NO. 100949-6

SUPREME COURT OF THE STATE OF WASHINGTON

PAUL J. PASTOR, JR., PIERCE COUNTY SHERIFF,
Plaintiff/Respondent,

v.

REAL PROPERTY COMMONLY DESCRIBED AS 713 SW 353rd PLACE, FEDERAL WAY, KING COUNTY, WASHINGTON, and all appurtenances and improvements thereon,
Defendant in Rem,

MEI XIA HUANG,
Interested Party/Petitioner

PAUL J. PASTOR, JR., PIERCE COUNTY SHERIFF'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

MARY E. ROBNETT
Prosecuting Attorney

Daniel R. Hamilton
Deputy Prosecuting Attorney
WSBA # 14658
955 Tacoma Ave. S., Ste. 301
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

Petitioner knowingly owned and profited from her illegal drug factory that used banned chemicals in a suburban neighborhood. She therefore does not dispute the substantive merits of her forfeiture order. Rather, she asks to be rewarded for evading personal service, obscuring any ground for that defense during litigation, obstructing discovery and then consenting to and reneging on, her agreement to forfeit the factory – all to run out the two-year statute of limitations. Though she also sought to avoid forfeiture under the Eighth Amendment, she chose not to acknowledge in the courts below all its required factors.

Respondent's cross-appeal should be considered and discretionary review denied.

II. COUNTER-STATEMENT OF THE ISSUES

1. Did the Court of Appeals properly affirm forfeiture of Petitioner's illegal drug factory when she argued for the first time

on appeal she did not receive personal service within 15 days of seizure even though the forfeiture statute expressly provides for service by publication, such service was used only because she was evading service, and she fully litigated it while also refusing discovery on that defense?

2. Did the Court of Appeals properly affirm forfeiture of Petitioner's illegal drug factory where she claimed it was an excessive punishment but failed to brief or apply the test for that claim and the record showed – *inter alia* – her factory was worth less than the drugs it regularly produced and the owner agreed to settle on terms inviting and waiving the supposed error that equitably estopped her from asserting the Eighth Amendment?

3. Did the Court of Appeals err by not alternatively affirming forfeiture on the Sheriff's cross appeal to enforce Petitioner's CR 2A settlement agreement?

III. COUNTER-STATEMENT OF THE CASE

A. WHEN PETITIONER'S DRUG FACTORY IS SIEZED SHE EVADES PERSONAL SERVICE, LITIGATES FORFIETURE AND OBSTRUCTS DISCOVERY

On August 6, 2018, the Tacoma Fire Department responded to a house fire and discovered a large marijuana growing operation in a residential neighborhood. CP 11. A later search discovered therein a receipt to Zhou Fu Chen for $900 from De Qiang Yang at 713 SW 353rd PL, in Federal Way. *Id*. Surveillance of the latter address by the Pierce County Sheriff (hereinafter "PCS") determined its outward appearance was consistent with homes in residential areas converted into hidden marijuana factories and that vehicles consistently parked there were registered to Chen, Yang and the property's owner Petitioner Mei Xia Huang. [1] *Id.*

[1] Petitioner claims her property was "rented to De Qiang Yang," supposedly only he and "not her, was suspected of the crime," and an "exception" to RCW 69.50.505(1)(i) forfeiture "applies if the criminal activity occurred 'without the owner's knowledge or consent.'" Pet. 3, 6-7. However, it is undisputed Yang was her child's father, she listed the property as their nuclear family's *joint* "home address," the cash in her possession was the equivalent of 10 months of his supposed "rent," and when arrested in her factory she was found in the midst of a loud, aromatic, blindingly lit and unmistakably reconfigured factory whose every corner was devoted to

On May 20, 2019, PCS executed a search warrant there and found all but one small room had been converted into a sophisticated factory for large scale illegal commercial marijuana cultivation/processing/packaging that used banned chemicals "myclobutanil" and "spiromesifen" at its secreted location in a residential neighborhood. CP 142-289, 368-72, 376. PCS also found: 1) Petitioner's Lexus SUV, which regularly had been parked outside the factory; 2) she was present within the factory; and 3) she was in possession of 1,327 marijuana plants[2] and 70 pounds of their quarterly or

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cultivation/processing/packaging of illegal marijuana on a large commercial scale. CP 100, 142-289, 308, 312, 368-72, 376. Thus, on appeal Petitioner did not dispute the Superior Court's ruling that any claim she was ignorant of her property being used as an illegal marijuana factory was "thoroughly contradicted by the objective circumstantial evidence that demonstrates her knowledge." CP 653-654. Indeed, she was dramatically profiting from it while reporting only the income of a "waitress." CP 359-61, 366-71, 375-626.

[2] "The number of cloned plants recovered during this search suggests that this grow was likely also supplying another grow (or grows) with starter plants." CP 13.

monthly crop[3] (value: 70 lbs. x $1,800 per lb. in 2019[4] = $126,000 *per crop*)), her $1,800 Louis Vuitton Handbag held $20,400 cash in $100 bills, and her $800 Louis Vuitton wallet contained a Washington identification card listing Defendant Property as her residence address. CP 133, 141, 166-173, 368-72, 375-76.

Therefore, on June 3, 2019, PCS mailed Petitioner a "Notice of Seizure and Intended Forfeiture" of personal property at the Defendant Property's address listed on her ID card, CP 127-130, 173, and on July 8, 2019, she asserted "ownership of all" the marijuana growing and processing equipment and drug money "seized from our client's *residence.*" CP 133-139, 327-32 (emphasis added). Though she often repeated this claim this

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[3] The "growth cycle for marijuana grown indoors is usually one hundred and twenty days, so that the cultivator will have a new crop to be harvested in approximately that time period. The cultivator oftentimes rotates the crops so that the cultivator will have a new crop, for example, every thirty days." CP 368.

[4] *See* https://mjbizdaily.com/washington-state-wholesale-cannabis-flower-prices/. *See also* ER 201(d) ("Judicial notice may be taken at any stage of the proceeding.")

was her "residence," *id.*; CP 100, 173, Petitioner later admitted she actually "was not living" there. CP 633. Unbeknownst to PCS, after receiving the June 2019 notice of personal property forfeiture, Petitioner: 1) stopped living at her *separate* Federal Way address where she actually had stayed for the past year; 2) sold her California "home June 24th 2019" where she also was residing; and 3) "[f]*rom July 2019* [when the real property forfeiture action began] lived" at a then undisclosed California address. CP 85, 308, 633.

On July 25, 2019, PCS filed a "Complaint of Forfeiture in Rem" and a "Summons and Notice," as well as moved "For Issuance of Warrant for Arrest in Rem" (naming Petitioner's property as "Defendant" and her as "Interested Party"). CP 1-16. Thereafter: 1) on July 30, PCS filed a "Lis Pendens," CP 17-21; 2) on August 9, 2019, the Court issued the Warrant, CP 22-23; 3) on August 14, 2019, PCS posted the court documents "in a conspicuous place" on Defendant Property, CP 27; 4) *two days after the posting/seizure* Petitioner's attorney on August

16, 2019 entered a notice of appearance for her, CP 24-25; and 5) within *8 days of seizure*, on August 22, 2019, a "Declaration of Due Diligence" was filed by PCS's private investigator stating, *inter alia*, he had been "requested to locate and serve" Petitioner but "neighbors say home has been vacant for a while" and after his diligent search he was "unable to locate an address in the State of Washington for service of documents" on her. CP 28-30 (emphasis added). On September 5, 2019, a Deputy Sheriff again found "no person" in possession of Defendant property and again "taped to [its] front door" another "copy of the warrant for arrest *in rem* …." CP 31-34.

Accordingly, on September 17, 2019, PCS moved under RCW 69.50.505(3) for service by publication pursuant to RCW 4.28.100(6), and on September 18, 2019, it was granted and thereafter published. CP 43-54.[5] *Less than a week later*, on

[5] Petitioner argues the "Sheriff did not move for leave to serve her by mail." Pet. 9. This ignores: 1) RCW 69.50.505(3) authorizes "substituted service"; 2) CR 4(d)(4) provides service by mail is just an "[a]lternative to service by publication;" 3)

September 24, 2019, Petitioner filed her "Answer and Affirmative Defenses" that vaguely asserted as its sixth "affirmative defense[]:" "defendant in rem and interested party" were not "serve[d] process … in the manner and form required by law." CP 59. Any supposed absence of subject matter jurisdiction was not alleged nor was lack of service raised by motion in the Superior Court. CP 55-60.

Indeed, during the subsequent litigation Petitioner *refused* to disclose any ground for her affirmative defenses and argued "discovery is not needed" and PCS' search for her location was not diligent since she falsely told the Court she "is a *resident of Washington State*." [6] CP 68-72. PCS thereafter noted: by

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PCS had learned mailed service would have been ineffective because Petitioner was not living at her marijuana factory despite her claims otherwise; *see* CP 30, 44-51; and 4) even if PCS had obtained an order for service by mail to the California address listed on her vehicle registration it too would have been ineffective since by then also she had sold that house and moved to an undisclosed California address. CP 85, 308, 633.

[6] In her June 1, 2020, declaration opposing summary judgment Petitioner admitted under oath: "From *July 2019 to the present*, I've lived" *in California* -- and thus *was not living in*

obstructing discovery Petitioner "fails to provide any address where service can be effected upon her, and fails to provide any affidavit that would permit service of process to be effected upon her attorneys." *Id.*; CP 76. On October 25, 2019, PCS served her counsel discovery, CP 723, 741, including a request Petitioner produce evidence "relating to the Sixth Affirmative Defense" claiming "defendant in rem and … Huang" were not "serve[d] process … in the manner and form required by law." CP 59, 761. After a CR 26(i) conference was conducted due to her repeated delays, CP 725-739, Petitioner on January 10, 2020, still did not provide discovery about – among other things – an alleged failure of personal service because she claimed the request was objectionable and she "will supplement when appropriate." CP 761-62.

When additional discussions did not produce the requested

Washington at the time of her property's August 2019 seizure but living only in California despite her October of 2019 misrepresentation to the Court that her residence was in Washington. CP 308 (emphasis added), 633.

discovery, CP 766-774, PCS: 1) on January 23, 2020, unsuccessfully attempted to obtain personal service on Huang at the California address stated on her Lexus' vehicle registration and learned she had sold that home in June 2019, CP 85, 368-69; 2) on April 20, 2020, moved for "summary judgment and order of forfeiture," CP 89-289; 3) on May 1, 2020, successfully moved to compel discovery over Petitioner's opposition, CP 711, 794; and 4) on May 14, 2020, moved to recover CR 37 expenses. CP 796, 799. Though Petitioner continued to oppose discovery, CP 783, the Superior Court on May 11, 2020, ordered her to provide it – including discovery concerning the alleged failure to serve process. CP 795.

B. PETITONER STALLS BY SETTLING THEN RENEGING

After she responded to PCS's summary judgment motion, CP 296, and a day before its discovery motion hearing, CP 836, Petitioner's counsel on June 3, 2020, offered "resolution" of the case if the parties agreed to "sell the property and split the proceeds, 50/50, give her the watch and $10,000.00 of the

seized cash." CP 864. Because her "financial records" showed "the house was purchased with drug money," PCS rejected the offer but after further negotiation made its "final" counteroffer that required, among other specifically listed terms, she "execute a formal settlement agreement and stipulated judgment in form and substance approved by Plaintiff which contains Plaintiff's preferred language" and "a full release of all claims." CP 862-64.

After her counsel discussed these terms with her, Petitioner "told my attorney John Kannin I would agree to settle the case" and "*instructed him to tell the Plaintiff's attorney that I would take this offer*." CP 885-886 (emphasis added). Her counsel then emailed PCS "I have discussed your latest offer with my client, … the risks and merits of our litigation and have explained your offer to my client," and counteroffered: if PCS "will make the percent on the house sale be 10% She [sic] will accept all the other terms you have set forth below to settle the litigation." CP 861. Her offer did not condition settlement on

execution of a more formal agreement but incorporated by reference her aforementioned promise she "will execute a formal settlement agreement" and "a full release of all claims." CP 862. In an email entitled "SETTLEMENT," PCS accepted her offer without reservation. CP 860-62. Petitioner's counsel confirmed: "Ok thank you Chad." CP 859-60.

A week after PCS struck its motions and trial date as well as drafted formal settlement documents as agreed, Petitioner on June 10, 2019, reneged on her promise by refusing to sign them. CP 858, 886.

C. MOTIONS TO ENFORCE AGREEMENT AND DISMISS

On July 10, 2020, PCS moved for summary judgment to enforce the settlement under CR 2A, contract principles and equitable estoppel. CP 838.

Petitioner disputed neither the record of her settlement nor equitable estoppel but claimed *her own offer* conveyed *by her attorney* was an unenforceable "excessive fine" under the Eighth Amendment. CP 873. Her declaration expressly

admitted she voluntarily authorized the offer but, *after it was made on her behalf and had been accepted*, she "decided I did not want to do it" and refused to sign. CP 886.

On August 10, 2020, the trial court determined "Huang entered into a settlement agreement that is *binding under contract law and CR 2A*," the "terms of that agreement are stated in the email," and "[n]o reasonable fact finder could find that Plaintiff and Huang did not enter into that agreement." CP 948-49 (emphasis added). Nevertheless, enforcement was denied because Petitioner "*argues* that the agreement is void under the Eighth Amendment to the U.S. Constitution,'" and PCS had not "established by clear and convincing evidence that Huang knowingly, intelligently, and voluntarily waived the Eighth Amendment rights *potentially* implicated by the settlement agreement." CP 849-50 (emphasis added). The Order did not find Huang had proved *her own offer* was an "excessive fine," explain why *PCS* had a duty to *disprove* waiver of an unproven violation or mention equitable estoppel. *Id.*

PCS filed appellate motions for review of that order, CP 692; RB 13 n. 10, and re-noted its long pending Superior Court summary judgment motion on the merits which had been stricken under Petitioner's settlement agreement. CP 1020. Petitioner opposed summary judgment by arguing without explanation she somehow did not "actually kn[o]w that recreational marijuana was being grown," and that forfeiture "violates the excessive fine clause of the 8th Amendment to the U.S. Constitution." CP 337-348. In the Superior Court she at no time argued it lacked jurisdiction or that service by publication was untimely or improper. *Id*; CP 628-650. On December 10, 2020, the honorable Judge Chad Allred granted PCS' summary judgment motion and awarded it a final judgment ordering forfeiture. CP 652-660.

D. COURT OF APPEALS AFFIRMS FORFEITURE ORDER

On January 7, 2021, Petitioner filed a Notice of Appeal, CP 666, and on January 21, 2020, PCS filed a Notice of Cross Appeal of – among other things -- the "Order Denying Motion

to Enforce Settlement Agreement." CP 1274.

On appeal, Petitioner did not dispute she evaded personal service and suffered no prejudice from service by publication. Instead, she waited to raise *for the first time* an alleged subject matter jurisdiction defense until after she was denied a 60-90 day extension and thus forced to file her appellate brief *two weeks before* she believed "the two year [statute of limitations] passed on May 20, 2021." 3/15/21 Order; Pet. 10. Among other things, she argued: 1) the trial court lacked subject matter jurisdiction because she now claimed the "15-day statutory deadline" expired without her being personally served; and 2) forfeiture of her illegal drug factory was an Eighth Amendment "excessive fine" (but addressed only one of that claim's multiple factors, and did so incompletely). *Compare* AB 18-23, 35-40 & Reply 3-44 *with* Amend. RB 15-25, 32-35 & Cross Appeal Reply 2-24.

Rejecting her subject matter jurisdiction defense, Division I held the forfeiture statute RCW 69.50.505(3) does not "function

as a statute of limitations" and "explicitly contemplates either personal service *or substitute service* of the interested party." *Pastor v. Real Prop. Commonly Described as 713 SW 353rd Place, Fed. Way, King Cnty.*, 21 Wn.App.2d 415, 426, 506 P.3d 658 (2022)(emphasis added). Because such service "could never be completed within 15 days," the Court ruled it was clear "the legislature was not treating service to be completed within 15 days as *jurisdictional, when the party to be served could not be found within the state and publication was required*." *Id.* at 427 (emphasis added). Because she evaded service "much as she evaded answering any questions as to her affirmative defense on that issue," and "both appeared through counsel and proceeded throughout the case in its entirety to the point that she even proposed and nearly entered a CR 2A settlement," the Court also found "her service of process arguments are waived as a matter of law." *Id*. at 430 (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 38–39, 1 P.3d 1124 (2000)(waiver where "defendant's assertion of the defense is

inconsistent with the defendant's previous behavior.”))

As to Petitioner’s Eighth Amendment defense, the Court observed she “neither sets out the test” for it “nor applies it to the facts of her own” case, and therefore held in “the absence of any engagement by Huang with the proper legal standard, our inquiry as to this issue ends here.” *Id.* at 433. As a result, it did not address PCS’ cross appeal and argument that Petitioner’s settlement waived any “excessive fines” claim. *Id.* at 434; Amend. RB 42-50 & Cross Reply 13-24.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioner argues forfeiture of her illegal drug factory should be reviewed again because she dislikes the Legislature’s civil forfeiture policy and claims it is “widely unpopular.” Pet. 1-6, 24-26. However, her Petition does not brief legislative policy but instead asserts *procedural issues* of subject matter jurisdiction, waiver of service objections, and her failure to argue a multifactor legal test. Regardless, reliance on the supposed unpopularity of forfeiture law is a fallacious

argumentum ad populum, and is based on: 1) issues not present here (*e.g.* the real property forfeiture was neither "administrative" nor lacking "judicial oversight," did not "burden the poor" or "impoverish[] [Petitioner] and remov[e] what ability [she] might have to successfully reintegrate into society,"[7] *id.*); and 2) a poll that did not address civil forfeiture of illegal commercial drug factories – much less those using banned chemicals in residential neighborhoods. *Id.*

A. PETITIONER'S SUBJECT MATTER JURISDICTION DEFENSE FAILS TO MEET RAP 13.4(B) TESTS

The Court of Appeals found the appellate briefing reflected a "conflation of terminology" for general and personal jurisdiction with that for subject matter jurisdiction. 21 Wn.App.2d at 423; *compare* Pet. 13-14 *with* Amend. RB 20-25

[7] Petitioner admits her "ability to pay" the fine was a defense "Huang did not raise" at any time. Pet. 34. Indeed, the record shows her ability to afford a luxury lifestyle and commute between homes in different states while at the same time retire the Defendant Property's $317,493.75 mortgage *within a single year*. CP 308, 359-61, 366-71, 375-626.

& Cross App. Reply 6-11. Even now Petitioner cites no authority that notice requirements for all "special statutory actions" determines *subject matter* jurisdiction – much less for forfeiture actions. Likewise, she fails to address the rationale of authority *rejecting* such a reading of RCW 69.50.505. *Compare* Pet. 15 *with Bruett v. Real Prop. Known as 18328 11th Ave. N.E.*, 93 Wn.App. 290, 297, 968 P.2d 913 (1998)(prior decisions do "not stand for the proposition that having proceeded by way of RCW 69.50.505 to obtain forfeiture, the State must strictly adhere to the service of process requirements of that statute.")[8]; *Cty of Seattle v. $43,697.18 in United States*

[8] Petitioner argues *Bruett* "is irreconcilable with Division I's published opinion here, which did not cite *Bruett*." Pet. 24. She ignores *she also* "did not cite *Bruett*" to Division I, *see* AB, Reply iv, and that *Bruett:* 1) makes no mention of "subject matter jurisdiction;" 2) does not involve substitute service under the forfeiture statute but instead concerned "service *of the warrant*" and found the "warrant *was not served*" at all, 93 Wn.App. at 302; 3) refutes Petitioner's argument a seizing agency must strictly comply with a *particular type of service of process* and instead rejects "the proposition that … the State must strictly adhere to the *service of process* requirements of that statute;" and 4) "is … inapplicable" where the seizing

Currency, 12 Wn.App.2d 1047 (2020)(unpublished)(holding cases interpreting special statutory actions do not "extend[] to a forfeiture proceeding" because "analogy to the unlawful detainer statute is not compelling" since the forfeiture statute's language is "not the equivalent of the strict jurisdictional statutory" language of the "unlawful detainer statute and accompanying case law.").

Further, her own petition argues there is: 1) "*tension* in this Court's cases on whether *strict compliance with statutory service requirements is necessary* to trigger the superior court's jurisdiction in special statutory proceedings," and 2) "confusion" in the law about "*whether a trial court's exercise of subject-matter jurisdiction despite insufficient statutory service is a legal error*, or whether it instead rises to the level of a jurisdictional error that can be raised at any time." Pet. 16, 21

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agency, like here, has "*complied* with the statute." *Snohomish Reg'l Drug Task Force v. Real Prop. Known as 20803 Poplar Way*, 150 Wn.App. 387, 400, 208 P.3d 1189 (2009)(emphasis added).

(emphasis added). If there were "tension in this Court's cases" regarding subject matter jurisdiction and "confusion" regarding its waiver by untimely litigation, she cannot claim under RAP 13.4(b)(1)-(2) the decision below somehow is "in *conflict* with a decision of the Supreme Court" [9] or the "Court of Appeals."[10]

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[9] This Court instead has been clear: "A court does not lack subject matter jurisdiction solely because it may lack authority to enter a given order," because there is "subject matter jurisdiction where the court has the authority to adjudicate *the type of controversy in the action ….*" *In re Stoudmire*, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000)(citing *Marley v. Department of Labor & Indus*., 125 Wn.2d 533, 539, 886 P.2d 189 (1994); *State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996))(emphasis added). *See also Buecking v. Buecking*, 179 Wn.2d 438, 452, 316 P.3d 999 (2013)("To conclude a court has the subject matter jurisdiction to hear a case, but then can lose it …, would conflict with the meaning of subject matter jurisdiction and our prior decisions" because a "court either has subject matter jurisdiction or it does not").

[10] Court of Appeals decisions likewise hold under "statute and under the state constitution, … forfeiture proceedings are a class of action the superior court" has the authority to hear. *See Cty of Walla Walla v. $401,333.44*, 164 Wn.App. 236, 248-50, 262 P.3d 1239 (2011). *See also Watson v. State*, 198 Wn.App. 1048 at *2-4 (2017)(unpublished)(affirming subject matter jurisdiction present for civil forfeiture action because a "court holds subject matter jurisdiction when it has authority to adjudicate the type of controversy involved in the action," and Wash. Const. art. IV, § 6 provides the "superior court shall have

In any case, even assuming *arguendo* Petitioner's core claim that a "*failure* to serve a statutory notice *in compliance* with a special statute deprives the trial court of jurisdiction," Pet. 13 (emphasis added), the decision here expressly found "PCS *complied* with the notice provision of RCW 69.50.505(3)." 21 Wn.App.2d at 427 (emphasis added). Division I so held because the forfeiture statute on its face "explicitly contemplates *either* personal service *or substitute service* of the interested party." *Id.* (citing RCW 69.50.505(3) ("Service of notice of seizure of real property shall be made according to the *rules of civil procedure*," such as by "*substituted* service"))(emphasis added). Since "[s]ubstitute service encompasses service by publication pursuant to RCW

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original jurisdiction ... in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars," so compliance with procedural prerequisites "has no bearing on the jurisdiction of the court in terms of the constitutional power of the court to hear a case.")(*citing In re Marriage of McDermott*, 175 Wn.App. 467, 480–81, 307 P.3d 717 (2013); *Cost Management Services, Inc. v. City of Lakewood*, 178 Wn.2d 635, 648, 310 P.3d 804 (2013)).

4.28.100," Division I held the forfeiture "statute *contemplates service by weekly publication in a newspaper for six consecutive weeks*" – and therefore "the legislature was not treating service to be completed within 15 days as jurisdictional, *when the party to be served could not be found within the state and publication was required*." *Id.* (citing CR(4)(d)(3); RCW 4.28.110) (emphasis added). Petitioner thus fails to satisfy RAP 13.4(b)(1)-(2) and fails subsection (4)'s requirement that her seeking to manipulate subject matter jurisdiction and waiver somehow "involves an issue of substantial public interest that should be determined by the Supreme Court."

Ignoring the decision's reasoning, Petitioner then mischaracterizes this *express* statutory language as merely being "an *implied exception* to RCW 69.50.505(3)'s 15-day notice period," and improperly requests this Court make superfluous its *express* provisions authoring "[s]ervice … *according to the rules of civil procedure*" such as by

"substituted service." *Compare* Pet. 19 (emphasis added) *with State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005)("each word of a statute is to be accorded meaning" because "drafters of legislation ... are presumed to have used no superfluous words"")(quoting *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000); *Greenwood v. Dep't of Motor Vehicles*, 13 Wn.App. 624, 628, 536 P.2d 644 (1975)).

Petitioner's sole rationale for reading the "substitute service" provision out of the statute is her claim that giving meaning to its express language somehow makes the "15-day specific timing requirement" a "nullity." Pet. 20. In reality, unlike Petitioner, Division I recognizes *each word of the statute* has meaning by acknowledging both the 15-day period *and* that the Legislature did not intend it to apply "when the party to be served *could not be found within the state and publication was required*." 21 Wn.App.2d at 427. This not only properly gives effect *both* to the statute's notice and "substitute service" provisions, but avoids creating a new limitations period for

forfeiture actions that incentivizes and rewards evasion of personal service and stalling litigation until limitation periods expire. Indeed, even a true statute of limitations yields when, as here, defendants evade service. RCW 4.16.180 (limitations period tolled when defendants "depart from and reside out of this state, or conceal himself or herself"); *Caouette v. Martinez*, 71 Wn.App. 69, 75, 856 P.2d 725 (1993)("if the statute of limitations is not tolled during the period of time a defendant is concealed because service could be had on him or her by publication, persons who intentionally conceal themselves to avoid service may be rewarded.")

As to the decision's separate holding that Petitioner waived any objection to service, she argues delaying litigation on that issue until appeal should not prevent a second appellate review because: 1) existence of an adequate independent ground *sustaining the result* somehow does not preclude her challenging a separate ground for that result; and 2) lack of personal service might not be waived if it were held essential to

subject matter jurisdiction. Pet. 26-27.

However, Petitioner cites no authority holding when one independent ground for a decision prevents recovery she nevertheless may appeal a second ground that would not change the result. *Id.* Indeed, an "issue is moot if it is not possible for this court to provide effective relief," and when "an appeal is moot, it should be dismissed." *State v. Deskins*, 180 Wn.2d 68, 80, 322 P.3d 780 (2014), as amended (June 5, 2014) (finding forfeiture challenge moot)(citing *Klickitat Cnty. Citizens Against Imported Waste v. Klickitat Cnty.*, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993). Further, it has been shown: 1) RCW 69.50.505(3)'s 15-day time limit *does not affect subject matter jurisdiction* so it was waived by Petitioner's failure to raise it in Superior Court; and regardless, 2) PCS's service *complied* with that statute.

B. FAILURE TO BRIEF AND ARGUE "EXCESSIVE FINE" TEST PREVENTS RAP 13.4(b)(3) REVIEW

1. Failure to Argue Issue Below Prevents Review Now

Petitioner had the burden to demonstrate forfeiture of her illegal drug factory was "grossly disproportional to the gravity of [the] offense" under the Eighth Amendment. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *United States v. Jose*, 499 F.3d 105, 108 (1st Cir. 2007)). However, her cursory appellate argument addressed only *a single aspect* of just *one of the five* required factors. AB 39-40. Because this did not meet her burden, Division I did not consider that defense. 21 Wn.App.2d at 433 *(citing Prostov v. Dept. of Licensing*, 186 Wn.App. 795, 823, 349 P.3d 874 (2015)("failure of an appellant to provide argument and citation of authority in support of an assignment of error precludes appellate consideration of an alleged error.")).

Petitioner fails to mention this holding or its cited legal support, confront the paucity of her earlier 2 page appellate "analysis" of the issue, or address that holding's fatal legal effect on any further appellate consideration. *Compare* Pet. 33-34 *with* AB 39-40 *with Utter v. Bldg. Indus. Ass'n of*

Washington, 182 Wn.2d 398, 443, 341 P.3d 953 (2015)(unpublished) ("too late" to make new argument after filing opening brief); *State v. Chen*, 178 Wn.2d 350, 358, 309 P.3d 410 (2013)(declining to address argument raised for the first time after opening brief).

2. Petitioner Still Fails to Show Forfeiture "Excessive"

Conceding two of the Eighth Amendment's five factors show forfeiture was *not* "excessive" (*i.e.* her "violation was related to other illegal activities;" she had the "ability to pay"), Petitioner instead *now* claims "[f]actors one, three, and four show the fine was excessive." Pet. 31-32. However, the Petition argues only factors *three and four* (*i.e.* "other penalties that may be imposed for the violation;" "extent of the harm caused.") *Id.* Even as to those two factors, her argument does not withstand examination – especially considering that the Eighth Amendment's "excessive fine" factors reflect a "general permissiveness" toward such forfeiture. *City of Seattle v. Long*, 198 Wn.2d 136, 167, 493 P.3d 94 (2021)(quoting David

Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. & Pol'y Rev. 541, 544 (2017) (noting "in the [first] fifteen years since *Bajakajian* was decided, only four courts of appeals applying *Bajakajian* ... found a forfeiture to be excessive")).

To argue the "other penalties" factor, Petitioner cites *State v. Clark*, 124 Wn.2d 90, 875 P.2d 613 (1994), overruled by *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997), and summarily asserts here "the maximum criminal fine was $10,000," claims the "*home* [was] worth between $488,000 and $602,000," and alleges "Federal courts have found forfeiture of a home excessive when similarly disproportionate." Pet. 31. However: 1) *Clark* ruled "we *do not find* the punishment in the form of the civil forfeitures of the Clarks' *home and motorhome* to be 'excessive'" because it was "rough remedial justice," *Clark*, 124 Wn.2d at 104; 2) here the property was not Petitioner's "home" but had been gutted into a dedicated illegal drug factory

using banned chemicals, CP 142-289, 368-72, 308, 376, 633; and 3) "courts look to *all* the penalties," *State v. Grocery Manufacturers Ass'n*, 198 Wn.2d 888, 904, 502 P.3d 806 (2022), and RCW 69.50.4013(2) and (5), are class C felonies punishable under RCW 9A.20.021 also by "confinement in a state correctional institution for five years."

Even assuming gutting the property into an illegal drug factory and using banned chemicals therein somehow had no effect on its supposed $488,000 value at time of seizure (as Petitioner questionably claimed below, *see* AB 9, 37, 39; Cy Resp. 34), as in *Clark*, its forfeiture was at worst "rough remedial justice." This is so because her property was worth *less than either* the $602,625 street value of its producing plants and the new crop found therein, CP 798, 868, *or* the illegal contraband annually grown/packaged/marketed from those plants. *See supra.* at 6 ($126,000 *per crop* x 4 (or 12) *crops per year* = $504,000 (or $1,512,000)). Further, federal precedent upholds even *home* forfeitures based on similar facts. *See e.g.*

United States v. Riedl, 164 F.Supp. 2d 1196, 1202 (D. Haw. 2001), aff'd, 82 F.App'x 538 (9th Cir. 2003)(forfeiture of *nine properties* involved in crime did not constitute an excessive fine); *United States v. Real Prop. Located in N. Hollywood*, 2009 WL 3770639, at *4 (C.D. Cal. 2009)(upholding forfeiture of house used to store drugs and proceeds from its sale, as well as to conduct sales); *United States v. Real Property Located at 24124 Lemay Street*, West Hills, Cal., 857 F.Supp. 1373 (C.D. Cal. 1994)(forfeiture of residential property where illegal drugs grown, stored, and sold was not unconstitutionally excessive.)

As to her Petition raising for the first time the "extent of the harm caused," Huang makes only a cursory assertion that with "legalization of cannabis, the gravity of the offense is much less" and supposedly is "more about evading regulation than about creating supply of a drug." Pet. 31-32. However, in legalizing cannabis the Legislature intended to treat "untraceable marijuana as particularly likely to threaten health and safety of marijuana consumers …." *U4IK Gardens, LLP v.*

State, 18 Wn.App.2d 1029, review denied sub nom. *U4IK Gardens LLP v. State Liquor Control Bd*., 198 Wn.2d 1028, 498 P.3d 960 (2021)(citing WAC 314-55-521)(categorizing traceability violations as an immediate threat to public health and safety)). As Division I recognized, a *confirmed* "harm" of Petitioner's regulatory evasion is "the chemicals utilized which could harm an individual," and this:

> … is of *critical concern* here in light of the fact that preliminary evidence gathered by PCS upon execution of the search warrant demonstrated that two chemicals it alleges are banned in marijuana cultivation in our state were used in the grow operation on the Defendant Real Property.

21 Wn.App.2d at 432 (emphasis added).

Considering the tax-free and substantial illicit profits produced by Petitioner's business model, CP 375-76, allowing criminal enterprises to retain ownership of unregulated and untaxed illegal factories after their exposure encourages their subsequent sale and reinvestment of the proceeds into purchase and conversion of the next unregulated factory hidden in some

new unsuspecting neighborhood in an unending cycle of environmental and consumer harm. Even Petitioner recognizes the Legislature intended "forfeiture of real assets … will provide a significant deterrent to crime." Pet. 30 (citing Laws of 1989, ch. 271, § 211). *See also Clark*, 124 Wn.2d at 99 (forfeiture provides a significant deterrent to crime "by removing the profit incentive …, and will provide a revenue source that will partially defray the large costs incurred by government as a result of these crimes.")

3. Petitioner's Settlement Waived Excessive Fine Defense

Finally, discretionary review would not reach any alleged "excessive fines" defense because Courts "avoid deciding constitutional questions where a case may be fairly resolved on other grounds." *See Cmty. Telecable of Seattle, Inc. v. Cty of Seattle, Dep't of Exec. Admin.*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008). Here, those "other grounds" arise from Petitioner's CR 2A agreement to settle her interest in the

forfeited factory – the binding nature of which she did not contest in Responding to PCS's Cross Appeal. *Compare* PCSD Amend Br 36-42 & Cross Reply 13-24 *with* RB 42-44. This agreement waived, equitably estopped, and made invited error any later Constitutional claim. *See discussion* Amend. RB 42-50 & Cross Reply 13-24.

V. CONCLUSION

PCS respectfully requests consideration of its cross-appeal and the denial of an unwarranted second appellate review.

I certify that this document contains 5,924 words, excluding those parts exempted from the word count by RAP 18.17.

DATED this 11th day of July 2022.

MARY E. ROBNETT
Pierce County Prosecuting Attorney
s/ DANIEL R. HAMILTON
DANIEL R. HAMILTON, WSBA # 14658
Deputy Prosecuting Attorney / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
Ph: 253-798-7746 / Fax: 253-798-6713
dan.hamilton@piercecountywa.gov

CERTIFICATE OF SERVICE

On July 11th, 2022, I hereby certify that I electronically filed the foregoing PAUL J. PASTOR, JR., PIERCE COUNTY SHERIFF'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Gary W. Manca
Talmadge/Fitzpatrick
gary@tal-fitzlaw.com

Billie R. Morelli
Billie@LawyerfortheLittleGuy.com

s/ URSULA JOHNSON
URSULA JOHNSON
Legal Assistant
Pierce County Prosecutor's Office
Civil Division, Suite 301
955 Tacoma Avenue South
Tacoma, WA 98402-2160
Ph:253-798-6257/Fax:253-798-6713
ursula.johnson@piercecountywa.gov

PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

July 11, 2022 - 11:56 AM

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Appellate Court Case Title:	Paul J. Pastor, Jr., et ano.v. Real Prop 713 SW 353RD Pl.., Mei Xia Huang

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