No. 93907-1

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 332624

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

CITY OF SUNNYSIDE

Appellant,

v.

ANDREAS GONZALEZ
IN RE: $5,940 U.S. CURRENCY AND 2001 SILVER 325i BMW

Respondent.

BRIEF OF RESPONDENT ANDREAS GONZALEZ

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I. INTRODUCTION

This case involves the seizure and forfeiture of Andreas Gonzalez's cash and automobile following a traffic stop for speeding.

Mr. Gonzalez was notified of the intent of the City of Sunnyside to forfeit the cash and car that had been impounded following his arrest. While acting *pro se*, Mr. Gonzalez requested a "Court Hearing" on the forfeiture matter.

The City of Sunnyside held the forfeiture hearing before Judge Steven L. Michels, Municipal Court Judge for the City of Sunnyside. Judge Michels indicated his intent to allow forfeiture and asked the Prosecuting Attorney to prepare an Order reflecting that decision.

Upon learning of the probable disposition of the matter, Gonzalez filed a Notice of Appeal to Superior Court pursuant to the rules of appeal from decisions of courts of limited jurisdiction, RALJ. The City of Sunnyside argued the appeal was not perfected because Gonzalez did not properly follow the rules set forth by the RALJ's thus the Superior Court lacked jurisdiction to hear the case.

The appeal was heard by the Honorable Blaine G. Gibson, Judge, Yakima County Superior Court. Judge Gibson found the Superior Court had jurisdiction, and reversed the decision of Judge Michels and remanded the matter to the Sunnyside Municipal Court pursuant to RALJ 9.1(e).

The City of Sunnyside filed a Motion for Discretionary Review and ten days later filed a Motion for Reconsideration. In the Motion for Reconsideration, the City argued for the first time, the forfeiture hearing was an agency hearing subject to the State Administrative Procedures Act. Because Gonzalez allegedly failed to follow the requirements of the APA, the Superior Court lacked jurisdiction to hear the appeal of Judge Michels Order of Forfeiture. Judge Gibson denied the Motion for Reconsideration ruling the forfeiture hearing was not before the seizing agency and the APA did not apply. In addition Judge Gibson found the argument had not been previously raised.

The City of Sunnyside appealed to this Court. The issues are: 1) Did Judge Gibson properly rule the forfeiture hearing was not subject to the APA? 2) Did Judge Gibson properly determine the Superior Court had jurisdiction to hear the appeal from Judge Michels' Order? and 3) Does the record contain substantial evidence to support the forfeiture?

II. ASSIGNMENTS OF ERROR

This case requires analysis of two separate types of decisions. First is the jurisdictional issue decided only by Judge Gibson. Next is the decision to allow forfeiture of the property made by Judge Michels and reversed by Judge Gibson.

With regard to the jurisdictional decisions made by Judge Gibson, the City has failed to properly assign error to Judge Gibson's Findings of Fact and Conclusions of Law. RAP 10.3(g) requires a party to set forth assignments of error identified by number. A general reference to the incorrectness of a decision is not sufficient identification under the rules. Brown v. State Dept. of Health, Dental Disciplinary Bd., 94 Wn.App. 7, 13, 972 P.2d 101 (1998).

There must be specific assignments of error before the appellate court will go behind the findings. When there has been no specific assignment of error, the findings become the established facts of the case. *Id.*

1. Judge Gibson's Superior Court Decisions.

Gonzalez does not assign error to the Decisions and Orders of Judge Gibson.

2. Judge Michels' Decision Re: Forfeiture. [1]

Judge Michels erred in making the following:

a. Findings of Fact:

1). Judge Michels erred in making Finding of Fact No. 4.

2). Judge Michels erred in making Finding of Fact No. 6.

[1] The City's argument the findings of Judge Michels are verities is incorrect. It is at this point in the appeal process exceptions to those findings must be made. Gonzalez has set forth proper exceptions pursuant to RAP 10.3(g) in this section and none of those findings excepted to can be considered verities for purposes of this appeal.

b. Conclusions of Law:

Judge Michels erred in entering the following Conclusions of Law:

1). The seized property, $5,940.00 U.S. Currency and a 2001 Silver 325 BMW were used and/or intended to be used for a controlled substance violation, specifically the furtherance of the sale of an illegal drug, and will NOT be returned to the claimant herein. (CP 70-71, not specifically noted as a Conclusion of Law in the Order).

2). Entering the Order the seized property described in Exhibit "A" is hereby forfeited for use and/or disposition in accordance with RCW 69.50.505. (CP 71).

Further, Judge Michels erred in not making the following:

Findings of Fact:

1) The amount of cocaine seized was a user amount and not an amount leading to an inference of distribution or sale.

2) Mr. Gonzalez had no criminal record or any history of drug convictions.

3) The money involved was not an unexplainable amount for Mr. Gonzalez to have acquired given the fact he lived at home with his parents, received unemployment benefits and the proceeds from a personal injury settlement.

4) Mr. Cisneros and Mr. Gonzalez travelled to California where Mr. Gonzalez had an opportunity to purchase a BMW for approximately $6,000.00.

5) Mr. Gonzalez did not have the money with him at the time but knew he had that amount at home.

6) Mr. Cisneros agreed to loan Mr. Gonzalez the money to purchase the car on the condition he repay Mr. Cisneros when they returned home.

7) The money held by Mr. Gonzalez when he was stopped was intended to repay Martin Cisneros for loaning Mr. Gonzalez money to purchase the BMW in California.

8) The amount paid in California for the BMW was approximately $6,000.00

9) At the time he was stopped, Mr. Gonzalez had just returned from California and had not had time to change the registration of the car to his name, but at the time of the forfeiture hearing, the car was properly registered in Mr. Gonzalez's name.

10) The arresting officer did not do a criminal check on Mr. Gonzalez at the time of arrest and seizure of the property and does not recall ever doing a criminal check on Mr. Gonzalez.

11) The canine officer involved in the search agreed that U.S. currency picks up cocaine in general circulation.

12) The canine officer admitted the federal government does not consider drug traces on money as evidence due to the prevalence of cocaine on currency in general circulation.

13) The court could take judicial notice that it is not uncommon for U.S. currency to contain traces of cocaine.

14) There was no evidence to show tracing of the money to a particular drug transaction.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Issues Pertaining to Judge Gibson's Superior Court Orders and Decision.

Although Gonzalez does not assign error to Judge Gibson's rulings, the following issues are pertinent to this appeal.

i). Was Judge Gibson correct in determining the APA did not apply to this case as tried and presented?

ii). Was Judge Gibson correct in determining the Yakima County Superior Court had jurisdiction to hear the appeal of Judge Michels' decision?

iii). Was Judge Gibson's reversal of Judge Michels' Order of Forfeiture correct and supported by the record?

2. Issues Pertaining to Judge Michels' Decision.

i). Did Judge Michels err when he found the amount of money held by Mr. Gonzalez could not be explained by any means other than illegal drug activity?

ii). Did Judge Michels err when he found the only explanation for the cash in Mr. Gonzalez's possession was as a result of the furtherance of the sales of illegal drugs or transactions in violation of statute?

iii). Did Judge Michels err when he determined the cash and car were used or intended to be used for a controlled substance violation in violation of statute?

iv). Did Judge Michels err when he found the property should be forfeited?

IV. COUNTER-STATEMENT OF THE CASE

On or about August 24, 2013, Andreas Gonzalez and his friend Martin Cisneros drove to California in Mr. Cisneros' car to visit relatives. (CP 21, 23, 26). While there, Mr. Gonzalez was offered the chance to purchase a car of his own. (CP 21, 26).

Mr. Gonzalez did not have the money with him to buy the car, but knew he had it available at home. (CP 21). Mr. Cisneros was seasonally employed in jobs that paid $17-18 per hour, and did have the funds available, and offered to lend the money to Mr. Gonzalez on the condition that Mr. Gonzalez would pay Martin Cisneros back when they returned home. (CP 21, 26).

Mr. Cisneros lent the money to Mr. Gonzalez to purchase the car (CP 26), and Mr. Gonzalez bought the car. (CP 23). When he bought the car, Mr. Gonzalez did not obtain a bill of sale, however, he did obtain the title from the seller. (CP 27).

On September 1, 2013, Andreas Gonzalez was pulled over for speeding by Sergeant Scott Bailey of the Sunnyside Police Department. (CP 8-9). Mr. Gonzales was driving the car he had just purchased in California two days earlier with the money Martin Cisneros had loaned him. (CP 21).

At the time he was stopped, Mr. Gonzalez had not had a chance to change the registration for the car because he had returned on a weekend

and was waiting until the following Monday to do the paperwork. (CP 21). The car also still had California license plates. (CP 9).

Mr. Gonzalez gave Sergeant Bailey his driver's license and the California registration. (CP 9). When asked who owned the vehicle, Mr. Gonzalez responded "a friend", but the name given was not on the registration. (CP 9-10).

Upon checking, Sergeant Bailey found Mr. Gonzalez was driving on a suspended license and placed Mr. Gonzalez under arrest and took him into custody. (CP 10).

While waiting for Officer Lemmon to arrive to assist with the impound of the car, one of the two cell phones Mr. Gonzalez had rang. It was Mr. Gonzalez's girlfriend who when asked, was told the vehicle would not be released to her because neither she, nor Mr. Gonzalez were listed as the registered owner. (CP 10). Ultimately, both the car and the cash were seized. (CP 11).

Following seizure of the car and the cash, while he was in jail as a result of his arrest, Mr. Gonzalez was served a Notice of Seizure and Intended Forfeiture of the $5,940.00 and the 2001 Silver BMW seized by the Sunnyside Police P.D. (CP 11, 57). That Notice was filed in the Sunnyside Municipal Court on September 23, 2013. (CP 57).

Acting *pro se* at the time, Mr. Gonzalez filed a request for a court hearing which stated:

> To Whom it may concern. I want a *Court Hearing* have (sic) proof of ownership of the 2001 BMW that was seized when takeing (sic) into custody. Money that was takeing (sic) from me was saving (sic) for the car that I had to purchase the car. (CP 56).

That request was signed by Mr. Gonzalez, dated September 23, 2013 and filed in the Sunnyside Municipal Court on September 23, 2013. (CP 56, italics and underlining added, caps in original).

In response to Mr. Gonzalez's request for a Court Hearing, the matter was assigned a Municipal Court Cause Number and a hearing was held in the Sunnyside Municipal Court before the Honorable Steven L. Michels, Judge, Sunnyside Municipal Court. (CP 7-34). During the course of that hearing, in addition to the facts noted above, the following testimony was given:

When Mr. Gonzalez's girlfriend called him on one of his cell phones, Mr. Gonzalez asked Sergeant Bailey if she could take the money that was in the car, whereupon Sergeant Bailey believed a "criminal activity might be at foot", (sic) and determined the cash would not be given to the girlfriend either. (CP 10).

Officer Lemmon, who originally had been called to assist with a traffic stop arrived. (CP 17). Because Officer Lemmon had a canine

partner, Mr. Gonzalez signed a consent form to allow a canine search of his car. (CP 10, 17).

The dog alerted on the center console where a street level user amount of cocaine was found, definitely less than an eighth of an ounce. (CP 10, 12, 17). The dog also alerted to cash in the drive side door. (CP 18). Other than that, the search found nothing else that would indicate narcotics were being dealt. There was no cutting powder, baggies, containers, cooking devices or ingesting devices. (CP 13).

Sergeant Bailey admitted it was not unusual for someone to have two cell phones (CP 12), including himself, (CP 12), however, because Mr. Gonzalez had two cell phones, a user amount of cocaine, cash money the dog alerted on, and a BMW that was not in Mr. Gonzalez's name, Sergeant Bailey believed criminal narcotics activity was involved. It was his experience that a person could be offered a job to drive a vehicle containing contraband from one place to another for pay. (CP 13).

Sergeant Bailey did not do a criminal check on Mr. Gonzalez at the time of arrest and seizure and doesn't recall if he did one later. (CP 13). When told at the forfeiture hearing that Mr. Gonzalez had no criminal convictions whatsoever and no drug convictions, Sergeant Bailey admitted he was not a surprised. (CP 13).

Officer Lemmon, the canine officer, admitted that U.S. currency goes through counting machines and ATM machines and picks up cocaine residue. He further admitted the federal government has stopped using anything associated with narcotics being on money as evidence. (CP 19).

At the forfeiture hearing, Mr. Gonzalez identified how he came to own the car, why he had cash in the car to repay his friend Martin Cisneros for the loan and why he hadn't had a chance to change the registration.[2]

Mr. Gonzalez also testified he was 28 years old at the time and had been steadily employed at Washington Beef for approximately 5 years until he was in a car accident and fractured his back. (CP 20). He received insurance money as compensation for his injury. (CP 20).

Mr. Gonzalez also described how he lived with his parents who provided all the basic necessities of life for him. (CP 20). He had no mortgage or rent payments and his parents paid for his groceries. (CP 21). He also received unemployment compensation. (CP 21). His calendar year compensation for 2013 was identified as $10,621. (CP 14).

Mr. Gonzalez transferred the title to the BMW as soon as he could. (CP 22), and brought it with him to the hearing before Judge Michels. (CP

[2] Recitation of facts regarding these issues are set forth above and will not be repeated here.

24). At the time of the hearing, Mr. Gonzalez had a driver's license, insurance and proper title and registration. (CP 25).

At the time of the hearing before Judge Michels, Mr. Cisneros had not been repaid for the money he loaned Mr. Gonzalez to purchase the car. (CP 26).

Following the hearing Judge Michels indicated by letter dated April 17, 2014, he would rule in favor of the City of Sunnyside and order forfeiture. He signed the letter as a judge of the Municipal Court. (CP 67). In response, Gonzalez filed a Notice of Appeal to Superior Court and Motion for Order of Stay on Forfeiture in the Sunnyside Municipal Court. (CP 68). That was filed in the Sunnyside Municipal Court on April 24, 2014. (CP 68).

An Order for Forfeiture of Property was prepared by the City of Sunnyside. The City provided Notice of Hearing for "Plaintiff's Presentation of Order for Forfeiture" which stated the matter would be set on the Court's calendar for May 8 2014. The Notice of Hearing contained the header the matter was in the Municipal Court for the City of Sunnyside on that Court's docket. (CP 78). That hearing did not take place on that date because it did not get placed on the calendar. (CP 82).

On May 15, 2014, the Sunnyside Municipal Court generated another Notice of Civil Hearing to reset the date for presentation of the

Order of Forfeiture to May 22, 2014. The second notice was generated by the Sunnyside Municipal Court and the matter was to be heard before Judge Steven Michels of the Sunnyside Municipal Court. (CP 84). The Order of Forfeiture was entered by Judge Michels on May 22, 2014, signed as Judge of the Municipal Court. (CP 70-71).

On June 9, 2014, Gonzalez filed a Designation of Clerk's Papers in the Sunnyside Municipal Court. (CP 52-53). Those papers were not forwarded to the Superior Court at that time because the filing fee had not been paid to the Municipal Court.

On August 19, 2014, Gonzalez filed a Notice of Appeal and Motion for Stay and Motion and Order to Dismiss the City's forfeiture action which included briefing on the matter. That Motion was filed in the Yakima County Superior Court. (CP 1-6). A filing fee was paid. (Gonzalez Supplemental Designation of Clerk's Papers, court docket, sub # 1).

On October 30, 2014, the City of Sunnyside filed Respondent's Motion, Declaration and Memorandum to Dismiss Appeal in the Yakima Superior Court. (CP 37-39). The Motion was based on the early filing of the Notice of Appeal in violation of RALJ 2.5(a), and the argument the filing fee for the appeal was not paid as required by RALJ 6.2(a). (CP 38). The Motion concluded that since Gonzalez had not followed the rules set

out by the RALJ State Court rules for "Appeal of Decisions", the appeal was not perfected for review within the time prescribed by law and should be dismissed. (CP 39).

On November 4, 2014, Judge Bartheld, Yakima County Superior Court, entered an Order titled "Order Continuing RALJ appeal hearing" (sic). (CP 40). The Order called for both parties to brief the issue raised by the City of Sunnyside's Motion.

On December 2, 2014, Mr. Gonzalez filed briefing regarding the jurisdiction question as ordered by the Court. (CP 41-44). The City of Sunnyside filed its briefing on December 9, 2014. (CP 45-49).

In response, on December 16, 2014, Judge Gibson entered an Order titled "Order Setting Procedure". (CP 50). Pursuant to that Order, Gonzalez was required to pay a second filing fee to the Municipal Court within ten days of the Order and the Municipal Court Clerk was to forward the papers to the Superior Court. (CP 50).

After payment of a second filing fee, on December 19, 2014, the Sunnyside Municipal Court transmitted its records to the Superior Court. (CP 52).

By Order dated February 10, 2015, the City's Motion regarding jurisdiction and Gonzalez's appeal was heard by Judge Gibson on February 17, 2015. (CP 86). Before hearing the matter on the merits,

Judge Gibson denied the City's motion regarding jurisdiction. (Verbatim Transcript, February 17, 2015, RP 3, lines 12-16). Judge Gibson then orally rejected the City's argument assignments of error were necessary under the RALJ's and reversed Judge Michels' Order of Forfeiture, 2/17/15, RP 23, lines 11-25; RP 24, lines 1-3).

> And looking at the findings, even considering them as a whole, I don't think that a reasonable person could find the money and the vehicle were involved somehow in narcotics trafficking based upon the record we have, so I'm reversing Judge Michael's (sic) and remanding for further proceedings which I assume would involve trying to get the car back if the car is still around and the money.

Id.

Following the February 17, 2015 hearing, Judge Gibson entered Findings of Fact and Conclusions of Law and Order dated April 3, 2015. (CP 87-89). The Order reflected his previous oral rulings the Yakima County Superior Court had jurisdiction over the case and parties. Specifically, the Court had jurisdiction over the Appeal per the RALJ rules and the City's Motion to Dismiss was denied. (CP 88).

The Order further found there was no evidence at the hearing before Judge Michels that the U.S. currency or the automobile were the "proceeds of narcotics transactions" under RCW 69.50.505(g).[3] (CP 88). The forfeiture record was devoid of evidence drug transactions were

[3] Statutes and rules not set forth in the body of the brief appear in the Appendix.

occurring and the lower court abused its discretion in finding against Gonzalez. Judge Gibson reversed the decision of the Municipal Court per RALJ 9.1(e) and remanded the matter to the Sunnyside Municipal Court. In addition, Judge Gibson found Gonzalez had substantially prevailed. (CP 88-89).

On that same date, the City filed a Notice for Discretionary Review. (Gonzalez's Supplemental Designation of Clerk's Papers, court docket sub #20).

On April 13, 2015, the City of Sunnyside filed a Motion and Declaration for Reconsideration Regarding Jurisdiction before Judge Gibson. (CP 90-96). The City argued the forfeiture hearing was subject to the State Administrative Procedures Act and appeal was guided by Title 34 RCW. The City argued Gonzalez had not followed the procedures set forth in the APA and as a result, the Superior Court did not have jurisdiction to hear the appeal.

By Order entered April 14, 2015, Judge Gibson denied the City's Motion for Reconsideration finding the hearing appealed from was not before the seizing agency and the APA did not apply, and the argument had not previously been made. (CP 97).

The City of Sunnyside filed a Motion for Discretionary Review or in the Alternative Review as a Matter of Right. Review as a Matter of Right was granted.

Mr. Gonzalez moved for Modification of the Commissioner's decision which was denied.

V. ARGUMENT

1. The Forfeiture Hearing Was A Judicial Proceeding and Appeal Was Not Subject to the APA.

The City argues the Superior Court lacked jurisdiction because the appeal should have been pursuant to the APA and Gonzalez failed to follow the statute. That issue was not part of the decision by Judge Michels regarding the forfeiture and is subject to a different standard of review than Judge Michels' decision.

a. Standard of Review.[4]

The argument the APA should have applied to the appeal of this matter was first raised by the City of Sunnyside after the forfeiture decision of Judge Michels had been reversed by Judge Gibson in Superior Court. It was brought as a Motion for Reconsideration under CR 59(a)(7) and (9). (CP 90).

[4] This case involves a two step analysis. The decision of Judge Michels regarding the forfeiture decision is subject to one standard of review and the decisions made solely by Judge Gibson regarding jurisdiction are subject to separate standards of review.

Denial of a motion for reconsideration is reviewed under the *abuse of discretion* standard. West v. Department of Licensing, 182 Wn.App. 500, 516, 331 P.3d 72 (2014); *see also* Davies v. Holy Family Hosp., 144 Wn.App. 483, 497, 183 P.3d 283 (2008).

In describing the abuse of discretion standard, the West Court stated:

> A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Additionally, we may affirm on any basis supported by the record.

West, at 516-517.

This Court further clarified the proper standard of review for a Motion for Reconsideration in Davies, *supra* when stating:

> An abuse of discretion exists *only if no reasonable person would have taken the view adopted by the trial court.*

Davies at 497 (Internal citations omitted, emphasis added).

Given the facts of this case and the manner in which it was tried and presented throughout the course of the hearings, Judge Gibson did not abuse his discretion when deciding the forfeiture hearing was not before the seizing agency and the APA did not apply.

b. Judge Michels was Not the Designee of the Sunnyside Police Department.

RCW 69.50.505 regulates seizure and forfeiture actions. The statute provides the right to a hearing if a party claims ownership in seized property. RCW 69.50.505(5). That statute states in pertinent part:

> ***The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee,*** ..... except that ***any person asserting a claim or right may remove the matter to a court of competent jurisdiction.*** Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. The person seeking removal of the matter must serve process against the state, county, political subdivision, or municipality that operates the seizing agency, and any other party of interest, in accordance with RCW 4.28.080 or 4.92.020, within forty-five days after the person seeking removal has notified the seizing law enforcement agency of the person's claim of ownership or right to possession. The court to which the matter is to be removed shall be the district court when the aggregate value of personal property is within the jurisdictional limit set forth in RCW 3.66.020. ***A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW***. In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.

RCW 69.50.505(5) (Emphasis added).

In their Response to Gonzalez's Motion to Modify the Commissioner's decision, the City of Sunnyside submitted a Declaration from Judge Michels' indicating he had been designated the hearing officer for the Sunnyside Police by former Chief Anderson and that his signing documents as a Judge of the Municipal Court was an oversight. Mr. Gonzalez objected to that Declaration, which was denied.

Mr. Gonzalez has filed the Declaration of former Sunnyside Chief of Police Anderson which directly contradicts Judge Michels' belief he had been designated as the hearing officer for the City of Sunnyside for forfeiture matters.[5] Chief Anderson's Declaration is attached as Ex. 1.

In his Declaration, Chief Anderson denies there was any document or letter authorizing Judge Michels to conduct forfeiture hearings as the designee for the Police Department. Further, if there had been such a document, it would have been invalid after Chief Anderson's retirement. Consequently, Judge Michels Declaration without providing any documentation to support his belief he was the designated hearing officer is not dispositive.

There is no evidence supporting the argument Judge Michels was appointed the City's designee. One cannot become a designee under the statute by default.

Statutory interpretation requires the language in a statute be given its plain meaning and the statute must be interpreted to give effect to all language so no portion of the statute is meaningless or superfluous. Rivard v. State, 168 Wn.2d 775, 783, 231 P.3d 186 (2010).

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[5] Mr. Anderson's declaration is offered pursuant to RAP 9.11(a) as material necessary to fairly resolve the issues on review given the City's submission of Judge Michels' declaration after trial on the merits and the Motion for Reconsideration before the trial court.

Relevant to the instant case, RCW 69.50.505(5) establishes three types of hearings. 1) a hearing before the chief law enforcement officer of the seizing agency; or 2) the chief law enforcement officer's designee; or 3) a court of competent jurisdiction.

The language and intent of the statute is clear. If a forfeiture hearing is not held before the chief law enforcement officer of the seizing agency, that officer must ***identify and designate*** the person who will take his or her place. By establishing a hearing could be before either the chief law enforcement officer, or the chief law enforcement officer's designee, the statute clearly requires there be ***some action to designate the alternate hearing officer***. Otherwise, the language of the statute makes no sense. How is one to determine who that designee may be absent some action identifying that designee?

Webster's Unabridged Dictionary, 1989 defines designee as "one who is designated". That dictionary defines "designate" as:

> 1. to mark or point out; indicate; show; specify. 2. to denote; indicate; signify. 3. to name; entitle; style. 4. to nominate or select for a duty, office, purpose; etc; appoint; assign.

The clear language of the statute requires that a designated hearing officer for a forfeiture hearing must actually be identified, selected, denoted, named or indicated in some manner. The statute does not allow after the fact or *de facto* identification of a designated hearing officer.

In the instant case, the chief law enforcement officer denies there was ever a designation of Judge Michels as the hearing officer for forfeitures. Absent a specific designation, there can be no appropriate designee of the chief law enforcement officer. Any other interpretation does not give plain meaning to the statute and renders the language meaningless.

Under the circumstances of this case, the forfeiture hearing was conducted before Judge Michels, Municipal Court Judge, as a hearing in a court of limited jurisdiction. All parties treated it as such right up until the Municipal Court forfeiture order was reversed by the Superior Court.

The decision by Judge Gibson that the forfeiture hearing was not before the seizing agency and the APA did not apply was not an abuse of discretion.

c. All Parties Treated the Forfeiture Hearing As A Judicial Hearing In a Court of Limited Jurisdiction.

In addition to the above reasoning, it is clear the forfeiture hearing was not an agency hearing as shown by the behavior of all parties throughout the nineteen months it took for this matter to work its way through the courts.

The process began with Mr. Gonzalez's *pro se* request for a "Court Hearing". (CP 56). In response, the City of Sunnyside sent out a Notice

of Hearing In the Municipal Court of the State of Washington In and For the City of Sunnyside. (CP 58). This notice *did not say*, this is an administrative hearing pursuant to the Administrative Procedures Act. It was a notice of a hearing in a court in response to Mr. Gonzalez's request for a "Court Hearing". It was given a Municipal Court Cause Number.

The City of Sunnyside filed its Motion for Order of Forfeiture in the Municipal Court for the State of Washington in and for the City of Sunnyside. (CP 59).

Mr. Ganzalez's Demand for Materials was in the Municipal Court for the City of Sunnyside. (CP 62). At no point did the City of Sunnyside try to claim the judicial setting was actually an administrative hearing.

Mr. Gonzalez's Motion for Order and Return of Property was in the Municipal Court for the City of Sunnyside. (CP 64).

In his letter opinion, Judge Michels signed as a Municipal Judge for the City of Sunnyside. (CP 67).

The Notice of Presentation for the Order of Forfeiture was placed on the Municipal Court Calendar by both the City of Sunnyside and the Municipal Court administration. (CP 78, 84, 85).

The Order of Forfeiture was headed in the Municipal Court for the City of Sunnyside, and was signed by Steven Michels as "Judge S. Michels". (CP 70-71).

Pursuant to RALJ 2.4(a), Mr. Gonzalez filed a Notice of Appeal to Superior Court and Motion for Order of Stay on Forfeiture in the Municipal Court of the City of Sunnyside. (CP 68-69). The City of Sunnyside responded as if this was a proper appeal from the decision of a court of limited jurisdiction and did not object on the grounds the Notice of Appeal should actually have been a Petition for Review filed in Superior Court pursuant to the APA. (RCW 34.05.514(1)).

The City of Sunnyside's Motion to Dismiss filed October 30, 2014 was based on the RALJ's. (CP 37-39). The argument was the appeal was prematurely filed and no filing fee had been paid. The City *did not argue the matter should have been appealed pursuant to the APA.*

While arguing its motion regarding jurisdiction for failure to follow the RALJ's, the City stated:

> And nothing has been done according to these Court Rules and I submit these Court Rules are mandatory *as the procedure followed to appeal a judgment of the court of limited jurisdiction*.

(Verbatim Transcript, December 16, 2014, RP 6, lines 6-8, emphasis added).

Later while arguing the merits of the case before Judge Gibson, counsel for the City argued:

> Mr. Garrison seems to think that this is a trial de novo, but *we haven't had trial de novos on the municipal court appeals since about 1977.*

(Verbatim transcript February 17, 2015, RP 16, lines 14-15 emphasis added).

The City also failed to object to the characterization of the matter as an appeal from a court of limited jurisdiction when the Superior Court entered its "Order Continuing RALJ appeal hearing" (CP 40), or in the briefing filed regarding jurisdiction under the City's RALJ arguments. (CP 45-49).

In their Motion for Reconsideration after reversal of the forfeiture order, the City argued, for the first time: 1) the forfeiture hearing was held pursuant to RCW 69.50.505(5) and the appeal should have been according to the APA which required a Petition for Review and not a Notice of Appeal; 2) the Petition should have been filed in Yakima Superior Court and not the City of Sunnyside Municipal Court; and 3) the filing fee had to have been paid at the time the Petition for Review was filed.[6] (CP 95).

The City's Motion merely cited the statutory terms, and failed to show how the forfeiture hearing had been conducted either before the seizing agency or a designee. The City provided no evidence Judge Michels was a designee.[7]

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[6] This was not technically a new argument, but it had only been previously presented as it pertained to the City's arguments under the RALJ's.

[7] As noted earlier, Judge Michels' Declaration was not provided to the trial court. If the City had attempted to provide the declaration to Judge Gibson, it would not have been

On the other hand, given Mr. Gonzalez's clear request for a "Court Hearing" and the actions of the City of Sunnyside to place the matter in the Municipal Court, Mr. Gonzalez met the basic requirements for removal of the matter to a court. He served proper notice as required by statute. (RCW 69.50.505(5)).[8]

Under the facts of this case and based on the material presented to Judge Gibson, it is clear his ruling the APA did not apply was correct. That ruling was not manifestly unreasonable or based on untenable grounds. It cannot be said no reasonable person would have taken the view adopted by Judge Gibson. The forfeiture hearing was not held before the seizing agency or a designee and appeal was not subject to the APA.

d. <u>The City of Sunnyside Waived the Jurisdictional Argument Under the APA</u>.

As a general rule, one may argue jurisdiction at almost any point in a proceeding, however, it is also the true a party, by their actions, may waive jurisdictional arguments when a case is allowed to proceed on its

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admissible. It did not meet the requirement for newly discovered evidence because it was not discovered since the trial, it could have been discovered before trial, and it cannot be shown the evidence could not have been discovered before trial by the exercise of due diligence. State v. Letellier, 16 Wn.App. 695, 700, 558 P.2d 838 (1977).

[8] Any argument the Municipal Court was not a proper court to hear the matter fails because after Mr. Gonzalez filed his then *pro se* request for a Court Hearing, it was the City that responded by placing the matter in the Municipal Court rather than the District Court. Mr. Gonzalez cannot be punished for the actions of the City in response to his request for a Court Hearing.

merits without first demanding an immediate answer to the jurisdictional question. In re Marriage of Markowski, 50 Wn.App. 633, 637-38, 749 P.2d 754 (1988).

In the instant case, the City claimed the Superior Court lacked jurisdiction because Mr. Gonzalez failed to properly appeal the matter pursuant to the RALJ's. Both parties were allowed to brief the issue and a hearing was held in Superior Court. (CP 37-39; 41-44; 45-47); (Verbatim Transcript December 16, 2014, RP 1-17). No mention was made of the APA argument.

Two months later, the matter was again in Superior Court. Before hearing the matter on the merits of the forfeiture decision, Judge Gibson denied the City's motion regarding jurisdiction. (Verbatim Transcript February 17, 2015, RP 3, lines 12-15). At the conclusion of the hearing on the merits, Judge Gibson reversed the decision of Judge Michels. (Verbatim Transcript February 17, 2015, RP 24).

At no point prior to, or during the hearing on the merits did the City argue the court had no jurisdiction based on the APA. The City let the matter be heard on the merits without making the APA argument. The City proceeded on the merits without demanding the question of jurisdiction under the APA be answered before a decision on the merits.

At the hearing on April 3, 2015 for entry of Findings and Conclusions, the City made no mention of an argument under the APA. (Verbatim Transcript April 3, 2015).

At that hearing, the City filed a Notice for Discretionary Review which is proper when appealing the decision of a Superior Court reviewing a decision of a court of limited jurisdiction. The City did not file a Notice of Appeal. (RAP 5.1(a); RAP 5.2(b) and RAP 5.3(b)). (Respondent's Supplemental Designation of Clerk's Papers, Original Notice for Discretionary Review filed April 3, 2015, sub. #20).

It wasn't until April 13, 2015, after the decision on the merits and their Notice of Discretionary Review, that the City filed its Motion for Reconsideration and raised, for the first time, the lack of jurisdiction based on the claim the matter was an APA hearing. That was nineteen months after Gonzalez was given notice of forfeiture and requested a court hearing; six months after the City first raised the jurisdiction issue under the RALJ's; four months after the hearing regarding jurisdiction under the RALJ's; two months after the hearing on the merits of the case, and ten days after the trial court entered its final decision.

The City waived its right to make this argument by proceeding with a hearing on the merits. The trial court properly rejected the City's

attempt to retroactively argue a lack of jurisdiction after the decision on the merits.

e. Gonzalez Substantially Complied with the APA.

Where statutory guidelines establish certain service requirements, substantial compliance with those guides may establish adequate jurisdiction. Skinner v. Civil Service Com'n of City of Medina. 168 Wn.2d 845, 232 P.3d 558 (2010).

> In determining whether a party has substantially complied with service requirements, the relevant inquiry is whether the party to be served has received actual notice of appeal or the notice was served in a manner reasonably calculated to give notice to the opposing party.

Id. at 855.

In the instant case, the City clearly had notice of the intent to appeal. The City received the first Notice of Appeal on April 24, 2014. The City also received notice of appeal by virtue of the Motion and Order to Dismiss which was filed in Superior Court on August 19, 2014, with the payment of the filing fee. (CP 3). Given the City's attempt to retroactively apply the APA to the facts of this case, it is a particularly appropriate candidate for application of the substantial compliance concept.

Nobody believed the APA applied to this case until the City contrived its after the fact argument which was proffered well after a

decision on the merits had been made. The City knew of the intent to appeal, a filing fee had been paid and the City was not prejudiced by Gonzalez's action.

f. <u>If this Court Finds the APA Applies, The City Failed to Comply with the Requirements of the APA and the Matter Must Be Remanded for Entry of a Proper Order and Opportunity for Appeal Under the APA</u>.

If this Court accepts the City's argument the forfeiture hearing was an APA hearing, the City failed to comply with the requirements of the APA. As a result, the case must be remanded for entry of a proper order and allow Mr. Gonzalez the opportunity to appeal to Superior Court under the terms of the APA.

The APA is very clear about the nature of orders and notice that shall be entered following an agency hearing.[9] RCW 34.05.461(3) dealing with adjudicative administrative hearings and orders resulting from those hearing states in pertinent part:

> . . . The order shall also include a *statement of the available procedures and time limits for seeking reconsideration or other administrative relief.* An initial order shall include a statement of

[9] The original notice of hearing sent out by the City did not comply with the requirements of RCW 34.05.434. (CP 58). The Notice was dated October 16, 2013 for a hearing on the Court's calendar October 17, 2013, violating the seven day requirement of RCW 34.05.434(1). This shows the City did not comply with the terms of the APA and the reason is clear, it never believed the APA applied until the case had gone through appeal to Superior Court and the forfeiture decision was reversed. The City had nineteen months after the original traffic stop and request for court hearing and numerous opportunities through judicial proceedings to raise the issue but failed to do so.

> any circumstances under which the initial order, without further notice, may become a final order.

(Emphasis added).

The Order entered by Judge Michels does not contain any language regarding the time limits for seeking reconsideration or any other administrative relief as required by the APA and therefore lacks the statutorily required notice to be included in an order.

The requirement that an agency decision must provide proper statutorily required notice in the order was established in Felida v. Neighborhood Ass'n v. Clark County, 81 Wn.App. 155, 161, 913 P.2d 823 (1996).[10]

Felida held that when an agency fails to give proper notice of its decision, the time for appealing under the APA will not begin to run until proper notice is given or it can be shown there was substantial compliance with the statutory notice requirements. Proper notice necessarily requires an order which includes the rights and opportunity available to a party to appeal the decision rendered by the agency.

The Felida Court explained:

> Where statutorily-prescribed adequate notice of an administrative decision is integral to the process of invoking appellate jurisdiction, adequate notice is the statutorily required event that triggers the period for a timely appeal.

[10] While the discussion in Felida deals with receipt of the notice of a final decision, the same reasoning applies if a notice is received, but inadequate in content.

Id. at 161.

Under Felida, if an agency order does not identify the required elements regarding appeal, it cannot be considered adequate notice. As a result, the time for appealing the agency decision does not begin to run from the date of the inadequate notice or order, but will only begin after a proper order has been given by the agency.

To have been proper under the APA, Judge Michels' order would had to have included the notice Mr. Gonzalez had a right to appeal the Order of Forfeiture under the APA allowing for judicial review of an agency decision pursuant to Part V RCW 34.05. It did not.

Because the City failed to provide adequate notice, the tolling period for appeal to Superior Court cannot run until Mr. Gonzalez receives a statutorily adequate notice. Mr. Gonzalez will have thirty days from receipt of a proper order to file a Petition for Review in Superior Court and pay the filing fee under the APA. RCW 34.05.542(3).

The requirement of an adequate notice and order is particularly necessary in the instant case. Given the City's attempt to avoid reversal of the Order of Forfeiture by arguing the forfeiture hearing was an agency action under the APA, it is doubly incumbent on the City, as the party

asserting application of the APA, to explicitly follow the requirements of the Act.

Further, if this Court finds the hearing before Judge Michels was an APA agency hearing, that result calls into question virtually every forfeiture decision made by Judge Michels for the City of Sunnyside. Unless every order on forfeiture can be shown to contain the statutorily required notice regarding potential appeal, those orders must also be considered invalid under the APA.

Consequently, every individual who has had property seized by the City of Sunnyside by order of Judge Michels has the right to receive a proper order containing notice of the right to appeal under the APA. Upon receiving the proper notice and order, each will have thirty days to file a Petition for Review in Superior Court pursuant to the APA. The City's argument brings about a result which truly falls under the category of be careful of what you wish for.

2. <u>The Superior Court Had Jurisdiction Under the RALJ's</u>.

The City also argued the Superior Court lacked jurisdiction under the RALJ's. Judge Gibson decided the matter and it was not part of Judge Michels' ruling concerning the forfeiture decision. As a result, it is subject to a different standard of review than the one to be applied to Judge Michels' forfeiture decision.

a. Standard of Review.

A trial court has jurisdiction to determine whether it has subject matter jurisdiction. In re Marriage of Kastanas, 78 Wn.App. 193, 201, 896 P.2d 726 (1995). The question of subject matter jurisdiction is a question of law and is reviewed de novo. Joy v. Kaiser Aluminum and Chemical Corp., 62 Wn.App. 909, 911, 816 P.2d 90 (1991).

When performing a de novo review, the appellate court reviews the facts which were in front of the trial court and does not consider evidence outside the record. The reviewing court does not hold a new evidentiary hearing and the review is limited to the legal conclusions the trial court drew from its findings of fact. Review is limited to the trial court record. State v. Monfort, 179 Wn.2d 122, 129, 312 P.3d 637 (2013).

Given this standard of review, it is clear that based on the record before Judge Gibson, he correctly ruled he had jurisdiction to hear the appeal from Judge Michels' Order of Forfeiture.

b. Judge Gibson had Jurisdiction to Hear the Appeal.

Following Judge Michels' letter indicating he would grant forfeiture, Gonzalez filed a Notice of Appeal in the Sunnyside Municipal Court pursuant to RALJ 2.4(a). Because his money had been seized and forfeited, Gonzalaz did not pay the filing fee at that time. Neither filing the Notice of Appeal prior to entry of the final order, nor failure to pay the

filing fee at the time of the Notice deprived the Superior Court of jurisdiction.

With regard to early filing of the Notice, RALJ 2.5(d) states:

> A notice of appeal filed after the announcement of a decision but before entry of the final decision will be treated as filed on the day following entry of the decision.

Thus, even though the Notice of Appeal was filed before entry of the final order, per rule, the Notice would be deemed timely because it was filed after Judge Michels issued his letter opinion but before signing the final Order.

Failure to pay the filing fee when a Notice of Appeal is filed under the RALJ's is not jurisdictional. The *only* jurisdictional element is the timely filing of a Notice of Appeal.

> (a) Review Initiated by Filing Notice of Appeal. A party appealing a decision subject to these rules must file a notice of appeal in the court of limited jurisdiction within the time provided by rule 2.5 *This is the only jurisdictional requirement for an appeal*.

RALJ 2.4(a) (emphasis added); *See also,* City of Lakewood v. Cheng, 169 Wn.App. 165, 167, 279 P.3d 914 (2012).

In rejecting a lack of jurisdiction argument because a filing fee was not paid until six weeks after a Notice of Appeal was filed under RALJ 2.4(a), the City of Lakewood Court stated at p. 171-172:

> The fact that Cheng was delinquent in paying the filing fee did not warrant the dismissal of his appeal, particularly where the municipal court accepted his late payment. *See Davidson v. Thomas*, 55 Wash.App. 794, 780, 780 P.2d 910 (1989) (RALJ 10.2 does not list failure to pay filing fee as a reason for dismissal of appeal); 4B KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE, RALJ 2.4 at 231 (7th ed.2008) (procedural error with respect to payment of filing fee is not necessarily fatal to appeal).
>
> In addition to imposing a 30-day time period within which a notice of appeal must be filed, the rules for appeals from courts of limited jurisdiction provide that they "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RALJ 1.2(a); *see also City of Goldendale v. Graves*, 88 Wash.2d 417, 424, 562 P.2d 1272 (1977) ("Doubts should be resolved in favor of protecting the right of appeal; we should be slow to deprive a litigant of that right."); *Graham Thrift Grp, Inc. v. Pierce County*, 75 Wash.App. 263, 268, 877 P.2d 228 (1994) (recognizing modern preference of courts to interpret their procedural rules to allow creditable appeals to be addressed on the merits absent serious prejudice to other parties).

The Yakima County Superior Court had jurisdiction under the facts of this case to hear the appeal from Judge Michels Order of Forfeiture.

Acting under the RALJ Rules of Court, the Superior Court was able to fashion a remedy for failing to timely pay the filing fee other than dismissing the appeal. RALJ 10.1 states in pertinent part:

> The superior court may condition a party's right to participate further in the appeal on compliance with the terms of a sanction order, including an order directing payment of an award by a party.

That is what the Superior Court did in the instant case. Gonzalez was directed to pay a second filing fee, which he did and the matter was ultimately allowed to proceed. (CP 40).

c. Gonzalez Filed all Proper Briefing.

After ruling he had jurisdiction and prior to the argument on the merits of the forfeiture hearing, Judge Gibson stated: "So, I have read the briefs. So, go ahead on the merits, Mr. Garrison." (Verbatim Transcript, February 17, 2015, RP 4, lines 11-12).

The issue regarding filing Gonzalez's brief arose later in the hearing as a result of the City arguing Mr. Gonzalez failed to make exceptions to the findings of Judge Michels. During that discussion, Judge Gibson indicated he did not have a document titled appellant's brief. Mr. Garrison explained that his brief was originally filed with the title Motion and Order to Dismiss (CP 3-6) but he was told he needed to file a brief, so it was re-titled and filed again. It was that second filing of the same brief that was not in the record. Judge Gibson did note "Well, I have the motion and order to dismiss." (Verbatim Transcript, February 17, 2015, RP 12, lines 4-18).

Clearly, sufficient briefing was filed and the trial court indicated it had read the briefing which was filed. The City was served with Gonzalez's brief and was not prejudiced by any purported lack of briefing.

(Verbatim Transcript February 17, 2015, RP 11, lines 24-25). The City fails to cite to any authority the decision by the trial court was an abuse of discretion other than the City's conclusory statement it believed the action to be improper. The failure to brief argument is a red herring.

The City also argues the trial court applied the wrong standards to Judge Michels' decision. The argument is not persuasive because for purposes of this appeal, the record on review is not the record of Judge Gibson, but the record of Judge Michels. As shown below, that record simply does not support the forfeiture order.

3. The City of Sunnyside Failed to Prove by A Preponderance of the Evidence Mr. Gonzalez's Cash and Car Were the Proceeds of or Intended to be Used In Illegal Drug Activities.

a. Standard of Review if the APA Applies.

Should this Court determine review of the forfeiture decision itself is subject to the APA as an agency decision, then review involves application of the APA to the record established before Judge Michels. Tri-City Metro Drug Task Force v. Contreras, 129 Wn.App. 648, 653, 119 P.3d 862 (2005).[11]

[11] The City's argument that Judge Gibson improperly commented on the evidence or applied the wrong standard of review to Judge Michels' finding is inapposite. Judge Gibson merely determined there was not substantial evidence the City had established by a preponderance of the evidence in the record that Mr. Gonzalez's cash and car were proceeds of, or were to used for illegal drug activity. For purposes of this appeal, this Court reviews the record before Judge Michels and not Judge Gibson as it pertains to the decision to allow forfeiture.

In addition, when reviewing agency decisions, issues of law are reviewed de novo and the reviewing court can substitute its judgment for that of the administrative body on legal issues. Brown v. State Dept. of Health, Dental Disciplinary Bd., 94 Wn.App. 7, 12, 972 P.2d 101 (1998).

In forfeiture hearings, the Court shall only consider findings supported by substantial evidence in determining if the order of forfeiture was actually supported by the evidence. Sam v. Okanogan County Sheriff's Office, 136 Wn.App. 220, 228, 148 P.3d 1086 (2006).

Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

For purposes of the instant case, an agency's decision may be overturned if 1) the agency has erroneously interpreted or applied the law; 2) the order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; 3) the order is arbitrary or capricious. RCW 34.05.570(3)(d), (e) and (i).

b. The City Failed to Meet Its Burden of Proof.

In order to support a property forfeiture, in all cases, the burden is on the law enforcement agency to prove by a preponderance of the evidence that the property is subject to forfeiture. RCW 69.50.505(5).

Further, when the property to be forfeited is personal property the statute requires in pertinent part:

> (g) All moneys, negotiable instruments, securities, or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW, *all tangible or intangible personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW,* and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter or chapter 69.41 or 69.52 RCW.

RCW 69.50.505(g) (Emphasis added).

This statute requires actual evidence of tracing. King County Dept. of Public Safety v. Real Property Known as 13627 Occidental Avenue S., 89 Wn.App. 554, 560, 950 P.2d 7 (1998).

Further:

> 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 for the personal property as proceeds. 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.

Tri-City Metro Drug Task Force v. Contreras, 129 Wn.App. *supra* at 653. (Relying on King County, *supra*).

In the instant case the record is devoid of evidence to show an effort was made to trace Mr. Gonzalez's cash and car to any illegal drug transaction. The findings entered by Judge Michels also fail to establish any tracing of the items to illegal drug activity. Neither Mr. Gonzalez's car or cash was traced or traceable to any illegal drug transactions. The forfeiture was not proper.

The record shows there is not substantial evidence in the record to support the forfeiture.

Mr. Gonzalez testified he travelled to California with his friend Martin Cisneros to visit family.[12] While there, Mr. Gonzalez had the opportunity to purchase a car. He did not have the funds with him at the time, but his friend, Mr. Cisneros, who had been employed in a well paying job did. Mr. Cisneros agreed to lend the money to Mr. Gonzalez on the condition Mr. Gonzalez repay Mr. Cisneros as soon as they returned home to Washington State. Mr. Gonzalez purchased the car in California. The price was approximately $6,000.00. At the time, he did not get a bill of sale, but did get the title.

Mr. Gonzalez was pulled over by the Sunnyside Police for speeding on the weekend he returned from California. He was driving the car he had purchased there, but had not yet had an opportunity to change

[12] Every factual representation made here is cited to in the record in the Counter-Statement of the Case above and for ease of reading will not be included in this section.

the registration because it was the weekend. It was his intent to take care of that the first thing Monday. Consequently, the car still had California license plates and the registration had not been transferred to his name.

None of this testimony was disputed or contradicted.

Mr. Gonzalez provided his driver's license and the yet to be transferred registration. When asked who the owner of the car was, Mr. Gonzalez provided a name that was not on the registration.[13]

When Mr. Gonzalez's license was run, it was learned it was suspended. Mr. Gonzalez was placed under arrest and taken into custody. A second officer was summoned to assist with the traffic stop. Mr. Gonzalez consented to a search of his car.[14]

When the second officer arrived he had a canine companion that searched the car. The dog alerted on the center console which contained a street level user amount of cocaine and cash in a pocket on the driver's side door. The cash and car were seized.

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[13] At this point it is reasonable to understand the name Mr. Gonzalez would have given as the owner was his friend Mr. Cisneros, because Mr. Gonzalez had not yet repaid Mr. Cisneros for his car loan. The record, however, does not reveal what name Mr. Gonzalez gave as the owner of the car, just that it was not the name on the registration. Further, it is not a reasonable conclusion that a person involved in illicit drug trafficking would, without any effort to evade or avoid, simply hand over a suspended license and title to a car in someone else's name.

[14] Again, the reasonable inference is one engaged in drug trafficking would not simply consent to a search of his car.

At the forfeiture hearing Mr. Gonzalez testified about driving to California and purchasing the car. In addition, he testified that at the time of the forfeiture hearing, he had a valid driver's license, insurance and brought the title to the vehicle to the hearing which was now in his name.

Mr. Gonzalez also testified he had been employed at Washington Beef for approximately five years and had to quit working when he was in a car accident and broke his back. He received compensation for his injury and also received unemployment compensation.

Mr. Gonzalez testified he lived at home with his parents who paid his living expenses, including groceries, and had virtually no expenses he had to pay on his own. Records were admitted which showed his income during 2013 was approximately $10,621.00. The amount of money seized from Mr. Gonzalez that he was going to use to repay Mr. Cisnersos for the car loan was $5,940.00.

Mr. Gonzalez also testified that he faced charges in Yakima County Superior Court for possession of a controlled substance, but not for possession with intent to deliver. He had never been arrested for a criminal charge other than driving issues.

None of the testimony was disputed or contradicted.

At the forfeiture hearing, Mr. Cisneros testified about the trip to California and the purchase of the car there by Mr. Gonzalez. Mr.

Cisneros also testified he was employed in a manner which paid well and had money available to loan to Mr. Gonzalez to purchase the car. Mr. Cisneros has not been repaid for his loan.

None of the testimony was disputed or contradicted.

In contrast, the seizure and forfeiture was based on the fact Mr. Gonzalez had two cell phones, the car registration was not in his name, he gave a different name as the owner of the vehicle than appeared on the registration, a user's amount of cocaine was found in the center console and the money had traces of drugs which caused the dog to alert. There was no evidence drugs were being dealt, such as cutting powder, baggies, cooking devices or ingesting devices.

The arresting officer did not do a criminal check at the time of the stop and did not know whether he ever performed one. He was not surprised to learn that Mr. Gonzalez had not criminal or drug convictions in any jurisdiction.

With regard to the canine alert, the testimony showed just two alerts occurred. One, the street level user amount of cocaine in the center console, and two, the alert on the money in the driver's door pocket. While testifying the alert on the money indicated drug presence on the money, the canine officer also admitted that U.S. currency commonly had

drug residue and the federal government stopped using anything associated with narcotics on money as evidence.

The *only* evidence offered that could tie the situation to drug activity was Sergeant Bailey's testimony that it was not uncommon for a person to be hired to drive a vehicle that had contents consisting of contraband from one place to another and get paid for that transport. That was in spite of the fact the only drugs found in the car were a street level user amount.

In contrast to the record established in the Gonzalez hearing, forfeiture was denied in Valerio v. Lacey Police Dept., 110 Wn.App. 163, 39 P.3d 332 (2002). There $58,300.00 in cash, made up of new uncirculated $100.00 bills placed in plastic bags was found in the trunk of a car. A drug canine alerted to the money. The defendant claimed the money had been acquired over time, but the evidence showed he earned $121 per week from 1995 to 1998. Regardless, the Court found the *evidence was not sufficient to support probable cause for forfeiture*. *Id.* at 178.

The type of evidence *which will support forfeiture* includes that found in Sam v. Okanogan County Sheriff's Office, 136 Wn.App. 220, 148 P.3d 1086 (2006). There, the executor of an estate wanted to claim

cash and other items found in a wrecked airplane that were subject to a forfeiture action.

The record showed the plane was found about 14 miles south of the Canadian border, the transponder had been turned off, the rear seats removed and extra fuel tanks installed. The plane had smaller than normal identifying letters and numbers. There was evidence the plane had been flying low in an attempt to avoid radar detection.

At the wreckage, a leather bag containing $95,080 in cash was found, along with an envelop attached to the bag containing another $5,000 in cash. There was another bag with $15,000 in cash and significant amounts of cash were in the pants pockets of the deceased in the plane. The money was bundled in groups of $100, $50 and $20 bills. There was also a ledger which appeared to show drug transaction and a small amount of marijuana.

The executor claimed the money had been inherited by the deceased from his grandmother and the deceased dealt mainly in cash. The court concluded there was a preponderance of evidence the money was connected to drug activity. *Id.* at 229-230.

Compare those two factual situations with the record in the instant case. It is clear there is not substantial evidence in the record to justify the finding the money was "coated" by drugs. There is not substantial

evidence to find the money Mr. Gonzalez had in his possession could not be explained by anything other than illegal drug activities. Finally, there is not substantial evidence in the record to conclude the currency and car were the proceeds from, or used, or intended to be used by Mr. Gonzalez, for a controlled substance violation in furtherance of the sale of an illegal drug. The decision of Judge Michels was in error and must be reversed.

c. Standard of Review if RALJ Applies.

Review of decisions of courts of limited jurisdiction is regulated by Court Rule. RALJ 9.1 provides in pertinent part:

> (a) Errors of Law. The superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law.
> (b) Factual Determinations. The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.[15]

An appellate court stands in the same position as the trial court when reviewing the decision of a court of limited jurisdiction. Walk v. State Dept. of Licensing, 95 Wn.App. 653, 656, 976 P.2d 185 (1999). Consequently, the appellate court applies the same rules for review as set forth in RALJ 9.1. *Id.*

[15] These rules do not require exceptions be made to findings. Any findings are automatically subject to the substantial evidence test.

Factual determinations under the RALJ review are subject to the same substantial evidence test that applies in review of an APA decision described above. Because the substantial evidence test is the same under the APA and the RALJ's, the analysis set forth above applies here and will not be repeated.

The error of law standard, however, allows the reviewing court to substitute its judgment for that of the lower court. When an agency decision is involved, if issues of law are particularly within the expertise of the agency, the reviewing court should accord substantial weight to the agency's legal interpretation. Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 325, 646 P.2d 113 (1982); Jefferson County v. Seattle Yacht Club, 73 Wn.App. 576, 588, 870 P.2d 987 (1994). There is no evidence Judge Michels had any particular expertise in this matter.

Because the error of law standard allows this Court to substitute its judgment for that of Judge Michels in the forfeiture hearing, this Court is not constrained by the conclusions made by Judge Michels. Reviewing the record produced through the hearing testimony before Judge Michels, this Court may decide on its own whether or not the City established by a preponderance of the evidence the cash and car seized and forfeited by Mr. Gonzalez was proven to be the proceeds of, or involved in, illegal drug activity. Review of the record clearly shows they were not.

4. Gonzalez Is Entitled To An Award of Attorneys Fees.

Pursuant to RAP 18.1 and RCW 69.50.505(6), Gonzalez requests this Court award reasonable attorneys' fees for this appeal.

RCW 69.50.505(6) states in pertinent part:

> In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant.

Pursuant to court rules and statutes, when fees are recoverable at the lower court level by the prevailing party, they will be recoverable upon appeal. That specifically applies to attorney fees awarded pursuant to improper seizure actions under RCW 69.50.505(6). Guillen v. Contreras, 169 Wn.2d 769, 780, 238 P.2d 1168 (2010).

In addition, this Court should allow an award of attorneys' fees for the work which was done at the trial court level in which Judge Gibson reversed Judge Michels and determined that Gonzalez had substantially prevailed in that hearing.

There is no basis to award fees to the City. The fee award statute does not allow an award to the City because the City is not, and cannot be, a "claimant" in a proceeding involving forfeiture of property under the statute. The City cites no statute or rule which allows an award of fees to the City and the City's request must be denied.

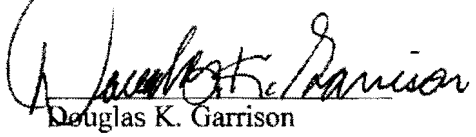
VI. CONCLUSION

Judge Gibson ruled the forfeiture hearing before Judge Michels' was not before the seizing agency and the APA did not apply. That ruling was supported by the record, was correct, was not an abuse of discretion and must be upheld.

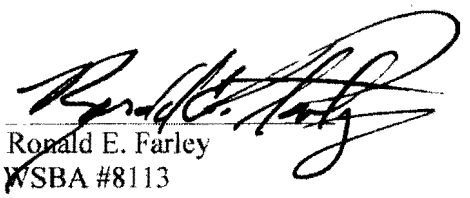
Judge Gibson's ruling the Superior Court had jurisdiction to hear the appeal from Judge Michels was supported by the record, was correct and must be upheld.

Review of the record before Judge Michels regarding the forfeiture hearing shows there was not substantial evidence to show the City had established, by a preponderance of the evidence, that Mr. Gonzalez's car and money were the proceeds of, or were to be used for, illegal drug activities. The order of forfeiture was in error and must be reversed.

RESPECTFULLY SUBMITTED this 12 day of January, 2016.



Douglas K. Garrison
WSBA #30857
Attorney for Gonzalez



Ronald E. Farley
WSBA #8113
Attorney for Gonzalez

APPENDIX

RCW 34.05.434. Notice of hearing

(1) The agency or the office of administrative hearings shall set the time and place of the hearing and give not less than seven days advance written notice to all parties and to all persons who have filed written petitions to intervene in the matter.
(2) The notice shall include:
(a) Unless otherwise ordered by the presiding officer, the names and mailing addresses of all parties to whom notice is being given and, if known, the names and addresses of their representatives;
(b) If the agency intends to appear, the mailing address and telephone number of the office designated to represent the agency in the proceeding;
(c) The official file or other reference number and the name of the proceeding;
(d) The name, official title, mailing address, and telephone number of the presiding officer, if known;
(e) A statement of the time, place and nature of the proceeding;
(f) A statement of the legal authority and jurisdiction under which the hearing is to be held;
(g) A reference to the particular sections of the statutes and rules involved;
(h) A short and plain statement of the matters asserted by the agency; and
(i) A statement that a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default in accordance with this chapter.
(3) If the agency is unable to state the matters required by subsection (2)(h) of this section at the time the notice is served, the initial notice may be limited to a statement of the issues involved. If the proceeding is initiated by a person other than the agency, the initial notice may be limited to the inclusion of a copy of the initiating document. Thereafter, upon request, a more definite and detailed statement shall be furnished.
(4) The notice may include any other matters considered desirable by the agency.
(5) The notice may be served on a party via electronic distribution, with a party's agreement.

RCW 34.05.461. Entry of orders

(1) Except as provided in subsection (2) of this section:
(a) If the presiding officer is the agency head or one or more members of the agency head, the presiding officer may enter an initial order if further review is available within the agency, or a final order if further review is not available;
(b) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and
(c) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.
(2) With respect to agencies exempt from chapter 34.12 RCW or an institution of higher education, the presiding officer shall transmit a full and complete record of the proceedings, including such comments upon demeanor of witnesses as the presiding officer deems relevant, to each agency official who is to enter a final or initial order after considering the record and evidence so transmitted.
(3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.
(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

(5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.
(6) If a person serving or designated to serve as presiding officer becomes unavailable for any reason before entry of the order, a substitute presiding officer shall be appointed as provided in RCW 34.05.425. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.
(7) The presiding officer may allow the parties a designated time after conclusion of the hearing for the submission of memos, briefs, or proposed findings.
(8)(a) Except as otherwise provided in (b) of this subsection, initial or final orders shall be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings in accordance with subsection (7) of this section unless this period is waived or extended for good cause shown. The initial or final order may be served on a party via electronic distribution, with a party's agreement.
(b) This subsection does not apply to the final order of the shorelines hearings board on appeal under RCW 90.58.180(3).
(9) The presiding officer shall cause copies of the order to be served on each party and the agency.

RCW 34.05.514. Petition for review--Where filed

(1) Except as provided in subsections (2) through (4) of this section, proceedings for review under this chapter shall be instituted by paying the fee required under RCW 36.18.020 and filing a petition in the superior court, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located.
(2) For proceedings involving institutions of higher education, the petition shall be filed either in the county in which the principal office of the institution involved is located or in the county of a branch campus if the action involves such branch.
(3) For proceedings conducted by the pollution control hearings board pursuant to chapter 43.21B RCW or as otherwise provided in RCW 90.03.210(2) involving decisions of the department of ecology on applications for changes or transfers of water rights that are the subject of a general adjudication of water rights that is being litigated actively under

chapter 90.03 or 90.44 RCW, the petition must be filed with the superior court conducting the adjudication, to be consolidated by the court with the general adjudication. A party to the adjudication shall be a party to the appeal under this chapter only if the party files or is served with a petition for review to the extent required by this chapter.
(4) For proceedings involving appeals of examinations or evaluation exercises of the board of pilotage commissioners under chapter 88.16 RCW, the petition must be filed either in Thurston county or in the county in which the board maintains its principal office.

RCW 34.05.542. Time for filing petition for review

Subject to other requirements of this chapter or of another statute:
(1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.
(2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.
(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.
(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.
(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.
(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.

RCW 34.05.570. Judicial review

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:
(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;
(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and
(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.
(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.
(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.
(ii) From June 10, 2004, until July 1, 2008:
(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and
(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.
(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
(d) The agency has erroneously interpreted or applied the law;
(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
(f) The agency has not decided all issues requiring resolution by the agency;
(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
(i) The order is arbitrary or capricious.
(4) Review of other agency action.
(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.
(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.
(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:
(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
(iii) Arbitrary or capricious; or
(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

RCW 69.50.505. Seizure and forfeiture

(1) The following are subject to seizure and forfeiture and no property right exists in them:
(a) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of this chapter or chapter 69.41 or 69.52 RCW, and all hazardous chemicals, as defined in RCW 64.44.010, used or intended to be used in the manufacture of controlled substances;
(b) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW;
(c) All property which is used, or intended for use, as a container for property described in (a) or (b) of this subsection;
(d) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, in any manner to facilitate the sale, delivery, or receipt of property described in (a) or (b) of this subsection, except that:
(i) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter or chapter 69.41 or 69.52 RCW;
(ii) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent;
(iii) No conveyance is subject to forfeiture under this section if used in the receipt of only an amount of marijuana for which possession constitutes a misdemeanor under RCW 69.50.4014;
(iv) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission; and

(v) When the owner of a conveyance has been arrested under this chapter or chapter 69.41 or 69.52 RCW the conveyance in which the person is arrested may not be subject to forfeiture unless it is seized or process is issued for its seizure within ten days of the owner's arrest;
(e) All books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this chapter or chapter 69.41 or 69.52 RCW;
(f) All drug paraphernalia other than paraphernalia possessed, sold, or used solely to facilitate marijuana-related activities that are not violations of this chapter;
(g) All moneys, negotiable instruments, securities, or other tangible or intangible property of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this chapter or chapter 69.41 or 69.52 RCW, all tangible or intangible personal property, proceeds, or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter or chapter 69.41 or 69.52 RCW. A forfeiture of money, negotiable instruments, securities, or other tangible or intangible property encumbered by a bona fide security interest is subject to the interest of the secured party if, at the time the security interest was created, the secured party neither had knowledge of nor consented to the act or omission. No personal property may be forfeited under this subsection (1)(g), to the extent of the interest of an owner, by reason of any act or omission which that owner establishes was committed or omitted without the owner's knowledge or consent; and
(h) All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner for the manufacturing, compounding, processing, delivery, importing, or exporting of any controlled substance, or which have been acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter or chapter 69.41 or 69.52 RCW, if such activity is not less than a class C felony and a substantial nexus exists between the commercial production or sale of the controlled substance and the real property. However:
(i) No property may be forfeited pursuant to this subsection (1)(h), to the extent of the interest of an owner, by reason of any act or omission committed or omitted without the owner's knowledge or consent;

(ii) The bona fide gift of a controlled substance, legend drug, or imitation controlled substance shall not result in the forfeiture of real property;
(iii) The possession of marijuana shall not result in the forfeiture of real property unless the marijuana is possessed for commercial purposes that are unlawful under Washington state law, the amount possessed is five or more plants or one pound or more of marijuana, and a substantial nexus exists between the possession of marijuana and the real property. In such a case, the intent of the offender shall be determined by the preponderance of the evidence, including the offender's prior criminal history, the amount of marijuana possessed by the offender, the sophistication of the activity or equipment used by the offender, whether the offender was licensed to produce, process, or sell marijuana, or was an employee of a licensed producer, processor, or retailer, and other evidence which demonstrates the offender's intent to engage in unlawful commercial activity;
(iv) The unlawful sale of marijuana or a legend drug shall not result in the forfeiture of real property unless the sale was forty grams or more in the case of marijuana or one hundred dollars or more in the case of a legend drug, and a substantial nexus exists between the unlawful sale and the real property; and
(v) A forfeiture of real property encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party, at the time the security interest was created, neither had knowledge of nor consented to the act or omission.
(2) Real or personal property subject to forfeiture under this chapter may be seized by any board inspector or law enforcement officer of this state upon process issued by any superior court having jurisdiction over the property. Seizure of real property shall include the filing of a lis pendens by the seizing agency. Real property seized under this section shall not be transferred or otherwise conveyed until ninety days after seizure or until a judgment of forfeiture is entered, whichever is later: PROVIDED, That real property seized under this section may be transferred or conveyed to any person or entity who acquires title by foreclosure or deed in lieu of foreclosure of a security interest. Seizure of personal property without process may be made if:
(a) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(c) A board inspector or law enforcement officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
(d) The board inspector or law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of this chapter.
(3) In the event of seizure pursuant to subsection (2) of this section, proceedings for forfeiture shall be deemed commenced by the seizure. The law enforcement agency under whose authority the seizure was made shall cause notice to be served within fifteen days following the seizure on the owner of the property seized and the person in charge thereof and any person having any known right or interest therein, including any community property interest, of the seizure and intended forfeiture of the seized property. Service of notice of seizure of real property shall be made according to the rules of civil procedure. However, the state may not obtain a default judgment with respect to real property against a party who is served by substituted service absent an affidavit stating that a good faith effort has been made to ascertain if the defaulted party is incarcerated within the state, and that there is no present basis to believe that the party is incarcerated within the state. Notice of seizure in the case of property subject to a security interest that has been perfected by filing a financing statement in accordance with chapter 62A.9A RCW, or a certificate of title, shall be made by service upon the secured party or the secured party's assignee at the address shown on the financing statement or the certificate of title. The notice of seizure in other cases may be served by any method authorized by law or court rule including but not limited to service by certified mail with return receipt requested. Service by mail shall be deemed complete upon mailing within the fifteen day period following the seizure.
(4) If no person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(d), (g), or (h) of this section within forty-five days of the service of notice from the seizing agency in the case of personal property and ninety days in the case of real property, the item seized shall be deemed forfeited. The community property interest in real property of a person whose spouse or domestic partner committed a violation giving rise to seizure of the real property may not be forfeited if the person did not participate in the violation.
(5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section within forty-

five days of the service of notice from the seizing agency in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The notice of claim may be served by any method authorized by law or court rule including, but not limited to, service by first-class mail. Service by mail shall be deemed complete upon mailing within the forty-five day period following service of the notice of seizure in the case of personal property and within the ninety-day period following service of the notice of seizure in the case of real property. The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee, except where the seizing agency is a state agency as defined in RCW 34.12.020(4), the hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. The person seeking removal of the matter must serve process against the state, county, political subdivision, or municipality that operates the seizing agency, and any other party of interest, in accordance with RCW 4.28.080 or 4.92.020, within forty-five days after the person seeking removal has notified the seizing law enforcement agency of the person's claim of ownership or right to possession. The court to which the matter is to be removed shall be the district court when the aggregate value of personal property is within the jurisdictional limit set forth in RCW 3.66.020. A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW. In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.

The seizing law enforcement agency shall promptly return the article or articles to the claimant upon a determination by the administrative law judge or court that the claimant is the present lawful owner or is lawfully entitled to possession thereof of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section.

(6) In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

(7) When property is forfeited under this chapter the board or seizing law enforcement agency may:
(a) Retain it for official use or upon application by any law enforcement agency of this state release such property to such agency for the exclusive use of enforcing the provisions of this chapter;
(b) Sell that which is not required to be destroyed by law and which is not harmful to the public;
(c) Request the appropriate sheriff or director of public safety to take custody of the property and remove it for disposition in accordance with law; or
(d) Forward it to the drug enforcement administration for disposition.
(8)(a) When property is forfeited, the seizing agency shall keep a record indicating the identity of the prior owner, if known, a description of the property, the disposition of the property, the value of the property at the time of seizure, and the amount of proceeds realized from disposition of the property.
(b) Each seizing agency shall retain records of forfeited property for at least seven years.
(c) Each seizing agency shall file a report including a copy of the records of forfeited property with the state treasurer each calendar quarter.
(d) The quarterly report need not include a record of forfeited property that is still being held for use as evidence during the investigation or prosecution of a case or during the appeal from a conviction.
(9)(a) By January 31st of each year, each seizing agency shall remit to the state treasurer an amount equal to ten percent of the net proceeds of any property forfeited during the preceding calendar year. Money remitted shall be deposited in the state general fund.
(b) The net proceeds of forfeited property is the value of the forfeitable interest in the property after deducting the cost of satisfying any bona fide security interest to which the property is subject at the time of seizure; and in the case of sold property, after deducting the cost of sale, including reasonable fees or commissions paid to independent selling agents, and the cost of any valid landlord's claim for damages under subsection (15) of this section.
(c) The value of sold forfeited property is the sale price. The value of retained forfeited property is the fair market value of the property at the time of seizure, determined when possible by reference to an applicable commonly used index, such as the index used by the department of licensing for valuation of motor vehicles. A seizing agency may use, but need not use, an independent qualified appraiser to determine the value of retained property. If an appraiser is used, the value of the property

appraised is net of the cost of the appraisal. The value of destroyed property and retained firearms or illegal property is zero.
(10) Forfeited property and net proceeds not required to be paid to the state treasurer shall be retained by the seizing law enforcement agency exclusively for the expansion and improvement of controlled substances related law enforcement activity. Money retained under this section may not be used to supplant preexisting funding sources.
(11) Controlled substances listed in Schedule I, II, III, IV, and V that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in Schedule I, II, III, IV, and V, which are seized or come into the possession of the board, the owners of which are unknown, are contraband and shall be summarily forfeited to the board.
(12) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the board.
(13) The failure, upon demand by a board inspector or law enforcement officer, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored to produce an appropriate registration or proof that he or she is the holder thereof constitutes authority for the seizure and forfeiture of the plants.
(14) Upon the entry of an order of forfeiture of real property, the court shall forward a copy of the order to the assessor of the county in which the property is located. Orders for the forfeiture of real property shall be entered by the superior court, subject to court rules. Such an order shall be filed by the seizing agency in the county auditor's records in the county in which the real property is located.
(15)(a) A landlord may assert a claim against proceeds from the sale of assets seized and forfeited under subsection (7)(b) of this section, only if:
(i) A law enforcement officer, while acting in his or her official capacity, directly caused damage to the complaining landlord's property while executing a search of a tenant's residence; and
(ii) The landlord has applied any funds remaining in the tenant's deposit, to which the landlord has a right under chapter 59.18 RCW, to cover the damage directly caused by a law enforcement officer prior to asserting a claim under the provisions of this section;
(A) Only if the funds applied under (a)(ii) of this subsection are insufficient to satisfy the damage directly caused by a law enforcement officer, may the landlord seek compensation for the damage by filing a

claim against the governmental entity under whose authority the law enforcement agency operates within thirty days after the search;
(B) Only if the governmental entity denies or fails to respond to the landlord's claim within sixty days of the date of filing, may the landlord collect damages under this subsection by filing within thirty days of denial or the expiration of the sixty-day period, whichever occurs first, a claim with the seizing law enforcement agency. The seizing law enforcement agency must notify the landlord of the status of the claim by the end of the thirty-day period. Nothing in this section requires the claim to be paid by the end of the sixty-day or thirty-day period.
(b) For any claim filed under (a)(ii) of this subsection, the law enforcement agency shall pay the claim unless the agency provides substantial proof that the landlord either:
(i) Knew or consented to actions of the tenant in violation of this chapter or chapter 69.41 or 69.52 RCW; or
(ii) Failed to respond to a notification of the illegal activity, provided by a law enforcement agency under RCW 59.18.075, within seven days of receipt of notification of the illegal activity.
(16) The landlord's claim for damages under subsection (15) of this section may not include a claim for loss of business and is limited to:
(a) Damage to tangible property and clean-up costs;
(b) The lesser of the cost of repair or fair market value of the damage directly caused by a law enforcement officer;
(c) The proceeds from the sale of the specific tenant's property seized and forfeited under subsection (7)(b) of this section; and
(d) The proceeds available after the seizing law enforcement agency satisfies any bona fide security interest in the tenant's property and costs related to sale of the tenant's property as provided by subsection (9)(b) of this section.
(17) Subsections (15) and (16) of this section do not limit any other rights a landlord may have against a tenant to collect for damages. However, if a law enforcement agency satisfies a landlord's claim under subsection (15) of this section, the rights the landlord has against the tenant for damages directly caused by a law enforcement officer under the terms of the landlord and tenant's contract are subrogated to the law enforcement agency.

RAP

RAP 5.1. REVIEW INITIATED BY FILING NOTICE OF APPEAL OR NOTICE FOR DISCRETIONARY REVIEW

(a) Review Initiated by Notice. A party seeking review of a trial court decision reviewable as a matter of right must file a notice of appeal. A party seeking review of a trial court decision subject to discretionary review must file a notice for discretionary review. Each notice must be filed with the trial court within the time provided by rule 5.2.

RAP 5.2. TIME ALLOWED TO FILE NOTICE

(a) Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e).
(b) Notice for Discretionary Review. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice for discretionary review must be filed in the trial court within the longer of (1) 30 days after the act of the trial court that the party filing the notice wants reviewed, or (2) 30 days after entry of an order deciding a timely motion for reconsideration of that act under CR 59.

RAP 5.3. CONTENT OF NOTICE--FILING

(a) Content of Notice of Appeal. A notice of appeal must (1) be titled a notice of appeal, (2) specify the party or parties seeking the review, (3) designate the decision or part of decision which the party wants reviewed, and (4) name the appellate court to which the review is taken.
The party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made, and, in a criminal case in which two or more defendants were joined for trial by order of the trial court, provide the names and superior court cause numbers of all codefendants. In a criminal case where the defendant is not represented by counsel at trial, the trial court clerk shall attach a copy of the judgment and sentence, the order of indigency, if applicable, and any service documents with the notice as provided in rule 5.3(j).

(b) Content of Notice for Discretionary Review. A notice for discretionary review must comply in content and form with the requirements for a notice of appeal, except that it should be titled a notice for discretionary review.
A party seeking discretionary review of a decision of a court of limited jurisdiction should include the name of the district or municipal court and the cause number for which review is sought.

RAP 9.11. ADDITIONAL EVIDENCE ON REVIEW

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 10.3. CONTENT OF BRIEF

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(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

RAP 18.1. ATTORNEY FEES AND EXPENSES

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.
(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

RALJ

RALJ 2.4. HOW TO INITIATE AN APPEAL

(a) Review Initiated by Filing Notice of Appeal. A party appealing a decision subject to these rules must file a notice of appeal in the court of limited jurisdiction within the time provided by rule 2.5. This is the only jurisdictional requirement for an appeal.
(b) Filing Fee. The first party to file a notice of appeal shall, at the time the notice is filed, pay the statutory filing fee to the clerk of the court of limited jurisdiction in which the notice is filed, unless the party filing the notice is excused from paying a filing fee by statute or by the constitution.
(c) Notice and Service. A party filing a notice of appeal shall immediately serve a copy of the notice on all other parties. The clerk of the court of limited jurisdiction shall immediately upon filing of a notice of appeal and

payment of the filing fee, if required, file a copy of the notice with the superior court.

RALJ 2.5. TIME ALLOWED TO INITIATE APPEAL BY FILING NOTICE

(a) Time Allowed to File Notice of Appeal. Except as provided in section (c), a notice of appeal must be filed within 30 days after the date of entry of the final decision which the party filing the notice seeks to appeal.
(b) Date of Entry Defined. If the final decision of the court of limited jurisdiction is oral and evidenced solely by a writing in the court record, the date of entry is the date the writing was placed in the record. If the final decision is by a writing signed by the court of limited jurisdiction, the date of entry is the date of delivery of the writing signed by the judge to the clerk for filing. If the decision is entered other than at a regularly scheduled and noticed hearing, the date of entry of the decision for a party is 3 days after the court of limited jurisdiction mails a notice to that party advising the party of both the court's decision and of the date that decision was written in the court record or the date that decision was delivered to the clerk for filing.
(c) Subsequent Notice by Other Parties. If a timely notice of appeal is filed by a party, any other party seeking relief from the decision must file a notice of appeal within the later of (1) 7 days after service of the notice of appeal filed by the other party, or (2) the time within which a notice of appeal must be filed as provided in section (a).
(d) Effect of Premature Notice of Appeal. A notice of appeal filed after the announcement of a decision but before entry of the final decision will be treated as filed on the day following entry of the decision.

RALJ 6.2. TRANSMITTAL OF RECORD OF PROCEEDINGS

(a) Transmittal Generally. The party seeking review shall, within 14 days of filing the notice of appeal, serve on all other parties and file with the clerk of the court of limited jurisdiction a designation of those portions

of the record that the party wants the clerk to transmit to the superior court. Any party may supplement the designation of the record prior to or with the party's last brief. Thereafter, a party may supplement the designation only by order of the superior court, upon motion. Each party is encouraged to designate only documents and exhibits needed to review the issues presented to the superior court. Within 14 days after the designation is filed, the clerk of the court of limited jurisdiction shall prepare the record and notify each party that the record is ready to transmit and the amount to be paid by each party. Each party shall pay for the cost of preparing the portion of the record designated by that party within 10 days of the clerk's notification, unless the party has been excused from paying by the court. Promptly after receiving payment, or after preparing the record in cases where payment is excused, the clerk of the court of limited jurisdiction shall certify that the record is true and complete, transmit it to the superior court, and notify the parties that the record has been transmitted.

(b) Cumbersome Exhibits. The clerk of the court of limited jurisdiction shall notify the superior court of exhibits which are difficult or unusually expensive to transmit. The exhibits shall be transmitted only if the superior court directs or if a party makes arrangements with the clerk to transmit the exhibits at the expense of the party requesting the transfer of exhibits.

RALJ 9.1. BASIS FOR DECISION ON APPEAL

(a) Errors of Law. The superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law.

(b) Factual Determinations. The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.

(c) [Reserved.]

(d) Final Judgment Not Designated in Notice. The superior court will review a final judgment not designated in the notice of appeal only if the notice designates an order deciding a timely posttrial motion based on (1)

CrRLJ 7.4 (arrest of judgment), (2) CrRLJ 7.5 (new trial), or (3) CRLJ 59 (new trial, reconsideration, and amendment of judgments).
(e) Disposition on Appeal Generally. The superior court may reverse, affirm, or modify the decision of the court of limited jurisdiction or remand the case back to that court for further proceedings.
(f) Limitation on Modification of Sentence. The superior court shall not modify the sentence imposed in a criminal case unless the sentence is incorrect as a matter of law.
(g) Form of Decision. The decision of the superior court shall be in writing and filed in the clerk's office with the other papers in the case. The reasons for the decision shall be stated.
(h) Discretionary Review. The decision of the superior court on appeal is subject to discretionary review pursuant to RAP 2.3(d).

RALJ 10.1. VIOLATION OF RULES GENERALLY

The superior court on its own initiative or on motion of a party may order a party or counsel who uses these rules for the purpose of delay or who fails to comply with these rules to pay terms of compensatory damages to any other party who has been harmed by the delay or the failure to comply. The superior court may condition a party's right to participate further in the appeal on compliance with the terms of a sanction order, including an order directing payment of an award by a party. If an award is not paid within the time specified by the superior court, the superior court shall direct the entry of a judgment in accordance with the award.
RALJ 10.1, WA R A LTD JURIS RALJ 10.1
Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 11/1/15. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 11/1/15.

EXHIBIT 1

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

CITY OF SUNNYSIDE, Appellant, vs. ANDREAS GONZALEZ, Respondent.	NO.33262-4-III DECLARATION OF WALLACE BERT ANDERSON

I, WALLACE BERT ANDERSON, declare as follows:

My name is Wallace Bert Anderson, I am 68 years old. I have been a Police Officer since July 4, 1970. I was the Chief of Police in Sunnyside, Washington from 1990 to 2002.

I do not recall being an author of any letter or document what would authorize the Honorable Steven Michels to conduct forfeiture hearings. I do not believe any such document exits.

I was the Chief of Police when the Police Department facility was located in downtown Sunnyside on 8th street. I oversaw the moving of the Police Department to its present location on Homer Street. There were no documents or property that went missing during the move.

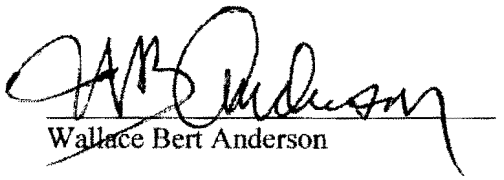
I do recall having documents such as Memorandum of Understanding and contractual documents but nothing regarding delegation of authorities for forfeitures.

Even if such a document does exist, it would be invalid as of the date I retired in 2002.

Garrison Law Offices, P.S.
516 South Seventh Street
P.O. Box 269
Sunnyside, WA 98944
(509)-837-2433
(509) 837-8326 FAX

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Sunnyside, Washington on this 15th day of December, 2015.



Wallace Bert Anderson

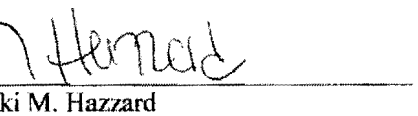
CERTIFICATE OF SERVICE

The undersigned, being first duly sworn on oath deposes and states:

On the 15th day of December, 2015, I caused to be forwarded copies of the foregoing to the following:

Margita Dornay 4109 Tieton Dr. Yakima, WA 98908-3346	via US MAIL
The Court of Appeals of the State of Washington Division III 500 N Cedar St. Spokane, WA 99201-1905	via FAX

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Nicki M. Hazzard

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Sunnyside, WA 98944
(509)-837-2433
(509) 837-8326 FAX

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner noted below a copy of Gonzalez's Brief of Respondent upon the following person(s):

[X] Counsel of Record Margita Dornay 4109 Tieton Dr. Yakima, WA 98908-3346 Douglas K. Garrison PO Box 269 Sunnyside, WA 98944	BY: [X] U.S. Mail [ ] E-Mail/PDF Format [ ] Electronic Filing [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile to: DATED this 12th day of January, 2016 at Spokane, WA. Ronald E. Farley