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Supreme Court No. 100392-7

Court of Appeal Cause No. 81783-3-I

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

CITY OF KENT, Petitioner

v.

ADRIAN JACOBO-HERNANDEZ, Respondent

PETITION FOR REVIEW

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I. INTRODUCTION

A man drives down a street, looking for somewhere to live. He needs somewhere to park his home, which he doesn't think has much life left in it. He notices on the side of the road: vehicle after vehicle after vehicle. They found what he is looking for. They are all domiciles. He parks his truck in a lot and proceeds on with his life. He works and when he is not working, he stores his tools in his truck. Some time passes.

At some point, officials alert him that he's on a municipally owned lot. He's asked to move a block — a pro forma shuffling of the neighborhood. He declines to do so. One day his home is impounded by a private company that has a contract with the city. This destabilizes his life and causes him to miss several weeks of work. A process follows, and what was a \$44 civil infraction becomes \$537 of debt on a payment plan. The private company contracted by the city needs to be reimbursed for its contribution to public service. The man's take-home pay will drop for months. It's not clear how long

exactly. One of the realities of living a life with low liquidity is late fees and collection charges which make end dates on debts a fuzzy concept. Thinking this unfortunate series of events as unnecessary and unfair, the man asserts his right to not be subject to an excessive fine.

A different man at a different time and place runs a business which is not succeeding. Like others in similar situations, this man takes a gig to supplement his income. It pays in cash. He gets a car from a scrapyard, fixes it up and becomes part of a supply chain. Periodically he drives his car north, taking with him thousands of doses of poison intended for human consumers. It would be impossible to exactly say how many people would ingest the product he moved; how many tried the product for the first time on a shipment that the man brought north; and impossible to say how many died from their dose. Causal chains to end-users are there but no one will seriously try to trace them. After all, the sort of strict product liability that gets applied to most every product in the regulated

market is not a concern in this unregulated one.

Notwithstanding the harm caused,¹ the man continues with the gigs. The advantages of cash payments can be persuasive.

The gigs are profitable up until the sting operation. The man takes his car to a garage and presents a local official with approximately \$30,000 worth of product. A process follows. Like many cases, his settles. The federal government is saved the costs of trial, and the costs of imprisoning a person in the long term. The unregulated market participant pays with time. The surviving consumers of the product transported by the man continue on the paths of their addiction.

The man goes to prison. The car that he was arrested with takes up space in a municipally-owned lot. The law enforcement agency that conducted the sting is responsible for the car's care as bailiff of the property, still owned by the man.

Time passes. The agency starts a process to take ownership of

¹ Methamphetamine Trends Across Washington State, University of Washington, Addictions, Drug & Alcohol Institute, (last updated Aug. 4, 2021), available at <https://adai.washington.edu/WAdata/methamphetamine.htm>

the car, which is taking up real estate and not paying rent. The man is set to leave prison and would like to sell the car, with proceeds going towards a fresh start, and so he asserts his right to not be subject to an excessive fine.

This appeal is about a judgment which saw these two men as similarly situated — as equally entitled to constitutional intervention. But they are not. One man was asked to indirectly pay a private company a month's wage, because he didn't indulge the polite fiction that moving his domicile vehicle a block was important. The other is being asked to surrender the instrumentality of a felony. Where one man's life was turned upside down for parking his vehicle on a municipally-owned lot; the other wants to start a new life by selling a vehicle that has been safekept by taxpayers on a municipally-owned lot ever since it was last used to transport methamphetamine.

II. IDENTITY OF PETITIONER

The City of Kent, petitioner, is a municipality.

III. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' published decision issued on October 25, 2021. (copy of decision at Appendix A) (Hernandez v. City of Kent, No. 81783-3-I, 2021 Wash. App. LEXIS 2517 (Ct. App. Oct. 25, 2021).

IV. ISSUES PRESENTED FOR REVIEW

1. When the constitutionality of the forfeiture of an instrumentality of a serious crime is challenged as excessive, is it error for the court to rely solely on a single factor in determining gross disproportionality?
2. Is it in error for the court to set aside the presumption of constitutionality which applies to fines set by the legislature, in favor of its own policy determination?
3. Did the court err by finding *salvo contenmento* weighed against proportionality, where the finder of fact found the forfeiture would have no effect on livelihood?
4. Did the court err by conflating present financial condition with future ability to earn a livelihood in its proportionality analysis?

V. STATEMENT OF THE CASE

A. FACTUAL HISTORY

On June 22, 2018, Jacobo-Hernandez arrived at a sting operation in a Dodge Charger. CP 333. Within a covered garage, Jacobo-Hernandez unloaded and delivered to law enforcement eight heat-sealed and zip locked baggies containing approximately 8lbs of methamphetamine, valued between \$25,000 and \$30,000. CP 258, 504. He admitted to having made several other deliveries prior to being caught. CP 51. Subsequently, Jacobo-Hernandez entered a plea of guilty to 21 U.S.C. §841, Possession with Intent to Distribute Methamphetamine. CP 255. The Dodge Charger was placed in the custody of the City of Kent and is stipulated to be valued at \$3,000. CP 216.

The statutory penalty applicable to Jacobo-Hernandez's crime is a mandatory minimum term of 10 years, a fine of up to ten million dollars (\$10,000,000.00), a mandatory minimum term of supervised release of five (5) years, and a mandatory

special assessment of one hundred (\$100) dollars. CP 421. However, the Sentencing Guidelines recommended a lower punishment for Jacobo-Hernandez's offense level of 26. CP 424. In entering the plea, Jacobo-Hernandez acknowledged "that a consequence of pleading guilty may include the forfeiture of certain property either as a part of the sentence imposed by the Court, or as a result of civil judicial or administrative process." CP 422. The District Court sentenced Jacobo-Hernandez to 24-month imprisonment and waived non-mandatory fines. CP 432, 436.

B. PROCEDURAL HISTORY

The City of Kent initiated forfeiture proceedings under RCW 69.50.505, and a hearing was held before a Hearing Examiner on August 7, 2019. Jacobo-Hernandez, through counsel, asserted the affirmative defense that the forfeiture violated the Excessive Fines Clause of the U.S. Constitution. The Hearing Examiner concluded the forfeiture was constitutional, as it was proportional to the crime and there was

no evidence that it was necessary for Jacobo-Hernandez's livelihood. CP 161.

On October 8, 2019, Jacobo-Hernandez, through counsel, appealed to the King County Superior Court, reasserting his excessive fine argument. The Superior Court conducted a proportionality analysis and considered each factor in tandem, noting that it cannot focus on a single factor. CP 508. The Court concluded that forfeiture was not grossly disproportionate and affirmed the Hearing Examiner's decision. *Id.*

The matter was subsequently brought to the Court of Appeals. CP 509. A settlement in principle was reached prior to oral arguments, but the Court denied Jacobo-Hernandez's motion to dismiss. Appx. A-6. On October 25, 2021, an opinion was published reversing the Superior Court. Appx. A-18. The Court of Appeals acknowledged that all but one of the factors weighed towards proportionality. Appx. A-13. Nonetheless, because Jacobo-Hernandez is indigent and the car was his sole asset, the court concluded that the forfeiture of Jacobo-

Hernandez's vehicle was grossly disproportionate and violated the Eighth Amendment. Appx. A-15.

VI. ARGUMENT FOR GRANTING REVIEW

The Court of Appeals' decision (1) is in conflict with the U.S. Supreme Court's decision in *Bajakajian*, and misapplies this Court's decision in *Long*, (2) is in conflict with its own holding in *Long*, that a legislative prerogative should be respected, (3) raises significant issues of both the State and U.S. Constitutions involving excessive fines; and (4) involves an issue of substantial public interest, as it affects countless forfeiture proceedings throughout the state.

1. The court erred by allowing a single factor of the gross proportionality test be dispositive, when all other factors weighed towards proportionality.

The court's decision is in conflict with the U.S. Supreme Court's decisions in *Bajakajian* and *Helm*; it improperly equivocates this matter to this Court's recent decision in *Long*.

a. From the start, modern jurisprudence which has considered the means of an individual in analyzing the proportionality of an excessive fine has consistently found inability to pay to be insufficient by itself.

The court erred by finding, “[e]ven given all the other proportionality factors weighing against Jacobo Hernandez, it seems illogical that the Constitution would allow the State to deprive him of his only asset, a \$3,000 vehicle, when he has been found to be indigent.” Appx. A-15.

The modern revival of *salvo contenmento* considerations in excessive fine analysis began in the First Circuit.² Judge Lynch authored two decisions which began the trend of considering means as a part of the proportionality standard; a consideration which recently reached Washington state jurisprudence in *City of Seattle v. Long*, 198 Wn.2d 136, 155 (2021). *E.g. United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007); *United States v. Levesque*, 546 F.3d 78, 85 (1st Cir.

² Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const.L.Q. 833, 835 (2013). Available at: https://repository.uhastings.edu/hastings_constitutional_law_quarterly/vol40/iss4/4

2008). This new, but also very old, consideration was introduced as a companion to the proportionality factors derived from the U.S. Supreme Court's analysis in *United States v. Bajakajian*, 524 U.S. 321, 335 (1998). There remains a circuit split on the inclusion of this factor to the proportionality analysis. *Long*, 198 Wn.2d at 170. In articulating this new consideration, one of the principles expressed by the First Circuit in *Levesque* was that "a defendant's inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional, nor is it even the correct inquiry." 546 F.3d at 85.

This approach to integrating the *salvo contentemento* consideration in determining proportionality, but not making ability to pay dispositive, has been adopted by a number of other federal circuits. Quoting *Levesque*, the Eighth Circuit found that an individual's inability to satisfy a \$10,000 forfeiture at the time of sentencing did not by itself make the judgment grossly disproportional, due to the individual's

culpability in storing ten pounds of methamphetamine for distribution. *United States v. Smith*, 656 F.3d 821, 828-29 (8th Cir. 2011) (“[a]t least five circuits have held that § 853 permits imposition of a money judgment on a defendant who has no assets at the time of sentencing.”). The Second Circuit has noted that “a forfeiture that deprives a defendant of his livelihood might nonetheless be constitutional, depending on his culpability or other circumstances.” *United States v. Viloski*, 814 F.3d 104, 112 (2d Cir. 2016).

Indeed, looking at *any* factor in isolation would be in error. This Court in *Long*, reversed in part because the court’s analysis focused solely on the single factor of remediation to the government for the costs of prosecution. *Long*, 198 Wn.2d at 114. On remand from the U.S. Supreme Court, the Supreme Court of Indiana emphasized that its decision of gross disproportionality was a close one which involved **multiple** factors:

To be sure, the Land Rover's forfeiture is not unconstitutional just because Timbs was poor. Or because he suffered from addiction.³ Or because he dealt drugs to an undercover officer and not someone who would use them.⁴ And it's not simply because the vehicle's value was three-and-a-half times the maximum fine for the underlying offense.⁵ Or because he received the minimum possible sentence for his crime and wasn't a sophisticated, experienced dealer.⁶ Or because the car, his only asset, was essential to him reintegrating into society to maintain employment and seek treatment.⁷ Rather, it's the confluence of **all** these facts that makes Timbs the unusual claimant who could overcome the high hurdle of showing gross disproportionality.

State v. Timbs, 169 N.E.3d 361, 376 (Ind. 2021).

³ Jacobo-Hernandez has not averred that addiction contributed to his crime.

⁴ As opposed to here, where several other trips occurred, such that tens of thousands of doses of poison *did* make it into the community. CP 152.

⁵ As opposed to here, where the fine is *less* than the maximum prescribed by law. *See infra* p.21.

⁶ *Timbs* involved a user reselling locally several hundred dollars of heroin; whereas Jacobo-Hernandez was conveying tens of thousands of dollars of contraband across state lines to supply the unregulated drug market.

⁷ The record is devoid of a finding that the car is necessary for Jacobo-Hernandez's livelihood. CP 161; *see also infra* p.23.

This approach of looking at all factors is doctrinally in sync with the U.S. Supreme Court's treatment of proportionality in another Eighth Amendment context, the Cruel and Unusual Punishment Clause. *Solem v. Helm*, 463 U.S. 277, 290 n.17 (1983). In *that* Eighth Amendment context, the Court expressly stated that “no one factor will be dispositive in a given case,” and that “no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.” *Id.* There is no compelling reason to think that this wholistic approach to using a multi-factored test would not apply here, to the Excessive Fines Clause.

b. The court erred by allowing a single factor to overcome the rest.

The Superior Court understood this principle. CP 508. (“the Court cannot focus on only one of the seven ... factors”). The Court of Appeals *expressly* disregarded it. Appx. A-15 (“an individual’s financial circumstances can make a forfeiture grossly disproportionate, even when all other factors support a finding otherwise.”).

The court's passing explanation for this disregard was simplistic: this Court in *Long* "meticulously examine[d] the history of the Eighth Amendment and the Magna Carta" and as a result of the "extensive history upon which the court relies" there is a suggestion that "an individual's ability to pay can outweigh all other factors." Appx. A-14.

This suggestion divined by the court, ignores an obvious explanation for the expansive treatment of the *salvo contenmento* factor in *Long*: this Court was adopting a new prong and had to explain why.

The effect of the Court of Appeal's *ipse dixit* reasoning is an abrogation of the factors established by *Bajakajian*, in direct contradiction of principles of *stare decises*. The court allowed this single consideration to control, by discounting and subordinating the controlling factors articulated by the U.S. Supreme Court and acknowledged by this Court. The effect of *Long* cannot be to overrule *Bajakajian* through implication, which is what the Court of Appeal's application of *Long* has

done. To be sure, *Bajakajian*'s framework is permissive enough to allow the sort of judicial gloss originally developed in *Jose* and *Levesque*, and which has been adopted here in *Long*, but that gloss cannot entirely supplant the Excessive Fine Clause framework provided by the U.S. Supreme Court.

c. The Court of Appeals' analogy to *Long* is flawed – the posture is inapposite to the present matter.

The infirmness of the Court of Appeal's reasoning can be traced in part to its uncritical comparison to *Long* – the case it almost exclusively cited to in analyzing the dispositive issue of proportionality. Appx. A-13–A-16. Both *Long* and this matter involve an affirmative defense which asserts the Excessive Fines Clause prevents government action. That is where the similarities stop, to wit:

- *Long* involved a civil penalty and debt. *Long*, 198 Wn.2d at 155 (“The impoundment and associated costs are not analogous to civil forfeiture.”). This is a civil forfeiture related to a felony.

- *Long* involved a \$537 impoundment charge not authorized by the legislature. 198 Wn.2d at 175-76. This involves a forfeiture authorized by the legislature, valued at less than the U.S. Sentencing Guidelines' \$10,000,000 recommended maximum fine.
- The actions in *Long* did not relate to any other crime. *Id.* at 155. The actions here involve tens of thousands of dollars of intermediary, wholesale, interstate drug transactions, and thousands of dollars of unreported and presumably untaxed income.
- Parking on an out of the way, unused gravel lot in *Long* had minimal impact to the community. *Id.* at 173-74. The actions here involve the predatory act of delivering tens of thousands of doses of poison to a community wracked by a drug epidemic, which further exacerbated an ongoing mental health epidemic.⁸

⁸ See University of Washington, *supra* note 1.

- *Long* involved an ongoing payment plan, with late fees and risk of collection costs. *Id.* This involves forfeiture of a single asset, and no future obligations or garnishment.
- *Long* had an apparent impact on livelihood, as tools of trade and domicile were seized, though this Court remanded for findings. *Id.* at 174-77 (“A natural venue for this inquiry is an impoundment hearing in municipal court.”). Here, there *was* fact finding and a Hearing Examiner found the forfeiture would not impact Jacobo-Hernandez’s livelihood.

The Court of Appeals has erred by misapplying *Long*.

2. The court failed to give proper weight to legislative prerogative.

A strong presumption of constitutionality should be applied when the legislature has spoken.

a. Congressional intent creates a strong presumption.

In “deriving a constitutional excessiveness standard” the U.S. Supreme Court held, “judgments about the appropriate

punishment for an offense belong in the first instance **to the legislature** [and r]eviewing courts ... should grant substantial deference to the broad authority **that legislatures necessarily possess in determining ... questions of legislative policy.**”

Bajakajian, 524 U.S. at 336 (emphasis added).

It is the role of the legislature to set the bounds of appropriate punishment for criminal behavior. “In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.” *E.g. Solem v. Helm*, 463 U.S. 277, 290 n.16, (1983).

b. *Long* recognizes the presumption of constitutionality for legislatively authorized fines.

The Court of Appeals once understood this presumption – in *Long* the Court of Appeals cited to *United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009), and stated: “If the value of the fine or forfeiture is within the range prescribed by the legislative body, a strong presumption exists that a forfeiture is

constitutional.” *City of Seattle v. Long*, 13 Wn. App. 2d 709, 731 (2020). To be sure, the Court of Appeals *was* reversed in *Long* — but not because this principle of respecting congressional prerogative was bad law, indeed this Court also cited to *Seher* and *Bajakajian* and suggested legislatures should be granted deference. *Long*, 198 Wn.2d at 175-76. The principle was simply inapplicable in that case because the fines at issue had not been approved by the legislature and were instead defined by a private party in a contract. *Long* does not stand for the proposition that it is the judiciary’s role to define appropriate punishment, untethered from the legislature’s will.

c. Courts may look to the maximum possible fine for the crime, or the U.S.S.G. in evaluating the “other penalties authorized” prong – this forfeiture satisfies either test.

In the proportionality analysis, deference to the legislature is generally borne out in a court’s review of the “other penalties authorized” prong. Courts look to the maximum penalty allowable by the violated statute, or preferably the penalty recommended by the U.S. Sentencing

Commission Guidelines, due to the Guideline's assessment of culpability. *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1999).

Here, that number is the same, \$10,000,000, because the guidelines defer to the statute when the statute calls for a fine greater than \$500,000. U.S.S.G. § 5E1.2(c)(4). The court briefly acknowledged this amount, but failed to discuss, analyze, or give weight to the amount's numeric relationship to the \$3,000 value of the forfeiture. Appx. A-13. Under the proper analysis, the relationship between the \$10,000,000 authorized and the \$3,000 forfeiture should have granted a strong presumption of constitutionality under *Bajakajian*, which should have required a compelling confluence of the other factors to overcome. Such a confluence was not present here.

The Court of Appeals tread into novelty by not granting this presumption, and by declaring unconstitutional a forfeiture which is far below the range prescribed by the legislature. A review of other cases, in which a penalty was deemed an

unconstitutional excessive fine or where an appellate court remanded for fact finding on the issue, reveals how dissimilar the court's disproportionality determination is to others.

Appendix B (Table of Disproportionality Ratios).

The outlier nature of the court's decision is further revealed by a review of published decisions which cite to both *Bajakajian*, 524 U.S. 321, and "21 U.S.C. § 841," the crime Jacobo-Hernandez pled guilty to. At the time of writing, such a search yielded 28 decisions where there was a sufficient record for a determination on proportionality under the excessive fine Clause to be made.⁹ Appendix C (Table of §841 Proportionality Decisions). Of those decisions, only one other forfeiture was found to be unconstitutionally disproportionate — where the government attempted forfeiture of marital property and the spouses had disparate levels of culpability. *See von Hofe v.*

⁹ The Court of Appeals' decision is not one of these cases, since in the process of determining what a proportional punishment for a violation of §841 would be, the court failed to cite to it.

United States, 492 F.3d 175, 191 (2d Cir. 2007).¹⁰ Notably, compared to the data, this matter simultaneously has the second highest authorized fine (\$10,000,000), but also the lowest forfeiture amount sought (\$3,000). Finding this forfeiture to be grossly disproportionate was a major departure from how federal courts have applied *Bajakajian* to violations of §841.

3. The court misapplied the single factor that it did use by applying a simplistic heuristic to a fact bereft record.

The court misapplied the *salvo contentemento* principle and appears to have misunderstood its historical context. It is true that historically under the common law, no one “shall have a larger amercement imposed ... than his circumstances or

¹⁰ *Von Hofe* involved a marijuana grow in the corner of the basement of a marital home. The grow was cultivated by the unemployed spouse, who consumed it with his son and bartered with it for odd jobs. The other spouse was the breadwinner and worked 70 hours a week as a nurse; she had knowledge of the grow’s existence but didn’t interact with it or know of any distribution. A 10-month investigation concluded with a declined federal prosecution and no indicia of widespread distribution found. Nonetheless, the government moved to extinguish the non-participant’s interest in the familial house, where she had lived thirty years. With *these* types of facts, she successfully overcame the presumption of constitutionality.

personal estate will bear.” 4 William Blackstone, Commentaries on the Laws of England *372 (1769). This statement in isolation ignores context. Blackstone continues to explain that this rule is a corollary to “an antient maxim, qui non habet in crumena luat in corpore.”¹¹ *Id.* At common law, in a world with debtors’ prison, the evil of a fine *greater* than the value of a person’s estate, is that the individual will be subject to perpetual imprisonment. *E.g. Dominus Rex v. Oates*, reprinted in 1 THE MANUSCRIPTS OF THE HOUSE OF LORDS, 1689-90 81 (1889) (taking exception to fines which exceeded twice the cleric’s worth, and where imprisonment would “perpetually disabled him” from satisfying the judgment.). That risk is not present here.

Moreover, Blackstone notes that historically forfeiture of a felon’s entire personal estate was contemplated and practiced under the common law and was not suggested to be in degradation of the *salvo contentemento* principle. 1 William

¹¹ “He who has nothing in his purse must pay the penalty with his body.”

Blackstone, Commentaries on the Laws of England *289-90 (1765) (“Hence, in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the moveables or personal estate...”).

The *salvo contentemento* consideration is concerned with one’s future ability to provide – access to the tools of one’s livelihood – and in a post-debtors’ prison world, not a book sheet analysis of wealth. The principle prevents a blacksmith from losing his forge; a tailor his loom; a farmer his plow. It protected Long, a tradesman, from losing access to his tools and domicile and from being subject to a monthly fee schedule that cut deeply into his income, for a simple parking infraction. *Long*, 198 Wn.2d at 173. However, the *salvo contentemento* principle shouldn’t be used to force the return of a drug courier’s instrument of illegal conveyance, any more than it should be used to require an arsonist be returned his lighter, or a poacher his rifle – even if those items are their sole possessions. *See Bajakajian*, 524 U.S. at 333 (“Instrumentalities historically

have been treated as a form of ‘guilty property’ that can be forfeited in civil *in rem* proceedings.”); 3814 NW Thurman St., 164 F.3d at 1197.

There is a distinction between livelihood and financial condition. A forfeiture may “render the defendant a pauper;” but that only indirectly relates to the proper consideration of whether the forfeiture affects one’s “ability to make a living.” *United States v. King*, 231 F. Supp. 3d 872, 904 (W.D. Okla. 2017).

This distinction appears to have been lost on the court. Appx. A-15, n.13 (“[I]t seems nonsensical that the State may deprive a person of all their assets, so long as they have some skill or ability to work.”). The insufficiency of the reasoning that the *salvo contenimento* principle must be violated by taking away an indigent individual’s sole asset is revealed by a single hypothetical change to the facts of this case: had Jacobo-Hernandez transported the eight pounds of methamphetamines in a \$10,000,000 yacht, which was his only possession, would

the forfeiture of that yacht be a violation of the Eighth Amendment in the same way as the court reasons the forfeiture of his \$3,000 car was? Would the Constitution look at his short-term inability to pay for counsel, and from that demand by ancient right that the yacht be returned from the City which had paid its docking fees for years? Under the court's balance sheet *salvo contemento* analysis, which equivocates net worth with future earning potential, the answer to both questions would appear to be "yes." The analysis demands more than was given.

The assertion that forfeiture violates the Eighth Amendment was an affirmative defense, which Jacobo-Hernandez had the burden of proof in establishing. *United States v. Viloski*, 814 F.3d 104, 114 (2nd Cir. 2016); *United States v. Sepúlveda-Hernández*, 752 F.3d 22, 37 (1st Cir. 2014). All that was established was indigency, an inquiry into financial condition looking at short-term cash flow to pay for counsel. The record is bereft of factual findings to support the claim that Jacobo-Hernandez's future ability to provide a livelihood for

himself is tied to this vehicle. Indeed, the Hearing Examiner let Jacobo-Hernandez make the argument through a self-serving affidavit, but explicitly stated he could “not find that such forfeiture of the instrumentality... used to transport illegal narcotics in the present proceeding deprives the Claimant of his livelihood.” CP 161; *e.g. Bajakajian*, 524 U.S. at 336 n.10 (“The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous.”); *Long*, 198 Wn.2d at 176-77 (“A natural venue for this inquiry is an impoundment hearing in municipal court.”). In turn, the Superior Court found “there is no evidence that this car will deprive him of his livelihood.” CP 507. “The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717 (2009).

VII. CONCLUSION

The community faces the negative externalities of meth use. Market participants like Jacobo-Hernandez are often

insulated from the downstream effects of the products they distribute. It is the community that bears the costs of treatment and lost quality of life of its members. In this matter, the equities weigh in favor of the City.

The City bore the substantial cost of the operation to interdict tens of thousands of dollars' worth of poison, which Jacobo-Hernandez stood to profit from. The City bore the costs of holding the vehicle on public property for years. The costs that the City had to bear, compared to the value of this car, is not proportional, but the legislature has provided only a limited solution for communities to recoup some costs.

To say that the pittance the City would receive is grossly disproportionate to the crime committed such that Jacobo-Hernandez is constitutionally aggrieved, is to ignore the downstream consequences of Jacobo-Hernandez's actions and to equivocate the federal government's pursuit of administrative convenience and unwillingness to bear imprisonment costs with clemency.

There is a need for this Court to take review of this case and clarify that *Long* announced an exception which was not meant to swallow the rule. This appeal on a constitutional question meets all the criteria for discretionary review set forth in RAP 13.4(b). This court should grant review, reverse, and remand with direction that the Superior Court's decision be upheld.

The document contains 4,972 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

Respectfully submitted this 18th day of November, 2021.

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CERTIFICATE OF SERVICE

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 Washington State Appellate Courts' Secure Portal, U.S. Mail, and Email service to the following:

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DATED this 18th day of November, 2021.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|----------------------------|---|-------------------|
| ADRIAN JACOBO HERNANDEZ, |) | No. 81783-3-I |
| |) | |
| Appellant, |) | DIVISION ONE |
| |) | |
| v. |) | PUBLISHED OPINION |
| |) | |
| CITY OF KENT, a Washington |) | |
| Municipal Corporation, |) | |
| |) | |
| Respondent. |) | |
| |) | |

HAZELRIGG, J. — Adrian Jacobo Hernandez challenges the forfeiture of his vehicle by the City of Kent pursuant to a criminal investigation. Jacobo Hernandez concedes forfeiture was proper under RCW 69.50.505, but argues that the forfeiture violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. Because an individual’s financial circumstances must be considered prior to a forfeiture determination, and because Jacobo Hernandez was found to be indigent in this and the related criminal proceedings, the forfeiture of his only asset is grossly disproportionate and therefore unconstitutional. We reverse.

FACTS

In June 2018, Adrian Jacobo Hernandez was arrested during a controlled purchase of methamphetamine conducted by the City of Kent Police Department.

Jacobo Hernandez had delivered methamphetamine to a residence in his Dodge Charger. While he used his vehicle to deliver the methamphetamine, the record demonstrates it was not purchased with drug money, but rather had been purchased out of salvage and restored by Jacobo Hernandez.

Jacobo Hernandez was charged in the United States District Court for the Western District of Washington and qualified for representation by a federal public defender. He entered a guilty plea to one count of possession with intent to distribute methamphetamine in May 2019. Jacobo Hernandez received multiple sentencing deductions under the Federal Sentencing Guidelines, including a "Minor Role Adjustment" and was ultimately sentenced to 24 months in prison and a mandatory assessment penalty of \$100. No supervised release was ordered. The federal judge declined to impose a fine, finding that Jacobo Hernandez was "financially unable and [was] unlikely to become able to pay a fine." He has since completed his sentence and was removed from the United States.

In 2018, the City of Kent initiated forfeiture proceedings to seize Jacobo Hernandez' vehicle. Jacobo Hernandez timely filed a request for a hearing, where he argued the forfeiture violated the Eighth Amendment Excessive Fines Clause because the vehicle (valued at \$3,000 to \$4,000) was the only asset in his estate. He had no bank accounts or savings other than \$50 in his jail account. The hearing examiner found the forfeiture did not violate the Eighth Amendment and forfeited the vehicle to the Kent Police Department. This determination was affirmed by the King County Superior Court. He appeals.

HISTORY OF CIVIL ASSET FORFEITURE IN WASHINGTON

In 1971, Washington enacted RCW 69.50.505, permitting civil asset forfeiture. LAWS OF 1971, 1st Ex. Sess., ch. 308 § 69.50.505. The statute permitted forfeiture of property which was used or intended to be used in the manufacture, distribution, or acquisition of controlled substances. Id. The law enforcement agency who seized the property was permitted to retain the entirety of the property for official use, sell it and retain the proceeds, or forward it for disposition. Id. There were no reporting requirements. In 1982, the statute was amended, including requiring 50 percent of the proceeds from sold forfeitures to be deposited into the general fund of the state, county, and/or city of the law enforcement agency. LAWS OF 1982, ch. 171, § 1. In 1984, this was again changed to give 50 percent of sold forfeiture proceeds to the general fund and 50 percent to the state treasurer to be deposited in the public safety and education account. LAWS OF 1984, ch. 258, § 333.

In 1988, the statute was further amended and the legislature made explicit findings that the goal of civil asset forfeiture was to compensate law enforcement for the costs of investigating drug crimes and deter drug offenses by reducing profits from drug trafficking. LAWS OF 1988, ch. 282 § 2. The legislature also increased the amount of proceeds law enforcement could retain, allocating 75 percent of proceeds to the general fund of the state, county, and/or city, but requiring the money to be “used exclusively for the expansion or improvement of law enforcement services.” Id. Twenty-five percent of proceeds were retained by the state treasurer to be deposited in the public safety and education account

(unless the proceeds were less than \$5,000). Id. Still, there were no reporting requirements. In 1992, the legislature permitted law enforcement to keep 100 percent of proceeds. LAWS OF 1992, ch. 211 § 2. Twenty years after the statute was created, the legislature added a requirement that law enforcement keep a record of the property and the amount of money, to be compiled and filed with the state treasurer quarterly. Id. The modern version of the statute allows law enforcement to keep 90 percent of the proceeds, remitting 10 percent to the state general fund. RCW 69.50.505. The recording requirement remains. Id.

During consideration of amendments to the statute in 2001, several stakeholders testified that they had concerns about underlying injustices in the statute. See HOUSE COMM. ON JUDICIARY, HB REP. on Substitute H.B. 1995, 57th Leg., Reg. Sess. (Wash. 1993). These stakeholders testified that “[t]he seizing agencies have a direct conflict of interest,” and that “[t]here is no incentive to reign [sic] in police misconduct.” Id. at 5. The stakeholders also identified disproportionate impacts, testifying that “[t]he vast majority of cases are small time cases, not big drug dealers.” Id.

This testimony reflects many issues raised by legal scholars. The “Research Working Group of the Task Force on Race and the Criminal Justice System” reports numerous concerns about civil asset forfeiture.¹ The task force stated the law “creates a conflict between a law enforcement agency’s economic self-interest and traditional law enforcement objectives” because law enforcement

¹ Research Working Grp., Task Force on Race and the Criminal Justice Sys., Preliminary Report on Race and Wash. Criminal Justice Sys., 47 GONZAGA L. R. 251 (2012).

relies on forfeiture to fund their operations.² “Legitimate goals of crime prevention are compromised when salaries, equipment, and departmental budgets depend on how many assets are seized during drug investigations.”³ Another concern reflected by the Research Working Group, and by Jacobo Hernandez, is that even indigent claimants do not have a right to appointed counsel during the proceedings. At oral argument before this court, defense counsel⁴ noted that Jacobo Hernandez would only have been able to pay counsel \$7.50 an hour before his legal costs outweighed the value of the property seized.⁵

Civil asset forfeiture is a million-dollar industry in Washington. The Institute for Justice found that Washington State accumulated nearly \$145 million in civil asset forfeitures between 2001 and 2018.⁶ Last year the state accumulated \$11.9 million, \$11.6 million of which came from drug offense forfeitures.⁷ These figures do not include proceeds the state received from federal forfeitures.

² Id. at 281.

³ Id. at 281–82.

⁴ Counsel for Jacobo Hernandez indicated at oral argument that he sought express permission from his supervisor at the federal public defenders to assist his client with these corollary proceedings. As such, Jacobo Hernandez was represented by his Federal Public Defender at the initial forfeiture hearing, the appeal to King County Superior Court and on appeal to this court.

⁵ Under RCW 69.50.505(6), a claimant who substantially prevails in a challenge to forfeiture is entitled to reasonable attorney fees. The record demonstrates that the hearing examiner in this case was well aware of this provision and, in fact, seemed to base his decision in part on the fact that Jacobo Hernandez would be entitled to attorney fees if he prevailed, which he characterized as a “ludicrous” result.

Entitlement to attorney fees for a prevailing party is a common, reasonable result in our legal system, particularly when there is no right to appointed counsel in the proceedings. A result authorized by the legislature, which makes our justice system more accessible to individuals of all socioeconomic classes, can hardly be described as “ludicrous.” However, in light of the fact that Jacobo Hernandez did not seek fees on appeal, we need not consider such an award here.

⁶ Policing for Profit: Washington, INSTITUTE FOR JUSTICE, <https://ij.org/report/policing-for-profit-3/?state=WA> (last visited Oct. 13, 2021).

⁷ Eric Scigliano, The Strange, Failed Fight to Rein in Civil Forfeiture in Washington, CROSSCUT (July 13, 2021), <https://crosscut.com/news/2021/07/strange-failed-fight-rein-civil-forfeiture-washington>.

With this legislative and procedural history in mind, we turn to Jacobo Hernandez' constitutional challenge.

ANALYSIS

I. Mootness

As a general rule, this court does not decide moot cases where the court can no longer provide effective relief. Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). “However, a recognized exception permits an appellate court, at its discretion, to ‘retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved.’” Id. (quoting Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). There are several factors to consider in determining whether an appeal involves matters of continuing and substantial public interest: (1) public or private nature of the issue; (2) whether a determination is desirable to give guidance to public officers; (3) whether the issue is likely to recur; (4) level of adverseness and quality of advocacy; and (5) the likelihood that the issue will escape review due to short-lived facts. Id. at 286–87.

Less than 24 hours before oral argument, Jacobo Hernandez submitted an unopposed motion to dismiss his appeal, stating that the parties had reached a monetary settlement. We denied the motion. After oral argument, the parties confirmed they were continuing to move forward with their prior settlement agreement, despite the court's denial of the motion to dismiss, and expected the agreement to be finalized within a few weeks. Because the parties have reached a settlement, this court cannot provide effective relief. See Id. at 287. However,

review is justified because the issues involved in this appeal are matters of “continuing and substantial public interest.” Id. at 286.

First, the issue is public in nature. The appeal comes from a municipal proceeding initiated by the City of Kent pursuant to statutory authority allowing localities to forfeit vehicles which are used to facilitate the delivery of controlled substances. See RCW 69.50.505.

Second, an authoritative determination is desirable to give guidance to public officers, particularly hearing examiners who are responsible for deciding whether a forfeiture violates the Constitution. While this appeal was pending, the Washington State Supreme Court issued its opinion in City of Seattle v. Long, ___ Wn.2d ___, 493 P.3d 94 (2021). Long revised the test for the Excessive Fines Clause, expressly requiring courts to consider the defendant’s ability to pay when conducting an excessive fine analysis. Id. at 107. This case presents an issue of first impression in interpreting Long’s impact, including analyzing its applicability to civil asset forfeiture and determining whether an individual’s financial circumstances can outweigh the other proportionality factors. The answers to these questions will provide much needed guidance to public officials applying constitutional principles to individual cases.

Third, the issue is likely to recur, as any individual who uses a vehicle to facilitate the sale, delivery, or receipt of controlled substances (or materials used in manufacturing, compounding, processing, or delivering controlled substances) is subject to civil asset forfeiture. Fourth, prior to settlement, there was a genuine level of adversity and quality of advocacy in briefing.

Finally, it is likely that the issue will escape review due to short-lived facts. If the owner does not notify the law enforcement agency of their claim of ownership within 45 days (90 for real property), the item is deemed forfeited. RCW 69.50.505(4). Additionally, there is no right to appointed counsel in challenging a seizure.⁸ As noted by Jacobo Hernandez at oral argument, individuals challenging a forfeiture risk losing more in attorney fees than their property may be worth.

All five factors weigh in favor of reviewing Jacobo Hernandez' case because it presents substantial and continuing issues of public interest. As such, we turn to the merits of his claim.

II. Whether Forfeiture of Jacobo Hernandez' Vehicle Violates the Eighth Amendment of the United States Constitution

A. Applicability of Long v. City of Seattle

The Washington State Supreme Court in Long considered vehicle impoundment charges under the Excessive Fines Clause. 493 P.3d at 99. In its analysis, the court relied on several U.S. Supreme Court cases analyzing civil asset forfeiture. Id. at 107 (citing Austin v. United States, 509 U.S. 602, 609–10, 113 S. Ct. 2801, 125 L. Ed. 2d 788 (1993); United States v. Bajakajian, 524 U.S. 321, 327–28, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (2019); Timbs v. Indiana, 139 S. Ct. 682, 686, 203 L. Ed. 2d 11 (2019)). The court concluded that “courts considering whether a fine is constitutionally excessive should also consider a person’s ability to pay.” Long, 493 P.3d at 114. It also stated that for Excessive Fines protection to apply, there must be a sanction that is a “fine” and it must be

⁸ See Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington’s Criminal Justice System, supra note 1.

“excessive.” Id. at 109. The U.S. Supreme Court held that forfeitures were punishments, stating that forfeiture under the federal statutes is “payment to a sovereign as punishment for some offense.” Austin, 509 U.S. at 622 (quoting Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)). Again in Timbs, the U.S. Supreme Court characterized the Excessive Fines Clause to limit “the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” 139 S. Ct. at 687 (quoting Bajakajian, 524 U.S. at 327–28).

These definitions by the U.S. Supreme Court make clear that civil asset forfeitures are identical for purposes of an Excessive Fines analysis. Therefore, Long applies to civil asset forfeitures and controls our review in this case.

B. Instrumentality and Proportionality

Article 1, Section 14 of the Washington Constitution states “[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” The Eighth Amendment of the United States Constitution states “[e]xcessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.” Long held that the state and federal provisions were coextensive for the purposes of excessive fines, absent an analysis under State v. Gunwall providing otherwise. 493 P.3d at 107 (citing 106 Wn.2d 54, 720 P.2d 808 (1986)). In 2019, the U.S. Supreme Court held that the Excessive Fines Clause applied to the states through the Fourteenth Amendment. Timbs, 139 S. Ct. at 698. Because the Eighth Amendment applies to the states, and the federal

Excessive Fines Clause is coextensive to the Washington state clause, we mirror the analysis in Long and consider Jacobo Hernandez' claim under the federal constitution.

“The purpose of the Eighth Amendment [of the United States Constitution] was to limit the government’s power to punish.” Austin, 509 U.S. at 609. To trigger its protections, “a sanction must be a ‘fine’ and it must be ‘excessive.’” Long, 493 P.3d at 109. The United States Supreme Court held that civil asset forfeiture that constitutes “payment to a sovereign as punishment” is subject to the Excessive Fines Clause. Austin, 509 U.S. at 622. The City of Kent does not argue the Excessive Fines Clause is inapplicable, only that this forfeiture does not violate the Clause.

While Austin held that civil asset forfeiture was subject to the Excessive Fines Clause, the Court declined to give a test for determining excessiveness. 509 U.S. at 622; see also Tellevik v. Real Prop. Known as 6717 100th St. S.W. Located in Pierce County, 83 Wn. App. 366, 372–73, 921 P.2d 1088 (1996). In analyzing how to determine excessiveness, Division II of this court considered several federal circuit tests, ultimately deciding to examine instrumentality and proportionality. Tellevik, 83 Wn. App. at 374. For instrumentality, the non-exhaustive factors include: (1) the role the property played in the crime; (2) the role and culpability of the property’s owner; (3) whether the offending property can be readily separated from innocent property; and (4) whether the use of the property was planned or fortuitous. Id. at 374–75. For proportionality, the similarly non-exhaustive factors consist of: (1) the nature and value of the property; (2) the effect

of forfeiture on the owner and innocent third parties; (3) the extent of the owner's involvement in the crime; (4) whether the owner's involvement was intentional, reckless, or negligent; (5) the gravity of the type of crime, as indicated by the maximum sentence; (6) the duration and extent of the criminal enterprise, including the street value of illegal substances; and (7) the effect of the crime on the community, including costs of prosecution. Id. In Long, the Washington State Supreme Court used the following factors in considering proportionality: 1) the nature and extent of the crime; 2) whether the violation was related to other illegal activities; 3) the other penalties that may be imposed; 4) extent of the harm caused; and 5) a person's ability to pay the fine. 493 P.3d at 114.

1. Instrumentality

First, the property at issue here had a central role in the crime. Jacobo Hernandez admitted he used his vehicle to deliver methamphetamine, hiding the drugs in his gas tank. Second, the property owner had a central role in the crime and was culpable. Again, Jacobo Hernandez owned the vehicle and pleaded guilty to possession with intent to distribute methamphetamine. The parties argued in their briefs and below about whether Jacobo Hernandez played a significant role in the crime. Jacobo Hernandez avers that he was a "mere courier" for a larger drug dealer, and the record reflects that he received a sentencing adjustment for playing a comparatively minor role.⁹ Additionally, he notes that the maximum

⁹ A minor role adjustment is given under the Federal Sentencing Guidelines for a defendant "who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." It entitles the defendant to a 2-level decrease. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2(b); cmt. n.1 (U.S. SENTENCING COMM'N 2018).

sentence for his charge was not less than 10 years and up to life in prison, the United States recommended a sentence of no more than 63 months, and the federal judge departed significantly from both of these possible terms of confinement, instead sentencing Jacobo Hernandez to only 24 months in prison without supervised release. The City of Kent argues that Jacobo Hernandez' adjustment was only because his culpability was lower than that of his co-defendant, who had been dealing methamphetamine for years and organized the entire drug-dealing scheme. The City argues that because Jacobo Hernandez alone used his vehicle to deliver drugs, he had a central role and significant culpability. While Jacobo Hernandez is correct that he was a drug courier and the sentencing judge clearly saw his overall culpability as low, demonstrated by his comparatively short sentence, he was convicted of possession of methamphetamine with the intent to distribute. Jacobo Hernandez was central to that crime, and his culpability is evidenced by his guilty plea and conviction. Third, the "guilty property" cannot be separated from the innocent property. The vehicle was used to store, transport, and then deliver methamphetamine. Finally, the vehicle's use was planned and/or fortuitous. Jacobo Hernandez admitted to hiding methamphetamine in his gas tank, driving it to the "customer's" home, where it would be sold. He met the co-defendant as a customer of his lawful business, agreed to deliver drugs, and was promised payment for the delivery. He also acknowledged making three such deliveries total, though he was never charged for any previous deliveries.

The instrumentality factors weigh toward forfeiture; the vehicle was clearly an instrument of Jacobo Hernandez' crime. However, the forfeiture must still be proportional to the crime in order to be valid under the Excessive Fines Clause.

2. Proportionality

A court must also consider proportionality factors. See Tellevik, 83 Wn. App. at 375–76 (holding the trial court erred in failing to analyze proportionality factors).

First, the nature and extent of Jacobo Hernandez' crime was a drug delivery involving a significant amount of methamphetamine—he admitted to knowingly possessing approximately eight pounds of methamphetamine with the intent to distribute it. Second, the crime was related to other illegal activities, and Jacobo Hernandez admitted to making two other deliveries. Third, the other penalties that may be imposed for the crime are a mandatory minimum term of 10 years in prison, a fine of up to ten million dollars, a mandatory minimum of five years on supervised release, and a mandatory special assessment of \$100. Fourth, the administrative hearing officer noted that the “legislature enacted this statute, in-part, as a deterrent to drug trafficking due to the impact that it has on our society.” The final factor under Long is a person's ability to pay.¹⁰

Here, Jacobo Hernandez declared that the vehicle is his only asset in his estate. He has no bank accounts, savings, or financial assets other than \$50 in

¹⁰ Jacobo Hernandez argues that considering whether a forfeiture would deprive an individual of their livelihood should be a separate consideration from a proportionality analysis. However, Long is clear that review of an individual's financial circumstances is wrapped within the proportionality analysis. 493 P.3d at 114.

his jail account. The City did not dispute this declaration below or in its briefing on appeal to this court.¹¹ At sentencing, the federal judge waived all fines, finding Jacobo Hernandez was financially unable, and unlikely to become able, to pay a fine. This final factor of considering his financial condition weighs in favor of finding excessiveness.

Jacobo Hernandez argues that under the proportionality analysis, the Excessive Fines Clause prohibits forfeiting the entirety of an owner's estate, and must not deprive an owner of his livelihood. Below, both the administrative hearing officer and the superior court stated that, even if they were to consider the financial circumstances of Jacobo Hernandez, they could not focus on only one factor.¹² Our Supreme Court's guidance in Long suggests otherwise. Long sets out and meticulously examines the history of the Eighth Amendment and the Magna Carta, which forbid "penalties 'so large as to deprive [a person] of his livelihood.'" 493 P.3d at 111 (alteration in original) (quoting Browning-Ferris, 492 U.S. at 271). While Long explicitly requires courts to consider an individual's ability to pay, the extensive history upon which the court relies suggests an individual's ability to pay can outweigh all other factors. Id. at 111–12.

Long also drew from the Colorado Supreme Court, which held "the 'concept of 'proportionality' itself' supported considering ability to pay," and "[a] fine that

¹¹ The City argues that the forfeiture will not deprive Jacobo Hernandez of his livelihood because the vehicle is not necessary for his ability to earn money, citing the Merriam-Webster thesaurus in support. The Merriam-Webster's Online Dictionary defines livelihood as "means of support or subsistence." (emphasis added) <https://www.merriam-webster.com/dictionary/livelihood> (last visited Oct 13, 2021).

¹² The court stated that it "cannot focus on just one factor" and the hearing examiner noted, "[W]hile it is unfortunate that the Claimant has put himself in the position that he is financially impoverished, the forfeiture of the vehicle neither 'shocking to the conscience' nor constitutionally an excessive, cruel, or unusual punishment in light of his illegal participation in the delivery."

would bankrupt one person would be a substantially more burdensome fine than one that did not.” Id. at 113 (quoting Dep’t of Labor & Emp’t v. Dami Hosp., LLC, 2019 CO 47, ¶ 30–31, 442 P.3d 94 (2019)). The Washington State Supreme Court requires courts to consider an individual’s financial circumstances, but the history the court uses to come to that conclusion suggests that an individual’s financial circumstances can make a forfeiture grossly disproportionate, even when all other factors support a finding otherwise.

We agree with Jacobo Hernandez’ argument that “[f]or the forfeiture of an entirety of a person’s estate to be proportional . . . it would have to be far more heinous than Mr. Jacobo[]Hernandez’s role as a courier on this one (or even three) occasions.” This is particularly persuasive because Jacobo Hernandez was found to be indigent, both by the federal judge presiding over his criminal matters and by the superior court, which granted an order allowing him to proceed with his appeal at public expense. Even given all the other proportionality factors weighing against Jacobo Hernandez, it seems illogical that the Constitution would allow the State to deprive him of his only asset, a \$3,000 vehicle, when he has been found to be indigent.¹³ As our Supreme Court noted in Long, “[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear.” 493 P.3d at 115 (emphasis added) (quoting Timbs, 139 S. Ct. at 688). In his federal matter and again in his civil asset forfeiture case, Jacobo Hernandez

¹³ The administrative hearing officer below held that Jacobo Hernandez would not be deprived of his livelihood because he had “skills that he can rely upon to earn a living.” This is inconsistent with Long, which held that the fine deprived Long of his livelihood despite the fact that like Jacobo Hernandez, Long was a skilled tradesman with knowledge and experience upon which he could rely to make money. 493 P.3d at 114–15. Additionally, it seems nonsensical that the State may deprive a person of all their assets, so long as they have some skill or ability to work.

was found to be indigent. The City does not challenge this evidence. Jacobo Hernandez' estate clearly will not bear the forfeiture of his only asset, worth only a few thousand dollars, considering his indigency.¹⁴

3. Closer Scrutiny Because the State Stands to Benefit

Additionally, Washington's Supreme Court "has recognized that punitive fines should not be sought or imposed as a source of revenue." Id. at 113 (quoting State v. Grocery Mfrs. Ass'n, 195 Wn.2d 442, 476, 461 P.3d 334 (2020) (noting that much of the funding for the criminal justice system comes from fines). "Courts scrutinize 'governmental action more closely when the State stands to benefit.'" Id. (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)). In the context of civil asset forfeiture, there is a significant financial benefit for the State in seizing assets—"Washington State allows local law enforcement agencies to retain 90% of the net proceeds from drug-related assets seized."¹⁵ We scrutinize the constitutionality of civil asset forfeitures more closely because individual law enforcement agencies, and the state government in general, stand to benefit millions of dollars each year from forfeiture.¹⁶

¹⁴ An individual's financial circumstances may not always outweigh the other proportionality factors. However, the facts here are sufficient to support a finding of gross disproportionality.

¹⁵ "Because a drug arrest automatically renders much of a defendant's property seizable, section 69.50.505 of the Revised Code of Washington has a disparate impact on defendants of color." See Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System, supra note 1.

¹⁶ See Policing for Profit: Washington, supra note 6; see also Eric Scigliano, The Strange, Failed Fight to Rein in Civil Forfeiture in Washington, supra note 7.

II. Procedure on Remand

At oral argument before this court, the City urged the panel to remand to the superior court if we found that Long controls. It argued the record below is insufficient to conduct the proportionality test, and asserted that this court cannot know the true extent of Jacobo Hernandez' finances based only on his declaration. While it is true that our court does not find facts, the City is mistaken as to the record before us and our standard of review. See Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (appellate courts do not find facts).

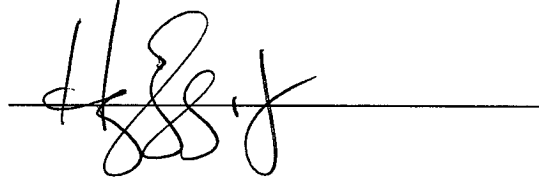
The record on appeal contains findings by both the superior court on review and the administrative hearing examiner indicating the vehicle is Jacobo Hernandez' only asset. Additionally, Jacobo Hernandez submitted a finding by the federal judge in his criminal case concluding that he was indigent and would likely never become able to pay a fine, which was the basis for waiving that sentencing requirement. For purposes of the appeal, the superior court found he was indigent and waived fees. Unchallenged findings of fact are "verities on appeal." State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).¹⁷

The City did not cross-appeal or otherwise challenge any of these findings below or in its briefing before us. The City's speculative assertions at oral argument, based on mere conjecture or facts not in the record before us, are not

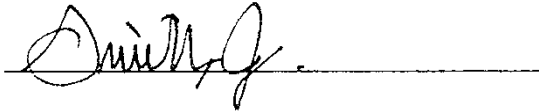
¹⁷ At oral argument, the City contended that these findings were mixed questions of law and fact. The City misunderstands the law and Jacobo Hernandez' assignments of error. We need not reach this argument.

sufficient to challenge the evidence properly submitted by Jacobo Hernandez.¹⁸ Accordingly, we have sufficient facts in the record to conduct the proportionality test. We conclude that the forfeiture of Jacobo Hernandez' vehicle was grossly disproportionate in violation of the Eighth Amendment.

Reversed.

A handwritten signature in black ink, appearing to be 'H. S. J.', written over a horizontal line.

WE CONCUR:

A handwritten signature in black ink, appearing to be 'Smith, J.', written over a horizontal line.A handwritten signature in black ink, appearing to be 'Luppelwick, J.', written over a horizontal line.

¹⁸ Jacobo Hernandez also assigned error to the superior court's finding of fact that he "played a significant role" in the underlying crime. He asserts in briefing that this is actually a mixed question of law and fact subject to de novo review by this court. In light of our conclusion as to his primary challenge, we need not reach this assignment of error.

APPENDIX B

APPENDIX B

TABLE B-1: Finding Gross Disproportionality or Remanded For Fact Finding

| Case | Statutory Max | Guideline Max | Forfeiture Amount | Ratio ¹ |
|---|---------------|---------------|-------------------|--------------------|
| <i>Hernandez v. City of Kent</i> , No. 81783-3-I, 2021 Wash. App. LEXIS 2517 (Ct. App. Oct. 25, 2021) | \$10,000,000 | \$10,000,000 | \$3,000 | 3333.33:1 |
| <i>Timbs v Indiana</i> , 169 N.E.3d 361 (Ind. 2021) | \$10,000 | | \$35,000 | 1:3.5 |
| <i>United States v. Muzaffar</i> , 714 F. App'x 52 (2nd Cir. 2017) | | \$125,000 | \$750,000 | 1:6 |
| <i>United States v. 18755 N. Bay Rd.</i> , 13 F.3d 1493 (11th Cir. 1994) | \$20,000 | | \$150,000 | 1:7.5 |
| <i>United States v. 59,000.00 Dollars in United States Currency</i> , 282 F. App'x 785 (11th Cir. 2008) | \$250,000 | \$5,000 | \$49,000 | 1:9.8 |
| <i>United States v. Beras</i> , 183 F.3d 22 (1st Cir. 1999) | \$250,000 | \$30,000 | \$357,144 | 1:11.9 |
| <i>City of Seattle v. Long</i> , 198 Wn.2d 136 (2021) | \$44 | | \$547.12 | 1:12.4 |
| <i>United States v. 3814 NW Thurman St.</i> , 164 F.3d 1191 (9th Cir. 1999) | \$1,000,000 | \$5,000 | \$200,686 | 1:40.1 |
| <i>United States v. Varrone</i> , 554 F.3d 327 (2d Cir. 2009) | \$250,000 | \$250,000 | \$12,012,924 | 1:48 |
| <i>United States v. Bajakajian</i> , 524 U.S. 321, (1998) | \$5,000 | | \$357,144 | 1:71 |

¹ Guideline Max used for numerator when available. Ratio represents how much was taken for every dollar authorized by the Guidelines, or the statute, e.g. a ratio of 1:4 means for every dollar authorized as a fine, the government took \$4 in that case; a ratio of 10:1 means for every ten dollars authorized as a fine, the government took \$1.

APPENDIX C

APPENDIX C

TABLE C-1:

Published Decisions on Proportionality of Fine for Violation of 21 U.S.C. §841

| Name | “Fine” Amount | Statutory Maximum | Guideline Maximum | Constitutional? |
|--|---------------------------------|----------------------|-------------------|-----------------|
| <i>United States v. Smith</i> , 656 F.3d 821, 829 (8th Cir. 2011) | \$10,000 | unstated | unstated | yes |
| <i>United States v. Basurto</i> , 117 F. Supp. 3d 1266, 1313 (D.N.M. 2015) | \$13,133.33 | \$2,000,000 | \$2,000,000 | yes |
| <i>United States v. Ortiz-Cintron</i> , 461 F.3d 78, 81 n.3 (1st Cir. 2006) | \$33,000 | \$1,000,000 | \$1,000,000 | yes |
| <i>United States v. 817 N.E. 29th Drive</i> , 175 F.3d 1304, 1311 (11th Cir. 1999) | \$70,000 | \$1,000,000 | \$1,000,000 | yes |
| <i>United States v. Carpenter</i> , 317 F.3d 618, 628 (6th Cir. 2003) | \$82,500 | \$250,000 | \$120,000 | yes |
| <i>United States v. Bernitt</i> , 392 F.3d 873, 881 (7th Cir. 2004) | \$115,500 | \$5,000,000 | unstated | yes |
| <i>United States v. 10380 S.W. 28th St.</i> , 214 F.3d 1291, 1295 (11th Cir. 2000) | \$119,000 | \$4,000,000 | \$4,000,000 | yes |
| <i>United States v. Real Prop., Bldgs., Appurtenances & Improvements Located at 221 Dana Ave.</i> , 81 F. Supp. 2d 182, 192 (D. Mass. 2000), vacated on other grounds, <i>United States v. Real Prop.</i> , 239 F.3d 78, 91 n.18 (1st Cir. 2001) | \$125,000 | \$2,000,000 | \$125,000 | yes |
| <i>United States v. 6941 Morrison Drive</i> , 6 F. Supp. 3d 1176, 1183 (D. Colo. 2013) | \$142,000 | \$250,000 | unstated | yes |
| <i>United States v. Candelaria-Silva</i> , 166 F.3d 19, 44 (1st Cir. 1999) | \$169,000 (substitute property) | \$6 million judgment | unstated | yes |
| <i>United States v. Martinez</i> , 146 F. Supp. 3d 497, 503 (W.D.N.Y. 2015) | \$170,000 | unstated | unstated | yes |
| <i>United States v. 5 Reynolds Lane, Waterford</i> , 956 F. Supp. 2d 349, 364 (D. Conn. 2013) | \$200,000 | unstated | unstated | yes |
| <i>United States v. One 1995 Grady White 22' Boat</i> , 415 F. Supp. 2d 590, 595 (D. Md. 2006) | \$225,000 | \$2,000,000 | \$2,000,000 | yes |

| Name | “Fine” Amount | Statutory Maximum | Guideline Maximum | Constitutional? |
|---|------------------------------------|-------------------------------|-------------------|------------------------------|
| <i>von Hofe v. United States</i> , 492 F.3d 175, 191 (2d Cir. 2007) | \$248,000 (2x \$144k interests) | \$1,000,000 | \$1,000,000 | No, as to one of the owners. |
| <i>United States v. 32 Medley Lane</i> , 372 F. Supp. 2d 248, 272 (D. Conn. 2005), reversed by <i>Van Hofe v. United States</i> , 492 F.3d 175 (2d Cir. 2007) | \$248,000 | \$1,000,000 | \$40,000 | yes, but reversed |
| <i>United States v. Fogg</i> , 666 F.3d 13, 19-20 (1st Cir. 2011) | \$264,000 | unstated | unstated | yes |
| <i>United States v. 2121 Celeste Rd.</i> , 189 F. Supp. 3d 1208, 1281 (D.N.M. 2016) | \$268,000 | \$1,000,000 | unstated | yes |
| <i>United States v. 325 Skyline Circle</i> , 534 F. Supp. 2d 1163, 1167 (S.D. Cal. 2008) | \$300,000 | \$2,000,000 | \$2,000,000 | yes |
| <i>United States v. Collado</i> , 348 F.3d 323, 328 (2d Cir. 2003) | \$385,000 | \$500,000 | \$500,000 | yes |
| <i>United States v. Cheeseman</i> , 600 F.3d 270, 286 (3d Cir. 2010) | \$500,000 | \$250,000 | \$75,000 | yes |
| <i>United States v. Cheeseman</i> , 593 F. Supp. 2d 682, 688 (D. Del. 2009) | \$500,000 | \$250,000 | \$75,000 | yes |
| <i>United States v. Heldeman</i> , 402 F.3d 220, 223 (1st Cir. 2005) | \$900,000 | \$6,000,000 | \$6,000,000 | yes |
| <i>United States v. Coleman Commer. Carrier, Inc.</i> , 232 F. Supp. 2d 201, 204 (S.D.N.Y. 2002) | \$1,000,000 | unstated | unstated | yes |
| <i>United States v. Sepúlveda-Hernández</i> , 752 F.3d 22, 37 (1st Cir. 2014) | \$1,000,000 | \$5,000,000 | \$5,000,000 | yes |
| <i>United States v. Riedl</i> , 164 F. Supp. 2d 1196, 1199 (D. Haw. 2001) | \$1,374,300 | \$1,250,000 | \$1,000,000 | yes |
| <i>United States v. Bradley</i> , 969 F.3d 585, 592 (6th Cir. 2020) | \$1,000,000 + five properties | “more than a million dollars” | unstated | yes |
| <i>United States v. Dicter</i> , 198 F.3d 1284, 1292 (11th Cir. 1999) | medical license | \$200,000,000 | \$200,000,000 | yes |
| <i>United States v. Real Prop. with Any Improvements Thereon Located at 40 Clark Rd.</i> , 52 F. Supp. 2d 254, 269 (D. Mass. 1999) | numerous cars and real estate | "millions" | unstated | yes |

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