Supreme Court No. 1003927

Court of Appeal Cause No. 81783-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF KENT, Petitioner

v.

ADRIAN JACOBO-HERNANDEZ, Respondent

ANSWER TO PETITION FOR REVIEW

ALAN ZARKY, WSBA #15155
Staff Attorney
JOHN R. CARPENTER, WSBA #23501
Assistant Federal Public Defender
Attorneys for Respondent
Federal Public Defender Office
1331 Broadway, Suite 400
Tacoma, Washington 98402
Phone: (253) 593-6710
Email: alan_zarky@fd.org
Email: john_carpenter@fd.org

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Other

I. INTRODUCTION

This Court has held an individual's ability to pay is a factor to be weighed under the Excessive Fines Clause. *City of Seattle v. Long*, 198 Wn.2d 136, 493 P.3d 94 (2021). In the decision below, *Jacobo Hernandez v. City of Kent,* __ Wn.App. __, 497 P.3d. 871 (2021), the Court of Appeals applied that holding in the context of forfeiture based on criminal activity – a context where City of Kent ("Kent") does not dispute the Clause applies. *Id.* at 877. The court did exactly what it was supposed to – balance the various factors this Court has said are applicable, under the particular facts of the case.

Kent, unhappy with the outcome, raises a number of claims in an attempt to obtain discretionary review. It wrongly declares the decision below "abrogate[ed]" United States Supreme Court precedent "in direct contradiction of principles of *stare decises*," "overrule[d]" that precedent "through implication," and "entirely supplant[ed] the Excessive Fine

Clause framework provided by" that Court. Petition for Review (PFR) 15, 16.

The court below did no such thing. As can easily occur when a court conducts a multi-factor balancing test, the court found that – on this particular occasion – ability to pay outweighed the other factors, an outcome fully consistent with Supreme Court, and this Court's, precedent.

Kent also claims the court wrongly treated Mr. Jacobo-Hernandez as "similarly situated" to the Petitioner in *Long*, PFR 4; in fact the court simply applied *Long*'s holding about ability to pay to a different situation where it was undisputedly applicable.

Kent further asserts the decision leaves courts "to define appropriate punishment, untethered from the legislature's will." PFR 20. Not so: the court simply found that one particular forfeiture violated the Excessive Fines Clause.

Kent lastly raises a "parade of horribles." It claims the decision negatively affects "countless forfeiture proceedings

throughout the state," to the extent that even a $10,000,000 yacht will be exempt from forfeiture. PFR 9, 26. This claim is based upon a complete misunderstanding of the law of forfeiture, and also based upon ignoring the particular circumstances of this case – a low-level drug courier who undertook a very few transactions, one who was evaluated by a federal district court judge as worthy of a remarkably low sentence, whose entire estate consisted of a "pittance," by Kent's concession, PFR 29, and who was deported in the middle of a pandemic.

Given the fact-specific nature of the decision below, one based on a balancing of all the appropriate factors, this Court should deny discretionary review.

II. STATEMENT OF FACTS

Mr. Jacobo-Hernandez was a valued member of the community for almost all his life. He worked in respected trades, and volunteered in his community, assisting those less fortunate than he. In a period of extreme economic desperation, he participated in three drug deliveries over a period of about three

months. Clerk's Papers (CP) 298-99, 370. On one of these deliveries, he used his own car, his sole possession. The car's value was approximately $3,000. It is the forfeiture of this car – his entire estate – that is at the center of this dispute.

Despite the above undisputed facts, Kent's PFR leaves an impression that his role was greater than it was. Kent suggests he reaped immense "profit[s]" from his offense, and refers to "thousands of dollars of unreported and presumably untaxed income." PFR 29, 17. But the record does not support these suggestions at all. On the other hand, his codefendant "had been dealing methamphetamine for years and organized the entire drug-dealing scheme." 497 P.3d at 878.

The court had before it a much fuller picture of Mr. Jacobo-Hernandez and his offense, which, even if not directly mentioned in the opinion, was relevant to its conclusion that, in this particular case, depriving him of his livelihood was

unconstitutional.[1] He came to this country about 18 years ago and was not a career drug smuggler. Rather, he became a skilled tailor who was adept at fixing sewing machines. Those skills helped land him a job with a company making clothing samples. He held this job for a decade, until the company was sold. A co-worker attested to his work history and character. CP 369.

He then worked as a tile installer for four years. That employer also confirmed his work history and his commitment to both his own kids and those in the community. CP 370. His marriage fell apart; with his wife as primary caretaker, he took custody of his children every weekend. *Id.*

He then opened up his own mobile car wash. Unfortunately, one of his customers asked him to deliver drugs. He agreed only because he was financially desperate at that point. He was arrested after completing his last of three deliveries. He did not purchase his car with drug funds. Rather,

[1] All facts in the remainder of this section, except where noted, are from his unrebutted declaration, CP 216-17.

he bought it out of salvage and restored it himself. 497 P.3d at 873.

His plan was, if forfeiture was denied, to either find a way to get the car to Mexico or sell it to have some funds to start a new life there.

Mr. Jacobo-Hernandez was not instrumental in developing the drug conspiracy or making decisions as to how that conspiracy would be carried out. He was a hired driver, nothing more, and he occupied this role for only a short time. In recognition of his minor role in the offense and the mitigating facts discussed above, the district court judge sentenced him to only two years imprisonment. After serving his sentence, he was deported to Mexico in the middle of the pandemic. CP 158.

III. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY RELEVANT PRECEDENT.

A. The decision below is not in conflict with decisions of this Court or those of the United States Supreme Court.

Kent claims the decision below "abrogate[d] the factors established by" *United States v. Bajakajian*, 524 U.S. 321 (1998) PFR 15. Apparently, Kent's claim of "abrogation" is based only on its faulty assertion that the court relied "solely on a single factor in determining gross disproportionality[.]" PFR 5. In making this assertion, Kent misapprehends both the decision below and how courts conduct multi-factor balancing.

As to the decision below, the court specifically considered such appropriate factors as the nature and extent of the crime, its relation to other criminal activities, the potential penalties for the crime, and the legislative purpose of forfeiture. 497 P.3d at 878.[2]

[2] The factors identified in *Bajakajian* are not exclusive, allowing the court to consider any of the facts in the record. *Long*, 198 Wn.2d at 167.

It also looked to the requirement that "[c]ourts scrutinize 'governmental action more closely when the State stands to benefit,'" a factor never mentioned by Kent. *See* 497 P.3d at 879 (quoting *Long*, 493 Wn.2d at 113).

And contrary to Kent's apparent view, conducting a multi-factor balancing test is not a matter of just counting which factors weigh in favor of each party, with the party favored by the most factors automatically winning. It is a matter of weighing all the factors in combination. Thus, a single factor can permissibly outweigh the others.

For example, in *Automotive United Trades Org. v. State*, 175 Wn.2d 214, 285 P.3d 52 (2012), this Court analyzed whether, when there was a necessary party to a civil suit whose joinder was not feasible, equity called for dismissal or instead for continuing the action. *Id.* at 222. The burden was on the party opposing dismissal. *Id.* at 223. This required balancing four factors. Three favored dismissal, one "strongly[.]" *Id.* at 231-32. But the fourth factor "counsel[led] strongly in favor of

proceeding" with litigation: dismissal would shield state action from constitutional challenge, which this Court considered sufficient to overcome the other factors in this particular case.

Just as Kent claims about the decision below, the sole dissenter in *Automotive United Trades Org* asserted the majority was "improperly focus[ing] on only one" factor] *Id.* at 243. But the majority didn't ignore the other factors, it simply concluded that, considering the relative strength of the various factors, one factor outweighed the others. That is also what the court did below.

Federal law is the same. *See*, *e.g.*, *Schoenberg v. Federal Bureau of Investigation*, 2 F.4th 1270, 1278 (9th Cir. 2021) (factors "each involve a sliding scale, allowing one or more factors to outweigh the others"); *United States v. Hobbs*, 136 F.3d 384, 389 (4th Cir. 1998) (as to three relevant factors, "if any one of the factors has a strong presence, 'it can outweigh the others'") (citation omitted); *United States v. Fell*, 531 F.3d 197, 234 (2d Cir. 2008) (reflecting that jury was told, as to factors

used to determine whether to impose death penalty, "you should not simply count the total number of aggravating and mitigating factors and reach a decision based on which number is greater; rather you should consider the weight and value of each factor"); *In re Fjeldsted*, 293 B.R. 12, 25 (B.A.P. 9th Cir. 2003) ("Mindful that [list of twelve factors at issue] are capable of being misconstrued as inviting arithmetic reasoning, we emphasize that these items are merely a framework for analysis and not a scorecard. In any given case, one factor may so outweigh the others as to be dispositive.")

At one point, the Court of Appeals stated *Long* allowed it to "focus on only one factor." 497 P.3d at 878. But the court's discussion shows it did not mean a focus that excluded consideration of other factors. It instead meant it could "allow one factor to dominate the conclusion in a given case," a completely appropriate outcome of factor-balancing. This one instance of arguably ambiguous wording is hardly a basis for exercising discretionary review, especially when that arguable

ambiguity is fully resolved by the remainder of the court's analysis.

The court's statement that ability to pay "*can* outweigh" the other factors also demonstrates the court realized this factor does not automatically outweigh the other factors, only that it did in Mr. Jacobo-Hernandez's case. 497 P.3d at 876 (emphasis added). *See also id.* n.14 (stressing it was the facts of this case that led to the court's conclusion). Indeed, Kent at one point effectively admits that the court considered all factors. PFR 8.

As Kent acknowledges, *State v. Timbs*, 169 N.E.3d 361, 376 (Ind. 2021), also found forfeiture excessive, similarly looking to ability to pay as a factor. Kent's contention that *Timbs* is contrary to the decision below, PFR 13, is based solely on the incorrect assertion that the Court of Appeals considered only that one factor.

In short, that the court below weighed the factors differently than Kent wished it had does not put the decision in

conflict with any controlling authority. [3] Nor does it make this case appropriate for discretionary review.

B. Kent's discussion of other federal decisions is irrelevant to the validity (or review-worthiness) of the decision below.

Kent discusses at length several aspects of federal case law. None of Kent's points are relevant to whether the decision below should be reviewed.

Kent notes there is a federal circuit split on whether ability to pay should be part of the analysis. PFR 10-11. This observation is really just a complaint about *Long*, where this Court ruled in favor of including that factor. 198 Wn.2d at 173. *Long* was unanimously decided on this issue only four months ago.

---

[3] The City claims the decision "misapplies" *Long.* PFR 9. That contention, too, is incorrect and appears to be based primarily on the decision's supposed errors in conducting balancing, discussed in this section, and the decision's supposed treating of Mr. Jacobo-Hernandez as "similarly situated" to Mr. Long, PFR 4, discussed in Part VII.

Kent also cites several federal cases as holding an "inability to satisfy a forfeiture at the time of conviction, in and of itself" cannot render a forfeiture unconstitutional. PFR 11 (quoting *United States v. Levesque*, 546 F.3d 78, 85 (1st Cir. 2008)). But *Levesque*'s very next sentence makes clear it was not talking about *in rem* forfeitures, where the property is taken from the person at the time of judgment. Rather, *Levesque* was addressing money judgment forfeitures, where the fact the individual cannot immediately pay the entire amount does not necessarily mean the forfeiture would deprive him of his livelihood – the government may delay that forfeiture, by setting a payment plan or seizing assets in the future to satisfy the judgment. 546 F.3d at 85. Thus, "even if there is 'no sign' that the defendant could satisfy the forfeiture in the future, there is always a possibility that she might be fortunate enough 'to legitimately come into money.'" *Id*. The same is true of *United States v. Smith*, 656 F.3d 821, 828-29 (8th Cir. 2011), and *United States v. Viloski*, 814 F.3d 104, 112 (2d Cir. 2016). PFR 12.

These cases are thus totally inapposite to this case, where the impact of forfeiture is right now, not at some time in the remote future. And here, the federal sentencing court rightly concluded that Mr. Jacobo-Hernandez "would likely never become able to pay" financial penalties. *Jacobo Hernandez*, 497 P.3d at 880.

Third, Kent tries to compare this case to a number of federal decisions finding forfeiture constitutional. PFR 22-23 and Appendix C. These cases are really of no use in evaluating the decision below. Most particularly, almost none even considered the issue of ability to pay.[4] *See* Appendix 1. Since that is a factor this Court has specifically endorsed using, these cases cannot shed light on the balancing conducted by the court below.

In addition, in many of these cases, the facts are not at all comparable. The claimants in many were occupied in high-level

[4] This is hardly surprising. About half the decisions were issued before the new judicial recognition of the history of the Excessive Fines Clause; many of the rest were announced shortly after that recognition. *See* PFR at 10 (stating the "trend of considering means as a part of the proportionality standard" did not even begin until 2007).

drug conspiracies involving millions of dollars' worth of narcotics. The sentences imposed were as high as 660 months.[5] In almost all cases, there was no indication the claimant possessed only a pittance or would be left destitute by the forfeiture. Some involved money judgment forfeitures, where if the claimant cannot currently afford the complete forfeiture, it can occur later. *See* p. 13-14, *supra*. Finally, some cases did not involve forfeiture of an instrumentality, but of proceeds of crime. In those, it can be argued the claimant never had any right to the asset. They are thus not at all relevant to this case. The fact that Kent invites this Court to examine such cases only confirms how fact-dependent the decision below was.

Kent's Appendix B is even less relevant. Kent does not purport to have found *all* decisions finding forfeiture unconstitutional or remanding for findings: it simply cherry-picked some. And most of these cases did not consider ability to

[5] *United States v. Candelaria-Silva*, 166 F.3d 19, 26 (1st Cir. 1999).

pay. Of course, of the many omitted federal cases finding forfeiture to be constitutional, most did not consider that factor either, given the relative recency of case law requiring that consideration.

Kent asserts it is only "future ability to earn a livelihood" that matters under the Clause. PFR 5; *see also id.* at 25. Their only support for that claim is their gloss on a passage in *United States v. King*, 231 F. Supp. 3d 872, 904 (W.D. Okla. 2017). Whatever *King* was saying about the interrelationship of current finances and future ability to make a living (which is far from clear), this is another case involving money judgment forfeitures, not *in rem* forfeitures. As discussed *supra*, it thus was dealing with forfeiture that would occur in the future, and thus future livelihood would be the only relevant issue. In any event, this statement by one district court cannot countermand a simple fact: a merchant needs "his merchandise" to sell *now*, not a year from now, in order to live; a farmer needs his plow to till *today*, not some time in the future. *See Long*, 198 Wn.2d at 168 and n.13.

As noted by the Court of Appeals, the dictionary definition of "livelihood" is "means of support," with every indication that it encompasses current means of support, not just speculative future possibilities. *See* 497 P.3d at 878 n. 11. And this Court equated "livelihood" with "ability to work," with no suggestion that meant only sometime in the future. *Long*, 198 Wn.2d at 175. In any event, the district court found not only that Mr. Jacobo-Hernandez lacked the present ability for payment, but also "would likely never become able to pay a fine[.]" *Jacobo Hernandez*, 497 P.3d at 880.

IV. KENT'S "PARADE OF HORRIBLES" IS WITHOUT LEGAL OR FACTUAL SUPPORT.

Kent suggests discretionary review is necessary because the decision below will have unacceptable consequences in "countless forfeiture proceedings[.]" PFR 9. It contends the decision means even forfeiture of a $10,000,000 yacht used in drug transaction would be unconstitutional, so long as it was the claimant's sole possession. PFR 26-27. That contention is, of course, ridiculous. Under the facts of *this* case, Kent cannot

forfeit a $3,000 vehicle that is Mr. Jacobo-Hernandez's entire net worth, because that would leave him *no* ability to provide for himself. The glaring problem with Kent's suggestion is that no individual needs $10,000,000 or a yacht to have a livelihood.

In Kent's imagined yacht case, a government can remit, or be constitutionally required by a court to remit, a portion of the forfeiture. That leaves the claimant with a small sum to keep him from going homeless and allowing him to maintain a livelihood, but without allowing him to keep the entire *res*. The concept of remitting a portion of an intended forfeiture is well-recognized in the courts. *See Bajakajian*, 524 U.S. at 326 (affirming district court conclusion that, although statute required forfeiture of $357,144, Excessive Fines Clause required reducing forfeiture to a lesser sum).[6] Whether Kent's hypothetical yacht owner would

[6] The PFR's position that forfeiture is an "all or nothing" proposition is directly at odds with the position Kent took below, where it correctly noted that when a fine is constitutionally excessive, the solution may be to reduce, rather than eliminate, it. CP 342.

be left with $3,000, or $15,000 (or possibly nothing, on different facts), is something that can be addressed in a future case. What is clear is the constitutional right to preserve *this* claimant's bare minimum for survival, on the particular facts of *this* case, does not come even close to meaning a government is powerless to forfeit most or all of a multi-million-dollar possession.

Given the possibility of remitting a forfeiture, the decision below has implications only for a case with nearly identical facts – a short-time minor courier challenging the forfeiture of a mere "pittance," which is his only asset, and one that was not purchased with the proceeds of any illegal activity.

V. THE DECISION BELOW WAS SUPPORTED BY THE RECORD.

Kent describes this case as having a "fact bereft record," insufficient to justify the decision below. PFR 23. Even if true, that would hardly make this an appropriate case for review; it would mean only that the Court of Appeals made factual errors, not that the Petition presents questions that are "significant" or of "substantial public interest." RAP 13.4(b). But the claim is not

true. Contrary to PFR 27, the basis for the court's conclusion regarding Mr. Jacobo-Hernandez's financial condition was not just his in-court declarations of indigency. Instead, it was his unrebutted declaration that the car was his only asset, other than about $50. CP 216. The Superior Court expressly found that the car was his only asset, a finding not disputed by Kent on appeal. CP 504.

Kent also points to the Superior Court's and Hearing Examiner's conclusions that there was no showing that forfeiture would deprive Mr. Jacobo-Hernandez of his livelihood, asserting that these were factual findings subject to clear error review. PFR 28. Once again, if correct, this would not be a basis for discretionary review. And once again, it is not correct. The amount of an individual's current assets, or his current job, are pure facts. Whether a financial situation would deprive someone of his livelihood depends not only on these facts, but on a legal judgment about such matters as what constitutes a "livelihood" (how well that person is entitled to live) and the time at which a

court evaluates his livelihood (if it looks to the present or near future, then a person with no assets has no current means by which to live).

"[I]f a determination is made by a process of legal reasoning from, or interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law." *Matter of Welfare of A.L.C.*, 8 Wn. App. 2d 864, 872, 439 P.3d 694 (2019) (citation omitted). The issue of livelihood clearly falls in this category. *See, e.g., Jacobo Hernandez*, 497 P.3d at 879 n.13 (court below disagreeing with Hearing Examiner about legal significance, in terms of livelihood, of fact that Mr. Jacobo-Hernandez had skills).

Thus, although Kent implies that both the Hearing Examiner and Superior Court made findings of fact on the question of livelihood, PFR 28, both of them quite properly designated their statements as conclusion of law, which are not

subject to the clear error standard. *State v. Scherf*, 192 Wn. 2d 350, 370, 429 P.3d 776 (2018). *See* CP 507, 161.[7]

In a related contention, Kent notes there was no finding the vehicle is necessary for Mr. Jacobo-Hernandez's livelihood. PFR 13 n.7. This contention too is of no legal significance: there was no need for such a finding, given the finding that the vehicle was his only asset. Mr. Jacobo-Hernandez's position was never that the physical vehicle itself was the issue, but that the funds from its sale would allow him to obtain the tools for maintaining a livelihood, or provide him shelter while obtaining a new job. Forfeiture of that asset thus "severely compromised [his] ability to work—in other words, his livelihood." *See Long*, 198 Wn.2d at 175.

[7] Mr. Jacobo-Hernandez acknowledges that such characterization is not dispositive. *Valentine v. Department of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352 (1995).

The decision below thus did not err in reaching a conclusion that the undisputed facts showed forfeiture would deprive Mr. Jacobo-Hernandez of his livelihood.

VI. KENT'S POSITION REGARDING THE COMMON LAW HISTORY OF THE EXCESSIVE FINES CLAUSE IS INCONSISTENT WITH THIS COURT'S DECISION IN *LONG.*

Kent accuses the court below of misunderstanding the history of *salvo contenemento*. PFR 23.[8] It claims the doctrine has meaning *only* because taking more than a person owned would place him in debtor's prison. PFR 24. There are at least three problems with this assertion. Most importantly, in suggesting this portion of the common law underlying the Excessive Fines Clause is a dead letter, given the end of debtor's prisons, Kent is again really just complaining about this Court's

[8] "[T]o save a man's 'contenement' was to leave him sufficient for the sustenance of himself and those dependent on him." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 855 (2013) (citation omitted).

decision in *Long*. This Court unanimously held that ability to pay is currently part of the excessiveness inquiry, even though debtor's prisons no long exist. *See id.* at 173. Kent's different reading of the Excessive Fines Clause is no reason to grant discretionary review.

As evidence of its claim that *salvo contenemento* is an outdated concept. Kent cites only one historical passage from *Dominus Rex v. Oates*, which complains about one particular sentence that was imposed. PFR 23-24. That passage contains no suggestion that concern about debtor's prison was the sole motivation behind the concept of *salvo contenemento*. And if Kent's position is the doctrine means only "take no more than a person has in his estate," as it implies through its quotation from Blackstone, it is flatly wrong. PFR 23-24. The principle "required that a penalty not exceed an offender's ability to pay it, *and* permitted an offender to preserve a minimum core level of economic subsistence and security notwithstanding the imposition of punishment." Brief of *Amici Curiae* of Eighth

Amendment Scholars in Support of Neither Party, *Timbs v. Indiana*, 2018 WL 4381213 at *3 (2019) (emphasis added). That second portion of the doctrine is reflected in the requirement to preserve a merchant his merchandise and a serf his implements of cultivation. *Long*, 198 Wn.2d at 168 and n.13.

VII. KENT'S REMAINING LEGAL CONTENTIONS DO NOT SUPPORT REVIEW.

A few other points warrant a brief response. Kent speaks of deference to the legislature, respecting legislative prerogatives, and the presumption of constitutionality. PFR 5, 18, 21. But obviously constitutional requirements will at times overcome such principles and render a particular legislative action unconstitutional. This confirms that Kent's complaint is simply with the specific weighing of factors the court below undertook, hardly making this an appropriate case for discretionary review. Even where there is a strong presumption of constitutionality, the entire history of the common law underlying the Clause shows that leaving a person with nothing to live on can, in appropriate cases, overcome that presumption.

While the case law certainly looks to the maximum punishments for a particular offense, PFR 20-23, a decision of whether a particular fine is constitutionally excessive must also provide for consideration of all other factors, including the culpability of the particular individual whom the government seeks to punish by forfeiture, given that the cases recognize the factors as non-exclusive. In this case, the court properly considered the maximum possible punishment. But Mr. Jacobo-Hernandez's role in the offense –a courier for a short period of time who had no decision-making authority in the larger criminal enterprise – and the lenient sentence he received in light of that role, are properly considered too. Those very considerations, as well as Mr. Jacobo-Hernandez's poverty, are what drove the sentencing court to impose a very lenient sentence, relative to the statutory maximum. To suggest the maximum possible punishment completely dictates the level of constitutional forfeiture both for someone like Pablo Escobar, who might own a $12-million-dollar yacht obtained by directing a large criminal

enterprise, and for someone like Mr. Jacobo-Hernandez, is contrary to *Long*. *See* 198 Wn.2d at 171 (conclusion that ability to pay is part of excessiveness inquiry because a "fine that would bankrupt one person would be a substantially more burdensome fine than one that did not") (citation omitted).

Lastly Kent, after stating that the court wrongly treated Mr. Jacobo-Hernandez as "similarly situated" to the Petitioner in *Long*, PFR 4, provides a long list of facts distinguishing this case from *Long.* PFR 16-18. But *Long*'s analysis of the Clause doesn't mean forfeiture will be unconstitutional only when the facts are quite similar to those in *Long*, just that ability to pay should be considered. Does Kent seriously dispute, for example, that the Clause applies to forfeitures based on criminality (even those with significant negative community effects), or to fines set by the Legislature?

Kent also asserts discretionary review is warranted because the decision below involves an issue of substantial importance. PFR 9. In one sense, application of the Clause is

always an issue of importance. But this was a single decision, applying the proper standard and balancing the appropriate proportionality factors to the particular facts, and simply coming up with a result Kent does not like; that is not a basis to grant review.

VIII. BEYOND ITS LEGAL ARGUMENTS, KENT'S APPEAL TO POLICY DOES NOT SUPPORT GRANTING DISCRETIONARY REVIEW.

Kent repeatedly discusses the negative effects drug trafficking has on the community. *See*, *e.g.*, PFR 17. No one disputes this point. But Kent's reliance on these effects depends on a highly debatable assumption: that occasionally finding constitutional limits on a government's ability to forfeit assets from impoverished low-level couriers would somehow reduce the deterrent effect of the government's broad arsenal of sanctions, and would thus hinder the war on drugs.

One might contend instead that, if the threat of years in prison will not sufficiently deter low-level couriers, the slight additional incremental effect of forfeiture of a small sum would

not deter them any further. One also might contend that far greater deterrence would result from forfeiture from those higher up in drug trafficking, who will not be able to contend their situation is comparable to Mr. Jacobo-Hernandez's and thus not able to bring an excessive fines challenge.

Kent also wrongly assumes there are many forfeiture claimants who will be in a similar situation to Mr. Jacobo-Hernandez: someone with a minor role in a very few transactions, possessing no other assets, and where the value of the forfeiture is a "pittance." *See* PFR 29.

Regardless of whether forfeiting the last dollar from someone like Mr. Jacobo-Hernandez might have some slight deterrent effect on the drug trade, there are negative social consequences as well from allowing forfeiture to go forward against such individuals. This Court has shown concern for the implications of taking every last cent from the poor, including those convicted of crimes. It has noted how, among other consequences, this can exacerbate the problem of homelessness.

See, *e.g.*, *Long*, 198 Wn.2d at 171 ("The homelessness crisis and widespread use of fines to fund the criminal justice system also fully support an ability to pay inquiry" under the Excessive Fines Clause). Similarly, the court below cited a report noting the disparate impact that taking most of a defendant's property has on people of color. 497 P.3d at 879 n.15.

These concerns address the policy arguments advanced by Kent. In any event, wishing the court below had balanced the relevant factors differently in a fact-specific analysis does not establish a basis for discretionary review.

IX. CONCLUSION

This Court should deny discretionary review.

The document contains 5000 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

DATED this 17th day of December, 2021.

Respectfully submitted,

s/ Alan Zarky
Staff Attorney

s/ John R. Carpenter
Assistant Federal Public Defender

DECLARATION OF FILING AND DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the document to which this declaration is affixed/attached, was filed via Electronic Portal in the Court of Appeals – Division One under the above captioned case number and a true copy was delivered to the following attorney(s) or party/ies of record in the following manner: electronically via Court of Appeals portal and via email:

Attorney for Petitioner:

Bijan T. Hughes, WSBA #51814
City of Kent / Office of the City Attorney
220 Fourth Avenue South
Kent, WA 98032-5838
(253) 856-5770
(253) 856-6770 (facsimile)
BHughes@KentWA.gov

DATED this 17th day of December, 2021.

s/ Alan Zarky
Staff Attorney

s/John R. Carpenter
Assistant Federal Public Defender
Attorneys for Respondent

APPENDIX 1

Name	Court considered ability to pay	Client impoverished	Money Judgement	Proceeds	Large-Scale Operations
United States v. Smith , 656 F.3d 821 (8th Cir. 2011)	No	Yes	Yes	Substitute assets for proceeds	
United States v. Basurto , 117 F. Supp. 3d 1266 (D.N.M. 2015)	Yes (statutorily required to for fines)	Did not present evidence that she could not pay fine	No	N/A - fine, not forfeiture	
United States v. Ortiz-Cintron , 461 F.3d 78 (1st Cir. 2006)	No	No indication	No	No	
United States v. 817 N.E. 29th Drive , 175 F.3d 1304 (11th Cir. 1999)	Refused to consider ability to pay	Reference to lack of other assets	No	No	
United States v. Carpenter , 317 F.3d 618 (6th Cir. 2003)	No	No indication	No	No	
United States v. Bernitt , 392 F.3d 873 (7th Cir. 2004)	No	No indication	No	No	
United States v. 10380 S.W. 28th St. , 214 F.3d 1291 (11th Cir. 2000)	No	No indication	No	No	
United States v. Real Prop., Bldgs., Appurtances & Improvements Located at 221 Dana Ave ., 81 F. Supp. 2d 182 (D. Mass. 2000), *vacated on other grounds, United States v. Real Prop* ., 239 F.3d 78 (1st Cir. 2001)	No	No indication	No	No	
United States v. 6941 Morrison Drive , 6 F. Supp. 3d 1176 (D. Colo. 2013)	No	No indication	No	No	
United States v. Candelaria-Silva , 166 F.3d 19 (1st Cir. 1999)	No	No indication	No	Substitute assets for proceeds	
United States v. Martinez , 146 F. Supp. 3d 497 (W.D.N.Y. 2015)	No	No indication	Yes	No	
United States v. 5 Reynolds Lane, Waterford , 956 F. Supp. 2d 349 (D. Conn. 2013)	No	No indication	No	No	
United States v. One 1995 Grady White 22' Boat , 415 F. Supp. 2d 590 (D. Md. 2006)	No	No indication	No	No	Marijuana grow operation that would have yielded plants valued at $532,800.
von Hofe v. United States , 492 F.3d 175, 191 (2d Cir. 2007)	No, finds excessive as to one party due to role in offense; not ability to pay	No indication	No	No	
United States v. 32 Medley Lane , 372 F. Supp. 2d 248 (D. Conn. 2005), *reversed by van Hofe v. United States* , 492 F.3d 175 (2d Cir. 2007)	No	Indicates forfeiture would be "harsh" for wife, but no indication property was her only asset	No	No	
United States v. Fogg , 666 F.3d 13 (1st Cir. 2011)	Yes, but because it was money judgment forfeiture, considered only ability to pay in the future	No showing by defendant that he lacked a livelihood.	Yes	No	

Name	Court considered ability to pay	Client impoverished	Money Judgement	Proceeds	Large-Scale Operations
United States v. 2121 Celeste Rd ., 189 F. Supp. 3d 1208 (D.N.M. 2016)	No	No indication	No	No	"On-going cocaine and heroin transactions between 2009 and 2011"
United States v. 325 Skyline Circle , 534 F. Supp. 2d 1163 (S.D. Cal. 2008)	Court discusses ability to pay but does not appear to have treated it as a factor.	Defendant claims forfeiture would leave him destitute but court rejects; notes he lived elsewhere most of time and farm operated at a loss, not providing income	No	No	
United States v. Collado , 348 F.3d 323 (2d Cir. 2003)	No	No indication	No	No	$20 million of narcotics transaction to which claimant was willfully blind
United States v. Cheeseman , 600 F.3d 270 (3d Cir. 2010)	No	No indication	No	No	
United States v. Cheeseman , 593 F. Supp. 2d 682 (D. Del. 2009)	No	No indication	No	No	
United States v. Heldeman , 402 F.3d 220 (1st Cir. 2005)	No	No indication	No	No	
United States v. Coleman Commer. Carrier, Inc ., 232 F. Supp. 2d 201 (S.D.N.Y. 2002)	No	No indication	Yes	Yes	Proceeds of conspiracy to distribute over 1,000 kilograms of marijuana
United States v. Sepúlveda-Hernández , 752 F.3d 22 (1st Cir. 2014)	Assuming without deciding that ability to pay was relevant, claimant presented no evidence	No indication	Yes	Yes	Proceeds of between $6 million and $15 million from marijuana sales
United States v. Riedl , 164 F. Supp. 2d 1196 (D. Haw. 2001)	No	No indication	No	No	Intended to launder $2.6 million in drug proceeds
United States v. Bradley , 969 F.3d 585 (6th Cir. 2020)	No	Claimant asserts "ruinous" but presented no evidence	In part (possibly all; decision unclear)	In part (possibly all; decision unclear)	Received over $1 million in drug proceeds
United States v. Dicter , 198 F.3d 1284 (11th Cir. 1999)	No	No indication	No	No	
United States v. Real Prop. with Any Improvements Thereon Located at 40 Clark Rd ., 52 F. Supp. 2d 254 (D. Mass. 1999)	No	No indication	No	In part	

FEDERAL PUBLIC DEFENDER, TACOMA

December 17, 2021 - 10:29 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,392-7
Appellate Court Case Title:	Adrian Jacobo Hernandez v. City of Kent

The following documents have been uploaded:

- 1003927_Answer_Reply_20211217101924SC829833_8624.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer Petition for Review Final w Appendix.pdf

A copy of the uploaded files will be sent to:

- alan_zarky@fd.org
- bhughes@kentwa.gov
- pfitzpatrick@kentwa.gov

Comments:

Sender Name: Amy Strickling - Email: Amy_Strickling@fd.org
Filing on Behalf of: John Robert Carpenter - Email: john_carpenter@fd.org (Alternate Email: jessica_cvitanovic@fd.org)

Address:
1331 Broadway Plaza, Suite 400
Tacoma, WA, 98402
Phone: (253) 593-6710

Note: The Filing Id is 20211217101924SC829833