

FILED

SEP 09 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 288871

COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON

CITY OF WALLA WALLA,

Respondent,

v.

\$401,333.44,

Defendant, and

ADRIAN IBARRA RAYA

Appellant.

BRIEF OF RESPONDENT
CITY OF WALLA WALLA

Tim Donaldson, WSBA #17128
Walla Walla City Attorney

Walla Walla City Attorney's Office
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3. Counter-statement of the Case

A. Case procedure

Walla Walla narcotics officer Chris Buttice obtained a warrant and seized money on July 14, 2006 from a suspected drug operation "drop house" following the arrest of persons found at that location earlier in the morning by patrol officers who had responded to a disturbance call. CP 1438, ¶1.3; CP 1439, ¶1.7; CP 1441-49 (warrant, return, and application); RP 227, line 19 through RP 229, line 5. The City initiated forfeiture proceedings against the money by notice of seizure/forfeiture that same day. Ex. 2; RP 71, line 14 through RP 72, line 1 (identifying the initial notice); RP 84, line 13 through RP 85, line 8; Ex. 7 (confirming service). The State filed a criminal information three days later against a person arrested at the house who then called himself Adrian Ibarra Raya alleging charges arising out of illegal drugs discovered at the premises. CP 117-19 (Information from criminal case).

The person then calling himself Adrian Ibarra Raya requested a hearing in the forfeiture matter on August 25, 2006 by a letter from his legal counsel. Ex. 4. The forfeiture matter was set for an October 6, 2006 administrative hearing, CP 8-9 (hearing notice), but the matter was removed to Superior Court by claimant on October 3, 2006 before that hearing could

take place. CP 1-22 (summons and petition for removal). The City moved on October 24, 2006 to dismiss the claim due, in part, to claimant's repeated denial of any ownership interest in the seized money, CP 24-75 (motion materials), however, the forfeiture proceeding was stayed at claimant's request over the City's objection on November 6, 2006 before the hearing on the City's motion could take place. CP 103-04 (stay order).

A hearing was held the following day in the criminal case on November 7, 2006 to consider motions filed therein on behalf of defendant to suppress evidence found at the house and to dismiss the criminal charges against him. CP 378-414 (RP from hearing in criminal case); CP 776-891 (motion materials from criminal case). The trial court denied the motions to suppress and dismiss. CP 409-14 (RP of oral ruling); CP 204-08 (written order). The criminal case proceeded to trial on November 13, 2006, and the defendant was convicted. CP 415-762 (RP from criminal trial); CP 121 (verdict); CP 210-27 (judgment and sentencing materials).

The City thereafter moved on November 27, 2006 in the forfeiture case to vacate the stay and to treat its dismissal motion as a summary judgment motion. CP 109-21 (motion materials). A motion hearing was held on December 18, 2006, and the matter was continued by the court which requested additional briefing before ruling. CP 130 (minutes entry). The

City filed the additional briefing and a reasserted motion on March 23, 2007 asking the trial court to vacate the stay, to grant summary judgment on the ownership issue, and additionally or alternatively to grant summary judgment of forfeiture on the merits on the strength of physical evidence which connected the money seized at the house to a drug smuggling operation uncovered at a storage unit in Milton-Freewater, Oregon. CP 131-229 (motion materials). Claimant filed a response on May 11, 2007 requesting that the court continue the stay pending the appeal of his criminal conviction and that claimant thereafter be afforded a full hearing. CP 232-60 (response materials).

A motion hearing was held on May 15, 2007, and the trial court lifted the stay and granted summary judgment to the City. CP 261 (minutes entry); CP 262-65 (order). Claimant thereafter appealed to this Court. CP 266-73 (notice of appeal). (In the meantime, the defendant had also appealed his conviction in the criminal case to this Court. *See* CP 233)

This Court held in the criminal case appeal on July 1, 2008 that the initial warrantless entry into the house could not be justified under the emergency exception, and that patrol officers impermissibly entered and collected evidence later used by the narcotics officer to obtain the search warrant. The Court therefore found that the trial court erred in denying

defendant's suppression motion, and the conviction was reversed. *State v. Ibarra-Raya*, 145 Wn.App. 516, 522-23, 525, 187 P.3d 301 (2008).

This Court held in the forfeiture case appeal on May 28, 2009 that an illegal seizure would not bar a forfeiture action, but that the City could not use evidence suppressed in the criminal case; and, with that evidence removed, the record was inadequate for summary judgment, because unresolved issues of material fact remained. The Court therefore reversed and remanded for trial. *City of Walla Walla v. \$401,333.44*, 150 Wn.App. 360, 364-69, 208 P.3d 574 (2009).

An evidentiary hearing was scheduled after remand to take place at the end of August, 2009. CP 1014 (e-mail notice from trial court). That hearing was continued at claimant's request until December 14, 2009 to allow discovery. CP 983-98 (claimant's motion materials); CP 999-1017 (City response materials); CP 1018 (letter order). Discovery took place, and the trial court considered and ruled on the sufficiency of claimant's dissembling discovery responses. CP 1019-1342, CP 1346-85, and 1592-98 (motion materials); RP 1-37 (report of hearing); CP 1418-23 (letter order). The trial court also considered and denied claimant's motion to dismiss and ruled on claimant's motions in limine. CP 1386-1417, and CP 1488-90 (claimant's motion materials); 1436-87 (City response materials); RP 38-57 (report of

hearing); CP 1491 (letter order denying dismissal motion); CP 1492-93 (letter order re: limine motions).

An evidentiary hearing was conducted on December 14-15, 2009. RP 58-328. The trial court issued a letter ruling on January 14, 2010 finding both that the seized money is drug sale proceeds and that claimant is not its owner. CP 1565-69 (letter ruling). The trial court entered findings and conclusions and judgment in favor of the City on February 18, 2010. CP 1585-88 (findings and conclusions); CP 1589-91 (judgment).

B. Evidentiary hearing.

During the evidentiary hearing, the City presented evidence that immigration officials stopped and deported an individual in 2002 who claimed to be Adrian Ibarra Raya. Ex. 19; RP 214, lines 5-24. In 2003, a new Adrian Ibarra Raya applied for an Oregon driver's license. Ex. 50; Ex. 7; RP 237, line 14 through RP 238, line 7. The original Adrian Ibarra Raya later reappeared posing as the new Adrian's brother, Gilberto. RP 126, line 15, through RP 129, line 4; Ex. 19; Ex. 13; RP 215, lines 3-7; RP 219, lines 9-13; RP 272, lines 13-21 (for clarity, the person who claimed in 2002 to be Adrian Ibarra Raya will hereinafter be referred to as Gilberto/Adrian). The new Adrian Ibarra Raya from 2003 later repeatedly represented to immigration officials that his name is Jairo Cain Franco Millan. Ex. 20; RP

213, lines 13-25; Ex. 46; RP 210, line 4, through RP 213, line 4. He is, however, the person known to be the claimant, Adrian Ibarra Raya, in this proceeding. RP 85, lines 3-8; Ex. 7; RP 272, lines 2-12; RP 128, lines 4-12; RP 213, line 13, through RP 214, line 4; Ex. 20 (for clarity, claimant will hereinafter be referred to as Jairo/Adrian).

A friend of Jairo/Adrian testified that she met him sometime around 2005 and saw him occasionally. RP 124, line 14, through RP 125, line 2. She knew him only as Adrian. RP 128, lines 11-14. The friend could not testify as to what Jairo/Adrian did for a living or how he obtained money. RP 126, lines 4-9. However, she knew that he could not work legally. RP 150, lines 3-8. Sometime around May of 2005, the friend rented an apartment for Jairo/Adrian's use under false pretenses claiming that it was for herself. RP 133, lines 3-14; Ex. 21; RP 291, line 21, through RP 292, line 3. The building manager eventually discovered the subterfuge and Jairo/Adrian was given an opportunity to rent under his own name, but he instead opted to be evicted. RP 133, line 15, through RP 134, line 16.

In January of 2006, a person named Benito Landa rented a storage unit in Milton-Freewater, Oregon. RP 154, line 24, through RP 156, line 3; Ex. 24; RP 152, lines 8-14. Once leased, all of the monthly cash rental payments for the storage unit were thereafter made by Gilberto/Adrian. RP

156, line 10, though RP 157, line 9; Ex. 13. Jairo/Adrian never personally paid for the storage unit rental, but he accompanied Gilberto/Adrian who handed the rent to the facility owner. RP 165, lines 1-13; Ex. 7, Ex. 13.

In March of 2006, Jairo/Adrian's friend rented a new location for him at 1035 St. John St. in Walla Walla, again under the false pretense that she would be living there. RP 130, line 2, through RP 131, line 2; Ex. 21; RP 291, lines 12-14. The friend personally made all of the rental payments using money orders that she had purchased, and she kept no records indicating the source of the purchase order money. RP 135, line 8, through RP 136, line 6. The friend testified that the rental money was supplied by Jairo/Adrian, but she also admitted that she never told this to the landlord during the time she was making rental payments. RP 150, lines 14-21; RP 292, lines 10-13.

During the spring and early summer of 2006, neighbors of both 1035 St. John St. and the Milton-Freewater storage unit began observing suspicious activity which connects the two locations. Workers at a business neighboring the storage unit began observing vehicles frequently coming and going from the unit without hauling materials for storage. RP 174, lines 4-25; RP 182, lines 8-24. The workers particularly noticed a customized white pickup coming and going 2-3 times a day during most days of the week making only quick stops. RP 183, line 10, through RP 184, line 20; RP 175,

line 13, through RP 176, line 24. The activity concerned the business supervisor enough that she reported it to the Sheriff's Office. RP 177, lines 9-14. The activity was also reported to the owner of the storage unit, who then began observing the suspicious activity and may have reported it herself. RP 157, line 10, through RP 159, line 4; RP 160, lines 16-22; RP 168, lines 5-15; RP 169, lines 13-22. The owner of the storage facility and two workers from the neighboring business testified that the white pickup was the same one that was later found and photographed at 1035 St. John St. in Walla Walla on July 14, 2006. RP 159, lines 12-22; RP 176, lines 3-6; RP 183, line 13 through RP 184, line 9; Ex. 16; Ex. 17; RP 232, line 21 through RP 233, line 19. One of the workers saw Gilberto/Adrian driving the white pickup a couple of times. RP 184, line 21, through RP 185, line 16; Ex. 13. The storage facility owner additionally saw Gilberto/Adrian driving the white pickup. RP 159, line 23, through RP 160, line 7; RP 166, line 24, through RP 167, line 11; Ex. 13. The storage facility owner is also certain that she once saw the white pickup driven by Gilberto/Adrian while Jairo/Adrian rode in it as a passenger. RP 160, lines 8-15; RP 166, line 24, through RP 167, line 18; Ex. 7; Ex. 13.

During that same time, neighbors of 1035 St. John St. began observing similar suspicious activity. A neighbor from across the street,

began observing cars regularly coming and going from 1035 St. John St. and staying for only short periods of time. RP 109, line 23, through RP 110, line 10. A lot of the people were seen coming and going from the house with little backpacks. RP 111, lines 15-22. There were many different people coming and going, and they all seemed to have their own keys. RP 111, line 23, through RP 112, line 4. There were also many different vehicles. RP 110, lines 15-22; RP 113, lines 20-23. A black Mercedes with aftermarket wheels was regularly seen. RP 110, line 21, through RP 111, line 12. One vehicle observed coming and going more often than others was a black pickup that Gilberto/Adrian was seen using quite a few times. RP 118, lines 1-4; RP 112, lines 5-25; Ex. 13. Another constantly seen vehicle was the white pickup that was later discovered at 1035 St. John St. on July 14, 2006. RP 118, lines 5-24; Ex.16, Ex. 17, Ex. 18; RP 232, line 21 through RP 233, line 19. The white pickup was driven to that location most of the time by Jairo/Adrian. RP 118, line 25, through RP 119, line 9; Ex. 7. The activity concerned the neighbor from across the street enough that he also notified the police multiple times. RP 116, line 18, through RP 117, line 15; RP 120, line 17, though RP 121, line 11; RP 121, line 24, through RP 122, line 13.

Another neighbor, who lived next door to 1035 St. John St., also began to notice suspicious activity during the spring and summer of 2006.

RP 91, lines 3-6. She observed many different people frequently coming and going from a side door at 1035 St. John St. carrying dark colored duffle bags containing something into the house, and leaving the house with the bags rolled up and empty. RP 91, line 6 through RP 92, line 20; RP 96, line 15, through RP 97, line 11.

A narcotics officer with extensive training and background in narcotics investigations testified that it is common for sophisticated drug operations to use multiple drop locations where money and drugs are separately kept to thwart law enforcement from assembling full evidence about the operations. RP 220, line 16, through RP 225, line 14; RP 226, line 24, through RP 227, line 18. He also testified that the activity reported at 1035 St. John St. was very consistent with it being used as a drug operation drop house. RP 227, line 19, through RP 228, line 1. He explained that frequent coming and going activities are an indicator of a drop location. RP 225, line 15, through RP 226, line 23. He further testified that drug operations often try to make a drop house look lived in so as to not draw attention to it. RP 225, lines 16-24.

The neighbor from across the street testified that he was never able to see inside 1035 St. John St., because the blinds were always closed. RP 122, line 21 through RP 123, line 2; RP 123, lines 12-14. He said that

Jairo/Adrian appeared to live there, though, because he seemed to be there most of the time. RP 123, lines 8-11; RP 117, lines 16-25; RP 120, lines 1-4. The next door neighbor testified that she recognized Jairo/Adrian as someone who she saw moving stuff into 1035 St. John St. RP 97, line 19, through RP 98, line 10. However, she testified that no one appeared to live at the house, because it didn't look like anybody stayed there at night, and there was only the coming and going activity. RP 98, lines 11-17. Jairo/Adrian's friend testified that she kept her own key to 1035 St. John St., and that Jairo/Adrian was there only once during her 4-5 visits to the house. RP 131, line 13, through RP 132, line 6.

During the midst of the suspicious activities occurring during the late spring and early summer of 2006, Jairo/Adrian was caught at the U.S./Mexico border and refused entry into the United States. RP 210, line 4, through RP 212, line 18; Ex. 46. A U.S. Immigration Officer testified that official records show that Jairo/Adrian was stopped on June 10, 2006 at the Calexico border crossing attempting to enter using documentation belonging to Joel Ramirez Montano while carrying only \$90 in U.S. Currency and \$50 in Mexican Pesos. RP 211, lines 4-8; RP 210, lines 18-24; Ex. 46. Once stopped, Jairo/Adrian gave a sworn statement that his true and correct name is Jairo Cain Franco Millan. RP 211, line 12, through RP 212, line 12; Ex.

46, Record of Sworn Statement (RSS) p. 1. He denied ever having lived in the U.S. Ex. 46, RSS p.3. He gave his address as Calle 21, de Marzo, Colonia Loma Linda, La Cruz, Sinaloa, Mexico. Ex. 46, RSS p. 2. He claimed that he was a field worker who was trying to go to Coachella, California to look for work in the grape fields. Ex. 46, RSS pp. 2-3. He was fingerprinted and deported by expedited removal. RP 212, lines 13-18; Ex. 46. Fingerprint evidence admitted during the forfeiture hearing conclusively established that Jairo Cain Franco Millan and the new Adrian Ibarra Raya are the same person. RP 212, lines 13-18; Ex. 46, fingerprint card; RP 239, lines 8-22; Ex. 52.

On July 14, 2006, narcotics officer Buttice seized money at 1035 St. John St. in Walla Walla. RP 229, lines 2-5. The white pickup previously seen at both the storage facility and 1035 St. John St. was found parked in the driveway and photographed. RP 232, line 21, through RP 233, line 10; Ex. 16, Ex. 17, Ex. 18. A notice of seizure forfeiture was served later that day on Jairo/Adrian, and he said that it was not his money and he had no idea what the serving officer was talking about. RP 85, lines 1-13.

Either that night or the following night, Jairo/Adrian's friend went to 1035 St. John St., accompanied by Jairo/Adrian's girlfriend, where they met with Gilberto/Adrian's girlfriend, and tried to remove items. RP 132, line 13,

through RP 133, line 2; RP 125, lines 3-7. Police arrived, and the friend told them that she lived there. RP 131, lines 3-12. She testified at the hearing, however, that this was a lie. RP 292, lines 4-9.

On July 19, 2006, narcotics officer Buttice received a tip that Adrian Ibarra Raya had a storage unit at the Milton-Freewater storage facility, so, he conducted a follow up investigation. RP 255, line 15, through RP 256, line 4. Officer Buttice interviewed the storage facility owner and employees at the neighboring business and thereafter called the Umatilla County Sheriff's Office for assistance. RP 240, lines 2-15; RP 254, line 23, through RP 255, line 14; RP 161, line 15, through RP 163, line 10; RP 178, line 25, through RP 180, line 10. A narcotics canine was brought in, and, after it alerted on the storage unit, an Oregon warrant was obtained to search the unit. RP 203, line 20, through RP 204, line 19.

The warrant was executed, and evidence of extensive drug trafficking was discovered inside the storage unit. RP 187, line 1, through RP 199, line 16. A stolen vehicle was found together with a fabricated false compartment of a type used by sophisticated drug smuggling operations. RP 189, lines 13-24; Ex. 28; RP 194, lines 10-23; Ex. 36; RP 241, line 23, through RP 243, line 5. A black bag was found which looked like one of those previously seen going in and out of 1035 St. John St. RP 196, line 16, through RP 197,

line 15; Ex. 40; Ex. 41; RP 250, lines 2-4; RP 92; lines 6-20; demonstrative Ex. 11. The black bag contained roughly \$107,000.00 worth of methamphetamine, marijuana, and cocaine. RP 197, line 23, through RP 199, line 13; Ex. 42; Ex. 43; Ex. 44, RP 248, line 14, through RP 249, line 6. The bag also contained hundreds of rubber bands of the type used to bundle drug money. RP 197, line 23, through 198, line 6; Ex. 42; RP 252, lines 5-16. A previously used drug money package was also found inside the storage unit with rubber bands still in it. RP 192, lines 1-10; Ex. 32; RP 249, lines 11-15; RP 250, line 24, through RP 251, line 3. The drug money package was a used vacuum seal bag that still retained impressions from money formerly stored therein and which had the number "15" written on it denoting that it previously held \$15,000.00. RP 249, line 11, through RP 250, line 23; Ex. 32. The drug money package was found inside an otherwise empty box from which 14 other similar bags were at large. RP 191, line 12, through RP 192, line 20; Ex. 31; RP 252, line 25, through RP 253, line 14.

The Milton-Freewater storage unit also contained other physical evidence besides the black bag that linked it to both a person and activities regularly witnessed at 1035 St. John St. in Walla Walla. An empty Gatorade bottle was discovered inside the storage unit which contained Jairo/Adrian's fingerprints. RP 190, line 3, through RP 191, line 8; Ex. 29; Ex. 30; RP 240,

line 20, through RP 241, line 18; Ex. 53. An empty water bottle was also found which contained Jairo/Adrian's DNA. RP 190, lines 3-15; Ex. 29; RP 201, lines 9-22. The stock wheels from a Mercedes were additionally located. RP 192, line 21, through RP 194, line 6; Ex. 33; Ex. 34; Ex. 35. Finally, the factory tail lights from the white pickup were found, and they were matched to that exact pickup by paint overspray lines and damages which corresponded to visible damage on the pickup. RP 195, lines 13-23; Ex. 38; RP 243, line 6, through RP 247, line 18; Ex. 54; Ex. 55; Ex. 56; Ex. 57; Ex. 58.

At the time of its discovery, the white pickup had aftermarket tail lights installed and only a temporary plate taped in its back window, but it was determined that the vehicle was registered to someone named David Allen Becker of Carmichael, California. RP 244, lines 6-16; RP 233, line 20, through RP 234, line 18; Ex. 47. On July 20, a claim was made against the truck by Isaias Campos Diaz who had previously been seen standing in front of the Mercedes at 1035 St. John St. RP 234, line 23, through RP 235, line 14; Ex. 15; RP 114, line 14 through RP 116, line 11. Campos Diaz immediately dropped his claim when officers pointed out that the obviously false paperwork he presented for the vehicle on July 20 showed that he had paid it off five days later, on July 25. RP 235, line 22, through RP 236, line

23; Ex. 48. Campos Diaz nonetheless proceeded to obtain a title in his name for the pickup. RP 236, line 24, through RP 237, line 9; Ex. 49. Jairo/Adrian later made his own request for a hearing regarding the white pickup. RP 72, line 17, through RP 73, line 3; Ex. 4.

Sometime thereafter, Jairo/Adrian's friend returned to 1035 St. John St. to clean it out. RP 136, lines 7-18. This time she was accompanied by Benito Landa, the renter of the Milton-Freewater storage unit. RP 136, line 19 through RP 137, line 4; Ex. 12; RP 99, lines 13-25. All of the property then remaining at 1035 St. John St. was moved out and kept by Landa. RP 137, line 11, through RP 138, line 2.

Jairo/Adrian filed a request for a hearing regarding the seizure/forfeiture of the money and other property on August 25, 2006 without asserting any claim of ownership. RP 72, line 17, through RP 74, line 3; Ex. 4. He later did file a sworn declaration in this proceeding saying that the money is his. RP 74, line 22, through RP 75, line 4; Ex. 5. However, he also later entered an Alford plea to a charge of false swearing for having made that declaration. RP 75, lines 5-8; Ex. 6. He was thereafter deported having re-assumed the name Jairo Cain Franco Millan. RP 213, lines 13-25; Ex. 20.

4. Argument

A. Subject matter jurisdiction exists

- (1) This Court has already ruled that an unlawful seizure does not bar forfeiture

Claimant's assignment of error 3 attempts to reargue under the guise of an alleged jurisdictional prerequisite that forfeiture is barred if a seizure was unlawful. This Court has already rejected the "bar" argument in this case, writing in response to claimant's first appeal:

Mr. Ibarra-Raya first contends that the City should be collaterally estopped from challenging the propriety of the search. He argues that this issue was resolved by our opinion in his appeal from his criminal convictions. The City responds that illegal seizure does not bar its action to forfeit. They are both correct. *United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars (\$639,558) in U.S. Currency*, 293 U.S.App. D.C. 384, 387 n. 5, 955 F.2d 712 (1992).

\$401,333.44, 150 Wn.App. at 364. This Court went on to explain:

Here, the City agrees that the forfeiture cannot be based on the unlawful search and seizure. The City urges instead that the court may consider the seized money "for the limited purpose of establishing its existence, and the court's *in rem* jurisdiction over it." *Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars*, 293 U.S. App. D.C. at 387 n. 5. We agree.

\$401,333.44, 150 Wn.App. at 366.

This Court's earlier ruling on this issue is the law of this case. The issue re-raised by claimant has already been decided against him and it is

binding herein under the "law of the case doctrine" which provides that "once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation.... This doctrine 'seeks to promote finality and efficiency in the judicial process.'" *State v. Roy*, 147 Wn.App. 309, 314, 195 P.3d 967 (2008) (citations omitted), *review denied* 165 Wn.2d 1051 (2009).

The law of the case doctrine is discretionary; however, claimant fails to meet either of the exceptions to its application: (1) a clearly erroneous earlier decision that would work manifest injustice; (2) an intervening change in the law. *Roberson v. Perez*, 156 Wn.2d 33, 42-43, 123 P.3d 844 (2005). Claimant cannot show that this Court's prior ruling on the issue is clearly erroneous, because the ruling follows the prevailing weight of authority. *E.g., U.S. v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars*, 955 F.2d 712, 715 (D.C. Cir. 1992), n. 5. Claimant also fails to show any intervening change in the law.

This case demonstrates the need for the law of the case doctrine. It was claimant who initially invoked jurisdiction alleging that the "Court has jurisdiction over this matter under RCW 69.50.505(5) and 2.08.010." CP 4, ¶4. Claimant did not appeal this Court's remand for trial, and the matter was returned to the trial court following claimant's first appeal on July 14, 2009.

CP 954. The matter was quickly reset for a trial to occur at the end of August. CP 1014. However, it was continued at claimant's request for full discovery. CP 983-98; CP 1018. Claimant then engaged in obstructive practices which the trial court described as "frivolous and possibly an abuse of discovery." CP 1423. After the 3 month discovery period requested by claimant, the matter proceeded to a two day trial at which numerous witnesses appeared and testified. RP 58-328. Claimant invoked jurisdiction, demanded full access to court processes following remand, and caused considerable expenditure of resources. Judicial process efficiency is not served by claimant's attempt to re-litigate a previously resolved legal question, especially when coupled with his actions in the proceedings below.

(2) The superior court possessed constitutional jurisdiction

Claimant's jurisdictional argument is inconsistent with his request for relief. Claimant argues that "[w]ithout subject matter jurisdiction, a court ... may do nothing other than enter an order of dismissal." Claimant's brief, p. 30. Claimant does not however request only an order of dismissal. He asks for entry of an order requiring the City to return the money to him. If the courts truly lack jurisdiction, they do not possess authority to enter any order regarding the money.

As claimant himself correctly alleged in his removal petition, the trial court had jurisdiction under RCW 2.08.010. CP 4, ¶4. RCW 2.08.010 provides that superior courts have original jurisdiction in all cases in equity and law "in which the demand or value of the property in controversy amounts to three hundred dollars" and also "all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court...." The statute codifies Const, art. IV, §6. RCW 4.12.010 additionally provides that all questions involving rights to possession of any specific article of personal property shall be commenced in the court in which the subject of the action is situated. Those jurisdictional requirements were all met in this case. RP 227, line 19 through RP 229, line 5; Ex. 1, Request for Admission 59; RP 64, lines 5-15.

Forfeiture is only one means by which a court may resolve conflicting claims to property. This Court made clear in its prior decision in this case that there are three ways that the court can refuse a claim to seized property:

"[A] court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; *or* (3) the property is subject to forfeiture pursuant to statute."

§401,333.44, 150 Wn.App. at 367 (emphasis added), *quoting State v. Alaway*, 64 Wn.App. 796, 798, 828 P.2d 591 (1992). The *Alaway* holding recognized

the above quoted criteria for determining when the state has a superior right of possession to even illegally seized property. *Alaway*, 64 Wn.App. at 798. The City did not rest its case solely upon forfeiture pursuant to statute. The City also prevailed on its claim that claimant is not the rightful owner of the property. RP 1568-69; RP 1587, ¶1.10; RP 1587, ¶ 2.4. In contrast, Jairo/Adrian's sole claim to the money is based on an argument that he should get the property by default if he just defeats the City's forfeiture claim.

Washington superior courts regularly and properly decide conflicting claims to property under their constitutional jurisdiction codified by RCW 2.08.010. The trial court's authority to determine that Jairo/Adrian is not the owner of the money, and its refusal to give him money that did not belong to him, emanates from that jurisdiction.

(3) The seizure of the money was not unlawful

The ruling in the criminal case did not obviate the lawfulness of the seizure. That case held that patrol officers unlawfully entered 1035 St. John St. and collected evidence later used to obtain a search warrant. *State v. Ibarra-Raya*, 145 Wn.App. at 522-23. However, seizure by warrant is one means by which a lawful seizure may be made under the forfeiture statute. RCW 69.50.505(2)(a). RCW 69.50.505(2) contains four different alternatives under which personal property may be seized. RCW

69.50.505(2)(a)-(d). These options are separated by the disjunctive term "or" which means that the search warrant alternative in RCW 69.50.505(2)(a) is not the only option under which property may be seized. *See State v. Leyda*, 157 Wn.2d 335, 346, 138 P.3d 610 (2006) (explaining that the use of the term "or" in a statute creates independent alternatives). In addition to the search warrant alternative in RCW 69.50.505(2)(a), personal property may be seized under RCW 69.50.505(2)(d) if a "law enforcement officer has probable cause to believe that property was used or intended to be used in violation of this chapter." RCW 69.50.505(2)(d) does not require a warrant. *See Lowery v. Nelson*, 43 Wn.App. 747, 749-50, 719 P.2d 594, review denied 106 Wn. 2d 1013 (1986), cert. denied 479 U.S. 1024 (1987).

The City acknowledges that this Court wrote in its prior decision herein that *State v. Ibarra-Raya* connotes that the search and subsequent seizure of drugs, money, and other evidence at 1035 St. John St. was unlawful. \$401,333.44, 150 Wn.App. at 364. If this court does decide to reverse its earlier ruling that an unlawful seizure does not bar forfeiture, the City requests that it also revisit that conclusion, because the City was not given an opportunity to litigate it prior to remand. As noted in the counter-statement, this case was stayed almost at its outset on claimant's motion over the City's objection. CP 103-04. By the time the City was allowed to

proceed, the superior court had ruled in the criminal case that the initial entry into 1035 St. John St. and search were valid, and the City had no reason to further litigate the validity of the seizure. CP 409-14; CP 204-08. That ruling was not reversed until this case was already on appeal. CP 266-73; *State v. Ibarra-Raya*, 145 Wn.App. at 516. Remand herein afforded the first reason and opportunity for the City to develop a record regarding the validity of the money seizure under RCW 69.50.505(2)(d). With that said, however, the City does not invite departure from the law of the case doctrine, and asks this Court to address the "lawfulness" issue only if it entertains claimant's attempt to re-litigate the "bar" issue.

The City acknowledges that narcotics officer Buttice believed that he was seizing the money at issue in this case pursuant to a valid warrant issued by the District Court. However, his subjective justification for the seizure on July 14, 2006 is not determinative. It has long been the rule in Washington that "an arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists.... 'The law cannot expect a patrolman, unschooled in the technicalities of criminal and constitutional law ... to always be able to immediately state with particularity the exact grounds on which he is exercising his authority.'" *State v. Huff*, 64

Wn.App. 641, 646, 826 P.2d 698 (citations omitted), *review denied* 119 Wn.2d 1007 (1992).

This Court held in its prior decision that jurisdiction is one of the two purposes for which the money could still be considered. \$401,333.44, 150 Wn.App. at 366. Even without the evidence excluded by *State v. Ibarra-Raya*, narcotics officer Buttice possessed much other evidence at the time of seizure on July 14, 2006 supporting probable cause to believe that the money found at 1035 St. John St. was drug money.

The neighbor across from 1035 St. John St. reported on June 6, 2006 that there was a lot of traffic in and out of 1035 St. John St. and that he had heard through a third party that there was a lot of marijuana and cocaine in the Basement. CP 1456-57, ¶1.5. Officer Michael Thompson made follow up contact with the neighbor who further reported that he suspected that 1035 St. John St. was being used as a possible drug drop-off house; that the renter of the house lived in Milton-Freewater, but he visited the house once a week; that people other than the person he believed to rent the house appeared to have their own keys to the house and that they would come and leave the house with packages; and that he had asked around about what he had seen and that he had learned that it was drug trafficking activity. CP 1457, ¶1.7. The information was relayed to the City Drug Unit. CP 1457, ¶1.8; 1459-60.

At right around that same time, the neighbor across from 1035 St. John St. also flagged down Officer Saul Reyna, and reported his suspicion that drug activity was going on, because he saw a lot of nice vehicles with Oregon and California license plates coming and going from the house during short time intervals. He further told officer Reyna that there did not seem to be anyone there during the day and that the coming and going activity would pick up during the nighttime. CP 1451-52, ¶¶ 1.7, and 1.8. This information was personally relayed to narcotics officer Buttice. CP 1452, ¶1.9; CP 1438, ¶1.5.

On July 13, the neighbor across from 1035 St. John St. called Police Chief Chuck Fulton to report additional activity. He told Chief Fulton that nobody appeared to actually live at the house, but that there was a lot of traffic coming and going from the location. CP 1454-55, ¶1.5. Chief Fulton relayed this information to the Supervisor of the Drug Unit and to Detective Buttice personally. CP 1455, ¶1.6-1.7.

What narcotics officer Buttice learned from his fellow officers may be used to support his probable cause to believe that he was seizing drug money. *See State v. Maesse*, 29 Wn.App. 642, 645-47, 629 P.2d 1349, *review denied* 96 Wn.2d 1009 (1981). Narcotics officer Buttice was entitled to rely in particular on the reports relayed to him that were made by the

neighbor across from 1035 St. John St., because the neighbor detailed the basis for his first hand knowledge and was well known to be reliable by officer Reyna, who had lived in that neighborhood and previously worked with the neighbor. CP 1450-51, ¶¶ 1.3, 1.4, and 1.5; *State v. Conner*, 58 Wn.App. 90, 98-99, 791 P.2d 261, *review denied*, 115 Wn.2d 1020 (1990); *see also State v. Atchley*, 142 Wn.App. 147, 161-64, 173 P.3d 323 (2007).

In addition to those reports, officer Buttice conducted some surveillance on 1035 St. John St. himself and confirmed that nobody appeared to live there. CP 1438-39, ¶1.6. Then on July 14, the police received a call from a second neighbor that 1035 St. John St. appeared to be vacant during the day but that there had been a lot of activity at night during the preceding 3 or 4 days. CP 1468. Using only the address information, the dispatcher checked records, made phone calls, and determined that the tenant at 1035 St. John St. was supposed to be someone named Jashay Ornelas. CP 1462, ¶1.6. When officer Buttice arrived at the scene, he observed the nice white pickup which then had only a temporary permit, but which was also confirmed to have previously borne a California license plate. CP 1439, ¶ 1.9; CP 1461-62, ¶ 1.5. He was also informed that the absent Ornelas was listed as the renter of the house, that those present turned off lights when officers knocked, and that two had tried to leave out the back. CP 1439-40,

¶ 1.10.

RCW 69.50.505(2)(d) requires only that law enforcement officer have probable cause to believe that property was used or intended to be used in violation of the controlled substances act at the time of seizure. When narcotics officer Buttice encountered the money, he already possessed all of the additional information recounted above besides the evidence found in the house. Probable cause is a "reasonableness test, considering time, place, circumstances, and the officer's special expertise in identifying criminal behavior.... Probability, not a prima facie showing, of criminal activity is the standard for probable cause...." *State v. Wagner-Bennett*, 148 Wn.App. 538, 541-42, 200 P.3d 739 (2009). Officer Buttice has extensive training in narcotics investigations. CP 1436-38, ¶1.2. By the time he seized the money, he had reports which he personally confirmed that no one appeared to live at 1035 St. John St. CP 1438-39, ¶1.6. Although he hadn't personally witnessed it, officer Buttice also had reliable first hand reports that many different people were seen coming and going from the house with packages. CP 1457, ¶1.7. The presence of the pickup truck in the driveway confirmed the neighbor's report about vehicles he had seen, and officer Buttice knew from his special expertise that the trip permit used to replace the vehicle's former California plates is a tool relied upon by drug dealers to conceal their

identity. CP 1439, ¶1.9. He knew that the house had been rented under an alias, and that this is another technique used by drug traffickers to avoid being discovered. CP 1439-40, ¶1.10. Lastly, he knew that those inside the house had demonstrated consciousness of guilt by trying to flee out the back rather than answering the door when patrol officers knocked. CP 1439-40, ¶1.10. These are all factors which support an objective determination of probable cause. *See Huff*, 64 Wn.App. 646-48. "Facts that, standing alone, would not support probable cause can do so when viewed together with other facts." *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). The seizure of the money in this case was lawful under RCW 69.50.505(2)(d) even if the warrant basis for the seizure under RCW 69.50.505(2)(a) was unlawful.

B. The city asserted from the very beginning that 1035 St. John Street was used as a drop house for drug dealing and judicial estoppel has no application

There is no merit to claimant's assignment of error 4 which argues that the State's community caretaking argument in the criminal case judicially estops the City from asserting that 1035 St. John St. was used as a drop house. The core factors of judicial estoppel are whether a later position is clearly inconsistent with an earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position, and whether the party asserting the

inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009). None of these factors are present here.

The first core factor has not been shown, because no inconsistent position was taken. From its very first filing onward, the City has maintained that 1035 St. John St. was used as a drop house. Narcotics officer Buttice prepared and filed a search warrant application on July 14, 2006 explaining the patrol officers' actions and reasons for entering that house. CP 1447-48.

He expressly told the court:

We have had information in the past that this house was a "DROP" house for illegal narcotics and that no one was living there. The neighbors stated that people would show up once in a while, but no one was living there. The neighbors believed that the house was vacant, other than people showing up a couple of times a week.

CP 1448. Claimant attempts to manufacture an inconsistent position, but nothing in the State's community caretaking argument disavowed the warrant application which was included in the motion record where the argument was made. CP 784-85. The State's argued only that the patrol officers' initial entry into the house could be justified based on their knowledge at the time. CP 839-50. However, the information regarding the drug unit's ongoing investigation was not kept secret from the court in the criminal case, and the

unit's supervisor even testified at the criminal trial that his unit's concerns about the house may have been relayed to the patrol division in June of 2006. CP 589-92. Claimant attempted to argue that investigation to his benefit in that case. CP 737. The State's community caretaking argument cannot be labeled clearly inconsistent, because the court was told about the City's belief that 1035 St. John St. was being used as a drop house.

In *CHD, Inc. v. Taggart*, 153 Wn.App. 94, 103-04, 220 P.3d 229 (2009), this Court held that the second "judicial acceptance" factor requires "success in a prior proceeding." The State's community caretaking argument was not successful. *Ibarra-Raya*, 145 Wn.App. at 522-23. Therefore, the requirements for this factor are not met.

Lastly, claimant cannot assert that he will suffer some unfair detriment or that the City will gain some unfair advantage. The City has maintained since the very beginning of this proceeding that 1035 St. John St. was used as a drop house for the money generated by the operation run out of the storage unit. CP 69-71. Its declaration stating that position was served on claimant's counsel with the City's motion materials on October 23, 2006. CP 75. It was claimant who thereafter sought stay of these proceedings so that he could litigate first with the State in the criminal case. CP 84-91. Claimant was granted his request. CP 103-04. Claimant then attempted to

use the materials filed by the City herein to his advantage in the criminal case. CP 704-707. The City does not raise this to complain about claimant's litigation strategy. It does so only to submit that there was no unfairness to claimant, and that he should not be allowed to deprive the City of a position that it clearly stated prior to his manipulation of the order of proceedings.

C. Substantial evidence supports the trial court's findings

The City's burden in the proceedings below was to prove its case by a preponderance of evidence. *\$401,333.44*, 150 Wn.App. at 367. That burden could be met by direct or circumstantial evidence. *Sam v. Okanogan County Sheriff*, 136 Wn.App. 220, 229-30, 148 P.3d 1086 (2006). The trial court heard and weighed the evidence, and it found that the City had met its burden on each count: (1) drug money was seized, and (2) it didn't belong to claimant. CP 1565-69; CP 1586-87, ¶¶1.9 and 1.10. Claimant's assignment of error 2 mis-characterizes the evidence considered by the trial court and urges that different inferences should be drawn therefrom. For example, claimant argues on appeal that the tail lights discovered in the storage unit could have come from one of thousands of pickups other than the customized white one discovered at 1035 St. John St. Appellant's brief, p. 23. However, the evidence presented at trial was that identical white paint overspray lines and other visible corresponding damage matched the tail lights to only that

pickup. RP 243, line 6, through RP 247, line 18; Ex. 54; Ex. 55; Ex. 56; Ex. 57; Ex. 58.

Review is limited to determining whether there was evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Holland v. Boeing Company*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). Substantial evidence review does not provide entrée for the party who lost at trial to retry the evidence on appeal and have it viewed in that party's favor. This court explained in *Affordable Cabs v. Employment Sec.*, 124 Wn.App. 361, 367, 101 P.3d 440 (2004):

The substantial evidence standard is deferential; therefore, we view "the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." We will not substitute our judgment for that of the agency regarding witness credibility or the weight of evidence.

See also Barker v. Advanced Silicon, 131 Wn.App. 616, 626-27, 128 P.3d 633 (2006).

Claimant throws in an exclusionary rule argument regarding use of evidence illegally obtained from his alleged home. Appellant's brief pp. 20-21. The argument is to no avail here, because no such evidentiary error was committed. The trial court recognized that "earlier appellate decisions herein have invalidated that entry and search. Therefore, none of the evidence discovered as a result thereof, nor any fruits of the poisonous tree may be

used in this forfeiture action. The City has not attempted to do so." The City was careful not to use evidence from the house and to explain the sources of its other evidence. For example, officer Buttice confirmed that he discovered the storage unit due to a tip and not any item found in the house. RP 255, line 15, through RP 256, line 4. The storage unit owner confirmed that there would be no way for someone to trace a key from one of her units to the facility, because they contain no identifying information. RP 170, lines 4-19. The City demonstrated that the storage unit was located and searched only after a follow up investigation and canine sniff which alone was sufficient for issuance of the warrant to search the unit. CP 1594-97, ¶¶1.8-1.12; *State v. Jackson*, 82 Wn.App. 594, 606-07, 918 P.2d 945 (1996), *review denied* 131 Wn.2d 1006 (1997); *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). The City offered only the money from inside the house, and did so just once and for the limited purposes of establishing its existence and jurisdiction. RP 64, lines 5-15; Ex. 1, Request for Admission 59; CP 1482-83. This Court held that the money could be used for jurisdiction and to establish its existence. \$401,333.44, 150 Wn.App. at 366. The City made no effort to overreach this Court's prior ruling to use evidence beyond the purposes allowed or to bring in anything that this Court said it couldn't use.

(1) Substantial evidence supports the trial court's finding that the cash was drug money

Claimant assigned error to the trial court's handling of evidence regarding the dollar amount of money seized at 1035 St. John St. Appellant's assignment of error 1. The City addresses assignment of error 1 later in this brief. It mentions the alleged error here, because it has no bearing on the trial court's drug money finding. CP 1586-87. Claimant attempts to portray the dollar amount as the major issue in the case, but it was not. The amount is not mentioned in any of the 27 facts, circumstances and evidence detailed by the trial court when finding that the cash was drug money. RP 1567-68, ¶¶ 1-27. The trial court thereafter states the dollar amount of money at issue in the forfeiture portion of its ruling only to identify what cash the court was talking about. CP 1568.

The extensive evidence actually considered by the trial court shows that the cash seized at 1035 St. John St. was drug money regardless of its exact amount. A well organized and dangerous drug dealing venture operated out of the Milton-Freewater storage unit. The following are just some of the evidentiary high points: \$107,000.00 worth of illegal drugs was found. RP 197, line 23, through RP 199, line 13; Ex. 42; Ex. 43; Ex. 44; RP 248, line 14, through RP 249, line 6. A drug smuggling vehicle was located.

RP 189, lines 13-24; RP 194, lines 10-23; RP 241, line 23, through RP 243, line 5; Ex. 28; Ex. 36. A rifle was recovered. RP 195, lines 2-9; Ex. 37. This and other physical evidence discussed further below confirms witness testimony that the frequent quick stop-and-go activity at the unit was devoid of any legitimate storage reason. RP 157, line 24, through RP 159, line 4; RP 174, lines 4-25; RP 182, lines 8-24. Claimant cannot seriously contend that the storage unit was used for anything other than a sophisticated high level illicit drug operation. RP 249, lines 7-10.

Claimant instead argues that there is not enough to link the storage unit to 1035 St. John St. However, multiple evidentiary links were made with both direct and circumstantial physical evidence and witness testimony. The white pickup was regularly seen at both locations by eyewitnesses. RP 118, lines 5-24; RP 159, lines 12-22; RP 175, line 13, through RP 176, line 24; RP 183, line 13 through RP 184, line 20; Ex.16, Ex. 17, Ex. 18. The proof at trial conclusively established that the tail lights found in the storage unit belonged to the white pickup found at 1035 St. John St. RP 243, line 6, through RP 247, line 18; Ex. 54; Ex. 55; Ex. 56; Ex. 57; Ex. 58. Stock Mercedes wheels were found in the storage unit, and a Mercedes with aftermarket wheels was regularly seen at 1035 St. John St. RP 192, line 21, through RP 194, line 6; Ex. 33; Ex. 34; Ex. 35; RP 110, line 21, through RP

111, line 12. Gilberto/Adrian paid the rent on the storage unit, was seen there by witnesses, and was also seen quite a few times by a witness at 1035 St. John St. RP 156, line 10, though RP 157, line 9; RP 159, line 23, through RP 160, line 7; RP 166, line 24, through RP 167, line 11; RP 184, line 21, through RP 185, line 16; RP 112, lines 5-25; Ex. 13. Jairo/Adrian was regularly seen at 1035 St. John St., accompanied Gilberto/Adrian to pay rent on the storage unit, and was seen riding as Gilberto/Adrian's passenger in the white pickup at the storage unit. RP 117, lines 16-25; RP 118, line 25, through RP 119, line 9; RP 120, lines 1-4; RP 123, lines 8-11; RP 160, lines 8-15; RP 165, lines 1-13; RP 166, line 24, through RP 167, line 18; Ex. 7; Ex. 13. Jairo/Adrian's fingerprints and DNA were found inside the storage unit. RP 190, line 3, through RP 191, line 8; RP 240, line 20, through RP 241, line 18; Ex. 29; Ex. 30; Ex. 53; RP 201, lines 9-22. Soon after the seizure occurred, the renter of 1035 St. John St. teamed up with the girlfriend of the storage unit rent payer at night and tried to remove any remaining evidence from the house. RP 132, line 13, through RP 133, line 2; RP 127, lines 7-13. Lastly, Benito Landa submitted the application to rent the storage unit, and Benito Landa cleaned out 1035 St. John St. RP 154, line 24, through RP 156, line 3; RP 136, line 19 through RP 137, line 4; RP 99, lines 13-25; Ex. 12. All of the inferences from these links must be viewed in a

light most favorable to the City, and it clearly shows that the storage unit and 1035 St. John St. were being run by the same illegal drug operation using the same people and vehicles.

The circumstantial evidence also defeats claimant's assertion that the money can't be attributed to the drug operation without relying on the exact dollar amount seized. Narcotics officer Buttice testified that empty drug money packaging was found at the storage unit which still contained indentations from the \$15,000 that it formerly held and demonstrated at trial how money fit in the package. RP 249, line 11, through RP 250, line 23; Ex. 32. Testimony was presented about discovery of a used box in the storage unit which formerly contained 14 missing identical type bags. RP 191, line 12, through RP 192, line 20; RP 252, line 25, through RP 253, line 14; Ex. 31. Proof was given that a black bag was found in the storage unit which contained not only \$107,000.00 worth of drugs, but also hundreds of rubber bands used to bundle drug money. RP 197, line 23, through 198, line 6; RP 252, lines 5-16; Ex. 42. Identical rubber bands were found inside the previously used \$15,000 drug money package. RP 192, lines 1-10; RP 249, lines 11-15; RP 250, line 24, through RP 251, line 3; Ex. 32. Narcotics officer Buttice provided demonstrative proof exhibiting how the rubber bands and packaging materials would be used in combination to store drug money.

RP 251, lines 8-23; Ex. 59. Narcotics officer Buttice also gave testimony that it is common for sophisticated drug operations to use separate drop locations for drugs and money. RP 226, line 24, through RP 227, line 18. Claimant attempts to discount officer Buttice's opinions as speculation, however, the City gave early notice that he would be called as an expert, CP 980-81, introduced extensive evidence about his background and training, RP 220, line 16, through RP 225, line 14, and the trial court was entitled to consider both his fact and opinion testimony. *Sam*, 136 Wn.App. at 227.

Officer Buttice's testimony regarding the large amount of money generated by drug trafficking out of the storage unit is coupled on the other end with eyewitness testimony by the next door neighbor to 1035 St. John St. that she saw bags similar to the one found in the storage unit frequently going into 1035 St. John St. with their contents being left at there. RP 91, line 6 through RP 92, line 20; RP 96, line 15, through RP 97, line 11. Claimant attempts to diminish the weight of that direct testimony, because the neighbor could only testify as to the similarity of the bags, however, the storage unit bag is also circumstantially linked to 1035 St. John St. through all of the other evidence which generally connected the two locations. The weight given to evidence is the domain of the trial court. *Affordable Cabs*, 124 Wn.App. at 367. Even without what claimant calls "tainted evidence of

amount," substantial untainted direct and circumstantial evidence proves that a lot of money was being generated by the storage unit operation and a lot of deposits were being made at 1035 St. John St.

In addition, even if the circumstantial evidence proving the existence of large sums of drug money is disregarded, substantial evidence established that any money at 1035 St. John St. was drug money. Witness, fingerprint, and DNA evidence directly linked Jairo/Adrian to the illegal drug operation run out of the storage unit. RP 160, lines 8-15; RP 165, lines 1-13; RP 166, line 24, through RP 167, line 18; RP 190, line 3, through RP 191, line 8; RP 240, line 20, through RP 241, line 18; RP 190, lines 3-15; Ex. 7; Ex. 29; Ex. 30; Ex. 53; RP 201, lines 9-22. According to his friend, Jairo/Adrian always had cash to pay rent and to buy things. RP 150, lines 14-21. However, Jairo/Adrian had no means of support known to his friend, and his friend knew that he could not work legally. RP 126, lines 4-9; RP 150, lines 6-8. At a border crossing on June 10, 2006, Adrian/Jairo swore that he was an unemployed field worker on his way to Coachella, California to look for a job in the grape fields. Ex. 46, RSS pp. 2-3. Even if the court is forced to pretend, as claimant suggests, that the only money in the house on July 14, 2006 was the meager amount that Jairo/Adrian was carrying a month earlier, the evidence presented in this case is that he obtained it from his only known

source of money: the storage unit drug operation.

- (2) Substantial evidence supports the trial court's finding that the money didn't belong to claimant

Claimant argues that the trial court erred by ignoring evidence of his ownership of the money. The crux of Jairo/Adrian's claim to the money is that it was illegally seized from his alleged home, therefore it must be his, and consequently must be returned to him. He presented no other evidence or argument. In *State v. Everett District Court*, 90 Wn.2d 794, 797-98, 585 P.2d 1177 (1978), the court wrote:

We think the courts below did not take sufficient account of the burden placed upon a person moving the court for the return of property which has been taken from him in an unlawful search and seizure. He must prove not only that the search and seizure was illegal, but also that he is lawfully entitled to possession of the property seized. This means that he must offer proof sufficient to satisfy the court of his right to possession.

This Court clarified in *State v. Card*, 48 Wn.App. 781, 790, 741 P.2d 65 (1987) that seizure of property from someone constitutes prima facie evidence of entitlement, but that a claimant must come forward with additional evidence of ownership if the government presents serious reasons to doubt the claimant's right to seized property. *See also State v. Marks*, 114 Wn.2d 724, 732-36, 790 P.2d 138 (1990).

For the reasons previously stated herein, the City initially showed that

the money found at 1035 St. John St. was the product of the criminal activity connected to the storage unit operation. It also presented vast evidence of serious reasons to doubt Jairo/Adrian's right to it. Jairo/Adrian denied that the money was his. RP 85, lines 1-13. Before it began working to his advantage to claim that he lived in Walla Walla at 1035 St. John St., he swore under oath one month prior to the seizure that he had never even lived in the United States and that his home was in Mexico. Ex. 46, RSS pp. 2-3.

1035 St. John St. was rented under someone else's name, and that other person made all of the rent payments. Ex. 21; RP 135, lines 8-25. The friend claims that Jairo/Adrian supplied the money, but admits that she never told this to the landlord at that time. RP 150, lines 14-21; RP 292, lines 10-13. She further acknowledges that she has no records to back up that claim. RP 136, lines 1-3. The friend also admits that she has repeatedly lied for Jairo/Adrian. RP 291, line 12, through RP 292, line 9.

The friend admits that she kept access to 1035 St. John St. Jairo/Adrian's friend testified that she kept her own key to 1035 St. John St. RP 131, lines 16-17. She admits that she went the house a few times when Jairo/Adrian was not there at all. RP 291, lines 9-11. She admits that Jairo/Adrian was, in fact, only there once during her 4-5 visits to the house. RP 131, line 18, through RP 132, line 6. The friend admits going back to

1035 St. John St. after the seizure occurred, and telling the police that she was renting the house. RP 131, lines 3-12.

Claimant attempts to take out of context and place great significance on the testimony of the neighbor from across the street who said that Jairo/Adrian lived there. RP 120, lines 1-4. However, that witness clarified that he concluded that Jairo/Adrian lived there because he seemed to be there most of the time, but that he never did see anybody moving around inside the house, because the blinds were always closed. RP 122, line 19, through RP 123, line 14. That same neighbor testified that many different people came and went from the house through the front door carrying backpacks, and they all appeared to have their own keys. RP 111, line 15, through RP 112, line 4.

The next door neighbor recognized Jairo/Adrian as someone who she saw moving stuff into 1035 St. John St. RP 97, line 19, through RP 98, line 10. However, she testified that no one appeared to live at the house, because it didn't look like anybody stayed there at night. RP 98, lines 11-17. She also observed many different people coming and going from the house through the side door to make deposits. RP 91, line 6 through RP 92, line 20; RP 96, line 15, through RP 97, line 11.

Evidence presented at trial conclusively established that Jairo/Adrian

was in Mexico for some period during the middle of the time he was allegedly living at 1035 St. John St. RP 210, line 4, through RP 212, line 18; Ex. 46. One of the people who had been seen at the house during his absence tried to make a false claim against the white pickup that was later found there. RP 114, line 14 through RP 116, line 11; Ex. 15; RP 234, line 23, through RP 236, line 23; Ex. 48. When the time came, the storage unit renter, Benito Landa, not only helped clean out 1035 St. John St., but, he also kept its remaining contents. RP 99, lines 13-25; RP 136, line 19 through RP 138, line 2; Ex. 12.

At this stage of the proceedings, the reasonable inferences to be drawn from any and all of this evidence must be construed in favor of the City. *Barker*, 131 Wn.App. at 626-27. The City respectfully submits that any fair minded person would find that there are serious reasons to doubt not only whether the money or other contents in 1035 St. John St. belonged to claimant, but also whether that location was ever his home.

(a) The trial court did not err considering the *Alford* plea.

While an *Alford* plea is not an admission of guilt, it is admissible as an admission against interest. *State v. Price*, 126 Wn.App. 617, 634-35, 109 P.3d 27, *review denied* 155 Wn.2d. 1018 (2005). This Court long ago decided the issue, and claimants alleged error warrants no further discussion.

Mendoza v. Rivera-Chavez, 88 Wn.App. 261, 272, 945 P.2d 232 (1997).

Jairo/Adrian entered an *Alford* plea that the only statement he ever made claiming that the money was his constituted false swearing. RP 75, lines 5-8; Ex. 6. That admission against interest is relevant as another serious reason to doubt his ownership claim. As detailed above, though, it is just one of an overwhelming many.

(b) Any error regarding the handling of the number \$401,333.44 was harmless

Claimant's assignment of error 1 attempts to elevate a comment made by the trial court about the claim's lack of credibility into the central issue in the case. The number \$401,333.44 was never central to the City's case, and was, in fact redacted from all other City exhibits and not mentioned by the City or its witnesses during the course of the trial. RP 58-328; Ex. 2; Ex. 3; Ex. 4. This Court held that the money could be used for jurisdiction and to establish its existence. *\$401,333.44*, 150 Wn.App. at 366. The trial court understood that holding and itself ruled that it was admitting the money for just those limited purposes. CP 1492 (ruling on second limine motion). The trial court's letter ruling confirmed that: "This Court has considered the existence of the money for the sole purpose of establishing in rem jurisdiction." CP 1566.

Claimant argues based on Ninth Circuit cases that a trial court erred by not self-imposing "cluelessness" about the dollar amount seized. Claimant's brief, pp. 17-18. The Supreme Court wrote in *Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984):

The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. See *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *United States ex rel. Bilokumsky v. Tod*, *supra*, [263 U.S.] at 158. A similar rule applies in forfeiture proceedings directed against contraband or forfeitable property. See, e.g., *United States v. Eighty-Eight Thousand, Five Hundred Dollars*, 671 F.2d 293 (CA8 1982); *United States v. One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (CA9 1974); *United States v. One 1965 Buick*, 397 F.2d 782 (CA6 1968).

The Ninth Circuit cases present one learned view about the meaning of that passage, but they do not express the only view. The court in *In re Forfeiture of \$180,975*, 478 Mich. 444, 460-64, 734 N.W.2d 489, 498-500 (2007) adopted what it called a more commonsense approach that evidentiary matters such as the physical characteristics of unlawfully seized money cannot be considered, but circumstances surrounding the existence of the money including its amount may be considered. See also *U.S. v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 806 (8th Cir. 1992);

U.S. v. \$37, 780 in U.S. Currency, 920 F.2d 159, 164 (2nd Cir. 1990).

It is an interesting the issue, but it has no significance here. The City's case was not about the number, and the trial court's listing of the 27 facts, circumstances and evidence make clear that the court did self impose cluelessness and was not considering specific dollar amount when finding that the cash was drug money. CP 1567-68. The trial court's only so-called evidentiary mention of the cash is when the court comments on how hard it is to believe claimant's naked claim. CP 1569.

There was abundant other evidence of claimant's pervasive deceptions ranging from his use of multiple names to making multiple false sworn statements. Even if the trial court should have continued to ignore the amount of money at issue when assessing the claim's lack of credibility, the evidence is of such minor significance in reference to the overall, overwhelming evidence as a whole, that any error was harmless. *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007).

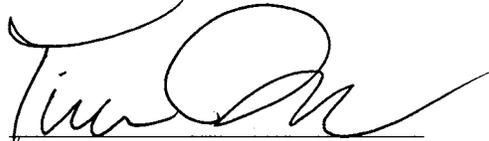
Finally, the exclusionary rule has never licensed lying to a court. Even illegally seized evidence may be used for impeachment. *State v. Greve*, 67 Wn.App. 166, 170-175, 834 P.2d 656 (1992), *review denied*, 121 Wn.2d 1005 (1993). Claimant filed and rested on a sworn statement declaring his alleged ownership of the money. CP 128-29; Ex. 5. Even if a court is

required to self-impose cluelessness, it should not be required to suffer impotence against sworn false claims.

5. Conclusion

The City of Walla Walla asks this court to affirm the trial court's findings and conclusions and judgment below. CP 1585-1591.

DATED September 8, 2010



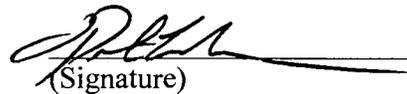
TIM DONALDSON, WSBA #17128
Walla Walla City Attorney

6. Certificate of Service

I certify that I delivered a copy of the corrected Brief of Respondent City of Walla Walla to the Carman Law Office, Inc., 6 E. Alder St., Ste. 418, Walla Walla, WA 99362, on September 8, 2010.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

SEPT 8, 2010 WALLA WALLA, WA
(Date and Place)


(Signature)