

FILED
AUG 6 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

No. 288871

CITY OF WALLA WALLA, Respondent,

v.

\$401,333.44, Defendant *in rem*,

and

ADRIAN IBARRA-RAYA, Appellant.

APPELLANT'S OPENING MEMORANDUM

JANELLE M. CARMAN, WSBA #31537
C. DALE SLACK, WSBA #38397

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Attorneys for Appellant

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TABLE OF CONTENTS

Authorities Cited.....

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

ASSIGNMENT OF ERROR 1: The trial court committed reversible error by relying upon the amount of money at issue in rendering its decision.....1

Issue 1: Did the trial court err in citing the amount of money at issue as a reason for finding that the money was used in or was the product of illegal drug sales or activity, where the money was illegally obtained by police?.....2

Issue 2: Did the trial court err in citing the amount of money at issue as a reason for finding that the Appellant was not the rightful owner of the money, where the money was illegally obtained by police?.....2

ASSIGNMENT OF ERROR 2: Insufficient evidence existed to support forfeiture in this case, and the trial court erred by so finding.....2

Issue 3: Did the trial court err in determining that sufficient evidence existed to show that, by a preponderance of the evidence, the money at issue was used in or was the product of illegal drug sales or activity?.....2

Issue 4: Did the trial court err in determining that sufficient evidence existed to show that, by a preponderance of the evidence, the Appellant was not the lawful owner of the money at issue?.....2

ASSIGNMENT OF ERROR 3: The Trial Court committed reversible error by refusing to dismiss the case for lack of subject matter jurisdiction.....2

Issue 5: May evidence which is obtained through illegal actions of the police which violate an individual’s constitutional rights be subject to forfeiture to the same perpetrators?.....3

Issue 6: Should public policy favor rewarding police departments for gross violations of the constitutional protections afforded citizens?.....3

ASSIGNMENT OF ERROR 4: The Trial Court committed reversible error by refusing to apply judicial estoppel to bar the City from forwarding an inconsistent factual position.....3

Issue 7: Should the City be permitted to take the factual position that it held suspicions of the Ibarra-Raya home as a “drug house” when it previously took the opposite factual position?.....3

III. STATEMENT OF THE CASE.....3

IV. ARGUMENT.....15

A. The Trial Court Erred by Considering the Amount of Money at Issue, Where Caselaw is Clear that the Amount of Illegally Obtained Currency is Inadmissible.....16

B. Insufficient Evidence Existed to Find that the Money at Issue, by Preponderance of the Evidence, Was the Product of Illegal Drug Activity, and that the Claimant is Not the Rightful Owner.....20

1. The Milton Freewater Storage Unit.....21

2. The Remaining Evidence is Indufficient to Support the Trial Court’s Findings and Conclusions.....24

3. The Court Erred in Relying on the *Alford* Pleas of Appellant to Support a Finding that Appellant “Plead Guilty to False Swearing.”.....26

4. The Court Erred in Ignoring Evidence of Ownership of the Money by the Appellant.....26

C. The Trial Court Erred by Refusing to Dismiss the Case for Lack of Subject Matter Jurisdiction.....30

D. Judicial Estoppel Prevents the City from Reversing Itself on the Facts.....36

1. Standard of Review Supports Application of Judicial Estoppel.....37

2. Judicial Estoppel is Appropriate to this Situation.....38

E. This Court Should Award Attorneys’ Fees Incurred by Appellant.....42

V. CONCLUSION.....43

TABLE OF AUTHORITIES

This Case

City of Walla Walla v. \$401,333.44, 150 Wn. App. 360, 208 P.3d 574 (2009) *passim*
State of Washington v. Ibarra-Raya, 145 Wn. App. 516, 187 P.3d 301 (2008) *passim*

Federal Cases

Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886)20, 21
New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808 (2001)40, 41
One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696, 85 S. Ct. 1246, 14 L.Ed.2d 170
(1965)20, 21
Pelham v. Rose, 76 U.S. 103, 19 L.Ed. 602, 1869 WL 11464 (1869).....30
Republic Nat’l Bank of Miami v. United States, 506 U.S. 80, 113 S. Ct. 554, 121 L.Ed.2d 474
(1992).....31, 32
United States v. \$38,570, 950 F.2d 1108, 1113 (5th Cir. 1992)29
United States v. \$57,790, 263 F. Supp.2d 1239, 1244 (S.D. Cal. 2003)28
United States v. \$186,416, 583 F.3d 1220 (9th Cir. 2009)17, 34
United States v. \$186,416, 590 F.3d 942 (9th Cir. 2010);17, 18, 19
United States v. \$191,910, 16 F.3d 1051 (9th Cir. 1994)17, 18, 27, 35
U.S. v. \$244,320.00, 295 F.Supp.2d 1050 (S.D. Iowa 2003)35
U.S. v. \$260,242, 919 F.2d 686, 687 (11th Cir. 1990)29
United States v. \$493,850, 518 F.3d 1159 (9th Cir. 2008).....17
U.S. v. \$515,060.42, 152 F.3d 491, 500-01 (6th Cir. 1998).....28
United States v. One 1936 Model Ford, 307 U.S. 219, 59 S. Ct. 861, 83 L.ED. 1249
(1939).....33, 35
United States v. One 1985 Mercedes-Benz, 14 F.3d 465 (9th Cir., 1994))33

State Cases

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007)37, 41
Ashmore v. Estate of Duff, 165 Wn.2d 948, 205 P.3d 111 (2009)38, 40
Baldwin v. Silver, 147 Wn. App. 531, 196 P.3d 170 (2008).38, 40, 41
Bartley-Williams v. Kendall, 134 Wn. App. 95, 138 P.3d 1103 (2006).37

CHD, Inc. v. Taggart, 153 Wn. App. 94, 220 P.3d 229 (2009)38, 40

Housing Authority of City of Everett v. Kirby, 154 Wn. App. 842, 226 P.3d 222 (2010)37

Inland Foundry Co., v. Spokane County Air Pollution Control Auth., 98 Wn. App. 121, 989 P.2d 102 (1999)30

In re Detention of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007).26

Miller v. Campbell, 164 Wn.2d 529, 192 P.3d 352 (2008).....40

Robinson v. City of Seattle, 102 Wn. App. 795, 10 P.3d 452, 469-470 (2000).....34, 35

Ricketts v. Bd. of Accountancy, 111 Wn. App. 113, 43 P.3d 548 (2002).....30

Sam v. Okanogan County Sheriff’s Office, 136 Wn. App. 220, 148 P.3d 1086 (2006).....20

State v. Clark, 68 Wn. App. 592, 607, 844 P.2d 1029 (1993).....30

State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1995).....33

State v. Davis, 16 Wn. App. 657, 558 P.2d 263 (1977)27, 28

State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007)29

State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)27

State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986)27

State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970).16

State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977)27

State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002).16

Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 73 P.3d 369 (2003).20

Thompson v. State of Washington Dept. of Licensing, 138 Wn.2d 783, 982 P.2d (1999).....39

Other Materials

South Staffordshire Water Co. v. Sharman, 2 QB 44 (Court of Queen’s Bench, 1896).....28

Statutes

RCW 69.50.505.....15, 16, 42

I. INTRODUCTION

This case comes before this Court once again following a full trial in the Walla Walla County Superior Court, in which the Walla Walla Police Department was allowed to keep over \$400,000 that its officers illegally seized during an illegal search of the home of Adrian Ibarra-Raya. The Court is well acquainted with the facts of this case, and will no doubt recall the evidentiary rulings in not only the criminal matter, *State of Washington v. Ibarra-Raya*, 145 Wn. App. 516, 187 P.3d 301 (2008), but in the first appeal of this matter, *City of Walla Walla v. \$401,333.44*, 150 Wn. App. 360, 208 P.3d 574 (2009). The “intruders” of Mr. Ibarra-Raya’s home have once more been allowed to keep the tainted profits of their misdeeds, and Mr. Ibarra-Raya seeks this Court’s review once more of the trial court’s decision. Mr. Ibarra-Raya respectfully submits that the trial court erred in deciding the case with insufficient evidence, by considering inadmissible evidence, and that this case should not have been allowed to proceed to begin with, because the trial court lacked subject matter jurisdiction over property stolen by the City.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court committed reversible error by relying upon the amount of money at issue in rendering its decision.

Issue 1: Did the trial court err in citing the amount of money at issue as a reason for finding that the money was used in or was the product of illegal drug sales or activity, where the money was illegally obtained by police?

Issue 2: Did the trial court err in citing the amount of money at issue as a reason for finding that the Appellant was not the rightful owner of the money, where the money was illegally obtained by police?

ASSIGNMENT OF ERROR 2: Insufficient evidence existed to support forfeiture in this case, and the trial court erred by so finding.

Issue 3: Did the trial court err in determining that sufficient evidence existed to show that, by a preponderance of the evidence, the money at issue was used in or was the product of illegal drug sales or activity?

Issue 4: Did the trial court err in determining that sufficient evidence existed to show that, by a preponderance of the evidence, the Appellant was not the lawful owner of the money at issue?

ASSIGNMENT OF ERROR 3: The Trial Court committed reversible error by refusing to dismiss the case for lack of subject matter jurisdiction.

Issue 5: May evidence which is obtained through illegal actions of the police which violate an individual's constitutional rights be subject to forfeiture to the same perpetrators?

Issue 6: Should public policy favor rewarding police departments for gross violations of the constitutional protections afforded citizens?

ASSIGNMENT OF ERROR 4: The Trial Court committed reversible error by refusing to apply judicial estoppel to bar the City from forwarding an inconsistent factual position.

Issue 7: Should the City be permitted to take the factual position that it held suspicions of the Ibarra-Raya home as a "drug house" when it previously took the opposite factual position?

III. STATEMENT OF THE CASE

This case has returned. This Court began its work with this case in *State v. Ibarra-Raya*, 145 Wn. App. 516, 187 P.3d 301 (2008).¹

The circumstances arose from an incident on July 14, 2006. *State v. Ibarra-Raya*, 145 Wn. App. 516, 520, 187 P.3d 301 (2008). At approximately 2:27 a.m., a neighbor to Mr. Ibarra-Raya's home in Walla Walla, Washington, called in a noise complaint. *Id.* Officers arrived and illegally entered the home, seizing cocaine, marijuana, and the money at

¹ Reconsideration was requested, and was denied on September 2, 2008; the case is currently on appeal to the Washington State Supreme Court, but only as to the charges against Gilberto Ibarra-Cisneros, who is not a party in the case at Bar.

issue here. *Id.* at 521. Police later searched a storage unit in Milton Freewater, registered to Benito Landa, which contained further drug evidence and mass-produced tail-light lenses similar to those used on a pickup truck parked in front of the Ibarra-Raya home. *City of Walla Walla v. \$401,333.44*, 150 Wn. App. 360, 368-69, 208 P.3d 574 (2009).² Thereafter, the City began its efforts to forfeit the funds. *Id.*

To that end, the Walla Walla County Superior Court awarded summary judgment to the City of Walla Walla on May 13, 2007; this decision was overturned. *City of Walla Walla v. \$401,333.44*, 150 Wn. App. 360, 208 P.3d 574 (2009).

On retrial, Mr. Ibarra-Raya argued that the forfeiture was improper, based upon a lack of subject matter jurisdiction. (CP 1386.)³ He was involved in pre-trial motions involving discovery and admissibility of evidence. (CP 1398–1401.) The trial court denied the motion to dismiss for lack of subject matter jurisdiction, citing this Court’s decision in *City of Walla Walla v. \$401,333.44*, 150 Wn. App. 360, 368-69, 208 P.3d 574 (2009). (CP 1566.)

² Other evidence connected the storage unit to items found in the Ibarra-Raya home, but that evidence was tainted and excluded. *\$401,333.44*, 150 Wn. App. at 368-69.

³ Herein, the “Clerk’s Papers” is referred to as “CP” followed by the sequential page number(s) of the document assigned by the Clerk of the trial court herein; the verbatim transcript of proceedings is referred to as “RP [X:Y],” where X is the page number of the record, and Y is the line number or numbers of the statement cited; Exhibits referred to as “Ex. X” are listed in the “Designation of Supplemental Clerk’s Papers and Exhibits” filed by the City in this matter.

A fact-finding on the merits commenced on December 14, 2009. The City first called Steven Ruley, the employee responsible for maintaining drug forfeiture records for the Walla Walla Police Department (“WWPD”). (RP 71:8–9.) Mr. Ruley established procedural issues relating to notice and claims in the forfeiture matter. (RP 71:14–83:13.)

Second, the City called Saul Reyna, an officer with the WWPD. (RP 84:4–10.) Officer Reyna established service of the notice of intent to forfeit upon Adrian Ibarra-Raya. (RP 85:1–2.)

The City then called Jasmine Pedroza, who lived next-door to the Ibarra-Raya home on 1035 St. John Street in Walla Walla. (RP 88:16–20.) Ms. Pedroza testified that she saw individuals “coming and going frequently” from the Ibarra-Raya home, using the side door of the house. (RP 91:7–8.) Further, the City made sure to elicit the information that these visitors were Hispanic. (RP 91:17–21.) Ms. Pedroza testified that these visitors sometimes carried in duffel bags that were “not full,” but had something in them. (RP 92:15–17.) Ms. Pedroza testified that the bags were rolled up when the visitors left. (RP 96:25.) Ms. Pedroza did not recall that the visitors used keys to get in, but instead believed that the doors may have been unlocked. (RP 97:10–11.) Ms. Pedroza identified Adrian Ibarra-Raya as being a person she often saw at the house, and the individual who moved into the house. (RP 97:20–23; RP 98:2–3; Ex. 7.)

Ms. Pedroza testified that it “didn’t look like anybody stayed the night [at 1035 St. John Street].” (RP 98:16–17.) Ms. Pedroza testified that she had seen a pickup truck at the house in the past, but could not describe it. (RP 98:25–99:5.) Ms. Pedroza testified that a person named Benito, pictured in Exhibit 12, came to the house following Mr. Ibarra-Raya’s arrest to move out the furniture and personal belongings in the home. (RP 99:14–25.)

On cross-examination, Ms. Pedroza clarified that she had also seen young women entering the house, carrying lamps and home furnishings, but not through the side door. (RP 103:17–22; 104:10-14.) Also, Ms. Pedroza clarified that she could only see the side door from her living room, not the front door, and so anyone may have come and gone from the front door without her observing them. (RP 103:25–104:3– 5.) Finally, Ms. Pedroza clarified that she did not know how many different young men had entered and exited the home. (RP 105:13–16.) On redirect, Ms. Pedroza admitted that, aside from some Hispanics coming and going, she did not notice anything unusual. (RP107:8–10.)

The City’s next witness was Jose “Frank” Garcia,⁴ another of Mr. Ibarra-Raya’s neighbors. (RP 108:1–6.) Mr. Garcia testified that he saw vehicles come to the Ibarra-Raya home a few times a week, stay for 15 minutes to half an hour, and then leave. (RP 110:1–10.) Mr. Garcia

⁴ Notably, this individual did not surface during the criminal trial.

clarified that some cars may have stayed at the home for longer than half-an-hour. (RP 110:11–14.) Mr. Garcia described a black Mercedes with custom wheels (RP 110:25; 111:6–7.), a “new” white Cadillac Escalade (RP 110:21.), and a “new” black Ford pickup. (RP 110:21–22.) Mr. Garcia never saw anyone get in or out of the vehicles, but somehow saw people going in and out of the house. (RP 111:13–16.) In contrast to Ms. Pedroza, Mr. Garcia saw the visitors enter and exit via the front door of the home, to which they all had keys. (RP 111:23–25.) These individuals, according to Mr. Garcia, were carrying “little backpacks” only when they came out of the house, not the full-to-empty duffel bags described by Ms. Pedroza. (RP 111:19–22.) Mr. Garcia identified Mr. Ibarra-Raya’s brother as a frequent visitor to the Ibarra-Raya home, and the individual who drove the black Ford truck. (RP 112:12–22; Ex. 13.) Mr. Garcia recalled an occasion when a number of cars were at the property helping “someone” move into the house. (RP 113:18–19.) Confusingly, Mr. Garcia then testified that, in fact, the first time he had seen the Mercedes, Escalade and Ford, they were at the Ibarra-Raya home for an hour, and the second time he saw them was two days prior to the police raid on the Ibarra-Raya home. (RP 114:11–17.) Mr. Garcia identified photos of Isaias Campos Diaz and Rosario Ramos as individuals who were at the Ibarra-Raya home. (RP 115:17–25; 116:1–11; Ex. 14; Ex. 15.) Mr. Garcia testified that he was offended by a

gesture made by Mr. Campos Diaz. (RP 115:3–9; 117:1.) This offensive gesture, combined with new cars being parked outside of Mr. Ibarra-Raya’s home, prompted Mr. Garcia to call the police. (RP 117: 11–15.) Mr. Garcia testified that he knew someone was living at the Ibarra-Raya home, and that it appeared someone matching Mr. Ibarra-Raya’s description was there all the time. (RP 117:16–20; 117:23–25; 118:22–25; 119:1–9; Ex. 7.) On cross-examination, Mr. Garcia confirmed that it was Adrian Ibarra-Raya who lived at 1035 St. John Street. (RP 120:1–4.) On redirect, Mr. Garcia told the court that the venetian blinds at 1035 St. John Street were always closed, and that he couldn’t see anyone moving around in the house, (RP 122:21–25; 123:1–2.) but that Mr. Ibarra-Raya was always home. (RP 123:10–11.)

The City next called Jashay Ornelas, a friend of Mr. Ibarra-Raya. (RP 124: 24–25.) Ms. Ornelas applied to rent the home at 1035 St. John Street, but never lived there. (RP 130:15–25.) Instead, Ms. Ornelas filled out the forms for renting the home for Mr. Ibarra-Raya, because of his lack of social security number, credit, and the like. (RP 140:17–25; 141:1–9.) She had done this previously for another rental home. (RP 133:3–14.) Ms. Ornelas indicated that she was also friends with Mr. Ibarra-Raya’s girlfriend, and Benito Landa, who was an old friend from high school, and Rosario Ramos. (RP 137:1–4; 129:11–18.) Ms. Ornelas indicated that she

had visited the house, and never saw evidence of drugs in the home. (RP 142:24–25; 143:1–4.)

The City next called Rosie Knapp, manager of a storage-unit complex in Milton Freewater, Oregon. (RP 152:10–14.) Ms. Knapp testified that she rented a storage unit to Benito Landa, whom she had known for several years. (RP 155:1–6.) Ms. Knapp testified that rent was actually paid, following the first month, by Gilberto Ibarra-Cisneros. (RP 156:12–23; Ex. 13.⁵) Ms. Knapp testified that a white Chevrolet pickup would be at the storage facility often. (RP 159:12–22; Ex. 16; Ex. 17.) Ms. Knapp testified that she saw Adrian Ibarra-Raya twice; once driving the Chevy pickup, once as a passenger. (RP 160:8–13.) Ms. Knapp testified in detail about a call she made to the sheriff’s office regarding the storage unit rented to Benito Landa. (RP 160:17–22.)

On cross examination, Ms. Knapp’s testimony changed somewhat. Now she recalled that she had seen the Appellant at the storage unit more than twice (RP 166:4–5.), and that he had never been driving the white pickup truck. (RP 166:25–167:13–14.) Also, Ms. Knapp now could not be certain

⁵ In the City’s list of exhibits, Exhibit No. 13 is misleadingly labeled “Gilberto Ibarra-Cisneros, a/k/a Adrian Ibarra-Raya. The City apparently is attempting to suggest that Gilberto and Adrian are one and the same, which is not supported by the identification evidence herein. Appellant asks the Court to take extra care in comparing the photographic exhibits to eyewitness testimony. Although there is evidence that Gilberto Ibarra-Cisneros may have used his brother’s name, the City has not provided any evidence that this is happening in this matter.

that she had called the sheriff's office with her concerns over the Landa storage unit. (RP 168:5–15.)

The City then called Kim Boyd, a payday-loan clerk whose office was formerly in the storage-unit complex. (RP 172:16; 173:25–174:3.) Ms. Boyd testified that she had seen two vehicles frequenting the storage units without appearing to be “doing anything in the storage unit;” she reported those two vehicles to the police: a red pickup and a white pickup. (RP 175:15–16.) As it turns out, the red pickup was a courier. (RP 175:18–20.) Unlike other witnesses, Ms. Boyd said that sometimes the white pickup “had a cover on the back,” and sometimes it did not. (RP 176:1–2.) Ms. Boyd never noticed the pickup taking or dropping anything off at the storage unit, but saw a weed-whacker in the back once. (RP 176:25–177:5.) Ms. Boyd told the court that she had mentioned a number of different vehicles to police, and that this was just one of those. (RP 177:11–14.) Ms. Boyd recalled that the individual she saw at the storage unit from the pickup had a moustache, a very short haircut, and was Hispanic. (RP 178:2–4.) She did not identify Adrian Ibarra-Raya from an exhibit.

Another payday-loan clerk, Mayra Osorio, testified next. Ms. Osorio testified that a number of vehicles came and went to a storage unit across from the payday-loan office. (RP 182:14–24.) None of the vehicles

appeared to take anything from the unit, except once they took a weed whacker from the unit. (RP 182:22–24; 183:2–3.) Or maybe on more than one occasion the individual in the white truck may have been taking or dropping off the weed-whacker. (RP 183:2–20; Ex. 16; Ex. 17.) The truck was at the storage facility three times a day, or more, or maybe once, according to Ms. Osorio. (RP 184:14–20.) Ms. Osorio identified Gilberto Ibarra-Cisneros as the driver of the pickup truck. (RP 184:21–185:16.)

The City called Rhiana Sheridan of the Umatilla County Sheriff’s Office. Ms. Sheridan executed a search warrant on the storage unit in Milton Freewater. (RP 187:1–3.) Ms. Sheridan detailed the evidence found in the storage unit, which she listed on a property report entered into evidence. (Ex. 27.) Ms. Sheridan also testified that a Gatorade bottle had been found inside the unit, next to a trash can. (RP 190:10–13.) The bottle was submitted for fingerprint testing. (RP 190: 22–24.) A fingerprint belonging to Adrian Ibarra-Raya was found on the Gatorade bottle. (RP 191:6– 8.) DNA belonging to Adrian Ibarra-Raya was found on an empty water-bottle also found there. (RP 202:15–16.) Among a list of items, a black duffel bag was also found in the unit, containing marijuana and methamphetamine . (RP 196:19; RP 198:12–18; Ex. 41.) Officer Sheridan did not identify any other items with fingerprint evidence of Adrian Ibarra-Raya.

The City next called Darryl Zaron, a special agent with the Department of Homeland Security, Immigration and Customs Enforcement (“ICE”). Agent Zaron testified that an individual names Jairo Millan was stopped at the border between the United States and Mexico on June 10, 2006. (RP 210:1–17.) The City took great pains to elicit the information that Jairo Millan had only \$90 US and 50 Mexican Pesos on him when stopped. (RP 210:18–24.) ICE Agent Zaron testified that Mr. Millan went by the alias “Adrian Ibarra-Raya.” (RP 213:3–4.) Fingerprints were taken for the documents. (RP 212:17–18.) The City also introduced a deportation form associated with Gilberto Ibarra-Cisneros. (RP 214:8–25; 215:1–7.)

Finally, the City called Chris Buttice from the WWPD. Officer Buttice offered his opinions regarding drug “drop-houses.” According to Buttice, sometimes the cars that stop by the drop house will be nice, sometimes they won’t. (RP 226:4–11.) Sometimes visitors will be there for a short time, sometimes visitors will be there for a long time. (RP 226:12–13.) A visitor may be at a drug drop-house for a few minutes or a few hours. (RP 226:17–18.) Visits may be frequent or infrequent. (RP 226:21–22.) Sometimes money may be found in the same location as drugs, sometimes not. (RP 227:11–14.) In Buttice’s “expert opinion,” and using the highly-specific criteria outlined above, 1035 St. John Street was a drug drop house, because there were reports from unnamed sources that fancy

vehicles visited the home, sometimes stayed for short durations, and “came and went” from the home. (RP 227:22–228:1.) To further confirm that this was a drug house, Buttice went to “stake-out” 1035 St. John, and his suspicions were confirmed when he observed absolutely no vehicles visiting the home, no lights, and no activity at 1035 St. John Street. (RP 228:10–16.) In all, on 12–15 occasions, Buttice saw no activity at 1035 St. John Street. (RP 228:17-18.) Not to be deterred, it was still Buttice’s “expert opinion” that seeing no activity was not inconsistent with a drug drop-house either. (RP 228:19–21.) Buttice testified that a white pickup truck claimed by Isaias Campos Dias was parked outside the Ibarra-Raya home on July 14, 2006. (RP 233:4–10; 235:3–4.) Buttice then opined that it is common for persons involved in the drug trade to use aliases. (RP 238:12–15.) Although the City made a valiant effort to establish that most drug dealers have Oregon identification documents, Buttice would not play along with this theory. (RP 238:23–239:7.) Buttice testified that the fingerprints for Jairo Millan actually belonged to Adrian Ibarra-Raya. (RP 239:21–22.) Buttice further testified that, despite her testimony at trial, Kim Boyd had identified Adrian Ibarra-Raya as an individual she had seen at the Milton Freewater storage unit. (RP 240:5–15.)

The City then walked Buttice through a laborious inventory of items in the Milton Freewater storage unit, and his opinions as to how each item had

importance to the drug trade. Again, the testimony was heavily concerned with tail-light lenses for a Chevrolet truck that were found in the storage unit. (RP 243:6–247:18.) Buttice further testified that the drugs found in the storage unit would have a value of \$107,000 (RP 249:2–6.); that bags found in the storage unit had been used to store cash (RP 250:5–23.); and that there were probably 14 plastic bags of money that were not in the storage unit, because there was only one bag left in a box of 15. (RP 253:1–14.)

On cross examination, Buttice admitted that there may be a number of reasons why individuals would “come and go” from a residence. (RP 271:16–21.)

Following closing arguments the next day, the Court took the matter under advisement. (RP 328:4–13.) On January 14, 2010, the trial court issued a memorandum opinion in the form of a letter to the parties’ attorneys. (CP 1565–1569.) In that opinion, the trial court cited 27 facts which were determinative of the decision that the money at issue was the product of illegal drug activity. (CP 1567–1568.) The court also determined that the Appellant was not the rightful owner of the money, based in part upon the following:

...[O]n 01/08/07, having been charged in Walla Walla County District Court with making a false statement in regard to the

money, Claimant entered a plea of guilty to false swearing.

The City further presented evidence at trial that when the Claimant attempted to cross the Mexican/United States border on 6/10/06, at Calixto, California, the Claimant only had in his possession \$90 in United States currency, and \$60 in Mexican pesos... in mid June 2006, the Claimant was denied admission to the United States and ordered to return to Mexico, without a job and with only \$90 in American money on his person. On July 14, 2006, barely a month later, Claimant is asking this Court to find credible his claim to \$401,333.44 in cash, without further explanation as to its source.

(CP 1569.)

Both parties submitted proposed findings of fact and conclusions of law, and the Court adopted those proposed by the City. (CP 1585–1588.)

IV. ARGUMENT

RCW 69.50.505 governs the procedure which must be followed when a government entity wishes to seize for its own use personal or real property which is alleged to be the product of illegal drug activity. The statute provides that “all moneys[sic]...furnished or intended to be furnished by any person in exchange for a controlled substance” or “used or intended to be used to facilitate any violation” of illegal drug laws is

subject to forfeiture. RCW 69.50.505(1)(g). In all forfeiture cases under RCW 69.50.505, the burden of proof is on the seizing agency—in this case, the Walla Walla Police Department (“WWPD”)—to prove by preponderance of the evidence that the property seized is subject to forfeiture. RCW 69.50.505(5). Upon determination by a court or hearing officer that a claimant is the present lawful owner of the property, the seizing agency must return the property. *Id.*

A. The Trial Court Erred by Considering the Amount of Money at Issue, Where Caselaw is Clear that the Amount of Illegally Obtained Currency is Inadmissible.

In a bench trial, this Court presumes that a trial judge, knowing the applicable rules of evidence, will ignore inadmissible evidence when making his or her decision. *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). This presumption can be overcome by showing either that the trial judge’s decision was not supported by sufficient admissible evidence, or that the trial court relied upon the inadmissible evidence to make decisions that it would not otherwise have made. *State v. Read*, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002). Unfortunately, the trial court’s decision is littered with references to the inadmissible evidence that was considered.

This Court has already ruled that the money at issue in this case was illegally seized by the City of Walla Walla⁶ through its agents, the Walla Walla Police Department. *State v. Ibarra-Raya*, 145 Wn. App. 516, 523, 187 P.3d 301 (2008), review granted, 165 Wn.2d 1036 (2009). The “Exclusionary Rule,” holding that illegally-seized items may not be admitted as evidence, applies to forfeiture proceedings as well as criminal ones. *U.S. v. \$186,416 in U.S. Currency*, 583 F.3d 1220, 1226 (9th Cir. 2009)⁷.

It is clear from caselaw that in a forfeiture case where the property at issue was illegally seized by police, the trial court may not consider the amount of the money in making its decision. *United States v. \$186,416*, 590 F.3d 942, 954 (9th Cir. 2010); *United States v. \$493,850*, 518 F.3d 1159,1165 (9th Cir. 2008) (citing *United States v. \$191,910*, 16 F.3d 1051 (9th Cir. 1994), superseded by statute on other grounds); *\$401,333.44*, 150 Wn. App. at 366. Courts may consider that “some currency” was found only rather than any particular amount. *\$493,850*, 518 F.3d at 1166.

In *United States v. \$186,416*, 590 F.3d 942 (9th Cir. 2010), state

⁶ We did specifically acknowledge, however, that this proceeding was far more orderly than the prior forfeiture proceeding, when officers had packed the courtroom. Although the lower court conducted an orderly and reasonable proceeding, we simply allege that errors were made requiring reversal.

⁷ Because the federal forfeiture statute is very similar to Washington’s forfeiture statute, Washington’s courts may look to federal case-law as persuasive authority in interpreting the Washington forfeiture statute. *C.f. In Re: Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 849, 215 P.3d 166 (2009); *Valerio v. Lacey Police Dept.*, 110 Wn. App. 163, 175 n.10, 39 P.3d 332 (2002).

drug-enforcement agents illegally raided a medical marijuana dispensary, and seized almost \$200,000 from the business. *\$186,416*, 590 F.3d at 947. The U.S. District Court for the Central District of California found for the government and forfeited the money. *Id.* On appeal, the Ninth Circuit Court of Appeals reversed, and cited the importance of *not considering* the amount of money at issue when the money is illegally seized:

This being so, we are left without a clue as to whether the currency of an unknown amount discovered at [the dispensary] was indeed revenue from the clinic's operations or was, for instance, a small amount of personal cash that an employee had acquired elsewhere and kept in a locked drawer at work.

Id. at 954.

This kind of self-imposed “cluelessness” is necessary to ensure that the government proves a direct connection between the cash and drug activity based solely on untainted evidence, and that it does not profit from its misdeeds. *\$191,910*, 16 F.3d at 1063.

In the case at Bar, it is unfortunately obvious that the amount of money at issue was relied upon by the trial court. In its memorandum opinion, the trial court cites the amount of money numerous times, and also points out that drugs worth six figures were found in the Milton Freewater storage unit. (CP 1568.) Most disappointingly, the court points out that it is incredible that a person with only \$90 on his person who

claims to be a farm worker would have \$401,333.44 in cash one month later. (CP 1569.) This is very clearly a violation of the rule that the Court is not to consider the amount of money at issue, and demonstrates the reason why. Under the rules, as succinctly explained in *United States v. \$186,416*, 590 F.3d 942 (9th Cir. 2010), the trial court should have had no clue how much money was in the Ibarra-Raya home. Without the tainted evidence of amount, the money could have been a quarter, ten one-dollar bills, two fives, or the \$90 which Mr. Ibarra-Raya had admitted to having earlier. The implication that the amount of money was incredible to the court was improper, and clearly shows a consideration of inadmissible evidence. Accordingly, the decision was in error and must be reversed.

By relying on the amount of money that was illegally seized and which the City sought to forfeit, the lower court violated governing law. On this basis alone, reversal is required. As a result, based on this issue alone, reversal is required. Accordingly, this Court should reverse the decision of the lower court forfeiting the money at issue to the City of Walla Walla, and Appellant respectfully requests that the Court so hold.

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B. Insufficient Evidence Existed to Find that the Money at Issue, by Preponderance of the Evidence, Was the Product of Illegal Drug Activity, and that the Claimant is Not the Rightful Owner.

Findings of fact are reviewed under a substantial evidence standard, defined as a “quantum of evidence sufficient to persuade a rational, fair-minded person [that] the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). This Court considers only findings of fact supported by substantial evidence in determining if an order of forfeiture is supported by the evidence. *Sam v. Okanogan County Sheriff's Office*, 136 Wn. App. 220, 228, 148 P.3d 1086 (2006). Questions of law and conclusions of law are reviewed *de novo*. *Dickie*, 149 Wn.2d at 880.

The Court in the *1958 Plymouth Sedan* case relied heavily upon *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), wherein it was previously determined that the Fourth Amendment applied to forfeiture proceedings. In its analysis, the Court recognized the very real possibility that a forfeiture could inflict far greater financial consequences upon an individual than a criminal prosecution. *Id.* at 701. There, the Court noted that forfeiture could cause ten times the financial punishment upon the owner when compared to a criminal action. *Id.* Noting the “quasi-criminal” nature of such proceedings, the Court held that the exclusionary rule would indeed prevent wrongfully obtained

evidence from being admissible against an individual facing a forfeiture action. *Id.* at 697, 702. Accordingly, the evidence was suppressed, and forfeiture of the vehicle was precluded. *Id.* The property had to be returned.

Ultimately, the Court ruled that, when officers wrongfully seize personal property that is not *per se* contraband, the items which must be returned to the person from whom they were taken. *Id.* at 700. Indeed, had the evidence been permitted, the Court noted that the damage to the individual would be doubled: first, by the unconstitutional action of the law enforcement officer, and second, by the forfeiture. *Id.*

Through its published decision in *State v. Ibarra-Raya*, 145 Wn. App. 516, 187 P.3d 301 (2008), *reconsideration denied* (2008), this Court has conclusively ruled that the money in dispute in this case was illegally obtained from petitioner's home. The exclusionary rule applies to forfeiture hearings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696, 85 S. Ct.1246, 14 L.Ed.2d 170 (1965).

1. The Milton Freewater Storage Unit.

This Court has previously addressed the tenuous connection between the Appellant and the storage unit in Milton Freewater. On this second round, the City provided some further evidence, but it still is not enough to link the Appellant to the illegal materials in the storage unit to a

sufficient degree to support a finding that the money at issue was the product of illegal drug activity. The trial court made the storage unit the central point of its findings numbered 13, 14, 15, 16, 17, 18, 21, 22, 23, and 25.

To begin, the City has provided evidence that two empty, discarded, plastic bottles linked to the Appellant were discovered in the storage unit; however, the City has provided no evidence that the Appellant's fingerprints or DNA were present on any other item in the unit; the bottles in question were in the storage unit near a trash-can.

Second, the city has provided "eyewitnesses" who attempted to link the Appellant to the storage unit. Rosie Knapp could not recall whether she saw the Appellant once, twice, or more than a couple of times at the unit. Additionally, she was completely uncertain if he drove the white pickup seen often at the facility or not. She provided no testimony which linked him to payment of the storage unit rent, rights of entry, rights of possession, or even entry into the unit, merely presence at the facility with his brother, who paid rent on the unit.

Kim Boyd never identified the Appellant as being at the storage unit or even facility.

Mayra Osorio identified Gilberto Ibarra-Cisneros as the driver of the frequently-spotted white pickup truck, but was unclear on how many

times she had seen it, and what exactly she had seen—possibly, she simply saw the pickup come to the unit to retrieve and re-store a weed-whacker. Ms. Osorio also failed to identify Appellant as a definite frequent visitor to the unit or facility, or connect him with illegal activity.

Other evidence found in the storage unit is similarly inconclusive. The tail-light assemblies that have been discussed more than any other evidence in this matter may belong to a truck owned by Isaias Campos Diaz, not Appellant. Or the assemblies may belong to one of thousands of other Chevrolet pickups manufactured in this country. Likewise, the car parts for other mass-produced vehicles found in the storage unit are far from convincing—it has never been alleged that the Appellant owns or has owned any of the vehicles for which car parts were found in the storage unit.

The wild speculation by Officer Buttice regarding the 14 missing mysterious plastic bags, and their speculative use to package money is bizarrely unconnected to any admissible evidence in this case, and is a complete non sequitur; and the City's sad attempt to elicit a connection between Oregon identification documents and drug dealers should be treated with the contempt it deserves by this Court. The City did not even attempt to make rational or logical connections between the other items found in the storage unit and the Appellant.

The City is left with the same evidence that this Court has already held “does not make it more probably true that the money in Mr. Ibarra-Raya’s house was ‘furnished or intended to be furnished... in exchange for a controlled substance.’” *\$401,333.44*, 150 Wn. App. at 369.

In total, it is clear that the City has insufficient evidence to connect the Appellant to the Milton Freewater storage unit, or any evidence found therein, except two pieces of refuse. The trial court’s findings were insufficient to persuade a rational, fair-minded person that the money at issue was the product of illegal drug activity, and the Court should reverse the lower court’s findings and conclusions.

2. The Remaining Evidence Is Insufficient to Support the Trial Court’s Findings and Conclusions.

Without the evidence of the Milton Freewater storage unit, the City is left only with the evidence provided by neighbors of Appellant. That evidence consists almost solely of the testimony that Mr. Ibarra-Raya had a few guests who drove nice, late-model luxury cars, that he kept his blinds closed, that friends brought duffel bags or maybe small backpacks to visits, that some stayed longer than others, and that sometimes it was quiet at the Ibarra-Raya home.

Frank Garcia’s testimony portrayed a young man constantly at home, but with an apparently quiet and private lifestyle. Jasmine

Pedroza's testimony painted a picture of a young man who was never at home, and whose friends let themselves in and out of the house. Either witness's conflicting testimony does not make it more probable than not that the money at issue was the product of illegal drug activity.

The "stolen license plates/stolen pickup" error is irrelevant in this matter. Mr. Ibarra-Raya is not being accused of stealing a pickup truck, and even if the pickup truck had been stolen, instead of the subject of a blunder by over-eager police officers, it does not make it more probable than not that the money at issue was the product of illegal drug activity.

Finally, the City has made this entire case about guilt by association. Absolutely no evidence is directly linked to Adrian Ibarra-Raya; instead, a truck parked at his house and licensed to another individual is connected to a storage unit rented to another individual which had drugs in it; or some cars which are too nice for young Hispanic men to own were seen at the house where Mr. Ibarra-Raya lived, even though none of the cars were registered to or owned by Mr. Ibarra-Raya; or, some of Mr. Ibarra-Raya's trash was found in a storage unit rented by a house-guest. These links are tenuous and not sufficient to persuade a rational, fair-minded person that the money at issue was the product of illegal drug activity by a preponderance of the evidence. This Court should reverse the lower court's findings and conclusions.

3. The Court Erred in Relying on the *Alford* Pleas of Appellant to Support a Finding that Appellant “Pled Guilty” to False Swearing.

Contrary to the lower court’s interpretation, an *Alford* plea is not conclusive of guilt in a subsequent civil action; a defendant who enters an *Alford* plea does **not** admit to committing a crime. *See In re: Detention of Stout*, 159 Wn.2d 357, 365-66, 150 P.3d 86 (2007).

In this case, the trial court made a finding of fact in its memorandum decision that the Appellant “entered a plea of guilty to false swearing.” (CP 1569.) This finding is unsupported by the evidence, where the Appellant entered two contradictory *Alford* pleas in a district court criminal case – brought by the city. Indeed, the pleas cited by the lower court involved Mr. Ibarra-Raya entering an *Alford* plea involving his statements in the forfeiture proceedings that the money was and was not his. The pleas are not helpful for purposes of the forfeiture proceeding whatsoever.

4. The Court Erred in Ignoring Evidence of Ownership of the Money by the Appellant.

The record made clear that Mr. Ibarra-Raya legitimately asserted a valid property interest in the funds seized from his home. After all, in order to contest forfeiture, a claimant need only have some type of

property interest in the forfeited items. This interest need not be an ownership interest; it can be any type of interest, including a possessory interest. *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994). Under this statement of the law, even constructive possession - - alone - - would be sufficient to state petitioner's interest. The money was found in petitioner's home; there is no dispute as to this fact at all. This would require the ownership to revert to the resident controlling the premises. *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977) (evidence sufficient to prove constructive possession where defendants' numerous personal items, including a payment book for the purchase of the home, were found on the premises); *State v. Davis*, 16 Wn. App. 657, 558 P.2d 263 (1977) (dominion and control may be inferred from payment of rent or possession of keys); compare with *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986) (evidence insufficient to prove constructive possession where a credit card receipt and traffic ticket found in residence indicated that the defendant resided elsewhere).

Constructive possession is the dominion and control over item or over the premises containing it. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). In the underlying criminal case, possession was inferred based on the circumstances. See *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977) (holding that there was sufficient showing of

constructive possession where defendants' numerous personal items, including a payment book for the purchase of the home, were found on the premises); *see also State v. Davis*, 16 Wn. App. 657, 558 P.2d 263 (1977) (holding that dominion and control may be inferred from payment of rent or possession of keys). We then ask why the money should be treated any differently.

Using the same analysis, other things found in the home would belong to petitioner too. Indeed, things found in far more intimate areas of the home – in the closets, laundry, bedroom, bed, clothing, and shelves – would be possessed by petitioner. These places are where the money was found.

Even if petitioner denied ownership of the cash initially, the fact that it was found in his home causes him to be the individual with a greater claim on the moneys than the Walla Walla Police Department. Indeed, this has been the law for generations. *See South Staffordshire Water Co. v. Sharman*, 2 QB 44 (Court of Queen's Bench, 1896) (holding that trespassers cannot take advantage of "found money"); *see also United States v. \$57,790*, 263 F. Supp.2d 1239, 1244 (S.D. Cal. 2003); *see also U.S. v. \$515,060.42*, 152 F.3d 491, 500-01 (6th Cir. 1998) ("the fact that the currency was found in the claimant's bedroom gave him constructive possession of the currency even though not present at the

time of seizure ... such a possessory interest is constitutionally sufficient to confer standing in forfeiture actions”); *see also U.S. v. \$260,242*, 919 F.2d 686, 687 (11th Cir. 1990) (standing exists for a claimant on the basis of constructive possession where the currency was seized from the trunk of a car registered to claimant); *see also United States v. \$38,570*, 950 F.2d 1108, 1113 (5th Cir. 1992) (explaining that a claimant’s indicia of ownership precluded danger of a third-party’s false claim of right to the money).

Mr. Ibarra-Raya’s initial denial to police officers is not controlling. *See State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007). In *Evans*, the Supreme Court considered for the first time the question of whether a defendant can correct his earlier statement: whether one who initially denies ownership of an item that is located in an area in which he has a privacy interest can later bring a motion to suppress as to that item. In that case, the court unanimously ruled that the defendant retains constitutional standing to bring such a motion. *Id.* at 413.

In total, the lower court’s findings and conclusions were insufficient to persuade a rational, fair-minded person that the money at issue was the product of illegal drug activity by a preponderance of the evidence. The findings and conclusions were based upon insufficient

evidence, and this Court should reverse the lower court's decision in this matter.

C. The Trial Court Erred by Refusing to Dismiss the Case for Lack of Subject Matter Jurisdiction.

A civil action must satisfy subject matter jurisdiction in order to proceed. *Ricketts v. Bd. of Accountancy*, 111 Wn. App. 113, 116, 43 P.3d 548 (2002) (quoting *Inland Foundry Co., v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999) that “[w]ithout subject matter jurisdiction, a court ... may do nothing other than enter an order of dismissal”).

This is the case in forfeiture actions as it is in other civil actions. *Pelham v. Rose*, 76 U.S. 103, 106, 19 L.Ed. 602 (1869). “The seizure of property, as thus seen, is made the foundation of subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture.” *Id.*; *see also State v. Clark*, 68 Wn. App. 592, 607, 844 P.2d 1029 (1993) (“[Plaintiffs] argue, additionally, that the trial court did not have jurisdiction to forfeit their real property because the property was never lawfully seized. This, they assert, is a prerequisite to jurisdiction. . . . The County agrees that seizure is a prerequisite to forfeiture [but asserted that jurisdiction existed].”)

Accordingly, for a forfeiture action to proceed in accordance with the law, there must be subject matter jurisdiction over the thing that was seized. *See Republic Nat'l Bank of Miami v. U.S.*, 506 U.S. 80, 84, 113 S. Ct. 554, 121 L.Ed.2d 474 (1992). The U.S. Supreme Court analyzed this issue in *Republic Nat'l Bank of Miami v. U.S.*, 506 U.S. 80, 84, 113 S. Ct. 554, 121 L.Ed.2d 474 (1992). That case involved a forfeiture proceeding related to a residence. The residence was subsequently sold, and the parties were therefore fighting over the sale proceeds. *Republic Nat'l Bank of Miami*, 506 U.S. at 82. The proceeds had been moved away from the judicial district in which the forfeiture action was pending. *Id.* The case therefore turned on whether the court had subject matter jurisdiction over the thing that was forfeited. *Id.*⁸ One side claimed that the conversion of the property into currency, which was then sent out of the district, divested the court of subject matter jurisdiction. *Id.* at 82-83. The circuit court agreed, and dismissed the forfeiture claim because of the perceived lack of subject matter jurisdiction after the funds were moved. *Id.* at 83. The Supreme Court disagreed.

⁸ Justice Blackmun identified the issue in the case as “whether the Court of Appeals may continue to exercise jurisdiction in an *in rem* civil forfeiture proceeding after the res, then in the form of cash, is removed by the United States Marshal from one judicial district and deposited in the United States Treasury.” *Id.* at 81-82.

In its analysis, the United States Supreme Court explained that the proper focus was not on whether the court somehow lost subject matter jurisdiction due to the transfer, but instead on whether the court had subject matter jurisdiction in the first place. It explained, “Certainly, it has long been understood that a valid seizure of the *res* is a prerequisite to the initiation of an *in rem* civil forfeiture proceeding.” *Id.* at 84. The opinion further explained that so long as the court originally had jurisdiction, it was not important that the object of forfeiture had been moved. *Id.* at 88-89.

In contrast to the situation in place in the *Republic National Bank of Miami* matter, here the City of Walla Walla never established valid seizure over the property it now seeks to forfeit. Instead, law enforcement officers illegally entered the Ibarra-Raya home in such contradiction to the State and Federal constitutions that this Court referred to the officers as “intruders.” *Ibarra-Raya*, 145 Wn. App. at 523. In contrast to the *Republic National Bank of Miami* case, never has the *res* involved in the case at Bar been in the valid and lawful custody and control of the City. Accordingly, the trial court could not have authority to make findings of fact or to issue any orders as to the proceeds because the wrongful seizure

prevented it from establishing subject matter jurisdiction over the property.

Additionally, public policy favors this rule. First, forfeiture actions are to be strictly construed against the plaintiff government entity. *U.S. v. One 1936 Model Ford*, 307 U.S. 219, 226 (1939). “Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.” *Id.* (cited with approval by *U.S. v. One 1985 Mercedes-Benz*, 14 F.3d 465, 468 (9th Cir., 1994)).

Second, the Court is to give careful scrutiny where the law enforcement agency that performed the allegedly unlawful seizure will end up with the seized money. *State v. Cole*, 128 Wn.2d 262, 275, 906 P.2d 925 (1995). Of course, in our case there is no “allegedly unlawful” term to be used in connection with the seizure: it has already been determined that the seizure was illegal. *Ibarra-Raya*, 145 Wn. App. at 519. However, even if we *were* still wrestling with this issue, Appellant would remind the Court of the fact that the Walla Walla Police Department will end up with the funds if the City remains successful in the forfeiture action. *Cole*, 128 Wn.2d at 275. “In recent decisions, the United States Supreme Court has noted reservations about civil forfeiture ‘where the government has a direct pecuniary interest in the outcome of

the proceeding,’ and where the government has a ‘financial stake in drug forfeiture.’” *Id.*

This special scrutiny is justified for at least three reasons. \$186,416 in *U.S. Currency*, 583 F.3d at 1227. “Given the government’s strong financial incentive to prevail in civil forfeiture actions, the application of the exclusionary sanction in these cases is likely to prove especially effective in deterring law enforcement agents from engaging in illegal activity.” *Id.* It “also protects judicial integrity by ensuring that the courts do not serve as a conduit through which the government fills its coffers at the expense of those whose constitutional rights its agents violated.” *Id.* “Moreover, the exclusion of evidence in forfeiture proceedings is without the major societal cost associated with exclusion in criminal cases: setting a criminal free.” *Id.*

The question here is whether the City gets to profit from the illegal actions of its police officers. When the actions of the State conflict with the constitutional protections, the latter is to prevail. *Robinson v. City of Seattle*, 102 Wn. App. 795, 827-828, 10 P.3d 452, 469-470 (2000). In *Robinson*, Division I explained,

The national scourge of drug abuse is a proper and abiding concern for government. But even in the face of such concerns, the

protections of the constitution control. Indeed, it is in the face of these concerns that we must most carefully guard against the government's abridgment of fundamental rights. As the Supreme Court expressed this duty in *City of Seattle v. McCreedy*, "our decision must be governed by the enduring mandate of our state fundamental law and not by the fluctuating demands of present expediency."

Robinson, 102 Wn. App. at 827-828 (internal citations omitted and emphasis supplied).

Here, if petitioner prevails, the City loses nothing. It never really had the right to the \$400,000 anyway.⁹ In contrast, a ruling in favor of the City would serve a debilitating blow to Article I, Section VII of this State's constitution. It would, in effect, have the opposite effect of the exclusionary rule by inviting rather than preventing officers' violation of residents' privacy protections.

Forfeitures are not generally favored. *U.S. v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226, 59 S.Ct. 861, 83 L.Ed. 1249 (1939); *U.S. v. \$191,910.00*, 16 F.3d 1051, 1068 (9th Cir. 1994); *U.S. v. \$244,320.00*, 295 F.Supp.2d 1050, 1055 (S.D. Iowa 2003). In addition, forfeitures are to be construed against the government. *One 1936 Model Ford*, 307 U.S. at 226. Indeed, forfeitures are enforced narrowly:

⁹ In truth, officials may very likely never permit Mr. Ibarra-Raya to have the money until various tax obligations were addressed anyway.

according to the letter and spirit of governing provisions with the law being construed against the government in such actions. *Id.* When that construction is applied to the facts at Bar, reversal of the forfeiture in this case is appropriate. Public policy favors a finding that the police and the government cannot profit from their own illegal activities, simply by shifting attention to the alleged illegal activities of the individuals from whom they have stolen property. Between the police officers of Walla Walla's Police Department and Adrian Ibarra-Raya, only the Police department has been found by a court to have broken the law. Thus, the Appellant respectfully urges the Court to adopt a rule in line with federal caselaw that would deny subject matter jurisdiction in cases where the property at issue has been seized in gross violation of the civil rights of Washington's citizens, as here.

D. Judicial Estoppel Prevents the City from Reversing Itself on the Facts.

This Court is well aware of the prior position taken in this case by the parties involved. When the criminal conviction was at issue, officers claimed the entry into the Ibarra-Raya home was solely the result of a noise complaint and there existed no connection with a criminal investigation involving drugs. *Ibarra-Raya*, 145 Wn. App. at 519-21. The City now seeks to reverse itself on these facts by alleging that indeed,

the Ibarra-Raya home was the center of an investigation of drug activity that should legitimize the forfeiture of seized funds. (RP 269:16 – 25; RP 227:11 – 14; RP 227:22 – 228:1; RP 228:10 – 16; RP 228:17 – 21.) The reversal of factual positions must be prevented through the application of judicial estoppel.

The equitable doctrine of judicial estoppel prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position in another court proceeding. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) Judicial estoppel applies where “a litigant’s prior inconsistent position benefitted the litigant or was accepted by the court.” *Housing Authority of City of Everett v. Kirby*, 154 Wn. App. 842, 858, 226 P.3d 222 (2010). The purpose of the doctrine is to preserve respect for judicial proceedings and to avoid inconsistency, duplicity, and waste of time. *Arkison*, 160 Wn.2d at 538-40.

1. Standard of Review Supports Application of Judicial Estoppel

The trial court erred in permitting the City to take an inconsistent factual position in the forfeiture proceeding as compared to the previous criminal proceedings. The issue was raised most notably in the argument regarding the motions in limine and the motion to dismiss. (RP 42:15 –

43:5; RP 44:22 – 45:6; RP 49:2 – 14.) An appellate court reviews a lower court's decision regarding judicial estoppel for an abuse of discretion. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). Here, by permitting the city to reverse its factual position, the lower court erred. The Claimant therefore respectfully requests that this Court apply judicial estoppel to the case at Bar.

Ultimately, the City's case rises and falls upon this change of factual position. Thus, upon application of judicial estoppel, reversal of the forfeiture order is required.

2. Judicial Estoppel Is Appropriate to this Situation

Judicial estoppel, like other equitable doctrines, requires proof of specific elements. *Baldwin v. Silver*, 147 Wn. App. 531, 535-36, 196 P.3d 170 (2008). The court focuses on three core factors when deciding whether to apply the doctrine of judicial estoppel to bar inconsistent arguments: inconsistency, judicial integrity, and unfair advantage. *Id.*

The first core factor that is considered in the judicial estoppel analysis is whether a party's later position is clearly inconsistent with its earlier position. *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 220 P.3d 229 (2009); *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 205 P.3d 111 (2009). Here, it is clear that the City has now fortuitously reversed positions when

this record is compared to the criminal proceeding.¹⁰ In the criminal proceeding, the State attempted to establish that the officers believed that they were making an emergency, caretaking entry into the Ibarra-Raya house because of a noise complaint. *Ibarra-Raya*, 145 Wn. App. at 523. The State asserted that the officers believed that there was noise coming from a vacant house. *Id.* at 520. In the case below, Officer Buttice's testimony established that the WWPD had been investigating the Ibarra-Raya house for evidence of drug trafficking for long before the "noise complaint. (RP 269:16 – 25; RP 227:11 – 14; RP 227:22 – 228:1; RP 228:10 – 16; RP 228:17 – 21.)

It is anticipated that the City may allege that it was not a party to the criminal litigation because it was the "State" that participated in the criminal prosecution, not the city. Of course, this argument has already been rejected in similar situations because of the privity involved. For example, in *Thompson v. State of Washington Dept. of Licensing*, 138 Wn.2d 783, 790-94, 982 P.2d 601 (1999), the Washington Supreme Court found that the criminal prosecutors and the Department of Licensing had privity, and thus applied collateral estoppel. As a result, the Department of Licensing was required to adopt the findings of fact and conclusions of law

¹⁰ The doctrine concerns itself with inconsistent assertions of fact, not with inconsistent positions taken on points of law. See *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009).

that previously issued from the criminal proceeding. *Id.* at 794. Said differently, the parties were barred from taking inconsistent factual positions in the different proceedings. Here, the city should be bound to the factual position its officers previously took –under oath–in the criminal proceeding. Based upon the analysis of this first core factor, the officers should be estopped from changing factual positions in this subsequent civil proceeding.

The second core factor asks whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. *CHD*, 153 Wn. App. at 94, *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008), *Baldwin*, 147 Wn. App. at 535-536; *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808 (2001).

In the case at Bar, when focused on the criminal conviction, law enforcement asserted that it was acting in its community caretaking role when officers entered the Ibarra-Raya home. *Ibarra-Raya*, 145 Wn. App. at 523. Indeed, officers insisted that they had not investigatory intent when entering the home. *Id.* at 523. Although the court ultimately held the entry into the home was illegal under a community caretaking doctrine, the officers testified factually that they were not attempting to investigate possible drug activity at the Ibarra-Raya home. *Id.* They now seek to reverse this factual position. The attempt to forward inconsistent factual

position should be barred under the doctrine of judicial estoppel because of the potential injury to the integrity of the court system. *See Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009); *see also New Hampshire*, 532 U.S. at 750-51.¹¹ Accordingly, this second prong of the analysis supports the application of judicial estoppel.

The third core factor that is considered in the judicial estoppel analysis is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Baldwin*, 147 Wn. App. at 535-36; *Arkison*, 160 Wn.2d at 538-39. The benefit produced to the City through this change of position hardly needs explanation. In the prior criminal matter, had the officers admitted that they had grave concerns of drug activity at the Ibarra-Raya home at the time of the entry, their attempt to assert a warrant exception would have been rejected immediately. Thus, taking the position that there were not concerns benefited the parties at that time. In contrast, now that the criminal matter is resolved, the City claims there did exist concerns that the Ibarra-Raya home was involved in drug activity. This position, of course, helps forward the claim to forfeit

¹¹ Notably, the marked change of factual positions by the officers involved demonstrates a significant question as to their credibility. *See Teledyne Indus., Inc. v. Nat'l Labor Relations Bd.*, 911 F.2d 1214, 1218 (6th Cir.1990) (explaining that such changes in factual positions threatens the integrity of the parties).

the funds found in the home. Indeed, the City stands to derive a windfall of more than \$400,000 through this fortuitous change of position.

As a result of the foregoing, this Court should apply judicial estoppel to bar the City from taking inconsistent factual positions with this incident. When faced with a motive to support the community caretaking exception to the warrant requirement, officers asserted that there were not concerns about drugs at the Ibarra-Raya home and they only were present to investigate a noise complaint. Based on the foregoing analysis, justice demands that the City is bound to that position.

Upon application of judicial estoppel, the City's case for forfeiture must fail. It is evident that reversal and dismissal of the forfeiture is appropriate.

E. This Court Should Award Attorney's Fees Incurred by Appellant.

In any proceedings under RCW 69.50.505, where the claimant substantially prevails, he is entitled to an award of attorneys' fees reasonably incurred in pursuing his claim. RCW 69.50.505(6) (2009).

In the event that this Court accepts Appellant's arguments and reverses the trial court's rulings, the Appellant should be entitled to attorneys' fees in this matter, and Claimant hereby respectfully requests the same be awarded to him.

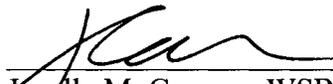
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IV. CONCLUSION

Based upon the authorities cited and the reasons aforesaid, the Appellant respectfully requests that this Court find that the trial court erred by considering inadmissible evidence of amount of money illegally seized, that insufficient evidence existed to support the forfeiture, that subject matter jurisdiction did not exist in this case, and that the City should be judicially estopped from reversing itself on the facts now. Based upon those errors, the Appellant respectfully requests that the Court reverse the findings and conclusions of the lower court. Appellant further requests an award of attorney's fees and costs in this appeal.

RESPECTFULLY SUBMITTED this 5th day of August, 2010.

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