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WASHINGTON STATE
SUPREME COURT

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SUPREME COURT NO. 93907-1

Court of Appeals No. 33262-4-III

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

CITY OF SUNNYSIDE

Respondent,

v.

ANDREAS GONZALEZ

Petitioner.

PETITIONER GONZALEZ'S
SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
1. Washington Courts May Look To Federal Cases To See If Property Forfeiture Is Supported.	1
2. The Preponderance Of Evidence Standard Was Not Met By The City Of Sunnyside.	3
3. Mr. Gonzalez Is Entitled To Return Of His Property	10
APPENDIX	13

TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page</u>
<i>City of Walla Walla v. \$401,333.44</i> , 164 Wn.App. 236, 262 P.3d 1239 (2011)	1
<i>Clarke v. Shoreline School Dist. No. 412 v. King County</i> , 106 Wn.2d 102, 720 P.2d 793 (1986)	1
<i>Guillen v. Contreras</i> , 169 Wn.2d 769, 238 P.2d 1168 (2010)	12
<i>International Brotherhood of Pulp Sulphite and Paper Mill Workers, AFL-CIO v. Delaney</i> , 73 Wn.2d 956, 442 P. 250 (1968)	10, 11
<i>Leonard v. Texas</i> , 137 S.Ct. 847 (2017)	11
<i>Mohr v. Grant</i> , 153 Wn.2d 812, 108 P.3d 768 (2005)	3
<i>U.S. v. \$405,089.23 U.S. Currency</i> , 122 F.3d 1285 (9th Cir. 1997)	4
<i>U.S. v. \$49,576.00</i> , 116 F.3d 425 (9th Cir. 1997)	6, 11
<i>U.S. v. Real Property Known as 22249 Dolorosa Street</i> , 190 F.3d 977 (9th Cir. 1999)	4
<i>U.S. v. U.S. Currency, \$30,060.00</i> , 39 F.3d 1039 (9th Cir. 1994)	5, 6

United States v. \$49,790 in U.S. Currency,
763 F.Supp.2d 1160 (N.D. Cal. 2010)7, 8

United States v. Real Prop. in Santa Paula, Cal.,
763 F.Supp.2d 1175 (C.D. Cal. 2011) 3

Statutes

RCW 69.50.505(1)(g)	1
RCW 69.50.505(5)	1
RCW 69.50.505(6)	12
18 U.S.C. §983(c)(1)	2
18 U.S.C. §983(c)(3)	2
21 U.S.C. §881(a)(6)	1, 2

1. Washington Courts May Look To Federal Cases To See If Property Forfeiture Is Supported.

When Washington statutes have the same purpose as their federal counterparts, Washington courts may look to federal decisions to determine appropriate construction. Clarke v. Shoreline Sch. Dist. No. 412, King Cty., 106 Wn.2d 102, 118, 720 P.2d 793 (1986); City of Walla Walla v. \$401,333.44, 164 Wn.App. 236, 246, 262 P.3d 1239 (2011).

For purposes of this appeal, Washington's authorization for seizure and forfeiture is guided by RCW 69.50.505(1)(g) which states:

.. 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.*

(Emphasis added).¹

When there is a seizure of property and a forfeiture hearing:

...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).

Federal asset seizure is regulated through 21 U.S.C. §881(a)(6)

which states:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

...

¹ Full statutory language appears in the Appendix.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, ***all proceeds traceable to such an exchange***, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

(Emphasis added).

Asset seizures under the statute are guided by 18 U.S.C. §983(c)(1)

which states:

(c) Burden of proof.--In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property -

(1) ***the burden is on the Government to establish, by a preponderance of the evidence***, that the property is subject to forfeiture;

.....

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a ***substantial connection*** between the property and the offense.

18 U.S.C. §983(c)(1 and 3), (Emphasis added).

The standards and goals of the Washington forfeiture laws are in accord with the federal laws. As a result, it is appropriate to review federal case law to see how those forfeiture statutes should be implemented. When doing so, it is clear the evidence produced by the City of Sunnyside does not meet the preponderance of evidence standard required under either federal or state laws.

2. The Preponderance Of Evidence Standard Was Not Met By The City Of Sunnyside.

Under the federal preponderance of evidence test, the government must show that it is more likely than not the property is subject to forfeiture.² When it is claimed the property was involved in an illegal act, there must be a substantial connection to that act, and the government must demonstrate a nexus between the property and the illegal act which is more than incidental or fortuitous.³ United States v. Real Prop. in Santa Paula, Cal., 763 F.Supp.2d 1175, 1184 (C.D. Cal. 2011).

Property purchased by someone known to be involved with illegal drugs will not be automatically forfeited. The fact the purchase was made by that person may create a suspicion the money used to purchase the goods was derived from illegal narcotics activity, however, that alone is not sufficient to establish the necessary nexus to allow forfeiture. Involvement in illegal activity is nothing more than a vague suspicion of some illegal activity. It does not show the property to be seized is traceable to illegal narcotics. To show that connection, it is necessary to establish, by credible evidence, the probability the money was, in fact,

² Similarly, the Washington preponderance of evidence standard requires the evidence establish that the question at issue is more probably true than not true. Mohr v. Grant, 153 Wn.2d 812, 821, 108 P.3d 768 (2005).

³ This requirement to show a connection to illegal activity is similar to the Washington requirement of tracing. That issue was briefed by Gonzalez in his Court of Appeals Response Brief at p. 38, and the Petition for Review at p. 10, and will not be repeated here.

connected to drugs. U.S. v. \$405,089.23 U.S. Currency, 122 F.3d 1285, 1290 (9th Cir. 1997). (Case finding no nexus to establish right to forfeiture under the lower probable cause standard). Without a specific connection between the cash and drug activity, a seizing agency does not demonstrate it is likely the money originated from the illegal drug activity, as opposed to another source, be it legal or illegal. *Id.* at 1290 fn.4.

In addition, even if it is shown a person is a large scale drug dealer, before forfeiture will be allowed, there must be a sufficient connection between the detailed narcotics activity and the assets to be forfeited.

Suspicious of general criminality are not enough ..[T]he government must have *probable cause* to believe that the money is connected specifically to *drug* activities.

U.S. v. Real Property Known as 22249 Dolorosa Street, 190 F.3d 977, 983 (9th Cir. 1999, emphasis in original). (Case involving the lower probable cause standard).

In Dolorosa, the court also rejected the argument that just because the evidence showed defendant had no legitimate source of income, it:

..requires too great a leap of logic to go from that assertion to the conclusion that it is more likely than not the funds used to remodel the Dolorosa property originated from drug activity than from some other legal or illegal source..."

Id. at 983.⁴

⁴ The court in Dolorosa noted the property in question had co-owners who could have been a source of the funds. That is similar to the facts in the instant case where Gonzalez was living at home, with virtually no expenses, and could have accumulated funds

Possession of a large amount of cash in a plastic bag, to which a drug dog alerts, does not establish a nexus between that cash and illegal drug activity. U.S. v. U.S. Currency, \$30,060.00, 39 F.3d 1039 (9th Cir. 1994). There, a driver was stopped for running a stop sign. He had a sack of money wrapped in plastic sitting on the front seat of the car. It was arranged in \$1,000.00 stacks and wrapped in rubber bands. A narcotics dog called to the scene alerted to the money. Further search found no drugs in the car, but the driver had no documentation to explain the money, and no bank account records. When the police attempted to verify the driver's statements, they found he lied about his employment and how he could have acquired the money. He was arrested but the charges were later dismissed. *Id.* at 1040.

In the forfeiture hearing that followed, the court found there was no probable cause to allow the forfeiture. Given the evidence that a large percentage of money in circulation is contaminated by drugs, the dog alert was probative only in showing the currency had been in contact with narcotics at some point.

The mere fact of prior contamination does not establish, however, that the currency was actually exchanged for or intended to be exchanged for drugs by the person currently in possession of the currency-especially when seventy-five percent of Los Angeles' paper money supply is tainted with drug residue.

through that savings. More importantly, the City of Sunnyside presented no evidence the funds or car forfeited were actually connected to an illegal drug act.

Id. at 1043.

The fact the money was separated into bundles also failed to establish a connection between that money and an illegal drug transaction.

The court concluded:

In this case, the government cannot show the "aggregate of facts" raises more than a mere suspicion that the money seized from Alexander was connected to drugs.

Id. at 1045. (Emphasis added).⁵

In addition, evasiveness, lying, and the fact a person may fit a drug courier profile does not establish a probable cause standard, let alone the higher preponderance of evidence standard, to justify forfeiture. U.S. v. \$49,576.00, 116 F.3d 425 (9th Cir. 1997). Fitting a drug courier profile might supply reasonable suspicion, but does not establish probable cause to allow forfeiture. *Id.* at 427-28. Lying and providing false documents does not satisfy the probable cause standard to allow forfeiture.

Finally, appellant's use of a fake driver's license, his evasive and dishonest answers to questions, and his general nervous behavior are indicative of some illegal activity, but not necessarily of drug trafficking. We therefore conclude that the government failed to produce sufficient evidence to support a finding of probable cause to believe the property was involved in a drug transaction.

Id. at 428.

⁵ It is of note that court made a comment about what constitutes a "large" amount of money to support a drug connection. It found there is a difference between a "large" amount, such as \$215,300.00, as opposed to a small amount of \$15,000.00 - \$20,000.00. *Id.* at 1045, fn.3. Andreas Gonzalez had less than \$6,000.00.

Guidance as to what level of evidence *may* meet the preponderance of evidence standard is shown in United States v. \$49,790 in U.S. Currency, 763 F.Supp.2d 1160 (N.D. Cal. 2010). There, a specially trained, sophisticated drug sniffing dog, alerted to a package at a Federal Express Facility. It was sent with priority overnight delivery and included a routing slip that was filled out by hand and was paid for in cash. A warrant was obtained and when opened, the parcel was found to contain a black notebook case which held two vacuum sealed plastic bags holding nearly \$50,000.00 in currency.

In the forfeiture proceeding, the court found there was a preponderance of evidence the currency had a substantial connection with illegal drug activity. That evidence included:

1. The drug alert was made by a "sophisticated" dog that was trained to react only to ephemeral by-products of narcotics and not to commonly circulated money. The canine officer testified regarding the extent of training, certification and performance history of the dog to allow the court to find it was a "sophisticated" dog.

2. The claimant to the money had a prior drug conviction for possession of cocaine with intent to distribute and transporting cocaine with intent to distribute.

3. On two prior occasions, the claimant had forfeited money which was found to be traceable to, and used in exchange for, illegal drug activity. The first was in December of 2004 for \$141,370, and the second in February of 2007 for \$40,425.

4. The currency was bundled and placed inside vacuum sealed bags. The court found secreting money and sealing it in cellophane or plastic reflected an attempt to reduce odors and lessen the risk of discovery by trained narcotics dogs because cellophane and plastic are highly impermeable to gas.

5. There was a large sum of money, although the fact there was money alone would not meet the burden of proof.

6. The method of delivery indicated involvement with illegal drug activity because the court noted sending currency was a preferred method for transferring money because it left no paper trail. Further, the claimant's cousin sent the package and filled out the Fed Ex slip using a false name, false address and non-working phone number.

Id. at 1167-68.

In the instant case, there was no evidence offered that the canine alert was made by a "sophisticated" dog. Officer Lemmon, the canine officer, admitted that U.S. currency goes through counting machines and cash machines and picks up cocaine residue. He also admitted the federal

government has stopped using narcotics residue on money as evidence. (CP 19).

Andreas Gonzalez had not been previously convicted of any sort of crime, let alone a drug crime. When told at the hearing Mr. Gonzalez had no criminal drug history, Sergeant Bailey, the arresting officer, admitted he did not do a background check at the time of the arrest and could not recall if he did one later. He also admitted he was not surprised Mr. Gonzalez had no drug convictions and no criminal convictions whatsoever. (CP 13). Mr. Gonzalez was not criminally charged with intent to deliver as a result of his arrest, but was charged only with possession.

No evidence was offered to show that Mr. Gonzalez had previously forfeited in excess of \$180,000.00 in cash which was traceable to illegal drug transactions. In fact, the City provided no evidence it ever checked Mr. Gonzalez's criminal record at all and offered no evidence it carried out any sort of investigation of Mr. Gonzalez or his activities.

Mr. Gonzalez's currency was located in the pocket of his driver side door. (CP 18). It was not wrapped in cellophane or plastic or vacuum sealed or placed in any other material that would be highly impermeable to gas in order to hide the smell. It was not in a special hidden compartment.

While the amount seized and forfeited by Mr. Gonzalez was not insignificant, \$5,940.00 is not in the tens or hundreds of thousands of dollars often involved in drug seizure cases. In addition, there was no testimony offered by the City to identify that amount as significant for purposes of drug transactions, i.e., it was not identified as the price of a specific amount of drugs, or broken down as to what it might represent in terms of drug trafficking.

The money in question for Mr. Gonzalez was not involved in any sort of unusual transportation other than Mr. Gonzalez was going to pay his friend back for the money he loaned Mr. Gonzalez to purchase the car. (CP 21, 26).

Mr. Gonzalez did not lie about his name or address and consented to a search of his vehicle. When stopped, he provided his correct driver's license and car registration. (CP 9-10). He did not behave in the manner of a drug courier.

The evidence brought forth by the City failed to establish by a preponderance of evidence, Mr. Gonzalez's property was subject to forfeiture under the statute.

3. Mr. Gonzalez Is Entitled To Return Of His Property.

This Court has stated it subscribes to the principle that provisions for forfeitures are not favored. International Brotherhood of Pulp,

Sulphite and Paper Mill Workers, AFL-CIO v. Delaney, 73 Wn.2d 956, 971, 442 P.2d 250 (1968).

Specifically with regard to drug forfeitures, it has been noted:

The stakes are exceedingly high in a forfeiture proceeding: Claimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes.

U.S. v. \$49,576.00 U.S. Currency, at 428, *supra*.

The U.S. Supreme Court is also concerned about the use and impact of seizure and forfeiture statutes.

This system -- where police can seize property with limited judicial oversight and retain it for their own use -- has led to egregious and well-chronicled abuses.

.....

These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.

Leonard v. Texas, 137 S.Ct. 847, 848 (2017). (Mem.) (Internal citations omitted).⁶

⁶ Leonard was a memorandum decision denying a petition for a writ of certiorari decided March 6, 2017. The petition involved a challenge to a Texas forfeiture statute on Due Process grounds, but the argument had never been made at any point in the case and the Texas Court of Appeals had not addressed the issue. As a result, the petition was denied. *Id.* at 850.

As shown above and through the previous briefing provided by Mr. Gonzalez to the Court of Appeals and to this Court in his Petition for Review, the City of Sunnyside has failed to meet its burden to allow forfeiture of Mr. Gonzalez's property. The forfeited property was not traced to any illegal drug activity. There is not substantial evidence in the record to prove, by a preponderance of evidence, Mr. Gonzalez's car or cash should have been forfeited.

As a result, this Court should reverse the Court of Appeals and reinstate the Superior Court decision denying forfeiture and finding Mr. Gonzalez was the substantially prevailing party pursuant to RCW 69.50.505(6). Also as argued below, Mr. Gonzalez should be awarded his costs and reasonable attorney's fees for his actions to pursue his rights through the initial hearing up to, and including the hearing before this Court, as allowed by RCW 69.50.505(6); RAP 18.1; and Guillen v. Contreras, 169 Wn.2d 769, 780, 238 P.2d 1168 (2010).

RESPECTFULLY SUBMITTED this 7th day of April, 2017.

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APPENDIX

RCW 69.50.505(1)(g)

(1) The following are subject to seizure and forfeiture and no property right exists in them:

.....

(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

RCW 69.50.505(5)

(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.

RCW 69.50.505(6)

(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.

18 U.S.C. §983(c)(1) and (c)(3)

(c) Burden of proof.--In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property--

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

.....

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

21 U.S.C. §881(a)(6)

(a) Subject property

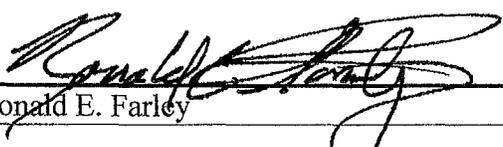
The following shall be subject to forfeiture to the United States and no property right shall exist in them:

...

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

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 Supreme Court Supplemental Brief on the following person(s):

<input checked="" type="checkbox"/> Counsel of Record Margita Dornay 4109 Tieton Dr. Yakima, WA 98908-3346 Douglas K. Garrison PO Box 269 Sunnyside, WA 98944	BY: <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail/PDF Format <input type="checkbox"/> Electronic Filing <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile to: DATED this <u>7th</u> day of <u>April</u> , 2017 at Spokane, WA.  _____ Ronald E. Farley
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