wis. 2d, 458, 483, 556 N.W.2d 521 (1997) *citing City of Cleburne, Texas, v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). The State, by ratifying Younguist's and Frost's acts and motivations in this prosecution, is clearly violating Limmex's right to the equal protection of law because he is not merely the subject of a solitary prosecution as a result of "governmental incompetence" in the form of a mistaken prosecution. *See Albright v. Oliver,* 975 F.3d 343, 348 (7th Cir. 1992). Instead, Limmex is the victim of vindictive DNR

wardens, in concert with federal law enforcement officials, that have targeted Limmex for prosecution out of a misguided sense that it is for them, rather than a federal court, to determine what sentence Limmex should have received in 2006.

This prosecution also violates Limmex's rights to substantive due process. "Substantive due process protects citizens against arbitrary or wrongful state actions regardless of the fairness of the procedures used to implement them." *State v. Jadowski,* 2004 WI 68, ¶ 42, 272 Wis. 2d 418, 680 N.W.2d 810. A claim that a person's substantive due process rights have been violated arises when a person shows a deprivation of a liberty or property interest protected by the U.S. Constitution or the Wisconsin Constitution. "It is well settled that the rights of ownership and use of property have long been recognized [in the State of Wisconsin]. *Penterman,* 211 Wis. 2d at 480-81. The State is arbitrarily and wrongfully attempting to enforce an administrative code regulation against Limmex despite a clear exemption for hay and corn, among other materials, present on his land as a result of "normal agricultural or gardening practices."[3]

Finally, NR 19.60 is unconstitutionally vague and overbroad as applied in this case. "The two-prong test for vagueness assesses whether: (1) the ordinance is sufficiently

[3] Although Youngquist testified that he has not cited farmers who left solitary bales of hay out (besides Limmex and Hodgson) based on their intent, (T.78), NR 19.60 as written does not contain a *mens rea* element. If the State is suggesting that a law enforcement officer's subjective opinion of intent is all that is necessary to validate these prosecutions, the State must concede that Limmex has a right to have a jury determine whether he acted with intent to violate the law. In criminal law, the existence of a mental-state element to crimes is the rule and not the exception. *See Staples v. U.S.,* 511 U.S. 600, 605 (1994). This is an important component of substantive due process which "protects citizens against arbitrary state actions, regardless of the fairness of the procedures used to implement them." *Jadowski,* ¶ 42. In line with the limitations of these principles, courts have upheld legislative enactments of strict liability crimes, "that is, crimes defined without any culpable state of mind," in situations in which a person has been deemed to have "sufficient notice concerning the risk of a penal sanction that it is not unjust to impose criminal liability without the necessity of proving moral culpability." *See id.* ¶ 44. All that apparently stands between Limmex and arbitrary state action is his right to have someone other than a law enforcement officer determine his mental state.

definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited; and (2) the ordinance provides standards for those who enforce the laws and adjudicate guilt." *Fond Du Lac County v. Mentzel*, 195 Wis. 2d 313, 320, 536 N.W.2d 160 (Ct. App. 1995) *citing State v. McManus,* 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989). If this Court rejects Limmex's claim that NR 19.60 cannot apply to his conduct as alleged by the State, this Court must then strike down that code section as unconstitutionally vague. Nothing in NR 19.60 provides any notice to a farmer or landowner that the presence of bales of hay or of corn located in a gravity box would in any way, shape, or form, violate that sections provisions. Indeed, the section itself appears to explicitly prohibit prosecutions thereunder for hay and corn, among other materials, that are present on land as a result of "normal agricultural or gardening practices."

"The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect." *Bachowski v. Salamone,* 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987) *(citations omitted).* If farmers are now subject to prosecutions for having bales of hay and corn in gravity boxes on their farms, it cannot but have a chilling effect on the constitutionally protected right to own and use property for agricultural purposes.

CONCLUSION

This case is not about whether the legislature can enact laws regulating the feeding of wildlife or laws that impact farming practices. This case is not about whether the DNR can enforce duly enacted laws in a fair and just manner. Instead, this is a case about whether Dick Limmex can be singled out and have his rights trampled by being subject to selective

enforcement of an administrative code provision clearly not intended to apply to farmers. Further, it is about whether Dick Limmex is entitled to the same Fourth Amendment protections as any other citizen. For the reasons stated above and upon the record in this matter, Dick Limmex respectfully requests the following relief:

- Suppression of any and all evidence, tangible and intangible, including any statements of Limmex, obtained in this matter as well as any and all evidence, physical or otherwise, derived therefrom, which was obtained as a result of an illegal search of Limmex's property;
- Dismissal of the instant matters with prejudice as result of that suppression of evidence;
- Dismissal of the instant matters on the grounds that they are the result of selective prosecution or enforcement of the offenses charged therein;
- Dismissal of the instant matters on the grounds that the prosecution of Limmex is barred by the express language of Wis. Admin. Code § NR 19.60 which excludes prosecutions based on, "Feed . . . found solely as a result of normal agricultural or gardening practices." *See* Wis. Admin. Code NR 19.60(3)(a)3; and finally, or alternatively,
- Dismissal of the instant matters because the prosecution of Limmex under Wis. Admin. Code § NR 19.60 is in violation of his rights to (i) the due process of law and (ii) equal protection under both the Fourteenth Amendment and Article I, Section 1, and Article I, Section 8 of the Wisconsin Constitution by penalizing Limmex for engaging in lawful agricultural uses of his land.

Respectfully submitted this 14th day of July, 2008.

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18 August 2008

VIA FACSIMILE (608.935.0386)
AND U.S. MAIL

Clerk of Circuit Court
Iowa County Courthouse
222 North Iowa Street
Dodgeville, WI 53533

RE: State of Wisconsin v. Richard J. Limmex
Iowa County Case Nos. 07-FO-046, 07-FO-047, 07-FO-048, 07-FO-049, 07-FO-050, and 07-FO-051

Dear Clerk:

Enclosed please find Defendant's Reply Brief in Further Support of Suppression and Dismissal for filing in the above matters.

In its Response Brief, the State cites on pages 2 and 11 to reports prepared by Warden David Youngquist. I believe that these reports represent inadmissible hearsay and object to their use. I respectfully request that the Court disregard any factual citations to those reports.

Thank you.

Very truly yours,

Matthew D. Moeser

MDM:lah
060776/Clerk 081808
Enclosure
cc: District Attorney Larry E. Nelson (w/enc.)
Attorney General J.B. Van Hollen (w/enc)
Representative Daniel LeMahieu (w/enc.)
Senator Robert Jauch (w/enc.)
Mr. Richard J. Limmex (w/enc.)
Attorney Stephen L. Morgan (w/o enc.)

STATE OF WISCONSIN **CIRCUIT COURT** **IOWA COUNTY**
BRANCH 1

STATE OF WISCONSIN,

Plaintiff, Case No. 2007 FO 46, 47, 48, 49, 50, and 51

v.

RICHARD J. LIMMEX, Unclassified: 30703

Defendant.

DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF SUPPRESSION AND DISMISSAL

ARGUMENT

I. The State Has Not Met its Burden to Justify the Warrantless Nonconsensual Search of Limmex's Property.

The State's argument in support of the Wisconsin Department of Natural Resources' ("DNR") warrantless search of Limmex's curtilage is best summed up by the State's argument that "there is no reported Wisconsin case where evidence was suppressed because officers entered only the curtilage, not the home, based on probable cause..." (*See* Plaintiff's Response Brief to Defendant's Brief in Further Support of Suppression and Dismissal ("Plaintiff's Response Brief"), p. 6). With this statement, like the rest of its arguments, the State attempts to blur and rewrite well-established law on the protection to which a citizen is entitled in his home and in the area intrinsically linked to his home known as the curtilage through a three-pronged and erroneous argument: (i) the anonymous tip received several days prior to the warrantless search can be used to establish probable cause, (ii) the existence

of a driveway within Limmex's curtilage somehow renders all the remaining curtilage open to searches by law enforcement officers, and (iii) exigent circumstances created solely by the DNR justified any warrantless search.

A. A Person's Home and Curtilage are One and the Same.

As a threshold matter, the State ignores well-established Wisconsin and Federal jurisprudence that, for purposes of search and seizure law, recognizes no difference between the protections granted to the home and the protections granted to the curtilage. "The protection provided by the Fourth Amendment to a home also extends to the curtilage of a residence." *State v. Martwick*, 2000 WI 5, ¶ 26, 231 Wis. 2d 801, 604 N.W.2d 552 *citing Oliver v. U.S.*, 466 U.S. 170, 180 (1984). **"The curtilage is actually 'considered part of [the] home itself for Fourth Amendment purposes.'"** *Id.* (**emphasis added**). It is well-established that a search without a warrant within a home, and under *Oliver* within the curtilage, is presumptively unreasonable. *See Brigham City, Utah v. Stuart,* 547 U.S. 398, 403 (2006). The State, therefore, bears the burden of overcoming the presumption of unreasonableness. *See Welsh v. Wisconsin,* 466 U.S. 740, 750 (1984).

B. An Anonymous Tip About a Hay Bale In an Open Field on One Side of a Road Does Not Create Even a Hint about Any Illegality in a Home/Curtilage On the Other Side of the Road.

The State's initial theory to justify its presumptively unreasonable search is its contention that it could search for other evidence of feeding because the tip said there was a "large round bale of hay out in the middle of a field on property owned by Mr. Limmex" (T. 5). The bale described in the tip was located on the other side of the town road from Limmex's house and buildings. (T. 31-32). There is absolutely nothing in the record

suggesting the DNR possessed any information, anonymous or not, that any person had observed feed materials present in violation of Wis. Admin. Code § NR 19.60 ("NR 19.60") by Limmex's house or buildings or on any other property owned by Limmex. The State seeks to combine this irrelevant information with allegations that there were a high number of deer in the area of Limmex's farm, but concedes that for one-to two-years there had been a high number of deer in that area and, due to those numbers, the DNR had been shooting deer from property adjacent to Limmex's farm. (T. 5, 35-36, 128-29).

C. It Stands to Reason That the State Must Have Probable Cause of the Location of Evidence Before, and Not After, the Search.

In the context of a search warrant, it is incumbent on the government to provide sufficient evidence to support a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238 (1983). In this case, there is no evidence – even in the form on an anonymous tip – that Limmex had placed feed in violation of NR 19.60 in the area of his home and buildings **but for** evidence obtained from, and after, an illegal search. It is unclear why the State cites *State v. Patton,* 2006 WI App 235, ¶ 10, 297 Wis. 2d 415, 724 N.W.2d 347, for the premise that law enforcement must corroborate anonymous tips through independent investigation. Unlike in many anonymous tip cases, the issue in the instant matter is not whether the DNR could corroborate that there was a bale of hay in a field across the road and away from Limmex's house; the issue is whether that information in any way, shape, or form supplied probable cause to conduct a **warrantless** search of the Defendant's curtilage in the absence of any evidence that feed was present on that curtilage. The answer to the latter question is absolutely not.

D. It is Elementary the State Cannot Conduct a Warrantless Search of a House/Curtilage.

The State erroneously cites to *U.S. v. Tolar*, 268 F.3d 530, 532 (7th Cir. 2001), *U.S. v. Evans,* 27 F.3d 1219 (7th Cir. 1994), *State v. Edgeberg,* 188 Wis. 2d 339, 524 N.W.2d 911 (Ct. App. 1994), in an attempt to support Warden David Youngquist's ("Youngquist") and Warden Joe Frost's ("Frost") illegal search. *Tolar* is clearly inapplicable because it dealt with a consensual search of a truck on commercial property. The issues raised regarding that search were whether the entry, during business hours and onto commercial property, to ask for that consent was legal and whether the consent was involuntary. *See Tolar,* 268 F.3d 531. *Evans* and *Edgeberg* are likewise inapplicable because both cases answer only the question of whether law enforcement officers can use normal means of access to a house (such as a driveway or sidewalk) for some legitimate reason. *See Evans*, 27 F.3d at 1229, *Edgeberg,* 188 Wis. 2d at 347. Neither *Evans* nor *Edgeberg* support the proposition advanced by the State that if any curtilage is held open to the public or constitutes the normal means of accessing a house that suddenly all curtilage is held open to the public. It does not appear to have occurred to the State that this argument would therefore invalidate they entire legal principle of curtilage.

E. Exigency Is Not In the Eye of the Beholder.

Finally, the State continues to grossly distort, stretch and misapply the doctrine of exigent circumstances. Although the State is happy to point out when it suits its purpose that the penalty for violating NR 19.60 is a $100.00 forfeiture, (*see* Plaintiff's Response Brief, p. 13), the State somehow believes that this $100.00 forfeiture is so serious that this Court, in

the face of binding precedent, should apply for the first time the doctrine of exigent circumstances in Wisconsin to a minor, noncriminal and nonjailable offense. The State also ignores the role of Youngquist and Frost in creating any exigent circumstances. It is clear that the Wardens themselves created the exigency by storming onto Limmex's farm when they knew Limmex was not at home, having seen him driving on the town road. Heavy-handed methods and poor planning by the DNR is no basis to cast aside Limmex's constitutional rights. The argument that any exigency existed is also nonsensical when viewed in light of the fact that several days lapsed between the receipt of the anonymous tip and the DNR's entry onto Limmex's property.

F. The Law Does Not Recognize a Warrantless Search of a House/Curtilage Even if Done in a "Reasonable" Manor.

Mistakenly relying on *State v. O'Brien*, 223 Wis. 2d 303 (1999), the State asks this Court to condone this illegal search because it was reasonable. The State indicates that a search of a vehicle near an outbuilding was permissible because the search of the vehicle was reasonable. (*See* Plaintiff's Response Brief, p. 6). The question of what was reasonable in *O'Brien* was whether it was reasonable to search within a vehicle because evidence described in a search warrant might be found there and whether the vehicle was subject to search because it was within the curtilage of a rural farm for which the warrant authorized a search of the premises. *See O'Brien,* 223 Wis. 2d at 317-18. In other words, the *O'Brien* Court was evaluating the meaning of a search warrant, not the legitimacy of a warrantless search.

In the instant case, there is clearly no justification for the DNR's illegal search except what the State has tried to create post hoc through its selective and creative citations to case law. This search is presumptively unreasonable and the State bore the burden of proving it reasonable and placing it under an exception to the warrant requirement. The State has failed to do so and therefore any and all evidence must be suppressed.

G. The State has Failed to Prove any Fact or Reason to Avoid Suppression.

The State has not attempted to rebut Limmex's claim that any evidence obtained following the illegal search must be suppressed as fruit of the poisonous tree. The State bears the burden of proving a sufficient break in the causal tree between any illegality and a subsequent search or seizure of evidence. *See State v. Phillips*, 218 Wis. 2d 180, 204-05, 577 N.W.2d 794, 805 (1998). The United States Supreme Court has set forth three factors for determining whether the causal chain has been sufficiently attenuated: (1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. The ultimate question is whether the evidence objected to is the result of exploitation of illegal police conduct or instead through means sufficiently attenuated that purge the evidence of any taint. *See id.* at 205-06 *(citations omitted)*. In the instant matter, it is clear that subsequent searches of Limmex's property occurred immediately after the illegal search and that there were no intervening circumstances that could remove any taint of those subsequent searches. Although there is not a blanket rule that every Fourth Amendment violation is sufficiently flagrant as to defeat the argument of attenuation, in the context of this case, suppression of

the so-called fruits of the poisonous tree is appropriate in light of the complete lack of any justification for the initial search.

II. Limmex is the Victim of Selective Enforcement.

The following undisputed facts are before this Court:

- There is no legal prohibition of a farmer leaving a bale of hay in his fields that is accessible to deer. (T.83-84; T.88; T.89; T.92).
- There is no law – statute, rule, common law – in the State of Wisconsin that regulates or restricts the manner in which a farmer stores hay. (T.63-64; T.66; T.67-69).
- It is not unusual for a farmer to leave a bale of hay in a field. (T.87; T.93; T.110-11).
- Deer will feed on hay despite precautions a farmer might take. (T.87; T.92; Exh. 4).
- During winters, it is not uncommon for deer to search for food sources on farms, including entering buildings. (T.67-69; Exh. 4).

In light of these undisputed facts, how did it come to be that Limmex was the only farmer (until December 2007 and **after** Limmex filed his motions) who has received a citation under NR 19.60 for having feed accessible to deer in the form of hay bales? How did it come to be that Limmex is the only farmer to receive a citation under NR 19.60 in the absence of an admission that he intentionally placed feed out for deer?

A. Justice May be Blind on Result But Not to Finding Undisputed Evidence.

Rather than refute Limmex's evidence showing Youngquist's and Frost's personal animus, the State simply asks this Court to ignore it. The State does not even suggest it can provide or has provided the Court with the required "compelling evidence" to meet its burden of demonstrating a reasonable basis exists to justify the prosecution. *See State v. Kramer*, 2001 WI 132, ¶ 25, 248 Wis. 2d 1009, 637 N.W.2d 35. Clearly, normal DNR practice does not involve issuing citations to or – as far as the record in this matter goes – investigating farmers who leave hay in their fields. Although Limmex denies any intentional feeding of deer, it would stand the protection of the prohibition against selective enforcement on its head to suggest that the State could overcome a person's rights to equal protection under the law to allow the State to disprove selective enforcement by arguing that there is evidence that someone may have committed a violation.

B. To Intend or Not to Intend.

While vigorously arguing that no judge and no jury can review the DNR's subjective conclusions regarding Limmex's intent, (*see* Plaintiff's Response Brief, pp. 14-15), the State also argues that this Court should consider intent in (i) evaluating the universe of farmers to whom Limmex should be compared for selective enforcement purposes and (ii) evaluating whether legitimate prosecutorial factors justify that enforcement. (*See* Plaintiff's Response Brief, p. 8). These arguments are without merit. First, the State appears to suggest a *per se* rule that begins with: farmers who have livestock cannot intend to feed deer; and then concludes with: therefore Courts must exclude from comparison purposes any farmer whom has livestock but leaves feed accessible to deer. Leaving feed out at night when cattle are in

the barn is an act of feeding deer. Second, if the State tries to argue that it does not have to prove an intent element at trial, it is grossly unfair to allow the State to bootstrap its arguments on selective enforcement by condoning the State's actions in light of its beliefs regarding Limmex's intent while denying Limmex the right to contest that subjective belief regarding intent. In other words, intent is either an issue or it is not.

C. The Wardens Clearly Were Pre-Disposed to Find a Violation.

Finally, this Court should not let the State simply brush off the evidence taken from Nancy Hylbert, Jasen Hylbert, Tom Arndt and Clyde Keen. The State appears to tacitly ask this Court to believe that the Hylberts will lie to a federal judge but not to a state judge. That is absurd. Clearly, the Hylberts' attempts to retract their attribution of certain statements to Youngquist did not occur as a result of a desire to tell the truth; it occurred as result of a belated realization that telling the truth would benefit Limmex. And, Youngquist agreed that he may just have told the Hylberts the negative stories about Limmex. The State also ignores Arndt's and Keen's testimony that they were collectively detained for long periods of time – Keen for four and five hours – on the same day and asked the same questions (about Limmex) repeatedly. This is solid proof of the goals and misplaced assumptions of the Wardens. The Wardens were intent on trying to "get" Limmex.

III. The Prohibition in Wis. Admin. Code NR § 19.60 Does Not Apply to Limmex.

The threshold question of whether NR 19.60 applies to Limmex is whether the rule applies to Limmex at all and, if it does, what quantum of proof does the State have to prove before he may be found guilty. A court should construe an administrative rule in the same manner it construes as statute. *See State ex rel. Staples v. Young,* 142 Wis. 2d 348, 353,

418 N.W.2d 333 (Ct. App. 1997). If there is no ambiguity, a court should look to the rule's plain meaning. A rule is ambiguous if reasonable persons could understand it differently. *See id.* at 354

The State argues that Limmex cannot meet the exclusion contained in NR 19.60(3)(a)3 for feed deposited by normal agricultural practices because it is abnormal to place or move bales of hay in a field. The State, however, also concedes that farmers may leave bales of hay in a field. (*See* Plaintiff's Response Brief, p. 12). For all practical purposes, however, what difference does it make to a deer if a bale of hay is left in a field or placed in a field? The State itself rejects its own construction of the rule by hypothesizing that a farmer who leaves a single bale of hay in a field should be subject to a citation but a farmer who leaves more hay bales in a field, stored end-to-end, should not be subject to a citation. (*See* Plaintiff's Response Brief, p. 12). This is the problem that renders NR 19.60 both unconstitutionally vague and overbroad. Under the State's interpretation, a farmer is guilty of violating the rule based on what the State appears to concede is a subjective and arbitrary determination by a DNR warden in the absence of any clear government direction to farmers regarding what is and is not a normal agricultural practice.

Wisconsin's legislature clearly intended to protect farmers from this arbitrary state action by creating a binary determination for the DNR and courts to use in evaluating alleged violations of NR 19.60. NR 19.60 was not intended as a tool for the DNR to use to enforce unlegislated mandates regarding agricultural practices. Instead, it was designed to be a common-sense rule that, if interpreted fairly, protects farmers from precisely the types of prosecution being pursued against Limmex.

From this starting point, the only constitutional manner in which NR 19.60 can be applied to a farmer like Limmex is to find in NR 19.60 a *mens rea* element. NR 19.60(1)(a) prohibits a person from placing, depositing or allowing the placement of any material to feed or attract wild animals. Not only does the plain language of NR 19.60(1)(a) itself require the State to prove intent, but the construction of NR 19.60(3)(a)3 urged by the State renders it doubly necessary to demand that the State bear the burden of proving intent. In the absence of a rule or law that clearly forbids a farmer from leaving a bale of hay (or bales of hay) in a field, the State should not be allowed to randomly and without justification penalize farmers for engaging in this practice.

Judicial construction of a DNR administrative rule as requiring the State to prove a mental state element is not without precedent. *See State v. Bucheger,* 149 Wis. 2d 502, 440 N.W.2d 366 (Ct. App. 1989). In the instant case, the only way to ensure that Limmex has a fair trial is to require the State to bear the burden of proving this element.

CONCLUSION

By its failure to accurately describe the law of search and seizure, the State concedes that this Court must suppress any and all evidence, tangible and intangible, including any statements of Limmex, obtained in this matter as a result of the illegal search of Limmex's property. The State has also failed to produce any compelling evidence to demonstrate a reasonable basis exists to justify the prosecution of Limmex. Finally, there is no reasonable and constitutionally permissible construction of NR 19.60 that allows for the prosecution of a farmer for having hay bales, in any condition, in his fields. The only interpretation that

might render NR 19.60 constitutionally valid is to recognize within it an intent element that the State must prove prior to securing a conviction.

Respectfully submitted this 18th day of August, 2008.

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