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~~No. 92385-0~~

SUPREME COURT

OF THE STATE OF WASHINGTON

URQUHART, KING COUNTY SHERIFF,

Plaintiff/Respondent

vs.

$6,510.00 U.S. CURRENCY,

In Rem Defendant

and

RICHARD MENDALL,

Claimant/Appellant

APPEAL of KING COUNTY SUPERIOR COURT No. 15-2-00716-5

APPELLANT'S REPLY

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A. MR. MENDALL'S ARGUMENTS ARE PROPERLY BEFORE THIS COURT AND REVIEWABLE UNDER RAP 2.5 BECAUSE OBJECTIONS TO BOTH DELAYS WERE PRESERVED AT THE ADMINISTRATIVE AGENCY LEVEL

The Sheriff alleges Mr. Mendall has raised new arguments on appeal not preserved below. (Br. of Respondent, pg. 11). The Sheriff is incorrect; The Sheriff's citation to RAP 2.5 is a red herring. Further, on page 12 of Respondent's brief, the Sheriff's recital certain material facts to this Court in furtherance of her RAP 2.5 argument is flawed[1]:the assertion that the Hearing Examiner and the parties discussed in a "volume of email traffic on the subject" the Hearing Examiner's schedule as part of the Sheriff's motion for continuance is false, as well is the assertion that the Hearing Examiner motioned for the continuances herself. (Br. of Respondent, pg 12, 14-15)). The administrative record is clear and the Sheriff's assertions are untrue.

1. Delay #1

The day before the Sheriff motioned for a continuance, the Hearing

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[1] Of note, the Sheriff recitation of some of the most important material facts in this case have been flawed at every stage of these forfeiture proceedings. At the administrative agency hearing level, the Sheriff incorrectly asserted Mr. Mendall failed to object to the second delay at issue in this case, (AR 77, ln 17), in the face of a clear record to the contrary (AR 69-70). At the Superior Court level, the Sheriff incorrectly asserted the second delay was wasn't really a delay at all because the Hearing Examiner had always meant to continue the hearing to the 2nd week of December (CP 33, ln 2), and that the Hearing Examiner was never available the first week of December (CP 33, ln 3), in the face of the Hearing Examiner's clear announcement she was available both December 2nd and 3rd that week (AR 60). Now on appeal, the Sheriff again relies on facts that do not exist anywhere in the record. The Hearing Examiner made no motions of her own and one email does not a "volume of traffic" make.

Examiner mentioned in just one email her upcoming schedule openings, which included December 2nd and 3rd 2014. (AR 60). The next day, the Sheriff motioned for a continuance stating she would likely be unavailable for a hearing through October, citing Ms. Jacobsen-Watt's family emergency as the sole "cause" to support her request, and promised to contact Mr. Mendall's counsel upon her return. (AR 62). Mr. Mendall objected to the delay, thus preserving the issue for appeal (AR 64). Contrary to the Sheriff's later assertions, the Hearing Examiner did not move for any continuance, and the entirety of the administrative record corresponds. Because Mr. Mendall preserved his objection, RAP 2.5 is irrelevant to this case.

A day after the Sheriff motioned for a continuance, the Hearing Examiner ruled on that motion, citing only Ms. Jacobsen-Watt's family emergency and her "assurance that upon return to her office she will review Mr. Mendall's claims and contact Ms. Morelli to see if a hearing may not be necessary." (AR 65). There was no "volume of email traffic on the subject" of the Hearing Examiner's schedule, as the Sheriff now brazenly asserts in her brief. (Br. of Respondent, pg 12).

Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. RCW 34.05.461(4). Because a fact cannot be established,

much less argued against, without first being disclosed, the Sheriff is correct that Mr. Mendall did not object to the Hearing Examiner's after-the-fact disclosure of her vacation as "good cause" for the continuance when opposing the Sheriff's motion. The Hearing Examiner did not disclose her vacation until months after she ordered that continuance, and then only disclosed it for the purpose of "finding" the vacation was "good cause" for it. (AR 102, ln 1-2).

Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. RCW 34.05.461(4). Thus, the Hearing Examiner's after-the-fact disclosure of her vacation cannot be the basis of a finding of "good cause" for a continuance granted over two months prior. Mr. Mendall objected to the motion that was made, preserving the issue for appeal. RAP 2.5 is irrelevant.

Even in administrative matters, there is a process that must be followed before any hearing can be delayed. (WAC 10-08-090). That process includes notice to the opposing party, as well as facts in evidence supporting a finding of "good cause" for any delay. (Id). For the first time in the course of these proceedings, the Sheriff now argues the Hearing Examiner herself made continuance motions, causing both delays. (Br. of Respondent, pg. 14-15). A review of the entirety of the agency

record makes clear The Hearing Examiner did no such thing, and the Sheriff can point to nothing in the record to substantiate this meritless argument.

2. ***Delay #2***

Mr. Mendall's full adversarial hearing was then delayed a second time without any motion or process at all – it was a unilateral disregard by the Sheriff of the Hearing Examiner's previous order – not a motion by the Sheriff or Hearing Examiner or anybody else. Still, Mr. Mendall preserved his objection to this second delay. (AR 71). RAP 2.5 does not apply to this case.

Mr. Mendall's counsel objected to another delay immediately in response to the Sheriff's office proposing a later date for the hearing than of that ordered by the Hearing Examiner. (AR 71). The Sheriff ignored Mr. Mendall's objection and the Sheriff's office unilaterally re-scheduled the full adversarial hearing to the second week of December, skipping the important steps of providing notice and an opportunity to be heard to Mr. Mendall (ie: due process) or disclosing, let alone establishing, a single fact to support "good cause" for such. Again, the Sheriff seems to assert the delay occurred due to a motion for continuance by the Hearing Examiner herself. (Br. of Respondent, pg. 14-15) Again, the Sheriff can point to nothing in the record to substantiate this meritless argument.

Mr. Mendall preserved for review his objections to the two delays in this case. Mr. Mendall has unequivocally demanded his due process rights at any mention of delay. His full adversarial hearing was delayed twice and Mr. Mendall opposed each delay in turn at the first possible opportunity. RAP 2.5 does not apply.

B. THE SHERIFF'S ARGUMENT IGNORES THE PLAIN LANGUAGE OF THE TELLEVIK CASES, THE HUTMACHER CASE, THE DRUG FORFEITURE STATUTE, AND THE ADMINISTRATIVE PROCEDURE ACT

The Sheriff's claim that the events in this case satisfy due process flies in the face of the plain language of the Court's holdings in Tellivik I and II, the drug forfeiture statute, the Administrative Procedure Act, and previous holding of Division I of the Court of Appeals.

Tellevik I & II saved the drug forfeiture statute from being unconstitutional by ruling claimants are entitled to a full adversarial hearing within 90 days of their timely claim because the drug forfeiture statute's vague recital that a claimant is entitled to "a reasonable opportunity to be heard" did not satisfy due process

The Tellevik Court saved RCW 69.50.505 from violating constitutional guarantees of due process by "reading in" a statute of limitations to hold a "full adversarial hearing within 90 days" of a timely claimant's claim.

1. *The Sheriff's arguments conflict with the plain language of the relevant statutes*

The Sheriff now argues all the Court meant was that law enforcement need only mail a notice of some future event within that time frame. The Sheriff argues the only process due Mr. Mendall within 90 days of his claim is notice that something might happen sometime in the future, and that future something need not be a full adversarial hearing.

In support of this argument, the Sheriff asserts that adjudicative proceedings in a drug forfeiture matter do not commence upon seizure, ignoring the plain language of the drug forfeiture statute itself: **[P]roceedings for forfeiture shall be deemed commenced by the seizure."** RCW 69.50.505(3). Instead, the Sheriff suggests a drug forfeiture action is composed of no less than 3 separate "proceedings: 1) seizure commences some forfeiture proceeding that is not an adjudicative proceeding; 2) the first proceeding ends and a second unnamed proceeding begins when a timely claimant files a claim, and 3) if a timely claim is made, then only when law enforcement gets around to mailing notice of yet another future event (that need not be a full adversarial hearing) does the third, real "adjudicative proceeding" commence.

The Sheriff's argument is unworkable in light of the plain language of the Court's holdings in Tellivik I and II, the plain language of the drug

forfeiture statute, the plain language of the Administrative Procedure Act, and previous holdings of Division I of the Court of Appeals.

2. ***The Statutory Language is plain and unambiguous***

The Administrative Procedure Act states, "an agency may commence an adjudicative proceeding at any time." RCW 34.05.413(1). When the Sheriff chose to seize Mr. Mendall's property, the Sheriff chose to implement this section. When law enforcement chooses to seize property under RCW 69.50.505, it chooses to commence an adjudicative proceeding under RCW 34.05.413(1) because the drug forfeiture statute clearly states "proceedings for forfeiture shall be deemed commenced by the seizure." RCW 69.50.505(3). The statutes are in accord.

RCW 34.05.413(5) continues, "[a]n adjudicative proceeding commences when the agency ... notifies a party that a ... stage of an adjudicative proceeding will be conducted. RCW 34.05.413(5) (truncated for clarity). Again, this statute is aligned with the requirements of the drug forfeiture statute, RCW 69.50.505(3). Certainly, potential claimants are notified proceedings have begun when they become aware law enforcement has seized their property. Again, the statutes are in accord.

The notice of seizure provision of the drug forfeiture statute agrees with the commencement provision of the APA, as well. The drug forfeiture statute directs that law enforcement "shall cause notice to be

served within 15 days" on potentially interested parties. RCW 69.50.505(3). The Sheriff abided by this section by providing Mr. Mendall with a document it titled "NOTICE OF SEIZURE AND INTENDED FORFEITURE." (AR 24). This satisfies the commencement provision of the APA: "[a]n adjudicative proceeding commences when the agency ... notifies a party that a ... stage of an adjudicative proceeding will be conducted. RCW 34.05.413(5). The written notice required by the drug forfeiture statute guarantees the potential claimant will have been notified of the commencement of proceedings in accord with RCW 34.05.413(5), even if the potential claimant is unaware of the seizure itself (for example, a party with a mere security interest). The statutory language is clear. Seizure commences the adjudicative proceeding.

Tellevik I & II are irrelevant to the commencement of drug forfeiture proceedings. Those cases did not discuss how to commence proceedings because that was not the issue in that case. Discussion was unnecessary because how to commence these proceedings are written in the plain language of the drug forfeiture statute itself, as well as the Administrative Procedure Act.

The Tellevik cases announced, in plain language that drug forfeiture claimants "are entitled to a full adversarial hearing within 90

days" of their timely claim.

Adjudicative proceedings commence upon seizure. The holding of *One Black Chevrolet Corvette* does not align with the drug forfeiture statute, the APA, the Tellevik cases or Division I's earlier analysis of the statute on which the Sheriff relies (see *Hutmacher v. Board of Nursing,* 81 Wn. App. 768, 772, 915 P.2d 1178 (1996) (providing in depth analysis of how RCW 34.05.419 is triggered).

*3. **Drug Forfeiture Claimants Need Not Ask for a Proceeding***

The Sheriff relies on RCW 34.05.419, but that statute applies only when someone applies for an adjudicative proceedings, not when an agency commenced by an agency on its own accord. The statute is titled, "Agency action on applications for adjudication," and the very first sentence reads, "[a]fter receipt of an application for an adjudicative proceeding ...an agency shall proceed as follows...."

Drug forfeiture claimants are not required to apply for anything because nowhere in the drug forfeiture statute does the legislature require a claimant make application for a proceeding. All a claimant need do is present a timely written notice of claim of property interest to the seizing agency. RCW 69.50.505(4-5), *Snohomish Regional Drug Task Force (SRDTF) v. Real Property known as 20803 Poplar Way*, 150 Wn. App. 387, 208 P.3d 1189 (2009) (holding that a mere Notice of Appearance

identifying Claimants as such satisfies the requirement to present a written claim to law enforcement).

The *Hutmacher* case is in accord with SRDTF. In *Hutmacher,* the Board of Nursing accused Hutmacher, a nurse, of stealing controlled substances from her workplace. The Court ruled that when the Board of Nursing issued a Statement of Charges against Hutmacher, adjudicative proceedings commenced, therefore RCW 34.05.419 did not apply. *Hutmacher,* 81 Wn. App. At 772. The Court held that Hutmacher's answer to the charges was simply a response to previously commenced adjudicative proceedings and *not* a request for anything. *Id.*

A drug forfeiture cases work the same way. Seizure of property commences proceedings. An person with a property interest need only provide written notice of a claim the seized property. A timely claimant requests nothing and RCW 34.05.419 is not triggered. *Hutmacher* is in accord with the drug forfeiture statute because their the legislature was clear in its language: "proceedings for forfeiture shall be deemed commenced by the seizure." RCW 69.50.505(3).

4. *The Reasoning of* One Black Chevrolet Corvette *does not comport with either statute or previous relevant caselaw*

The legislature made clear that a timely claimant "shall be afforded" a reasonable opportunity to be heard, which the *Tellevik Cases*

court ruled to mean "a full adversarial hearing within 90 days" of a timely claim.

The reasoning of *One Black Chevrolet Corvette* is not in harmony with the *Tellevik Cases, Hutmacher,* the Administrative Procedure Act, or the drug forfeiture statute. It should be overturned.

Our courts must construe statutes to preserve constitutionality when possible. *High Tide Seafoods v. State*, 106 Wn.2d 695, 698, 725 P.2d 411 (1986). The *Tellevik I* Court preserved the constitutionality of the generic phase "reasonable opportunity to be heard" in RCW 69.50.505(5) by holding that individuals claiming a property interest in property seized under the statute have a due process right to "a full adversarial hearing within 90 days if they contest the seizure." *Tellevik I*, 120 Wn.2d at 86, 87. Two years later the *Tellevik II* Court affirmed and reiterated this 90-day requirement again, explaining that "[c]ontrary to the State's assertion, the 90-day hearing requirement articulated in *Tellevik I* is not dicta, but is, instead, central to its holding." *Tellevik II*, 125 Wn.2d at 372, 374.

The reasoning of *One Black Chevrolet Corvette* is not in harmony with the *Tellevik Cases, Hutmacher,* the Administrative Procedure Act, or the drug forfeiture statute. It should be overturned.

5. ***As a Matter of Policy, all drug forfeiture claimants are entitled to***

***the same quantum of due process, which is not workable under* One Black Chevrolet Corvette**

As a matter of policy, this is the correct rule. That all drug forfeiture claimant's are entitled to a full adversarial hearing within 90 days of their claim provide the exact same amount of due process to all claimants across the state, regardless of seizing agency and regardless of venue.

Using the Sheriff's rule, one agency may choose to always provide an actual full adversarial hearing within 90 days, while another agency may only give notice within that time frame, that the full adversarial hearing was scheduled for some date in the future, while still another agency may only give notice that a pre-hearing conference or other stage of proceedings will occur, pushing out the Claimant's full adversarial hearing even further.

The nature of the interest and the severity of the deprivation dictate the amount and type of process due. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S.Ct. 893 (1976). The amount of due process cannot be dependant seizing agency or venue. All drug forfeiture claimants are entitled to a full adversarial hearing within 90 days of a timely claim, providing the same quantum of process to all claimants equally, as required by *Mathews v. Eldridge.*

Mr. Mendall's adjudicative proceeding commenced in May 2014 when his property was seized. Commencement is not the issue in this case. The issue is whether or not he was afforded the "full adversarial hearing" within 90 days of his claim as *Tellevik* Courts ruled he was entitled. He was not and this case must now be dismissed and his property returned.

C. DELAYING MR. MENDALL'S FULL ADVERSARIAL HEARING PAST THE 90-DAY POST-CLAIM STATUTE OF LIMITATION BY OVER 2 MONTHS WAS AN ABUSE OF DISCRETION THAT DENIED HIM DUE PROCESSS BECAUSE ONLY 1 MONTH OF THE DELAY COULD BE FOUND TO BE FOR GOOD CAUSE AND NO PREJUDICE NEED BE SHOWN

A full adversarial hearing in a drug forfeiture adjudicative proceeding may be continued for "good cause". WAC 10-08-090; *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 91, 838 P.2d 111(1992), modified 845 P.2d 1325 (1993) (hereinafter "*Tellevik I*"). The decision to grant or deny a continuance of a commenced forfeiture action is reviewed for an abuse of discretion. *Tellevik I, 120 Wn.2d at 90-91; City of Des Moines v. $81,231*, 87 Wn.App. 689, 698, 943 P.2d 670 (1997), quoting *City of Bellevue v. Vigil*, 66 Wn.App. 891, 892, 833 P.2d 445 (1992). The granting of a continuance is an abuse of discretion when "manifestly unreasonable, or resting on untenable grounds, or for untenable reasons." *City of Des Moines*, 87 Wn.App at 698.

Our courts must construe statutes to preserve constitutionality when possible. *High Tide Seafoods v. State*, 106 Wn.2d 695, 698, 725 P.2d 411 (1986). Our Supreme Court preserved the constitutionality of the generic phase "reasonable opportunity to be heard" in RCW 69.50.505(5) by holding that individuals claiming a property interest in property seized under the statute have a due process right to "a full adversarial hearing within 90 days if they contest the seizure." *Tellevik I*, 120 Wn.2d at 86, 87. Two years later our Supreme Court affirmed and reiterated this 90-day requirement again in *Tellevik II*, explaining that "[c]ontrary to the State's assertion, the 90-day hearing requirement articulated in *Tellevik I* is not dicta, but is, instead, central to its holding." *Tellevik II*, 125 Wn.2d at 372, 374.

"A fundamental rule of statutory construction is that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into the statute." *Espinoza v. City of Everett*, 87 Wn.App. 857, 869, 943 P.2d 387 (1997), citing *In re Vandervlugt*, 120 Wn.2d 427, 436, 842 P.2d 950 (1992). The phrase "a reasonable opportunity to be heard" contained within RCW 69.50.505(5) operates as if it were originally written "a full adversarial hearing within 90 days." *Tellevik II*, 125 Wn.2d at 372, 374.

In this case, Mr. Mendall was entitled to his due process right to a

full adversarial hearing within 90 days absent "good cause." WAC 10-08-090; *Tellevik I,* 120 Wn.2d at 90-91.

1. ***Because in this case there are no facts in evidence regarding the "cause" of the delays beyond October 2014, no finding of "good cause" for further delay can be made***

In Mr. Mendall's case, the Sheriff motioned for a continuance based on Ms. Jacobsen-Watt's family emergency, which she believed would prevent her availability through October 2014 (just over one month). No other "cause" for a delay was provided. The Hearing Examiner granted the continuance, ordering Mr. Mendall's full adversarial hearing to be rescheduled out over *two months*, to "the first week of December" 2014. The Sheriff did not immediately reschedule the hearing but instead waited over seven weeks (about 51 days) to place Mr. Mendall's full adversarial hearing on the calendar. In late November the Sheriff did reschedule the full adversarial hearing, but ignored the Hearing Examiner's order and Mr. Mendall's objection and scheduled the hearing for December 9, 2014, the second week of December.

Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in

that proceedin RCW 34.05.461(4).

In Mr. Mendall's case, there are no facts in evidence to find "good cause" for a continuance beyond October 2014. Ms. Jacobsen-Watt's absence through October was the only reason offered for a delay.

Although the record is devoid of explanation why the Sheriff waited seven weeks to reschedule the hearing, a likely explanation is mere inadvertence, thus causing the Sheriff to ignore the Hearing Examiner's order by rescheduling the hearing for the second week of December over Mr. Mendall's objection.

Inadvertence is not good cause. But to be clear, no cause for the second month of the first delay was brought to light at the time the continuance was ordered, and to date, no cause has been offered for the second delay at all. But given the similar administrative error in this case[2], inadvertence seems the most likely explanation for at least the

[2] According to the Sheriff, the scheduling of Mr. Mendall's original full adversarial hearing date was a mistake. (AR 60, Email from Ms. Jacobsen-Watts). Given that the Sheriff provided less than week's notice to Mr. Mendall of his full adversarial hearing date, in violation of the model rules, this writer wonders if perhaps the Sheriff "mistakenly" neglected to schedule Mr. Mendall's hearing earlier in the year, noting the originally scheduled hearing date was 85 days after he had made his claim. This author

second delay.

Inadvertence of the party seeking an excusal of the delay is not "good cause." *State v. Luvene*, 127 Wn.2d 690 (1995). Further, the United States Supreme Court has stated the party seeking an excusal of missed deadline cannot be the "cause" of the delay. *Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). In that case, the Supreme Court defined the term "cause" when determining whether or not an attorney's inadvertence is good cause to delay filing a criminal appeal, where prejudice from an error is at it's height:

> We think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Id. at 753. The *Coleman* Court explained via quote to an earlier Supreme Court case deciding a similar case, "[A]ttorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear

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surmises the original hearing date was hurriedly scheduled without consulting Ms. Jacobsen-Watts, after someone noticed the "mistake," and that is why such little notice was provided Mr. Mendall, and why the original hearing date was just a hair's length away from the 90-day deadline.

the risk of attorney error." *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2644 2649, 91 L.Ed.2d 397 1986). Even where the prejudice is at its greatest for the party that caused the delay, where there is no external cause for the delay, there is no "good cause."

In other words, the party seeking a finding of "good cause" must have clean hands. The Sheriff does not have clean hands here.

In Mr. Mendall's case, there are no facts in evidence to find "good cause" for a continuance beyond October 2014.

Certainly for there to be "good cause" there must first be a "cause." And it is clear in Mr. Mendall's case, whatever the mysterious reason for the delay was, it was the Sheriff's fault and not an external event.

In this case the record is devoid of facts to support "good cause" beyond October 2014. The rulings below must be reversed, this case dismissed, and Mr. Mendall's property returned.

2. ***Mr. Mendall Need Not Show Prejudice Under These Facts***

The Sheriff incorrectly states the law regarding when a party

must show prejudice from a delay such as those here in Mr. Mendall's case.

Mr. Mendal is *not* required to show prejudice in this case.

The Sheriff asserts prejudice is always a condition precedent a party must show prior to arguing a delay in proceedings lacked good cause. That is not the law. Even the United States Supreme Court case on which the Sheriff relies makes clear prejudice is *not* a condition precedent. When discussing the four-factor balancing test that case announced, the Court stated plainly no one factor weighs heavier than others:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker v. Wingo, 407 U.S. 514, 533, 92 S. Ct. 182, 3 L. Ed. 2d 101 (1972).

Further, our State Supreme Court has long held that no prejudice need be shown by a party objecting to a delay in their case. *State v. Mack,* 89 Wn.2d 788, 576 P.2d 44 (1978). The Sheriff's misstates the law. Mr. Mendall need not show prejudice here.

In *Mack*, the court held court calendar congestion is not "good cause" for the court to schedule a juvenile defendant's trial beyond the 60-

day rule defined in former JCrR 3.08, even when no prejudice is shown. *Id.* at 795.

In *Mack*, the length of delay was not even considered.

In *Mack*, the Court refused to find good cause for scheduling the defendant's trial outside the 60-day court-rule requirement. Mack did not show prejudice and the length of delay was not even considered. The *Mack* court focused on the "cause" of the delay, and found that court congestion is not "good cause." *Id.* at 795.

The Court explained its policy reasoning for its holding:

> If [court congestion] were to "justify" extended trial settings, the state or other governmental authority involved would have no inducement to remedy the problem by providing financial relief, authorizing additional judgeships, or by providing additional facilities. We do not agree this concern constitutes "good cause" for delay.

Id. at 795.

In Mr. Mendall's case, the "cause" of the delay is the same. For the first delay, no cause was given at all until the Hearing Examiner "found" her vacation to be "good cause." The "cause" of the second delay is still unknown. Even if the Hearing Examiner's vacation is held to be a valid "finding," it still lacks "good cause" under *Mack.* The Sheriffs knows Claimants are entitled to a hearing within 90 days, as is shown by its desperate attempt to schedule it within that timeframe. The Sheriff, as

an agency that seizes probably hundreds of thousands of dollars from drug forfeiture claimants each year, when a Hearing Examiner goes on vacation a pro tem Examiner should take the regular Hearing Examiner's place. The Sheriff knows its Hearing Examiner is going to want some time off now again (don't we all?!), and should hire accordingly to protect claimants from due process violations depriving them of their property, such as happened to Mr. Mendall.

As for the second delay in Mr. Mendall's case, the "cause" is still unknown. No facts are in evidence. The only reference is an email from Sheriff's Attorney's assistant mentioning the Hearing Examiner was no longer available the 1st week of December. It's easy to imagine the only "cause" of the Hearing Examiner's unavailability was the Sheriff's failure to reschedule the hearing after its Motion for Continuance was granted. The Hearing should have been scheduled immediately. The Hearing Examiner made clear she had two days available the first week of December. The Sheriff waited over seven weeks to reschedule the hearing, and by that time, the Hearing Examiner's schedule for that week was full.

Assuming for argument that is the "cause," it does not satisfy "good cause" under *Mack*. The likely delay was the Sheriff's negligence. Considering the Sheriff's office erred each time it scheduled Mr.

Mendall's full adversarial hearing, it seems there is an administrative problem in the Sheriff's Attorney's office.

Mr. Mendall is not responsible for incompetent employees of the King County Prosecutor's office, and incompetent employees cannot be "good cause" under *Mack.* Neither length of delay nor amount of prejudice need be considered.

And then, for the second delay I am just guessing – there are no actual facts in the record for which to find any cause, let alone good cause.

Mr. Mendal's due process rights have been violated. The King County Sheriff likely has systemic problem the potentially affects all claimants. This case must be dismissed and Mr. Mendall's property returned.

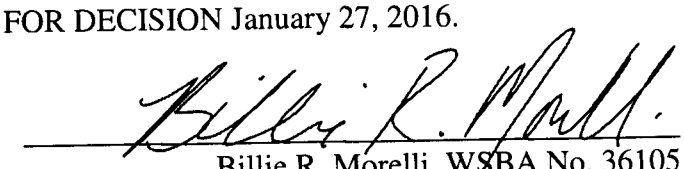
D. CONCLUSION AND REQUEST FOR RELIEF

For the above reasons, Mr. Mendall respectfully requests the reversal of the Orders of the Examiner regarding the continuance and re-scheduling of the full administrative hearing date, an Order directing the Sheriff to return Mr. Mendall's property immediately, and the dismissal of this forfeiture action.

Mr. Mendall further requests an award of his costs and attorney fees. Mr. Mendall asks for time to submit an accounting, and for a

judgment against Plaintiff for those fees and costs reasonably incurred.

PRESENTED FOR DECISION January 27, 2016.

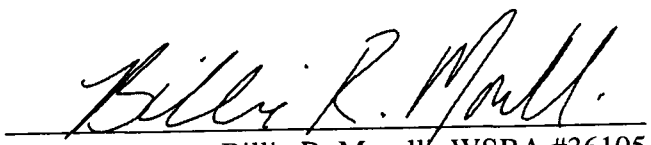


Billie R. Morelli, WSBA No. 36105
Counsel for Claimant Richard Mendall

CERTIFICATE OF SERVICE

I, Billie R. Morelli, declare that on or about January 27, 2016, I emailed a digital PDF copy of this document to Jacobsen-Watts at Heidi.Jacobsen-Watts@kingcounty.gov. Ms. Jacobsen-Watts and I have mutually agreed to accept email service in this matter.

DECLARED January 27, 2016, in Concrete, Washington



Billie R. Morelli, WSBA #36105

OFFICE RECEPTIONIST, CLERK

To: billie@lawyerforthelittleguy.com; Jacobsen-Watts, Heidi
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Attached is Mr. Mendall's Reply Brief in this matter. Please confirm receipt. Thank you.

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