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Supreme Court No. 96133-6  
Court of Appeals No. 34986-1-III  
SUPREME COURT  
OF THE STATE OF WASHINGTON

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SCOTT SHUPE,

Petitioner,

v.

CITY OF SPOKANE,

Respondent.

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ANSWER TO PETITION FOR REVIEW

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## **I. INTRODUCTION.**

Appellant Scott Shupe's petition for review should be denied. Choosing to challenge the Washington Court of Appeals' finding that his claims are barred by the applicable statute of limitations, Mr. Shupe now seeks review by this Court. Although, the petition fails to provide any basis grounded in RAP 13.4. Mr. Shupe's inverse condemnation claim fails to set forth any constitutional questions of law and does not concern matters of substantial public interest. Also, Mr. Shupe fails to identify a single Washington Supreme Court or Court of Appeals decision that conflicts with the Court of Appeals decision below. Mr. Shupe's reiteration of points he unsuccessfully argued below bear no weight. Well-settled law precludes Mr. Shupe's claim, as such, the petition should be denied.

## **II. STATEMENT OF THE CASE.**

In September 2009, Mr. Shupe was arrested and charged with delivery, possession with intent to deliver, and manufacture of marijuana. Following a jury trial, Mr. Shupe was convicted on all counts. Mr. Shupe appealed his conviction to Division III of the Washington State Court of Appeals. On December 11, 2012,

Division III of the Washington State Court of Appeals reversed Mr. Shupe's conviction, remanding the case to the trial court. The Appellate Court's Mandate terminating review of the criminal matter was issued on June 4, 2013 and filed in the trial court June 14, 2013.<sup>1</sup>

On August 19, 2016, Mr. Shupe filed his Complaint for Damages in the Spokane County Superior Court under Cause No. 16203232-4.<sup>2</sup> On August 25, 2016, Mr. Shupe served the City with his Summons and Complaint. Mr. Shupe alleged that on September 10, 2009 police officers employed by the City acting within the course and scope of their employment with the City of Spokane "entered [his] property and searched and seized [his] property."<sup>3</sup>

On September 20, 2016, the City moved the trial court for dismissal of the Complaint.<sup>4</sup> After briefing and oral argument by the parties, the trial court granted the City's motion.<sup>5</sup>

Mr. Shupe appealed the Superior Court's decision to the

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<sup>1</sup> Petitioner's Brief (hereinafter "Pet. Br."), Appendix (hereinafter "App."), at A-002.

<sup>2</sup> CP 1-7.

<sup>3</sup> CP 4, at ¶¶ 2.1-2.3

<sup>4</sup> CP 15

<sup>5</sup> CP 31-33

Court of Appeals.<sup>6</sup> Upon review, the Court of Appeals issued an unpublished opinion affirming the trial court's dismissal of his lawsuit, ruling that a governmental appropriation of Mr. Shupe's personal property (i.e. marijuana) is immediately apparent and a claim for wrongdoing is governed by a three-year statute of limitations found in RCW 4.16.080.<sup>7</sup>

### **III. LEGAL ARGUMENT.**

#### **A. STANDARD OF REVIEW.**

Contrary to Mr. Shupe's contentions, the issue before this Court is not whether the Superior Court "properly dismissed" his complaint under CR 12(b)(6)<sup>8</sup>, but instead whether the circumstances of that dismissal meet this Court's high threshold for accepting discretionary appellate review. They do not. Under RAP 13.4(b), the Court will only grant a petition for discretionary review:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

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<sup>6</sup> CP 37-38

<sup>7</sup> Pet. Br., App. at A-001-005.

<sup>8</sup> Pet. Br. at 1.

- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Shupe has failed to demonstrate any conflict to meet the requirements of (1) or (2). As to (3) and (4), Mr. Shupe fails to demonstrate that his claim raises any significant questions of state or federal constitutional law or that his petition involves issues of substantial public interest requiring this Court's intervention.

**B. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT OR WITH DECISIONS OF OTHER DIVISIONS OF THE WASHINGTON STATE COURT OF APPEALS.**

Mr. Shupe contends that the Court of Appeals ruling below is in conflict with this Court's decision found in *Petersen v. Port of Seattle*, 94 Wn.2d 479, 618 P.2d 67 (1980). Mr. Shupe contends the decision establishes there is no statute of limitations



governing an action for inverse condemnation claims for just compensation involving real or personal property.<sup>9</sup> Mr. Shupe is mistaken as to the application of this Court's ruling in *Petersen, supra*, and is wrong in his assertion that no applicable statute of limitations exists to his claim.

In *Petersen v. Port of Seattle, supra*, property owners brought an inverse condemnation action seeking just compensation for the diminished value of their residences and land resulting from the operation of an airport by a municipal corporation.<sup>10</sup> At issue was whether the municipal corporation met all the elements of adverse possession to establish the existence of a prescriptive easement in order to invoke the 10 year statute of limitations associated with real property.<sup>11</sup> This Court analyzed a number of cases and specifically noted and reaffirmed that by virtue of the doctrine of prescription (i.e., adverse possession), a 10 year statutory period is applicable to inverse condemnation suits relative to real property.<sup>12</sup> Because

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<sup>9</sup> Pet. Br. At 3.

<sup>10</sup> *Petersen, supra*, at 481.

<sup>11</sup> *Id.*, at 482; See also: *Highline School District 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).

<sup>12</sup> *Petersen, supra*, at 484- 486.

the Port of Seattle was unable to show the crucial element of “hostility” needed to establish a prescriptive right, the property owners’ claims were not time barred.<sup>13</sup>

A three-year statute of limitations applies to Mr. Shupe’s personal property inverse condemnation claim. Case law explicitly defines inverse condemnation as taking or damaging of property without the formal exercise of the power of eminent domain.<sup>14</sup> Washington case law has found a distinction between personal property and real property when considering eminent domain and that distinction naturally flows to inverse condemnation.<sup>15</sup>

Mr. Shupe’s inverse condemnation claim does not involve real property. Mr. Shupe’s claim is simply another way of seeking compensation for damages related to personal property. By virtue of this fact, the decision of Division III of the Court of Appeals in the instant matter was correct in affirming the trial

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<sup>13</sup> *Id.*

<sup>14</sup> *Dickgieser v. State*, 153 Wn.2d 530, 534-35, 105 P.3d 26, 29 (2005) (citing *Phillips v. King Cty.*, 136 Wn.2d 946, 957, 968 P.2d 871, 876 (1998)).

<sup>15</sup> *Union Elevator & Warehouse Co. Inc. v. State*, 144 Wn. App. 593, 604-05, 183 P.3d 1097, 1103 (Div. 3, 2008) (grain elevator equipment was personal property and was not compensable when underlying real property and fixture was seized through eminent domain).

court's decision granting the City's motion to dismiss and is totally consistent with any previous decisions of this Court, as all actions involving the deprivation of personal property are subject to the provisions set forth in RCW 4.16.080, which provides for a three-year statute of limitations in actions "for taking, detaining, or injuring personal property, including an action for the specific recovery thereto."<sup>16</sup>

**C. MR. SHUPE'S PETITION DOES NOT INVOLVE ANY SIGNIFICANT STATE OR FEDERAL CONSTITUTIONAL ISSUES.**

The underlying basis for Mr. Shupe's petition—compensation for the value of deprived personal property (i.e. marijuana)—does not involve a "significant" constitutional issue. In his civil complaint, Mr. Shupe alleges due process violations as well as right to privacy violations under the Washington State Constitution, Article 7 § 1 and Article 1 § 7, respectively.<sup>17</sup> Mr. Shupe alleges no Federal Constitutional violations.

Without analyzing the factors governing the acceptance of review by this Court, Mr. Shupe seems to summarily assert and/or imply that the factors are met simply due to pleading state

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<sup>16</sup> RCW 4.16.080(2)

<sup>17</sup> CP 1-7.

constitutional violations in his Complaint for Damages which was ultimately dismissed.<sup>18</sup> That is not the case and Mr. Shupe's argument, and/or his line of reasoning, fails for at least three reasons.

First, a review of the record before this Court clearly evidences that Mr. Shupe was afforded due process of law guaranteed by the Washington State Constitution relative to the underlying deprivation of his personal property. Mr. Shupe was tried and convicted of the underlying felony charges stemming from his possession of marijuana; he appealed his conviction, which was reversed by Division III of the Court of Appeals. Mr. Shupe also availed himself to the asset forfeiture procedure, requesting the return of his personal property seized on September 10, 2009, additionally appealing the lower court decisions related to the underlying asset forfeiture proceeding to the same Court. Lastly, Mr. Shupe subsequently brought a civil complaint against the City for the deprivation of his personal property, which was dismissed by the trial court and affirmed on

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<sup>18</sup> Pet. Br. at 3.

appeal.<sup>19</sup> Simply put, these facts exhibit due process of law as is contemplated and provided by the Washington State Constitution.

Second, although Mr. Shupe's state constitutional allegations against the City include due process violations and an invasion of his right to privacy, Washington courts have consistently refused to create a cause of action for damages due to a violation of a citizen's constitutional rights.<sup>20</sup> Plaintiff's rights are adequately protected by "their day in court" and a constitutional violation does not, "without the aid of augmenting legislation, establish a cause of action for money damages against the state."<sup>21</sup>

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<sup>19</sup> Pet. Br., App. at A-001-003.

<sup>20</sup> See generally, *Reid v. Pierce Cty.*, 136 Wn.2d 195, 961 P.2d 333 (1998) (explicitly refusing to recognize a cause of action for damages under state constitution for violation of privacy for sharing pictures of a deceased relative); *Spurrell v. Bloch*, 40 Wn. App. 854, 861-62, 701 P.2d 529, 535 (Div. 2 1985) (quoting *Sys. Amusement, Inc. v. State*, 7 Wn. App. 516, 518, 500 P.2d 1253 (1972)) (wrongful removal of children from home due to medical neglect); *Blinka v. Wash. State Bar Ass'n*, 109 Wn. App. 575, 591, 36 P.3d 1094, 1102 (Div. 1, 2001) (refusing to recognize an independent cause of action for a violation of plaintiff's freedom of speech).

<sup>21</sup> *Spurrell*, *supra*, at 862.

Mr. Shupe alleges he was deprived of personal property without due process of law.<sup>22</sup> Deprivation of due process constitutes “personal injury.”<sup>23</sup> RCW 4.16.080 requires claims made for personal injury or damage to personal property must be commenced within three years. Mr. Shupe did not commence his cause of action within the requisite time frame and as such, the trial court in granting the City’s motion to dismiss and the Court of Appeals decision affirming were correct, as the claim is time barred.

Mr. Shupe’s civil complaint further alleges violation of Art. 1, § 7 right to privacy by way of an unlawful search and seizure.<sup>24</sup> Under RCW 4.16.100, privacy actions are subject to a two-year

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<sup>22</sup> CP 5, at ¶ 3.8; Pet. Br. at 1 and 3.

<sup>23</sup> *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 638-39, 127 P.3d 713 (Div. 1, 2005) (When a person acting under the color of state law deprives an individual of due process guaranteed by the federal constitution, the individual may sue under § 1983 for damages. The United States Supreme Court has held that the applicable state law period for personal injury torts is the appropriate limitations period for § 1983 claims. Thus, the three-year statute of limitations for personal injury torts under Washington law applies to a § 1983 action alleging due process violations.).

<sup>24</sup> CP at 4.

statute of limitations.<sup>25</sup> Unlawful searches and seizures accrue at the time the allegedly unlawful act(s) takes place<sup>26</sup> and are subject to a three-year statute of limitations.<sup>27</sup> Under either standard, the trial court was entirely correct in granting the City's motion to dismiss, recognizing that Mr. Shupe's claims were brought far too late.

Third, after the Superior Court properly dismissed Mr. Shupe's claim, in its unpublished opinion the Court of Appeals distinguished between actions brought to recover for resulting damages to real property from actions brought to recover for resulting damages to personal property, correctly ruling that Mr.

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<sup>25</sup> See 29 Wash. Prac., Wash. Elements of an Action § 25:6 (2015-2016 ed.); *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986)).

<sup>26</sup> Federal law is also in accord, see e.g. *Hawkins v. Douglas Cty.*, 2016 WL 347684, at \*5-6 (E.D. Wash. Jan. 28, 2016) (The plaintiff's section 1983 claim for unlawful search and seizure was barred by the statute of limitations. The Ninth Circuit has held that a claim for unlawful search and seizure follows the standard rule of accrual; that is, it accrues when the wrongful act occurs. *Citing Belanus v. Clark*, 796 F.3d 1021, 1026 (9th Cir. 2015) (holding that the plaintiff's cause of action accrued when the police conducted the searches and plaintiff knew of the searches); *quoting Johnson v. Johnson Cnty. Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) ("Claims arising out of police actions toward a criminal suspect, such as...search and seizure, are presumed to have accrued when the actions actually occur.")).

<sup>27</sup> *Farrare v. City of Pasco*, 68 Wn. App. 459, 465, 843 P.2d 459 (Div. 3, 1992).

Shupe's personal property claim was subject to a three year statute of limitations set forth in RCW 4.16.080.<sup>28</sup>

Division III of the Court of Appeals decision affirming the Superior Court's CR 12(b)(6) dismissal was not a deprivation of Mr. Shupe's constitutional privacy or due process rights. There is no basis for Mr. Shupe's assertion that this matter involves a significant question under the Washington State Constitution. For these reasons, Mr. Shupe identifies no significant federal or state constitutional issues involved in this matter.

**D. THE PETITION DOES NOT CONCERN ANY ISSUES OF SUBSTANTIAL PUBLIC IMPORTANCE.**

Mr. Shupe's inverse condemnation claim brought against the City of Spokane—and the Superior Court's dismissal of it—does not concern itself with a situation where the real merits of the controversy are unsettled and a continuing question of great public importance exists.<sup>29</sup> In determining "public importance" this Court will consider the public vs. private nature of the question presented, the need to clarify the issue for future guidance as well as the likelihood of the issue to recur.

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<sup>28</sup> Pet. Br., App. at A-003-004.

<sup>29</sup> *Sorensen v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).



The crux of Mr. Shupe's complaint is just compensation for the deprivation of his personal property. This narrow and private issue does not lend itself as being consistent with the magnitude contemplated by the court rule governing this Court's acceptance of review or case law as constituting "an issue of substantial public importance." This is not an issue of first impression<sup>30</sup>, as the law is well settled that underlying actions governing deprivation of personal property are governed by a three year statute of limitations.<sup>31</sup> Accordingly, this Court should deny Mr. Shupe's petition.

**E. TRIAL COURT "ERROR" IS NOT GROUNDS FOR DISCRETIONARY REVIEW; REGARDLESS, THE SUPERIOR COURT DID NOT ERR, AS THE APPLICABLE THREE-YEAR STATUTE OF LIMITATIONS BARRED MR. SHUPE'S CLAIM.**

Failing to articulate any significant constitutional issues or matters of public importance under RAP 13.4, Mr. Shupe falls back on simply re-litigating arguments already rejected correctly by the lower courts, but such "error" is not grounds for appeal.

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<sup>30</sup> *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 922 P.2d 1335 (1996), (holding review was proper as being a matter of first impression).

<sup>31</sup> RCW 4.16.080

Neither the Superior Court nor the Court of Appeals erred in its decision.

Mr. Shupe concedes Washington law applies a three-year statute of limitations to claims for damages to personal property.<sup>32</sup> While Mr. Shupe does not dispute the applicability of the limitations period, he does not accept the reality of when his claim accrued. Mr. Shupe mistakenly believes, without citation to authority, that the reversal of his criminal conviction triggered the three-year statutory period applicable to Mr. Shupe.<sup>33</sup> Mr. Shupe is wrong.

A civil cause of “action accrues when the factual basis for the action becomes known to the party bringing the action.”<sup>34</sup> Washington courts have consistently held that a party has knowledge of such factual basis when they suffer “actual and

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<sup>32</sup> RCW 4.16.080(2) (“**[a]n action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated shall be commenced within three years.**”) (emphasis added).

<sup>33</sup> Pet. Br. at 4-5.

<sup>34</sup> *Gausvik v. Abbey*, 126 Wn. App. 868, 879-880, 107 P.3d 98 (Div. 2, 2005).

appreciable damage.”<sup>35</sup> Washington courts are “not unmindful of the difficulty” of defending oneself in a criminal case while simultaneously pursuing a civil suit, nevertheless “a showing of hardship or understandable delay is insufficient to support tolling of the statute of limitations.”<sup>36</sup>

Here, Mr. Shupe indisputably was deprived of his property on September 10, 2009.<sup>37</sup> Mr. Shupe filed his personal property complaint for damages on August 19, 2016, almost seven years from the taking, and, as a result, his claim is time-barred.<sup>38</sup>

As at the Court of Appeals, Mr. Shupe tries to argue around this clear bar by suggesting the discovery rule tolled the three-year statute of limitations until after it was determined that

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<sup>35</sup> *Id.* (citing *Haslund v. City of Seattle*, 86 Wn.2d 607, 620, 547 P.2d 1221 (1976)); see also *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 220, 543 P.2d 338, 341 (1975); *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163, 165 (1997) (unless the discovery rule applies, the limitations period begins to run when the plaintiff suffers some form of injury or damage).

<sup>36</sup> *Petcu v. State*, 121 Wn. App. 36, 72, 86 P.3d 1234, 1253 (Div. 2, 2004) (citing *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992) (holding that a wife's grief over her husband's murder did not excuse her failure to file a wrongful death action within the limitations period); see also *Gausvik, supra*, at 882 (in dismissing the plaintiff's claim as untimely the court suggested the proper method to preserve a civil claim was to file the action and move to stay it during the pendency of the criminal appeal).

<sup>37</sup> Pet. Br. at 2.

<sup>38</sup> Pet. Br., App. at A-004.

the property was not validly seized.<sup>39</sup> The discovery rule, however, does not cure Mr. Shupe's untimeliness. Under that rule, a cause of action accrues when the plaintiff discovers—or should have discovered in the reasonable exercise of due diligence—the elements of his cause of action.<sup>40</sup> “This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when ***the plaintiff discovers the salient facts*** underlying the elements of the cause of action.”<sup>41</sup>

As the Court of Appeals noted in their decision pertaining to Mr. Shupe's argument:

Our resolution of his criminal conviction was not based upon a novel theory of law unavailable back in 2009. We simply interpreted the applicable statute and issued a ruling in Mr. Shupe's favor. Just as Mr. Shupe was able to file challenges in his criminal cause prior to his initial appeal, so too was he able to file a claim for civil damages.<sup>42</sup>

The reversal of Mr. Shupe's criminal conviction did not change the facts then available—or previously available—to Mr. Shupe

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<sup>39</sup> Pet. Br. at 4-5.

<sup>40</sup> *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575-76, 146 P.3d 423 (2006).

<sup>41</sup> *Id.* at 576 (emphasis added).

<sup>42</sup> Pet. Br., App. at A-003-004.

regarding the facts and law related to his civil claim. Rather, Mr. Shupe had knowledge of all relevant facts underlying any potential cause of action on September 10, 2009, the date he was deprived of his personal property. Accordingly, Mr. Shupe's personal property claims expired on September 10, 2012, and his claim is time-barred under the statute of limitations.

#### **IV. CONCLUSION.**

For the foregoing reasons, this Court should deny Mr. Shupe's petition for review.

Respectfully submitted this 27<sup>th</sup> day of August, 2018.

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## DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 27<sup>th</sup> day of August, 2018, I electronically filed the foregoing "Answer to Petition for Review," with the Supreme Court Clerk of the Court using the Washington State Appellate Courts' Portal which will send notification of such filing to the following:

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**OFFICE OF THE CITY ATTORNEY**

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