

63096-2

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No. 63096-2

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION I

KING COUNTY SHERIFF's OFFICE

PLAINTIFF / APPELLEE

vs

\$45,513.00 IN UNITED STATES CURRENCY

DEFENDANT in REM

and

LARRY LONNELL HOWARD

CLAIMANT / APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Michael Heavey

AMENDED OPENING BRIEF OF APPELLANT
LARRY LONNELL HOWARD

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ASSIGNMENTS OF ERROR

1. The Examiner Erred in Failing to Rule that Howard's Administrative Hearing Was Not Set in a Timely Manner
2. The Examiner Erred in Failing to Place Exhibit 1 into the Administrative Record
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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Issue Pertaining to Assignment of Error #1.**

Whether An Administrative Hearing for a Personal Property Claim Must Be Set Within 45 Days of the Claimant's Request to Be Timely In Accordance with RCW 69.50.505's Constitutional Requirement for a Firm and Prompt Hearing Deadline?

2. **Issue Pertaining to Assignment of Error #2.**

Whether a Piece of Evidence with Article 1, Sec. 7 Implications that Is Marked, But Not Specifically Offered Into Evidence at an Administrative Hearing, Must Be Preserved or Replaced to Complete the Administrative Record for Purposes of Appellate Review of Constitutional Search and Seizure Claims?

3. **Issue Pertaining to Assignment of Error #3.**

Whether a Hearing Examiner is Required to Memorialize Dispositive Rulings to Preserve the Agency Record?

4. **Issue Pertaining to Assignment of Error #4**

Whether Objective Evidence Impeaching an Officer's Testimony is Sufficient to Vitiating the Legal Justification for a Traffic Stop?

5. Issue Pertaining to Assignment of Error #5

Whether K9 Evidence Sought to Be Admitted through an Admittedly Unqualified Witness to Prove a Scientifically Questionable Proposition Fails the Foundational Pre-Requisite's of the *Frye* Standard, *Cauthron*, and ER 702?

6. Issue Pertaining to Assignment of Error #6

Whether a Pistol Found Pursuant to a Warrantless Search of a Trunk is Admissible in an Administrative Asset Forfeiture Hearing in the Absence of a Manifest Necessity for Police to Search the Trunk Prior to Getting a Warrant?

7. Issue Pertaining to Assignment of Error #7

Whether a Curved Blade Found Pursuant to the Interior Search of a Drug Suspect's Car is Admissible in an Administrative Asset Forfeiture Hearing in the Absence of Any Testimony as to How It Is Relevant to Determining if the Claimant Was In the Drug Business?

8. Issue Pertaining to Assignment of Error #8.

Whether the Presence of a Golf-Ball Sized Piece of Suspected Cocaine and Approximately \$45,463.00 on a Suspect Who Resists Arrest, After Being Told to Stop and Grabbed from Behind by a Police Officer, is Substantial Evidence that the \$45,463.00 was

Drug Proceeds, or Utilized, or Intended to Be Utilized, in a Drug Transaction?

9. Issue Pertaining to Assignment of Error # 9.

Whether Drug Forfeiture Testimony Which is Composed Exclusively of the Speculation of the Arresting Officer as to the Use or Purpose, or Intended Purpose of \$45,463.00 is Substantial Evidence that the \$45,463.00 is Drug Proceeds, or Utilized, or Intended to Be Utilized, in a Drug Transaction?

10. Issue Pertaining to Assignment of Error #10.

Whether Money Can Be Forfeited, in accordance with RCW 69.50.505, in the Absence of Any Known Link to an Actual Drug Transaction?

11. Issue Pertaining to Assignment of Error #11.

Whether an 8th Amendment Proportionality Analysis of Seized Money Must Be Performed Prior to Forfeiting the Money If Such Analysis is Requested by the Claimant?

A. **STATEMENT OF THE CASE**

Procedural History - This appeal involves an administrative decision in a drug asset forfeiture case. Identical claims of ownership / rights of possession by Appellant Larry Lonnell Howard were received by the King County Sheriff's Office on July 6, 2007 and July 9, 2007. CP 450-1. An administrative hearing was set for September 21, 2007. CP 452.

Prior to September 21, 2007, Howard filed a brief and motion to dismiss the forfeiture action because the Sheriff did not schedule Howard's administrative hearing in a timely manner. CP 147-61. The Hearing Examiner denied Howard's timely hearing motion in an oral ruling which the Examiner never memorialized. CP 99.

Howard petitioned the Superior Court to dismiss the forfeiture action on the same ground and, failing that, remand the matter to the Examiner for entry of a written order memorializing his timely hearing findings, but the Superior Court denied Howard's petitions. CP 130-34, 143-4.

Howard also petitioned the Superior Court to remand the matter to the Hearing Examiner to insert an Exhibit that Howard marked and

offered to witness Kevin Savage at the September 21, 2007 hearing, CP 135-42. That petition was also denied. CP 143-4.

September 21, 2007 Objections to Seizure / Forfeiture - Howard filed another brief on September 21, 2007 after testimony was taken from the only witness, Deputy Kevin Savage. Specifically, Howard's September 21, 2007 brief argued that:

(1) At the time of seizure Deputy Savage had no idea if Howard was the man sought by the warrant hit and did not have probable cause to order Howard to do anything or grab Howard from behind. CP 478-9. Therefore, Howard was within his rights to ignore Savage's commands. CP 478-9.

(2) The Sheriff was without probable cause to seize Howard's money, even if suspected drugs on, or near, Howard's person were legally seized because the Sheriff had not performed any review of Howard's assets at that time and had no idea if Howard had legitimate income. CP474-81, esp 479.

(3) The money, suspected drugs, and a knife found in Howard's car were insufficient to show or prove that the seized money is proceeds of a drug transaction because there is no known

“link” to any drug transaction and an officer “hunch” is simply not enough to justify seizure of the money. CP 474-81, esp 479.

(4) Any items seized from Howard’s trunk were seized without a warrant and could not be considered by the Examiner in making his decision. CP 479.

(5) The seizures were punitive and violated either double jeopardy or the 8th Amendment Excessive Fines Clause because the Sheriff could not trace the money to a drug sale. CP 474-81, esp 480-1.

The Alleged Traffic Violation - Larry Lonnell Howard was traveling westbound on a service road known as 206th Street that exits Military Road South, in King County, on May 25, 2007 at 3:15 A.M. CP 44-5, 76, and 87-8. Deputy Kevin Savage of the King County Sheriff’s Office testified he was traveling in the opposite direction on 206th and spotted Howard as Howard initiated his right turn signal to turn into a Shell gas station. CP 44-5. In Savage’s words, 206th is “an access portion to several buildings [which] then turns in a southbound direction and exits, or enters, into the Motel Six located in that area.” CP 88.

Howard entered the Shell from the driveway furthest from Military Road, (the westernmost driveway). CP 88-9. Savage passed Howard going the opposite direction and entered the Shell

from the driveway nearer Military Road, (the easternmost driveway). CP 88-89. Savage testified that Howard violated "RCW Code," because Howard's turn signal was not initiated at least 100 feet before the turn into the westernmost driveway. CP 44-5.

After spotting Howard's alleged violation, Savage testified he:

took note of [Howard's] plates as he [turned into the Shell station] ... [I] went around the other side of the gas station, and ran the plate as I was doing so. When I ran the plate, the plate came back with a warrant hit associated with the vehicle, and the description on the warrant was roughly the description of the subject. CP 44-5.

Inconsistencies in Savage's Traffic Violation Testimony -

Savage, on cross examination, denied he had gone to the other side of the gas station to wait for the warrant hit and admitted that the person whose name showed up on the warrant hit was not even close to Howard's. CP 83 and 88-9. He testified that it is possible to get a warrant hit on a license plate for someone other than the legal or registered owner associated with the plate. CP 83-5.

Savage specifically testified that he managed to spot Howard's traffic violation, pass Howard going the opposite direction, input the license plate information into his computer, turn left into the Shell station, get a warrant hit, pull up to Howard and start conversing with Howard

without stopping his police vehicle. CP 88-89. According to Savage, all of the above-described action took place in five or six seconds and his car “never stopped moving.” CP 88-9.

Photographic Evidence Impeaching Savage’s Traffic

Violation Testimony - Howard marked an overhead photograph of the pertinent roadways / buildings at 206th and Military Road as Exhibit 1 for the administrative record. CP 85-6. The Hearing Examiner allowed Howard to offer Exhibit 1 to Savage, over the objection of Sheriff’s counsel, and Savage began to mark where he had pulled over Howard. CP 85-87.

The Hearing Examiner, *sua sponte*, questioned Exhibit 1’s relevance, whereupon Howard’s counsel stated that he was “trying to get some idea of when ... [Savage] ran the plate, because there may be a probable cause issue here ...” CP 85-7.

The Hearing Examiner never specifically excluded Exhibit 1, but it was not included in the administrative record that was initially forwarded to the Superior Court for review. Howard petitioned the Superior Court to remand the case to the Hearing Examiner to insert Exhibit 1 into the administrative record. CP 135-7. That petition was denied. CP 143-4.

Encounter w/ Howard After the Alleged Traffic Violation –

After Savage allegedly ran the plate, etc., Savage pulled up to Howard at the gas pumps and asked Howard what his name was. CP 45. Howard then asked Savage ‘what’s this about’ or something to that effect. CP 45. Savage told Howard that he was contacting him regarding the turn signal issue and the fact that a warrant came up when Savage ran the plate. CP 45.

Savage then asked for identification and asked Howard to give his name. CP 45. Howard said his name was “Lonnell,” [his middle name]. CP 45. This did not correspond to the warrant hit. CP 45. Savage looked back at Howard and noticed what appeared to be a driver’s license in Howard’s hand. CP 45. Savage testified that Howard was acting as if he could not find his identification and Savage said, “it’s right there in your hand sir, can I see it?” but Howard started walking toward his own vehicle. CP 45.

Savage informed dispatch that he was out with a suspicious person, exited his patrol unit, and watched Howard lean down. CP 45-6. Savage then told Howard to stop and watched Howard set his driver’s license face-down on the armrest of Howard’s open driver’s side door and begin to lean into his vehicle. CP 46.

Savage approached Howard from behind. CP 46. Howard then leaned forward into his car with the license in one hand and something else balled up in the other hand. CP 46. Savage placed his hands on Howard's back and "stood him up." CP 46. A struggle ensued. CP 46.

The Fight w/ Howard - During the struggle, Howard was holding what appeared to be cocaine in his right hand. CP 46. Savage finally used head strikes to get Howard somewhat under control, then threatened to use a taser to subdue him. CP 46. Howard said, "this can't be happening" and pushed himself backwards into Savage's chest whereupon Savage pushed Howard away and tased him. CP 46, 80-82.

Savage testified that Howard turned to face him after being tased, then back-pedaled, tried to move the taser wires off himself, and started tearing at the "white substance ... throwing chunks of [it] around." CP 46-7, 80-82. Eventually, Howard tried to run and Savage gave Howard a second "ride" with the Taser. CP 47, 80-82.

During this second "ride," Howard was still "throwing these pieces of cocaine. I watched a piece of cocaine go flying across the parking lot and land on the concrete. I [said], 'Sir, I'm gonna get that,' ... I eventually had to use the baton [again] ... struck him a couple of times ...

tackled him to the ground, was assisted by another unit and took him into custody.” CP 47.

Absence of Paraphernalia – No cocaine paraphernalia was found in subsequent searches of Howard and his car. CP 64. Savage testified that this is significant because users usually have paraphernalia on them. CP 65. Savage admitted, though, that he arrests people for drugs even if they do not have paraphernalia and he does not have the discretion to decide what crime people will be charged with. CP 65-7.

Recovery of Cocaine / Money - Savage testified that his exact location was not known to the other responding officers and a second police officer did not find Savage until after Savage took Howard to the ground. CP 48. After the second officer arrived, he and Savage performed a search incident-to-arrest on Howard’s person, but Savage then walked away from Howard and began recovering some of the pieces of cocaine that Howard dropped or threw. CP 50-52, 74-5. After recovering the cocaine from the ground, Savage testified that, “I then went back to the car and began recovering, or checking, [Howard’s] person incident to arrest. And that’s where we discovered large amounts of money.” CP 50.

K9 “Alert” – Savage testified, over Howard’s objection on foundation grounds, that a K9 officer was called to the scene and the K9 officer wanted to see if the K9 would alert on Howard’s money. CP 63. Savage testified that, without the K9 officer watching and without the K9 around, he placed Howard’s money into a brown paper bag, a cel phone in another bag, and some other item in a third paper bag, and that the K9 walked up to the three bags and alerted on the one with money. CP 63.

Prior to handling the money, however, Savage had picked up cocaine in the parking lot. CP 50-52 and 74-5. It was only after Savage handled both the cocaine and the money that he placed the money into the bag which the K9 alerted on. CP 50-52 and 74-5.

When questioned about the K9’s qualifications, Savage testified the K9’s name is “Jetson” and Jetson is certified via a 6 week course through the King County Sheriff’s Office to do drug detection. CP 63. Savage further testified he was not Jetson’s handler, but Jetson’s “standards [are] above average and high. Exactly what it is, I think he’s in the maybe ninety percentile bracket.” CP 64. Savage admitted, though, that he did not know why Jetson had a ten percent inaccuracy rate and did not have any qualifications to testify about the training or qualifications of

a K9 or any knowledge of the industry standards for certification of K9's.
CP 69-70.

Savage also admitted he did not know whether there was a nationwide law enforcement standard for K9 training, had no knowledge as to what the federal K9 training standards are, whether Washington's standards complied with federal standards, or whether Jetson underwent double-blind testing. CP 70. He admitted he has no idea what goes into the training of narcotic K9's and does not consider himself qualified to testify about the training of, or standards for, K9's. CP 70.

Amount of Contaminated Money in Circulation – Savage
testified that he did not know what the DEA's figures are for the proportion of contaminated money as a percentage of U.S. currency, but he imagines it's "pretty high." CP 58 and 75. He also admitted that he did not know when, if ever, narcotic substances ever wash off or evaporate from currency. CP 57.

Items Found on Howard's Person – Savage testified that, "In Mr. Howard's left front pants pocket I found fifteen thousand, four hundred, and sixty dollars in U.S. currency. In his right front pants pocket, he had nine thousand dollars in U.S. currency. I also found nine thousand seven hundred and thirty one dollars in U.S. currency in a black wallet that was

in one of his rear pockets. In the other rear pocket, there was a blue wallet that contained eleven thousand and forty dollars in U.S. currency.” CP 50. Also, two cel phones were found on Howard, one of which was known to be working because it rung during the detention of Howard. CP 79 and 92.

Neither cel phone was checked to see if incoming or outgoing calls could be linked to drug transactions or suspicious persons, but Savage testified he believes Howard was using one phone for his personal use and the other to conduct drug business. CP 91-2.

Positive Field Test / Absent Lab Test - Savage testified that he performed a field test on the suspected cocaine and it was positive. CP 64. No lab tests were entered into evidence, though, despite the fact that Savage packaged the suspected cocaine for analysis at the State Crime Lab. CP 71. Savage admitted that he was not qualified to make the determination as to whether a substance was cocaine, based on his field test, and does not know the reliability of the field test kits. CP 69 and 92. He also admitted that, based on his training and experience, the results of a field test are not admissible in court. CP 92.

Condition of \$15,000.00 - Savage testified that fifteen thousand dollars of the money found in Howard’s left front pants pocket was in

three quantities of five thousand, folded intricately on top of each other, and almost worn to the point where they were molded together. CP 53. “It was just molded together, I actually had to pry them apart. Not only that, they were old script hundred dollar bills. They also appeared to have aging, or like burn or wear marks around the edges of the bills, indicating to me they are quite old.” CP 53.

Savage’s Grounds / Opinion re. the \$15,000.00 – Savage admitted that he did not personally know whether Howard’s \$15,000.00 bundle of money was the result of drug sales and he had not witnessed any drug sales. CP 60. Nonetheless, the Sheriff asked, over the objection of Howard, for Savage to give his opinion as to whether the condition of the currency found on Howard indicated it had been used in a drug transaction. CP 53. Howard objected on the grounds of witness competence and lack of foundation. CP 53. Howard repeated his objections at the conclusion of his voir dire of Savage. CP 61.

Savage testified to his qualifications by describing a significant number of police training courses, including significant narcotics courses, CP 53-55, and alluding to what “I’ve heard ... in discussions at the California Narcotics Officers’ Association Conference in 2005 ... It was discussing marijuana course as a case study in something that that particular district attorney who taught the

course had seen. I've also heard it in several of the other conferences I attended based on other officers that have run across the same thing. They found the same types of quantities of money. It was definitely discussed in my street drugs course, as far as old script money, because usually what happens is this money is handed back and forth when they're moving product." CP 56.

Without being additionally questioned, Savage interjected his opinion that, "What's indicative about somebody carrying these types of money in different locations is he (sic) represented to me he's probably a mule." CP 56. Savage later testified that the way \$15,000.00 of Howard's money was folded and the way it had been molded together over time was indicative of a specific quantity of money that has possibly been traded back and forth. CP 58 and 60. Savage made it clear that only \$15,000.00 of the money found on Howard matched the description of being folded and molded together as a trading instrument. CP 58-60.

What I was talking about was one specific quantity of money [the \$15,000.00]. ...he had nine thousand in a wallet, eleven thousand, in another wallet ... This particular quantity, however, [this \$15,000.00] appeared to be molded. And I have seen on several different narcotics raids quantities of money, along with loose money, that is bundled together and is used as a standard amount, For instance, if you were able to get, say, a pound of methamphetamine for fifteen thousand dollars, that's gonna be a pretty common size quantity, It might be, I don't know the going rates up here so I apologize, it might be about a half a pound of cocaine up here. It could be used as a trading instrument in that regard. CP 58.

Savage later testified, again, that only the \$15,000.00 packet of money seized from Howard had the physical markers indicating its use as a drug trading instrument. CP 59.

[What] we were discussing is whether one particular amount of money meant something specific to me based on its appearance. That was the question. No one asked me about the rest of the money ... The fifteen thousand was predominantly the oldest, rattiest looking money ... There were other old script bills mixed in with the rest of it as well. But that particular amount of money was all old script, all really worn, and like I said, three different quantities pushed together in five thousand dollar increments, just molded together. I mean, if you picked one bill up, they'd all come. CP 59.

Savage stated that he believes the rest of the money found on Howard is also drug money because it was in quantities in separate places on Howard's person and this means "this money is slated for different things, or belongs to different people." CP 61.

Savage's Other Opinions – Savage testified he believes the suspected cocaine was being transported for distribution or sales, but admitted that he does not know that. CP 66. Savage testified, though, that he believed Howard was a mule, in part, because:

In retrospect, looking back on this, the way I look at this is, I'm holding so and so's money, I get caught, the money gets gone, I'm a dead man. So, that too, plays into the fact that he's probably a mule. He knows I'm gonna discover this money. He knows I'm gonna discover the cocaine. He knows he's gonna get arrested. And he knows I'm gonna

take the money. So, that, his resistance, his fighting, his statement that this can't be happening, all those things combined, yeah, to me it's indicative he's a mule. CP 78.

On further examination, though, Savage admitted that he has also taken down non-drug suspects that resisted. CP 78.

Items Found in Howard's Car - Howard's car was searched after Howard was placed into custody, but Savage did not participate in the search and denied actively watching the search of either the car or the trunk. CP 50 and 67-8. Savage admitted, though, that the car was "pretty cram packed" and "looked like he was living out of it." CP 68.

Inside the car, a curved blade "that looks like something maybe an old sharecropper might use to whack down grass" was found on the floor between Howard driver's seat and the car door. CP 51-2. During the hearing, Howard orally objected to the admission of anything found in the front seat area as irrelevant. CP 50.

During the hearing, Savage testified that he did not know if people who lived in their cars were particularly vulnerable to violent crime, but he would prefer living in a house, as opposed to a car, and admitted that the curved blade in Howard's care was not significant to him as a tool of the drug trade; it was significant because it was a weapon. CP 76-7.

Savage testified that other items, including two quantities of suspected cut, two “very small amounts” of suspected cocaine in packaging, and two checkbooks showing total balances of less than \$300 were also found in Howard’s car. CP 51-2. Also, two hundred and thirty-two dollars was found “strewn about his automobile.” CP 50. An unloaded Derringer pistol was found in the trunk, but none of the officers obtained a warrant to search the trunk where the Derringer was found. CP 51 and 69.

Total Cash Seized – The Sheriff’s Office seized \$45,463.00 from Howard’s person and car. CP 50.

Hearing Examiner’s Conclusions - As near as Howard can surmise, the Examiner made the following mixed conclusion of law and fact:

In Calhoun, the court determined that the dogs do not alert to the cocaine itself, but rather to a substance used in the processing of cocaine [methyl benzoate]. This substance evaporates very quickly, making in my opinion, a narcotics trained K9 alert on currency probative. CP 511.

Once the government established by a preponderance of the evidence that the money is subject to forfeiture, the burden then shifts to the claimant to prove by a preponderance of the evidence that the money was not furnished, in whole or in part, or was intended to be furnished, in whole or in part, in exchange for a controlled substance, or that some statutory defense is applicable. CP 511.

This hearing examiner does find that the deputy had the right to seize the money based on Howard's actions, based on the amount of money, based on the cocaine that was found in the area, and based on the narcotics K9 dog that was brought to the scene and alerted on the money. CP 511.

The claimant's money is properly forfeited under RCW 69.50.505. CP 512.

B. ARGUMENT

1. The Examiner Erred in Failing to Rule that Howard's Administrative Hearing Was Not Set in a Timely Manner

Timeliness of the September 21, 2007 Hearing - The failure to hold a personal property forfeiture hearing within 45 days of receiving Howard's request deprived the Sheriff of jurisdiction over this matter and Howard urges this Court to reverse the Examiner's ruling as to timeliness, and void his order of forfeiture, because a judgment is void if entered by an entity without subject matter jurisdiction. See *Bour v Johnson*, 80 Wn App 643, 646, 910 P2d 548 (1996).

On, or around, **July 6, 2007**, Claimant Howard delivered to the Sheriff, through its attorney, a claim of ownership or right to possession of the seized items at the address specified in the Notice of Seizure. On, or around, **September 7, 2007**, the Sheriff delivered a Notice of Hearing to Howard's Attorney for a hearing to be held on **September 21, 2007**. As a

result, the administrative hearing took place 77 days after the request for a hearing and 118 days after the initial seizure.

Howard argues that, at most, the Sheriff had until **August 20, 2007**, 45 days after Howard delivered his claim of ownership, to hold a forfeiture hearing. That 45 day deadline expired long before the September 21, 2007 hearing was held. Howard's argument is as follows:

No court of record has, to Howard's knowledge, established a firm hearing deadline for personal property cases. *Tellevik 1* and *Tellevik 2*, below, establish a 90 day deadline for real property. Howard's position is that the logic of *Tellevik 1* and *Tellevik 2* mandates a 45 day hearing deadline for personal property cases based on the same logic they used to establish a 90 day deadline for real property cases. See argument below.

In *Tellevik 1*, the forfeiture statute, itself, was challenged as unconstitutional for real property because it allowed for *ex parte* issuance of a seizure warrant and *lis pendens* before the owners received notice and an opportunity to be heard. *Tellevik 1*, 120 Wn2d 68, 85-87, 838 P2d 111 (1992). The constitutionality of the real property forfeiture statute was upheld, however, because RCW 69.50.505 only allowed the government to maintain an inchoate interest, i.e., a *lis pendens* or cloud over title, in the real property AND because the *Tellevik 1* Court inferred that RCW

69.50.505 intended a firm 90 deadline for an actual hearing. *Tellevik 1* at 87, citing then-existing RCW 34.05.419 and RCW 69.50.505(e).

Tellevik 1 never discusses what language in the forfeiture statute specifically requires an actual hearing within 90 days for real property, but *Tellevik 2* points to the following reasoning: “The statute effectively limits the State’s seizure action to the filing of a lis pendens, and it expressly prohibits the State from ‘transferring or otherwise conveying [the property] until ninety days after the seizure or until a judgment of forfeiture is entered, whichever is later.’” *Tellevik 2* at 371.

Under *Tellevik 1* and *Tellevik 2* a firm, prompt deadline is necessary to maintain the constitutionality of the real property statute itself. *Tellevik 1* at 87 and *Tellevik 2* at 371-2. The 90 day deadline for real property hearings is inferred from the portion of the statute prohibiting the State from “transferring or conveying [the property] until 90 days after the seizure. *Tellevik 1* at 87. *Tellevik 2* at 371-2. This requirement of a firm, prompt deadline for an actual hearing is at odds with Title 34’s directive that an adjudicative proceeding commences when the agency or a presiding officer simply notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted, see RCW 34.05.413, but based on *Tellevik 1* and *Tellevik 2*, the

constitutional requirement for an actual hearing within a specific period of time, not just notice of a future hearing, is required.

The *Tellevik* cases' logic should be doubly true in the case of a personal property forfeiture because the government maintains full possession and control of seized personal property items, not just an inchoate interest. The current version of RCW 69.50.505, like the real property statute at issue in *Tellevik 1* and *Tellevik 2*, prohibits the government from transferring or otherwise conveying personal property until 45 days after a seizure. RCW 69.50.505(4). RCW 69.50.505, however, sets no explicit deadline for an actual hearing to take place. Such a hearing deadline must be implied, however, just like in *Tellevik 1* and *Tellevik 2*, to maintain the constitutionality of the statute.

In *Tellevik 1* and *Tellevik 2*, the deadline can only be implied by looking at the period of time following a seizure when the subject real property can not be conveyed or transferred to the government. That statutory period for real property is 90 days and, using the same method, the statutory period for personal property can only be 45 days. Therefore, the last possible day for a hearing on Howard's money was August 20, 2007, not September 21, 2007.

The *Tellevik 2* Court specifically upheld dismissal of the forfeiture action, in spite of the harshness of that remedy, because the agency waited almost six months before it scheduled court proceedings. *Id.* at 372-4.

Contrary to the State's assertion, the 90 day hearing requirement articulated in *Tellevik 1* is not *dicta*, but is instead, central to its holding The Pearsons were therefore entitled to a full adversarial hearing within 90 days of the issuance of the mandate ... The State ignored the clear and unambiguous language in *Tellevik 1* and waited nearly six months before *obtaining* a trial date [emphasis in original] ... *Tellevik 2*, 125 Wn2d 364, 372, 884 P2d 1319 (1994).

Unlike *Good*, the 90-day requirement is not merely an 'internal timing requirement.' Here, as discussed above, the time limitation requirement was read into the statute in order to preserve its constitutionality. Because a prompt postdeprivation hearing was an integral component of the Pearsons' due process rights under the Fifth and Fourteenth Amendments, and the Pearsons were denied this right, dismissal of the actions was appropriate." *Id.* at 374.

2. The Examiner Erred in Failing to Place Exhibit 1 into the Administrative Record

Exhibit 1 - Howard argues that this matter should be remanded to the Examiner to place Exhibit 1, the overhead photograph of the traffic stop area, into the administrative record. The Examiner should have preserved and reviewed Exhibit 1 because it shows, in conjunction with Savage's testimony and the markings Savage put on then-existing Exhibit 1, that: (1) Howard did not have 100 feet in which to initiate his turn signal between

the two Shell station driveways and (2) it would be impossible for Savage to see Howard's right front turn signal as Howard turned into the westernmost Shell driveway because Savage had to take a blind corner to get eastbound at the exact point where Howard was turning. CP 44-5, 88-9. (A pending motion was filed with the Court of Appeals to show this, conclusively, by supplementing the record with the insertion of Exhibit 1).

The Motel 6 is the southern terminus of the 90 degree angle created when 206th Street changes direction from East-West, (the Shell vector) to North-South (the Motel 6 vector). See Exhibit 1 (if available). As a result, there is no way Savage could have been "eastbound" in front of Howard and facing him while Howard was traveling "westbound" and initiating a turn into the Shell station. See Exhibit 1, (if available), and CP 44-5, 88-9.

The failure to preserve Exhibit 1 violates the spirit, if not the letter of RCW 34.05.476(2)(c)(d), because the agency record must include any petitions, requests, and intermediate rulings; evidence received or considered; and proffers of proof and objections and rulings thereon. RCW 34.05.476(2)(c), (d), and (f). The absence of Exhibit 1, however, prevents *Terry*, probable cause, or *Ladson* issues from being fully examined because the one

piece of compelling objective evidence available to the Hearing Examiner and reviewing courts is missing. See *Terry v Ohio*, 392 U.S. 1 (1968) and *State v Ladson*, 138 Wn2d 343, 979 P2d 833 (1999).

There is statutory authority for such a remand. Under RCW 34.05.562(2)(a), a reviewing court can remand a matter to an agency with directions to conduct additional proceedings and take further action if the agency failed to prepare or preserve an adequate record. The matter must be remanded because forfeiture evidence which is tainted by unconstitutional search and seizure must be excluded and the Examiner is required to undertake this review in the course of an administrative hearing. See RCW 34.05.452(1), RCW 69.50.505(2)(c), and (d), and *Barlindal v City of Bonney Lake*, 84 Wn. App. 135, 141, 925 P.2d 1289 (1996).

It should also be remanded because the agency record, at this time, is inadequate due to the missing Exhibit. See RCW 34.05.476 (2) (c), (d), and (f). The absence of these items from the record will complicate, and perhaps prevent, Howard from being able to adequately present certain issues to the reviewing court because petitioners are required, in most

cases, to refer to the agency record when presenting issues for review.

RCW 34.05.554(1).

Howard previously petitioned the Superior Court for such a remand, but his petition was denied. He now repeats his request for relief because it bears on a constitutional issue which should be presented to the Court of Appeals.

3. The Examiner Erred in Failing to Provide a Written Ruling to Memorialize His Oral Ruling that the September 21, 2007 Hearing was Held in a Timely Manner.

The Examiner orally denied Howard motion to dismiss the forfeiture action based on Howard's argument that the hearing was untimely CP 99, but it is the duty and obligation of the Hearing Examiner to memorialize his / her orders in writing to provide a record for review. See RCW 34.05.562(2)(a) and (c). As a result, Howard urges the Court to remand the matter to the Examiner with instructions to do so. Howard previously petitioned the Superior Court for such relief, but his petition was denied. CP 135-7, 143-4.

4. The Examiner Erred in Ruling that Savage's Original Stop of Howard was Justified.

Absence of Probable Cause / Articulate Suspicion - Howard offered an overhead photograph of the arrest scene which clearly shows that Savage's testimony about why he pulled over Howard can not be true.

The photograph shows two entrances to the Shell station from the service road. (See Exhibit 1, if available). The overhead photograph clearly shows that either the alleged violation did not occur or, even if it did, Savage was not in a position to see it.

Specifically, a review of the photograph reveals there are two entrances to the Shell station from the service road, but there is no way Savage could have viewed Howard's right blinker being initiated immediately prior to Howard's turn into the westernmost entrance to the Shell station. The reason why Savage could not observe the right hand blinker is because the westernmost entrance is just shy of the 90 degree angled turn that Savage needed to proceed eastbound on 206th.

Howard has previously moved the Superior Court to remand this matter to the Hearing Examiner to insert the overhead photograph, (see Exhibit 1, if available), and complete the administrative record. That motion was denied by the Superior Court. Howard repeats his motion here to avoid inadvertently waiving his constitutional search and seizure claims, but concedes that, in the absence of the overhead photo, he is ill-equipped to argue that he was illegally detained by Savage for a traffic violation.

5. The Examiner Erred in Admitting and Considering the K9 Evidence Offered by the Sheriff.

Foundational Objection to K9 “Alert” Evidence – A K9 “alert”

on Howard’s money was admitted over Howard’s foundational objection. After that Savage’s qualifications to testify about K9 alerts were questioned.

Savage testified on cross-examination that he has no knowledge of what the federal standards for training K9’s are, can not explain K9 Jetson’s 10% inaccuracy rate, does not know if there are nationwide law enforcement standards for K9 training, has “vague” knowledge of what goes into the training of K9’s, does not know whether double blind testing was performed on K9 Jetson, and considers himself unqualified to testify about the training, qualifications, or standards for K9’s.

This should have been sufficient to exclude Savage’s K9 testimony because, under ER 702, expert testimony can only be admitted if the witness qualifies as an expert and the expert testimony will be helpful to the trier of fact. *State v Cauthron*, 120 Wn.2d 879, 885, 846 P2d 502 (1993). Deputy Savage, by his own admission, however, is unqualified, so he is not an “expert” and his testimony should not have been admitted.

Probative Value of K9 Evidence - Savage is not a K9 expert, but, even if he was, Savage’s K9 “alert” testimony could not be admitted. On cross-examination, Deputy Savage testified that, after his struggle with Howard, he picked up pieces of what he believed to be cocaine from the

parking lot and put them into a bag, then took some of the money that was found on Howard and placed it in another bag to see if the on-scene K9 would alert. Not surprisingly, the K9 did alert.

It should be patently obvious that if the goal of offering items to a K9 is to prove money from Howard was involved in a drug transaction, then the Sheriff is operating under the theory that drug chemicals are transmitted to currency when drug handlers first handle drugs, then, in turn, handle currency.

The Sheriff's purported "proof" that Howard's currency has been involved in a drug transaction, however, fails on four grounds:

(1) Savage handled what he alleges to be cocaine, then handled Howard's money, then put it into the bag. As a result, it is not surprising the K9 alerted on the money. If handling drugs and handling money taints money, then Savage certainly tainted the money, himself, before offering it to the K9;

(2) Evidence of a dog's certification, alone, is insufficient to establish a dog's reliability; see *Matheson v. State*, 870 So.2d 8, 15 (Fla. Dist. Ct. App. 2004), and

(3) The value of a K9 alert on Howard's currency is virtually meaningless because:

(a) Drug chemicals are much more likely to be transmitted to, and retained in, U.S. currency, as opposed to a cel phone or paper bag because U.S. Currency is composed of a much more absorbent and adhesive material; i.e., 75% cotton and 25% linen, not wood pulp or plastic. www.ustrea.gov/education/faq/currency.shtml, and

(b) Most, if not nearly all, U.S. Currency in general circulation is drug-tainted. See citations at pp 34-5, esp *U.S. v. \$639,558.00*, 955 F2d 712, 714, n.2 (D.C. Cir 1992), (citing *Crime and Chemical Analysis*, 243 Science 1554, 1555 (1989) and R. Siegel, *Intoxication* 293 (1989)).¹

U.S. currency becomes tainted when small quantities of drugs adhere to the sebum on a person's hands and fingers and the sebum-drug mix is then transferred to, and retained in, currency.² *Id.* See also J. D.

¹ See also David B. Smith, Prosecution and Defense of Forfeiture Cases, Par. 4.03 at 4-79 (1993); A. Schneider & M. P. Flaherty, *Drugs Contaminate Nearly All the Money in America*, p A6, (Pitt. Press, Aug. 12, 1991); and J. Brazil & S. Barry, "You May be Drug Free, But is Your Money?" Orlando Sentinel, June 15, 1992, at A6.

² Sebum is an oil found on the epidural layer of human hands and fingertips. Sebum is more commonly known as the agent which allows fingerprints. Fingers don't leave imprints; they leave oil patterns on the surfaces they touch. The patterns are the sebum oil on the ridges and swirls of a person's fingertips. Forensic examiners get "prints" by "lifting" these faint oil patterns from clean smooth surfaces like glass. <http://www.technologyreview.com/articles/03/02/innovation20203.asp>.

Wolferts, Note, *In re One Hundred Two Thousand Dollars: Cash Friendly Civil Forfeiture*, 1993 Utah L. Rev. 971, 979-80.³

This drug-sebum mix evaporates over time but is retained for lengthy periods in currency. *Id.*, incl footnotes 1-3, and Doan-Trang T. Vu, *Characterization and Aging Study of Currency Ink and Currency Canine Training Aids Using Headspace SPME / GC-MS*, *Journal of Forensic Sciences*, Vol 48, pp 1-17).

Drugs, via currency, are also transferred to wallets, ATM's, bill counting machines, etc., which further contaminate other currency. *Id.*, esp. Vu, *Characterization and Aging, supra*, and *U.S. v. \$639,558.00*, 955 F2d at 714, n.2. See also David B. Smith, Prosecution and Defense of Forfeiture Cases, Par. 4.03 at 4-79 (1993).

K9's alert after smelling drug gases evaporating from the sebum-drug mix in the currency. *Id.* See also J.E. Amoore, *Molecular Basis of Odor* (C.C. Thomas 1970), and Cain, Schmidt, Wolkoff (2007), *Olfactory*

³ "Cocaine can be easily transferred simply by shaking hands with someone who has handled the drug: a pharmacist, toxicologist, police officer, or drug trafficker" *Id.* At 979. In fact, "a single bill used to snort cocaine or mingled with the drug during a transaction can contaminate an entire cash drawer." Debbie M. Price, *Use of Drug-Sniffing Dogs Challenged*, citing study of Lee Hearn, chief toxicologist for the Dade County, Florida Medical Examiner's Office, *Washington Post*, May 6, 1990, at D1, D6.

Detection of Ozone and D-Limonene Reactants in Indoor Spaces, Indoor Air, Vol 17, Issue 5, October 2007, pp 337-47.⁴

As a result, a drug-sniffing K9 will almost always “alert” on currency, thus making any individual alert meaningless if the K9 is being used to determine who contaminated the currency and when it became contaminated. (See “Legal Citations” at pp 34-5).

Legal Citations – As a result of the above adhesion / evaporation process, courts have concluded that a K9 alert on currency does not provide evidence that a particular suspect is the source of drug contamination because there are detectable amounts of controlled substances on virtually all circulated U.S. currency. *U.S. v. \$639,558.00*, 955 F2d 712, 714, n.2, *United States v. \$30,060.00 in US Currency*, 39 F3d 1039 (9th Cir. 1994), and *United States v. \$22,474.00 in US Currency*, 246 F3d 1212 (9th Cir. 2001). See also *Muhammed v. DEA*, 92 F3d 648 (8th Cir. 1996) and *U.S. v. \$5,000.00*, 40 F3d 846 (6th Cir. 1994); (value of dog alert is minimal because 70% to 97% of currency in the United States is “so thoroughly corrupted” with cocaine contamination), and *United States v. \$506,231.00*, 125 F3d 442 (9th Cir. 1997); (dog alert can not be

⁴ Scents are composed of evaporating gas molecules which are generally produced by heat. J.E. Amoore, *Molecular Basis of Odor* (CC Thomas

taken seriously because 33% to 96% of currency in the United States is contaminated with cocaine).

Analysis under *State v Cauthron* - Savage's testimony on K9 Jetson's "alert," even if Savage was a qualified K9 drug detection expert, would not be admissible because expert testimony is not helpful when the party opposing the testimony can identify a precise problem which renders the expert's evaluation unreliable. See *State v. Cauthron*, 120 Wn.2d 879, 886, 890, 846 P.2d 502 (1993). The amount of drug contaminated currency in general circulation is a known problem. That problem should have rendered Savage's currency experiment inadmissible.

6. The Examiner Erred in Failing to Exclude the Derringer Pistol on Article 1, Sec. 7 Grounds

Howard objected to the admission of the unloaded derringer found in Howard's trunk during a warrantless search. He repeats those objections here.

Unconstitutionally gathered evidence must be excluded at administrative adjudicative hearings. See RCW 34.05.20 and RCW 34.05.452(1). The unloaded derringer was clearly obtained in an unconstitutional manner. See *White* and *Houser*, *infra*.

1970). A true solid can not be smelled at all. *Id.*

In Washington, it is firmly established that warrantless trunk searches are unconstitutional whether the interior of the vehicle is searched incident to arrest or not. *State v. White*, 135 Wn2d 761, 770-772, 958 P2d 982 (1998), citing *State v. Houser*, 95 Wn2d 143, 155-6 (1980).

7. The Examiner Erred in Failing to Exclude the Curved Blade on Relevance Grounds

While the reviewing court must give some deference to agency findings and relaxed admissibility standards in an administrative hearing, the Examiner is supposed to refer to the Washington Rules of Evidence as guidelines for evidentiary rulings. RCW 34.05.570(3)(e). In addition, findings can be vacated if they are not supported by evidence that is substantial when viewed in light of the whole record before the court. See *Premera v Kreidler*, 133 WnApp 23, 32, 131 P3d 930, 934 (2006).

As a result, Howard urges that the curved blade be excluded from consideration because it does not make the existence of any drug fact more, or less, likely. Deputy Savage, himself, dismissed any connection between the curved blade and the issue of proving drug connections. “Why it was significant to me was not ‘cause it’s related to the drug trade. It was significant to me ‘cause it was a weapon.” CP 76-7.

8. The Examiner Erred in Finding and Concluding that Substantial Evidence Justifying Seizure of Over \$45,000.00 Was Entered at the Administrative Hearing

Standard of Review - The reviewing court is not compelled to blindly follow an agency's conclusions. A *de novo* standard applies to reviewing an agency's conclusions of law and a court may also grant relief from an agency order when the order "is not supported by evidence that is substantial when viewed in light of the whole record before the court." See *Premera v Kreidler*, 133 WnApp 23, 32, 131 P3d 930, 934 (2006) and RCW 34.05.570(3)(e).

In order to surmount the substantial evidence standard, the agency's evidence must be of sufficient quantum to persuade a fair-minded person of the truth of a declared premise. *In re Registration of Elec. Lightwave, Inc.*, 123 Wn2d 530, 542-3, 869 P2d 1045 (1994). In addition, agency orders can be vacated if they are unreasoning or disregard the facts and circumstances. See RCW 34.05.570(3)(e), *Heinmiller v. Department of Health*, 127 Wn. 2d 595, 609, 903 P.2d 433, 909 P.2d 1294 (1995), *cert. denied*, 518 U.S. 1006, 135 L. Ed. 2d 1051, 116 S. Ct. 2526 (1996), and *Green Thumb, Inc. v. Tiegs*, 45 Wn. App. 672, 676, 726 P.2d 1024 (1986).

Finally, it is within the authority of the reviewing court to remand the matter back to the agency to conduct fact-finding and other proceedings, and take further action on that basis if the agency failed to preserve an adequate record or improperly excluded or omitted evidence from the record. RCW 34.05.562(2)(a) and (c).

Ultimate Issue of Forfeiture – The Examiner stated he found Savage had the right to seize Howard’s money based on Howard’s actions, the amount of money, the cocaine that was found in the area, and the narcotics K9 dog that was brought to the scene to alert on the money. CP 511.

The Examiner also found that “the way the money was clumped together and had aged was significant, and was indicative to Savage, a deputy with a significant amount of training and experience ... that the money itself was used in drug transactions – to buy drugs and sell drugs.” CP 511).

(This conclusion concerning “clumping” is not phrased in the type of language normally required for a finding of fact / conclusion of law, because it states what Savage finds / believes, as opposed to what the Examiner finds / believes. Howard presumes, however, that the Court will

consider it an “Examiner Finding / Conclusion” in ascertaining whether the Examiner’s decision was supported by substantial evidence).

The K9 issue has previously been addressed, so, presumably, the only probative evidence left is the amount of money and suspected cocaine found on, or near, Howard, and Howard’s resistance after he was grabbed from behind and “stood up” by Savage. There is no case of record that Howard’s counsel can find which allows forfeiture on the sole grounds that cocaine and money were found in the same place and a subject resisted arrest. He also can not find a case where forfeiture is based on an officer’s speculation about the meaning of old, tattered bills molded together or even a case where old, tattered, moldy bills are used as proof of a drug transaction.

Howard’s forfeiture case is based on Savage’s opinions which, in turn, are based on a set of ambivalent and ambiguous facts. Howard urges the Court to see these opinions for what they are, half-informed.

Speculation About the \$15,000.00 - The \$15,000.00 in old, tattered, moldy money that Savage considers drug money was, notably, found in Howard’s left front pants pocket, not in a wallet. It certainly could have become old, tattered, and moldy after spending a considerable amount of time wedged in a pocket and pressed up against the body heat

of Howard. Likewise, the discovery of large amounts of money on a person living in his car, can make a great deal of sense if that person is hoarding cash by trying to live on as little as possible. There is evidence that this is exactly what Howard was doing. CP 51-2, 68, but this behavior is not criminal. The only thing which makes it “criminal” is Savage’s speculation.

Speculation as to the Segregation of Howard’s Money - Even if the Court considers the old, tattered, molded-together nature of \$15,000.00 to be evidence of a crime, then the converse would have to be true of the other approximately \$30,000.00 found on Howard’s person. As a result, the Court is confined to limit the forfeiture in this case, even if it believes some seizure is justified by the facts upon which Savage is basing his opinion. The rest of the seizure, however, would be based on pure speculation.

Speculation as to Why Howard Resisted Arrest - It is, no doubt, true that people in possession of drugs may sometimes resist arrest and attempt to destroy evidence, but the same could, as likely, be said of those who are guilty of some other crime, mentally ill, intoxicated, or naturally boisterous and obnoxious. In fact, Deputy Savage testified to that proposition:

Howard's Counsel: Have you ever taken down a non-drug suspect that resisted?

Savage: Yes. (CP 78).

Savage's opinion that resistance is proof of drug dealing is no more than an opinion or "hunch" by Savage and hunches do not provide probable cause for arrests, let alone proof of a criminal activity. It is true that a large piece of cocaine and over \$45,000.00 in bills seems to lend credence to Savage's "hunch," but, taken as a whole, this evidence still does not prove Howard was engaged in any illegal activities, except for, possibly, possession of cocaine and resisting arrest.

It is interesting to note that Savage did not even an attempt to qualify his presumptions about Howard's reasons for struggling with him by describing what training and experience led him to this belief, but even a layperson can probably think of more than one reason why a person might struggle with a police officer when he or she is grabbed from behind and "stood up." To assume otherwise is simply myopic.

Speculation as to the Sources of Howard's Income - There is no direct evidence that Howard ever sold suspected cocaine to anyone or was planning to use his money to buy drugs. Nor is there evidence that Howard was living beyond his means.

The Sheriff has no employment or debt information for Howard and did not bother to do an income or debt analysis. The Sheriff just assumes Howard is guilty of deriving money from a criminal source. This is speculation, not proof.

Speculation as to What the White Substance Is - There was no evidence before the Examiner indicating the suspected cocaine is, in fact, cocaine. No lab test was ever done.

9. The Examiner Erred in Relying Solely on the Hunches and Opinions of Savage to Find / Conclude that Forfeiture was Warranted.

Speculation Does Not Equal Forfeiture - The question that remains in this case is: Can a civil forfeiture case proceed based on a group of hunches by a police officer? If so, all cash found on persons with drugs is forfeitable. Howard argues that, for substantive and Constitutional reasons, this can not be the basis for a forfeiture.

It is clear that speculation, even under suspicious circumstances, is not enough for forfeiture. The danger of over-reliance on opinions, specifically law enforcement opinions, is well documented, in part because police officer's testimony carries an "aura of reliability." See *State v Montgomery*, 163 Wn2d 577, 595, 183 P3d 267 (2008), *State v Demery*, 144 Wn2d 753, 30 P3d 1278 (2001) and *State v Kirkman*, 159

Wn2d 918, 155 P3d 125 (2007). But police officers opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt. *Montgomery* at 595. As a result, there are some areas which are clearly inappropriate for opinion testimony in criminal trials, particularly expressions of personal belief as to the guilt of the defendant, the intent of the accused, or the veracity of the witnesses. *Montgomery* at 591, citing *Demery* at 759, *Kirkman* at 927, and *State v Farr-Lenzini*, 93 Wn App 452, 463, 970 P2d 313 (1999).

The Howard case is not a criminal trial, but Savage was, throughout the administrative hearing, expressing his personal belief as to Howard's guilt and intention to do business as a drug mule who was selling or distributing drugs for another. Those opinions are not buttressed by anything, save possibly the condition of the \$15,000.00, but even that fact is open to alternative explanations. In sum, an officer's opinions should not be considered "substantial evidence." The Washington Courts do not allow arrests, based simply on officer opinion, and it should not allow forfeiture either.

10. The Examiner Erred in Ruling the Forfeiture Was Justified, Despite the Absence of Any Known Link to a Drug Transaction

Contreras and 13627 Occidental Ave Require that Seized Assets be Traceable to a Known Drug Transaction, Period –

Making broad assumptions has proved hazardous for law enforcement agencies seeking to forfeit property in cases with far more drug-dealing evidence than Howard's. See *Tri-Cities Drug Task Force v Contreras*, 129 Wn App 648, 651-2 (Div 3, 2005).

In *Contreras*, the Tri-Cities Drug Task Force seized five pounds of methamphetamine with a street value of \$25,000.00 and 13 ounces of marijuana based on information that Mr. Contreras and another gentleman were going to go to Contreras house and "cut" the methamphetamine. *Id.* at 650-51. The Court of Appeals found that Contreras' possessed the methamphetamine with intent to deliver, possessed marijuana in a greater amount than one would expect for personal consumption, and the Contreras were engaging in massive expenditures which far outweighed their marital income. *Id.*

The Court of Appeals, however, reversed an order forfeiting three of the Contreras' vehicles, (two of which were paid for, or paid off, with a total of \$21,000.00 in cash), \$1,264 in cash, seven silver dollar coins, and a dizzying array of high-end consumer goods found in the Contreras' home because these assets

could not be tied to any specific drug transaction. See *Tri-Cities Drug Task Force v Contreras*, 129 Wn App 648, 651-2 (2005).

The Court of Appeals ordered the forfeiture reversed, despite an income investigation showing Mr. and Ms. Contreras had a combined legitimate income of only \$8,000 to \$12,000 per year in the three and $\frac{3}{4}$ years preceding Mr. Contreras late 2001 arrest, and paid approximately \$1,000 in monthly residential expenses for nearly four years prior to Contreras' arrest. *Id.*

Contreras, though, ordered the property returned to Mrs. Contreras and awarded costs and attorney's fees for the underlying action and the appeal. *Contreras* at 653-4. These rulings were based on the fact that the evidence adduced at the forfeiture hearing did not show that personal property or assets were acquired in whole or in part with proceeds traceable to an exchange or series of exchanges" which constitute illegal drug activity. *Id.*

Contreras stated that the drug forfeiture statute "requires some evidence of tracing" and indicated, by its decision, that the evidence presented by the police at the forfeiture hearing did not trace the property to an exchange or series of exchanges constituting illegal drug activity. *Id.* In so ruling the *Contreras* Court cited *King County Dep't of Pub. Safety v. 13627 Occidental Ave. S.*, 89 Wn. App. 554, 950 P.2d 7 (1998).

When "[t]he record does not reflect that any effort was made to trace the proceeds" to any illegal drug transaction, and the findings do not address that issue, there is no basis for the forfeiture of the personal property as proceeds. *Id.* Such is the case here. Since the property was not traceable to any illegal drug transaction, it was not subject to forfeiture under the statute. The hearing examiner misapplied the statute. Because the statute does not apply, the other issues raised by the parties are superfluous. *Contreras* at 653-4.

Likewise, in Howard's case, there is no admissible evidence of any criminal proceeds having been acquired by Howard. As a result, a forfeiture of his property is clearly an excessive fine, and a violation of the Eighth Amendment, because none of his cash can be "traced" to any illegal proceeds, even if the Government is suspicious about how Howard acquired it. (See authorities below, *infra*).

11. The Examiner Erred in Failing to Perform an 8th Amendment Proportionality Analysis to Determine if the Forfeiture Action Was Punitive, Rather than Remedial

Forfeiture proceedings are not, per se, unconstitutional, but Constitutional protections still apply, specifically the Eighth Amendment. See *State v. Catlett*, 133 Wn2d 355, fn 9 (1997). *Catlett* unambiguously states that 8th Amendment protections apply to forfeiture proceedings: "We do note ... that the statute must still be analyzed in accordance with Eighth Amendment principles. To

the extent civil forfeiture constitutes an excessive fine, it will be invalid.” *State v Catlett*, 133 Wn2d 355, fn 9 (1997), citing *Austin v United States*, 509 U.S. 602, 113 S Ct 2801, 125 L Ed 2d 488 (1993).

Catlett and *Austin*’s logic was followed by *Tellevik v Chavez*, (Division 2), when *Chavez* mandated a proportionality analysis for pending forfeitures for all litigants who expressly ask for them. *Tellevik v Chavez*, 83 Wn App 366, 375-6, 921 P2d 1088 (Div 2, 1996). *Chavez* recognized that a forfeiture which is more than remedial in nature constitutes additional criminal punishment, not a civil remedy to disgorge drug profits. *Chavez* at 371-6.

Howard objected to the forfeiture on 8th Amendment grounds and argued that the sort of tracing required in *Contreras* and *13627 Occidental, supra*, is required to avoid punitive overreaching. CP 474-81. This request to examine the forfeiture’s proportionality fell on deaf ears. The Examiner neglected to even address Howard’s 8th Amendment concerns either orally or in his written rulings.

The Eighth Amendment states, in pertinent part, that ‘excessive fines [shall not be] imposed, nor cruel and unusual

punishments inflicted.’ *Chavez, supra*, at 372, citing *Austin, supra*, at 618-22 and Scalia, J., (concurring), at 623. It restricts ‘punishment’ which can include civil in rem forfeitures. *Id.*

The test adopted by a host of courts to determine whether a legislative act is punitive is: Are the proceedings so punitive as to persuade the Court that the forfeiture proceedings may not be viewed as civil in nature despite [the legislature’s] intent? See *Austin, supra*, and *Catlett* at 364-7, expressly adopting the rule of *United States v One Assortment of 89 Firearms*, 465 US 354, 361, 366, 104 S Ct 1099, 79 L Ed 2d 361 (1984).

Howard argues that forfeiture of over \$45,000.00, when no evidence of a single drug transaction has been offered, is disproportionate to any crime he could even, conceivably, be charged with. Howard does not believe any money seized from him can, legally, be traced to drug proceeds, but he is clearly entitled to an Eighth Amendment proportionality analysis if the Court finds sufficient evidence that some of the seized money is drug proceeds. As a result, Howard urges the Court to remand the matter to the Examiner to perform a proportionality analysis or to perform one itself utilizing the proportionality test adopted by

Chavez. See *Tellevik v Chavez*, 83 Wn App 366, 375-6, 921 P2d 1088 (Div 2, 1996).

Under the *Chavez* rule, constitutional excessiveness is analyzed by examining instrumentality and proportionality factors. Instrumentality factors include, but are not limited to, the role the property played in the crime, the role and culpability of the property's owner, whether the offending property can readily be separated from innocent property, and whether the use of the property was planned or fortuitous. *Id.* at 374.

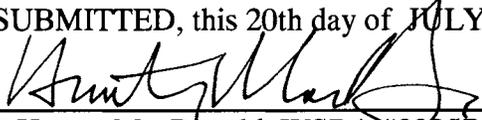
Proportionality factors include, but are not limited to, the nature and value of the property, the effect of forfeiture on the owner and innocent third parties, the extent of the owner's involvement in the crime, whether the owner's involvement was intentional, reckless or negligent, the gravity of the type of crime, as indicated by the maximum sentence, the duration and extent of the criminal enterprise, including the street value of the illegal substances, and the effect of the crime on the community, including costs of prosecution. *Id.* at 374-5.

C. **CONCLUSION / REQUEST FOR FEES and COSTS**

This forfeiture action is punitive and must be dismissed. Division 1 and Division 3 have vacated forfeitures where the Government could not show that all of the property seized was traceable to criminal proceeds, even if such assets were co-mingled, and the claimant had no apparent economic means to acquire the assets. See *King Cty Dept of Pub Safety v 13627 Occidental Ave. S.*, 89 Wn app 554, 950 P2d 7 (1998) and *Tri-Cities Drug Task Force v Contreras*, 129 Wn App 648 (2005). That is the result that the Examiner should have reached in Howard's case.

Howard should be awarded his fees and costs of appeal because RCW 69.50.505 specifically provides for payment of reasonable attorney's fees and costs for a prevailing claimant. As a result, Howard requests an order compelling payment of reasonable attorney's fees and costs of this appeal by the Sheriff, in accordance with RAP's 14.1, 14.2, and 18.1.

RESPECTFULLY SUBMITTED, this 20th day of JULY, 2009.



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