THE SUPREME COURT OF THE STATE OF WASHINGTON

DIVISION 2 COURT OF APPEALS NUMBER
102211-5
No. 57002-5-II

Chin Fu Chen and My Tieu Lao,

Petitioners

v.

Chuck E. Atkins, Sheriff of Clark County, and the

Clark County Sheriff's Office, and

Clark County, Washington,

Respondents

In the Matter of the Forfeiture of Personal Property to wit:

Bank of America Account # 2074: $5,963.47
Bank of America Account # 1451: $75,429.42
Bank of America Account # 2074: $ 7,685.18

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

Roger A. Bennett, WSBA 6536
Attorney for Petitioners

112 W. 11th Street, Suite 200
Vancouver, WA 98660
(360) 713-3523
Rbenn21874@aol.com

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A. IDENTITY OF MOVING PARTIES

Chin Fu Chen and My Tieu Lao request review of the decisions designated in Part B of this motion.

All of the representations of fact below are based upon documents contained in the Court of Appeals record, but are not included in the Appendix hereto, due to the limitations under RAP 13.4(c)(9).

B. DECISION

Division 2, Washington Court of Appeals

On September 20, 2022, Commissioner Eric B. Schmidt accepted review, Appendix Item 1, on only one of several issues raised by Petitioners: staleness of the information in the Search Warrant Affidavit supporting seizure of money from three bank accounts.

On May 9, 2023 the Court of Appeals issued its unpublished opinion affirming the lower courts' decisions, Appendix Item 2.

Petitioners filed a timely Motion for Reconsideration which was denied on June 27, 2023, Appendix Item 3.

C. ISSUES PRESENTED FOR REVIEW

1. Where an affidavit for a Search Warrant states that Items to be seized (money in bank accounts) were withdrawn from the accounts years prior to issuance of the warrant, is the information stale, failing to establish probable cause to issue the warrant?

2. Where an affidavit for a Search and Seizure warrant alleges that money received in drug transactions had been deposited and removed from bank accounts years in the past, does a warrant which authorizes seizure of all funds currently in the bank accounts, regardless of source, violate the Particularity Clause of the United States Constitution 4th Amendment and Article I, Section 7 of the Washington State Constitution?

3. In an affidavit for a Search and Seizure Warrant which alleges that homeowners have engaged in growing and selling Marijuana, does Washington law require that the source of the accusations be stated in the affidavit, under Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969),?

4. Where an affidavit for a Search and Seizure warrant is invalid on its face for failure to comply with Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969), should the Supreme Court properly exercise its discretion to consider the issues under RAP 2.5(a)(3)?

5. Does a trial court error by ordering forfeiture of the contents of bank accounts, due to insufficiency of evidence and without making any finding of fact as to what amount, if any of the funds in the account were received in drug transactions, and without identifying any specific drug transaction?

D. STATEMENT OF THE CASE

1. On January 9, 2020, the Clark County Sheriff's Office raided the residence of Petitioners and seized a quantity of Marijuana plants, grow lights, $ 6,300.00 in cash on hand, a pickup truck, tax returns and bank records.

2. Almost a year later, on December 11, 2020, Sheriff's employee John Luciano executed a Search Warrant, issued by Superior Court Judge Daniel Stahnke and seized all money on deposit in three bank accounts, totaling $ 89,078.07. ("December 2020 Warrant").

3. The December, 2020 Affidavit for Search and Seizure Warrant contained no proof that any money representing drug proceeds had been deposited in the three accounts in 2020.

4. The December, 2020 Affidavit for Search and Seizure Warrant and the Search Warrant itself, did not distinguish between monies in the accounts representing proceeds from drug sales versus monies acquired lawfully.

5. On December 18, 2020, the Sheriff's Office mailed Petitioners a Notice of Seizure and Intent to Forfeit of the bank accounts' contents.

6. The Petitioners removed the forfeiture proceeding to Clark County District Court and moved for Summary Judgment, essentially a Motion to Suppress, which was denied by Judge Kristen Parcher with Findings of Fact and Conclusions of Law, entered on July 29, 2021.

7. On June 30, 2021, prior to trial, the Sheriff relinquished $ 30,242.30 of the $ 89,078.07, leaving the amount in controversy at $ 58,835.67.

8. At trial on July 9, 2021, John Luciano calculated that Claimants had deposited and spent approximately $ 214,000 in "unreported income," prior to January, 2020, which he characterized as Marijuana sales proceeds.

9. Mr. Luciano hypothesized that unreported income had been received by Petitioners only on the basis that they had spent that amount in excess of lawful earnings from January 2016 to December, 2019.

10. At the beginning of 2016, Petitioners had $50,551.84 in their bank accounts. At the end of December of 2019, they had $ 58,835.67 in the accounts. Mr. Luciano omitted this information from his Affidavit.

11. On July 29, 2021, the Trial Court ordered that the entire remaining $ 58,835.67 be forfeited to the Sheriff.

12. The Trial Court failed to make any Finding of Fact that any of the $ 58,835.67 in forfeited funds had been received in exchange for Marijuana.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review of this matter.

The Search Warrant was issued to seize property which, according to the affiant, had been removed from the bank accounts over a year earlier.

Further, the Trial Court ordered forfeiture of $ 58,835.67, which the Court acknowledged could not be traced to drug transactions; on the theory that lawfully earned money can be seized in lieu of sales proceeds which had slipped through the Sheriff's hands years earlier. Therefore the forfeiture was based upon insufficient evidence.

Issue # 1 Staleness

1. The Court of Appeals decision affirming the Superior Court's ruling, which affirmed the Trial Court, was in conflict with published decisions of the Court of Appeals, RAP 14.4(b)(2).

The Court of Appeals, the District Court and Superior Court all recited generalized vagaries about the concept of staleness, but failed to apply them to the affidavit in this case.

The courts cited State v. Maddox, 152 Wn. App 2d. 499, 506, 98 P. 3d 1199 (2004,) for the proposition that in order for the information in the affidavit to not be stale, the circumstances must support a "common sense determination that there is continuing and contemporaneous possession of the property intended to be seized."

Nothing in the affidavit established any continuing or contemporaneous presence of drug sales proceeds in the accounts after December 2019. The affidavit states that all hypothesized drug proceeds had been spent prior to January, 2020. Applying the "common sense" requirement of Maddox, supra, issuance of a warrant to seize property which was removed from the place to be searched over a year earlier makes no sense, and is in conflict with Maddox, and with State v. Young, 62 Wn. App. 895, 802 P.2d 829, (1991): "A period in excess of 1 year obviously casts doubt on the validity of the warrant..."

> " It is not enough . . . to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal

> activity was occurring at or about the time the warrant was issued. Sgro v. United States, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138, 85 A.L.R. 108 (1932)" State v. Young, 62 Wn. App. at 903.

The rulings by the lower courts are also in conflict with State v. Higby, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980), which holds that in cases of contraband (a small amount of Marijuana) the period of time in which information becomes stale is even shorter than for non-contraband. Proceeds of drug sales are, as a matter of law, contraband RCW 69.50.505(1)(g).

2. A significant question of law under the Constitution of the State of Washington or of the United States is involved. RAP 13.4(b)(3).

Staleness of information in a Search Warrant affidavit is a question of constitutional magnitude, as it defeats a finding of probable cause.

> "We have recognized an affidavit in support of a search warrant "must state facts so closely related to the time of the issuance of the warrant so as to justify a finding of probable cause at that time."..."The reason for this rule is that probable cause, with time, dissipates." State v. Winborne, 273 S.C. 62, 64, 254 S.E. 2d 297 (1979.)

ERRORS OF THE COURT OF APPEALS

The Court of Appeals, in finding that the information in the Affidavit for search Warrant was not stale, dramatically deviated

from the four corners of the Affidavit. The Court did an erroneous analysis of the facts which was never argued at any level by the Sheriff's attorney, because the analysis was patently incorrect.

A. Error in double-counting the amount of illicit sales proceeds.

The Court of Appeals erroneously read the affidavit as saying that the amount of alleged sales proceeds received by the Petitioners from 2016 through 2019 was twice the amount actually claimed in the affidavit.

Specifically, the Court stated:

> " Luciano's affidavit alleged that his investigation had determined that approximately $60,000 of unreported income was deposited into Chen and Lao's bank accounts each year from 2016 to 2019 for a total of approximately $225,000 of unreported income. During this same period, Chen and Lao both received legitimate income reported on W-2 forms that was deposited into the bank accounts and commingled with the unreported income.
>
> **In addition,** Luciano alleged that account records showed that Chen and Lao's personal living expenses exceeded their W-2 reported income by approximately $72,000 and their cash on hand and asset acquisitions increased by approximately $154,000."(Emphasis added.)

Later In the opinion, the Court repeated this erroneous interpretation of the affidavit:

> "First, Luciano's affidavit supports the common sense conclusion that proceeds from illegal activities were in Chen and Lao's bank accounts in January 2020. Luciano

> stated that from 2016 through 2019, Chen and Lao had $225,000 in unreported income, spent $72,000 more than their legitimate income on living expenses, and had $154,000 in increased cash on hand and asset acquisitions. Although Luciano did not specify the amount of increased cash on hand, he clearly concluded that there was some amount of cash on hand in the bank accounts that related to illegal activities." (Emphasis added)

The Court erred by double counting the total of alleged sales proceeds over the four year period, and then assumed that some portion of the greatly inflated amount must still have been in the accounts a year later.

The Court recited that Mr. Luciano computed the total of sales proceeds at approximately $ 225,000.00, but when Mr. Luciano broke that figure down into $ 72,000.00 in living expenses and $ 154,000.00 in asset acquisitions and cash on hand, the Court of Appeals apparently perceived it as additional illicit income.

The mistake is obvious, as Mr. Luciano repeats the $ 225,000.00 figure in his conclusion on page 6 of the Affidavit:

"Conclusion

> Documentary financial evidence shows that the married couple accumulated approximately $225,000 of identified unreported Income. The only evidence as to the source of the unreported income is the illegal marijuana operation."

The affidavit does not state that Petitioners deposited $ 225,000.00 into their accounts and also spent an additional same amount on personal expenses and asset acquisitions. The Affidavit claims that the expenses and asset acquisitions came out of the bank accounts, into which the sales proceeds had been deposited.

The totality of the unreported income (money subject to forfeiture) was calculated by Mr. Luciano by adding the money spent on living expenses ($ 72,000.00) and asset acquisitions/cash on hand ($ 154,000.00) in excess of W-2 income. That is why the total from the excess living expenses and asset acquisitions/cash on hand ($ 226,000.00) almost precisely equals the conclusion as to drug sales proceeds ($225,000.00.)

It appears that the Court erroneously inferred an incorrect amount of drug proceeds by adding the $ 225,000.00 to the living expense/asset acquisitions /cash on hand figure, to effectually double the amount of sales proceeds over the period of 2016-2019, leading the Court to believe that the affidavit established that the bank accounts may have contained more unlawfully obtained money in January, 2020 than the $225,000.00 already spent by the Petitioners.

B. Error in assessing "cash on hand."

Next, the Court of Appeals erred when it concluded that:

> Although Luciano did not specify the amount of increased cash on hand, he clearly concluded that there was some amount of cash on hand **in the bank accounts** that related to illegal activities." (Emphasis added)

The Affidavit says nothing about "cash on hand in bank accounts." The Court of Appeals erroneously mis-read the affidavit and added "facts" which did not exist.

Further, there is no such thing as "cash on hand" in bank accounts. Cash on hand is currency in one's possession. Bank accounts are not cash. The "cash on hand" referenced in the Affidavit was the $ 6,300.00 seized on January 8, 2020. Obviously it could not have been in the bank accounts in January or December, 2020 since it was seized in the raid of January 2020.

C. Error in assuming bank balances in December, 2015 and December, 2019.

The Court based its decision on the premise that:

> "...the common sense inference is that the money was spent on a pro rata basis. Therefore, unless the account balances went to zero at some point after January 2020, some of the illegal proceeds necessarily remained in those accounts."

In doing so, the Court deviated from the facts stated in the Affidavit. Mr. Luciano never stated what the beginning balance and ending balance from 2016 through 2019 was. He never stated that there was any beginning balance, nor ending balance, and he definitely never investigated whether or not the bank accounts had or had not been drawn down to zero between January, 2020 and December, 2020.

Mr. Luciano chose his unique method of "accounting." He chose to conceal from the issuing magistrate two extremely important facts: the January 2016 opening balance and the December 2019 closing balance of the accounts, and the low balance, if any, in the accounts during 2020.

If Mr. Luciano had included the truth in his affidavit, that the accounts in January, 2016 held $50,551.84 and ended in December 2019 with $58,835.67, the issuing magistrate would have, or should have limited the seizure to the difference, $ 8,283.83.

In the Search Warrant Affidavit, Mr. Luciano's' snap-shot method of calculation was based on the assumption that the only relevant facts were what happened in 2016 through 2019. Because he chose to omit all other facts relating to money in the

bank accounts, the Affidavit must be read as establishing only those facts set out therein. His calculations were premised upon starting and ending up with an empty bank account.

The Sheriff cannot claim an inference that money other than that spent between 2016 and 2019 remained in the bank accounts after January, 2020, when the Sheriff himself concealed the facts known to him which would support or refute the inference.

By drawing a "common sense inference" that some speculative of amount of money from Marijuana sales transactions remained in the accounts after January, 2020, the Court of Appeals deviated from the four corners of the Affidavit.

D. Error in relying upon Mr. Luciano's erroneous and conclusory statement of law or fact.

Petitioners repeatedly argued in their briefing that the Affidavit claimed that they had spent all sales proceeds prior to January, 2020. The Court rejected this argument:

> But the affidavit language does not support this claim – Luciano did not state that Chen and Lao had spent all the illegal proceeds. In fact, he opined in the affidavit that "[a]ny bank balance represents illegal proceeds."

When Mr. Luciano "... opined in the affidavit that "[a]ny bank balance represents illegal proceeds," that was simply an erroneous conclusion of law. Mr. Luciano apparently believed that

money in bank accounts, regardless of source, can be seized and forfeited in total if the account was ever used to contain illicit proceeds; a view not shared by our legislature.

Further, even if perceived as a statement of fact, it is a bald, unsupported conclusion, which should have been ignored by the issuing magistrate and appellate courts. State v. Youngs, 199 Wn. App. 472, 400 P.3d 1265 (2017.)

Due to Luciano's failure to investigate any activity in the bank accounts for over a year, there was no factual basis in the affidavit for such a claim.

If Judge Stahnke gave any credence or weight to this curious statement, he abused his discretion as an issuing magistrate, and the Court of Appeals erred by doing the same.

Issue # 2 Lack of Particularity

1. A significant question of law under the Constitution of the State of Washington or of the United States is involved. RAP 13.4(B)(3).

The December 2020 Warrant violated the Particularity Clause of the 4th Amendment:

> "...no warrants shall issue, but upon probable cause, ..., and *particularly describing* ... the persons or *things to be seized."*

The Affidavit for the December, 2020 Warrant purports to establish an amount of "approximately $ 225,000.00" in drug proceeds already been spent. This estimate shrank to $ 214,000.00 at trial.

No effort was made in the affidavit to quantify any amount of actual drug proceeds still in any bank account in December, 2020.

The issue, therefore, is whether law enforcement can obtain a Search and Seizure Warrant by alleging in an affidavit that Petitioners had received and already spent drug proceeds in the distant past, for the seizure of all contents, regardless of source and amount.

Under this affidavit and warrant, the Sheriff could have, and would have, seized a million, or two million dollars, regardless of source, if such was in the accounts. No limit was stated in the warrant, and neither the Bank nor Sheriff had information as to the amount or source of any contents of the accounts.

The Warrant was a blank check for seizure of all of Petitioner's funds from three accounts selected by the Sheriff for any amount found there.

If the Sheriff was searching for $ 214,000 in drug proceeds, seen in the Petitioners' home years earlier, (and since spent) could he obtain a warrant to seize "all money, regardless of amount, source or origin" in said residence? That is exactly what happened here.

A blank check hardly describes with particularity the amount of money to be seized from a bank account. No bank would cash such a check, except, apparently, the Bank of America.

This Warrant placed no limit on anyone, neither the Sheriff nor the bank on how much money could be seized. Further, it left it totally up to the discretion of the Sheriff as to which accounts would be seized, because the Sheriff's employee simply listed three account numbers, without connecting them in the affidavit to any alleged deposits or withdrawals of drug proceeds.

A warrant which leaves the Items to be seized to the discretion of the police violates the Particularity Clause: "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 195-96 (1927, 275 U.S. at 196.

The December 2020 Warrant, was a general warrant,

allowing seizure of an undefined and unlimited amount of money. Such warrants are abhorrent. Stanford v. Texas, 379 U. S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

Issue # 3 Failure of the Affidavit to Show the Basis of Knowledge, under Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969).

1. A significant question of law under the Constitution of the State of Washington or of the United States is involved. RAP 13.4(b)(3).

The December 2020 affidavit sets out a summary description of a January, 2020 search of the residence of the Claimants, and a claim that certain Items were recovered, and conclusions therefrom that Petitioners were engaged in growing and selling Marijuana.

Nowhere therein does Mr. Luciano state the source of his information.

He fails to state whether his information came from his own knowledge, from a confidential informant, a "citizen" informant," another police officer or police report, or the basis of knowledge of any source.

Without this information, the affidavit fails to establish the existence of a Marijuana grow operation at all.

If a police officer presented an affidavit stating that "I wish to search a residence at X address which is being used to grow Marijuana illegally," a reasonable magistrate should say: How do you know that to be true? Tell me the basis of your knowledge." Mr. Luciano's affidavit in this case is no better than the example above.

Compliance with Spinelli is necessary to establish probable cause for issuance of a search warrant; therefore the issue is one of constitutional magnitude.

A search warrant affidavit which relies upon conclusory statements without establishing the basis for such conclusions is invalid on its face, State v. Youngs, 199 Wn. App 472, 400 P.3d 1265 (2017).

Issue # 4. Where an affidavit for a Search and Seizure warrant is patently invalid on its face for failure to comply with Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969), should the Court of Appeals properly exercise its discretion to consider the issue under RAP 2.5(a)(3)?

1. A significant question of law under the Constitution of the State of Washington or of the United States is involved. RAP 13.4(B)(3)

Petitioners adopt the arguments set out above as to the Spinelli defect in the December 2020 search warrant affidavit. The constitutional significance of the issue is undeniable.

2. RAP 2.5: A party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.

Counsel for Petitioners didn't raise the Spinelli argument in the District Court, not for strategic reasons, but as an oversight.

The issue was raised on RALJ Appeal however, and fully argued by both sides. Judge Clark, on RALJ Appeal, simply declined to rule. Failure to exercise discretion is an abuse of discretion. In re Adoption of A.W.A., 198 Wn. App. 918, 922, 397 P.3d 150 (2017).

> "(...W)e will consider constitutional issues raised for the first time on appeal. State v. Regan, 97 Wn.2d 47, 50, 640 P.2d 725 (1982); State v. Theroff, 95 Wn.2d 385, 391, 622 P.2d 1240 (1980); State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980). RAP 2.5(a) reflects this view that a "manifest error affecting a constitutional right" may be raised for the first time in an appellate court." State v. Sauve 100 Wn.2d 84, 666 P.2d 894, (1983.)

Because the affidavit for the December 2020 Search Warrant was defective, issuance of the Warrant was a manifest error affecting the constitutional right to be free of unreasonable searches and seizures. A "manifest error" is one which had "'practical and identifiable consequences in the trial.'" State v. Burns, 193 Wn.2d 190, 438 P.3d 1183 (2019). If a constitutional

error is prejudicial, then it is "manifest," State v. Scott, 110 Wn.2d 682 at 688, 757 P.2d 492 (1988), State v. Lynn, 67 Wn. App. 339, 342, at 346, 835 P.2d 251 (1992).

The constitutional error in the issuance of the December 2020 Search Warrant had practical and identifiable consequences in the Petitioner's trial: It eventuated in the forfeiture of Petitioner's property.

The policy considerations for declining to hear errors first raised on appeal actually favor the Petitioners' request.

> "(P)ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts". State v. Lynn, 67 Wn. App. at 344."

Here, the trial process is not undermined, as the issue is easily and efficiently litigated on appeal, as strictly an issue of law; the issue is simple and straightforward with no review of any record other than the affidavit required; no unnecessary appeal is generated, as the issue is presented in an existing appeal; no re-trial will occur, because if Petitioners are successful, the result is dismissal of the forfeiture proceedings instead of retrial; and there

is no waste of resources because the case is before the court on other issues anyway.

No-one is prejudiced by this court hearing and deciding the simple issue as to applicability of the Spinelli rule, other than perhaps the Sheriff in losing his profitable windfall from making an unconstitutional seizure.

The fact that the trial court was not asked to rule on the Spinelli issue is of no consequence. The content of the affidavit is set in stone. No fact finding was required; the application of Spinelli is a matter of law, which this court would make *de novo*, regardless of how Judge Parcher or Judge Clark would have ruled on it.

Issue # 5 Insufficiency of evidence that any of the funds in the account in December, 2020 were received in drug transactions, and without identifying any specific drug transaction.

1. The decision involves an issue of public interest which should be determined by an appellate court, RAP 13.4(b)(4).

Judge Parcher, in her ruling, failed to identify any specific occurrence of a Marijuana sale, nor any specific transaction in which money was received by Petitioners. She acknowledged that the Sheriff's case was predicated on a theory that sales transactions had occurred one to five years in the past, because Petitioners had spent more money in that time period than they

reported earning to the IRS. She stated in her Conclusion of Law 16, page 11, lines 15-18:

> "No one can recover illegal drug proceeds already spent. Claimants should not reap the benefits of already spent, illegally obtained income."

As a philosophical matter, one can agree, however, forfeiture under RCW 69.50.505 is not a philosophical exercise; it is a legal process. The law is that:

> "(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..."

As noted above, the Sheriff's employee, John Luciano, a former IRS agent with no training at all on the application of Washington forfeiture laws, chose the "spent money" methodology to claim that Petitioners had sold Marijuana in the past, and how much money was received. He added up the amount of income reported to the IRS, then added up total money spent in a four year period, and then concluded that the excess in <u>spent funds</u> represented proceeds of Marijuana sales.

Mr. Luciano made no effort to identify any sales transactions,

nor to identify any deposits of sales proceeds, and most significantly, no effort to identify funds in bank accounts in the entire year of 2020 that had been received in Marijuana transactions.

Most egregiously, he failed to account in his "unaccounted for income" analysis, for the pre-existing balance in the accounts of $50,551.84.

He concluded at trial that $ 214,000.00 of "unreported income" (drug proceeds, he said) had been received, because it was spent, from 2016 through 2019.

The fact that the evidence established that the claimed drug proceeds had already been spent was of no consequence to district court Judge Parcher, because "No-one should reap the benefits of already spent, illegally obtained income."

The Trial Court forfeited the Petitioners' $ 58,835.67 **in lieu of** spent, unattainable drug proceeds. The illegally obtained money was gone, so the Trial Court forfeited lawfully acquired assets to make up for it.

This approach, that is, forfeiting assets which cannot be identified as drug proceeds, upon a theory that the Claimants

currently have too much in assets, or spent too much in the past in relation to their lawful income reported to the IRS, has been rejected by the Court of Appeals in Tri-City Metro Drug Task Force v. Contreras, 129 Wn. App. 648. 119 P.3d 862 (2005). In that case, forfeiture was reversed, in the absence of tracing of specific assets to drug transactions.

The Sheriff was required to demonstrate by a preponderance of the evidence that individual assets seized in December, 2020 had been **provided in exchange for** controlled substances, between January 1, 2016 and December 31, 2019.

The failure of the trial court to identify, in Findings of Fact, any specific drug transaction, or any specific deposit of drug proceeds, nor any amount of money in Petitioners' bank in December, 2020 which was received in exchange for controlled substances accounts in the entirety of 2020, shows that the Trial Court was not concerned with the source of the forfeited funds. The $ 58,835.67, which included the 2016 beginning lawful balance of $ 50,551.84, was forfeited to make up for past drug proceeds which were not seized.

This is an issue of public concern because the Sheriff unlawfully seized the entirety of Petitioners' funds on deposit with

total disregard for property rights and the law, and will no doubt continue such misconduct unless the Supreme Court provides appropriate guidance to the trial courts.

The Trial Court's concern that Petitioners should not "reap the benefits" of selling Marijuana substituted the Court's indignation for the Legislature's rule of law. The objects of a proper seizure and forfeiture are clearly and unequivocally listed in RCW 69.50.505. That list does not include money in a bank account acquired from lawful, or even unknown sources, in lieu of proceeds long ago spent.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E, order the District Court to vacate the forfeiture, to return Petitioner's funds and any interest earned thereon, and award Petitioners attorney's fees incurred in these proceedings at every level of court.

G. WORD COUNT

This document, exclusive of those provisions excluded by RAP 18.17, contains 4,525 words.

Respectfully submitted this 24th day of July, 2023,

Roger A. Bennett WSBA 6536
Attorney for Petitioners

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Filed
Washington State
Court of Appeals
Division Two

September 20, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHIN FU CHEN and MY TIEU LAO, Petitioners, v. CHUCK E. ATKINS, Sheriff of Clark County, AND CLARK COUNTY, WA,, Respondents. In the Matter of the Forfeiture of Personal Property to wit: Bank of America Account #7024: $5,963.47 Bank of America Account #1451 $75,429.42 Bank of America Account #8810 $7,685.18	No. 57002-5-II RULING GRANTING REVIEW

Chin Fu Chen and My Tieu Lao (Claimants) seek discretionary review of the superior court's decision to affirm the decision of the district court denying their claim to

property seized by the Clark County Sheriff following execution of a search warrant. Concluding that Claimants have shown that discretionary review is appropriate under RAP 2.3(d), this court grants review.

FACTS

On January 9, 2020, the Clark County Sheriff's Office executed a search warrant at the residence of the Claimants. It seized growing cannabis plants, ballast for grow lamps, $6,300 in currency, a truck, and financial documents, including tax and bank records.

On December 11, 2020, the Clark County Sheriff's Office executed a search warrant and seized the following Bank of America accounts in the Claimants' names: #7024 in the amount of $5,963.47; Bank of America Account #1451 in the amount of $75,429.42; Bank of America Account #8810 in the amount of $7,685.18, for a total amount of $89,078.07. The warrant was based on an affidavit of John Luciano, III, a financial investigator with the Clark-Vancouver Regional Drug Task Force.

On December 18, 2020, the Clark County Sheriff's Office issued to the Claimants a Notice of Seizure and Intended Forfeiture as to the amounts seized from the bank accounts. On January 13, 2021, the Claimants timely filed a notice contesting the December 2020 seizure and demanding a hearing. By stipulation of the parties, $30,242.40, which was the difference between the account balances between January 2020 and December 2020, was returned to the Claimants' attorney. A hearing as to the remaining funds was held on July 9, 2021. Luciano testified that the Claimants had over $200,000 in unreported income during the years prior to the January 2020 seizure and had no identifiable source of legitimate income. Claimants argued that the December 11,

2020 warrant was not supported by probable cause. The district court rejected their argument, concluding that Luciano's affidavit was sufficient to support the warrant.[1] The district court found that the Clark County Sheriff had proved by a preponderance of the evidence that the amounts seized from the bank accounts were income from a sophisticated illegal cannabis grow operation and therefore subject to forfeiture. The district court rejected the Claimants' claim that the amounts should be returned to them.

The Claimants appealed to superior court, arguing that the affidavit in support of the December 2020 warrant was stale, that the December 2020 warrant was not sufficiently particular, whether the warrant was defective under *Spinelli*,[2] whether the evidence was sufficient to support the forfeiture, and whether the calculation of the amounts of funds was correct. The superior court affirmed, concluding that the affidavit was not stale, concluding that the warrant was sufficiently particular, declining to rule on the *Spinelli* issue because it had not been raised in the district court, concluding that the evidence was sufficient to support the forfeiture, and concluding that the amount of funds was based on being the result of illegal drug sales. Claimants seeks discretionary review in this court.

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[1] The district court also denied the Claimants' motion to dismiss the forfeiture on grounds that the service of the Notice of Seizure and Intended Forfeiture was improper. The Claimants do not raise this issue in this motion.

[2] *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

ANALYSIS

RAP 2.3(d) provides:

> **(d) Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction.** Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:
>
> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

First, the Claimants argue that the superior court's conclusion, that the December 2020 affidavit was not stale, conflicts with *State v. Maddox,* 152 Wn.2d, 499, 506, 98 P.3d 1199 (2004), which holds that for the information supporting a search warrant not to be stale, there must be a "common sense determination that there is continuing and contemporaneous possession of the property intended to be seized." They argue that the superior court's conclusion also conflicts with *State v. Young*, 62 Wn. App. 895, 903, 802 P.2d 829 (1991), which held that "a period in excess of 1 year obviously casts doubt on the validity of the warrant."[3] While the superior court cites the *Maddox* standard, the evidence does not appear to support its determination of a "continuing and

[3] The Claimants also argue, but fail to demonstrate, that the superior court's conclusion constitutes a significant question of constitutional law, under RAP 2.3(d)(2), or a departure from the accepted and usual course of judicial proceedings, under RAP 2.3(d)(4).

contemporaneous possession" of the money seized under the December 2020 warrant. The Claimants have shown that discretionary review is appropriate under RAP 2.3(b)(1).

Second, the Claimants argue that the superior court's conclusion was sufficiently particular under the Fourth Amendment is a significant question of constitutional law. But the warrant identified the bank accounts to be seized. The Claimants do not present any authority that the basis for the amounts sought to be seized must also be stated particularly. The Claimants have not shown that discretionary review is appropriate under RAP 2.3(b)(2).

Third, the Claimants that the December 2020 affidavit does not comply with the basis of knowledge requirement of *Spinelli*. But the superior court declined to address the *Spinelli* issue because it had not been raised in the district court. While a reviewing court may choose to address a constitutional issue not raised below, nothing in the RALJ's require the superior court to do so. The Claimants have not shown that discretionary review is appropriate under RAP 2.3(b)(2).

Finally, the Claimants argue that the evidence was insufficient that the funds seized from the three Bank of America accounts were received in drug transactions, such that they are subject to forfeiture. The December 2020 affidavit provides sufficient evidence of the source of the funds. This is not an issue of public interest. Nor have the Claimants shown that the superior court departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the district court. The Claimants have not shown that discretionary review is appropriate under RAP 2.3(d)(3) or (d)(4).

CONCLUSION

The Claimants have demonstrated that discretionary review is appropriate under RAP 2.3(d)(1), but only as to the staleness issue. Accordingly, it is hereby

ORDERED that Claimants' motion for discretionary review is granted as to the staleness issue only. The Clerk will issue a perfection schedule. The Claimants' request for an award of attorney fees is denied for lack of any basis for such an award at this time.

Eric B. Schmidt

Eric B. Schmidt
Court Commissioner

cc: Roger A. Bennett
William P. Richardson
Hon. Suzan L. Clark
Hon. Kristen L. Parcher

Filed
Washington State
Court of Appeals
Division Two

May 9, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHIN FU CHEN and MY TIEU LAO, Petitioners, v. CHUCK E. ATKINS, Sheriff of Clark County, CLARK COUNTY SHERIFF'S OFFICE, and CLARK COUNTY, WASHINGTON, Respondents. In the Matter of the Forfeiture of Personal Property to wit: Bank of America Account #7024: $5,963.47 Bank of America Account #1451: $75,429.42 Bank of America Account #8810: $7,685.18	No. 57002-5-II UNPUBLISHED OPINION

MAXA, J. – Chin Fu Chen and My Tieu Lao appeal the superior court's order affirming the district court's forfeiture order regarding funds from their bank accounts that the Clark County Sheriff's Office (CCSO) seized as proceeds from an illegal cannabis grow operation. The seizure occurred pursuant to a search and seizure warrant for Chen and Lao's bank accounts that was issued 11 months after law enforcement shut down Chen and Lao's grow operation.

Chen and Lao argue that probable cause did not support the search and seizure warrant because the information in the affidavit supporting the warrant was stale. We hold that the

superior court did not err by concluding that the information in the affidavit was not stale. Accordingly, we affirm the superior court's order affirming the district court's forfeiture order.[1]

FACTS

Background

In January 2020, law enforcement executed a search warrant at Chen and Lao's residence[2] and uncovered a sophisticated cannabis production operation. Law enforcement seized 115 cannabis plants, 31 pounds of processed cannabis, $6,300 in cash, equipment involved in growing, processing, and packaging cannabis, and financial documents. Nothing in the record suggests that the cannabis operation continued after January 2020.

In December 2020, John Luciano – a financial investigator for the CCSO – submitted an affidavit supporting a warrant for the seizure of Chen and Lao's bank accounts. Luciano obtained financial records from Chen and Lao's bank to distinguish between legitimate income and illegal proceeds and to establish the disposition of illegal funds.

Luciano's affidavit alleged that his investigation had determined that approximately $60,000 of unreported income was deposited into Chen and Lao's bank accounts each year from 2016 to 2019 for a total of approximately $225,000 of unreported income. During this same period, Chen and Lao both received legitimate income reported on W-2 forms that was deposited into the bank accounts and commingled with the unreported income.

In addition, Luciano alleged that account records showed that Chen and Lao's personal living expenses exceeded their W-2 reported income by approximately $72,000. And their cash

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[1] Chen and Lao also request an award of attorney fees pursuant to RCW 69.50.505(6). Because they are not the prevailing party, they are not entitled to an award of attorney fees.

[2] Chen and Lao are a married couple.

on hand and asset acquisitions increased by approximately $154,000. The affidavit stated that Chen and Lao admitted that they had no other sources of legitimate income other than their W-2 income and they received no cash gifts. Luciano opined that any balance remaining in the bank accounts would be illegal proceeds.

A superior court judge issued a warrant to search and seize proceeds from violations of the controlled substances and money laundering statutes from three of Chen and Lao's bank accounts. The judge issued the warrant based on a review of Luciano's affidavit.

Pursuant to the warrant, the CCSO seized amounts in three of Chen and Lao's bank accounts totaling $89,078.07. The CCSO sent Chen and Lao a Notice of Seizure and Intended Forfeiture regarding the seized funds. Chen and Lao contested the forfeiture and removed the proceeding to district court.

District Court Proceedings

In district court, Chen and Lao moved for summary judgment, arguing among other things that the bank account funds could not properly be forfeited to the CCSO because the information supporting the search and seizure warrant was stale. The district court reviewed the December 2020 affidavit and concluded that the information supporting the warrant was not stale. Accordingly, the court denied the motion.

The CCSO subsequently relinquished any claim to $30,242 of the seized funds, which represented the increase in account balances between January and December 2020. After an evidentiary hearing, the district court ordered that the remaining $58,835 would be forfeited.

Superior Court Proceedings

Chen and Lao appealed to the superior court, arguing among other things that the district court erred by concluding that the information supporting the search and seizure warrant was not

stale. The superior court reviewed the December 2020 affidavit and concluded that the information was not stale because the warrant affidavit clearly established a continuing and contemporaneous possession of illegal proceeds from the cannabis operation. Accordingly, the superior court affirmed the district court's forfeiture order.

Chen and Lao sought discretionary review in this court of the superior court's affirmance of the district court's forfeiture order, raising several issues. A commissioner of this court granted discretionary review regarding the staleness issue only.

ANALYSIS

A. LEGAL PRINCIPLES

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution require probable cause to support the issuance of a search warrant. *See State v. Gudgell*, 20 Wn. App. 2d 162, 174, 499 P.3d 229 (2021) (Fourth Amendment); *State v. Ollivier*, 178 Wn.2d 813, 846, 312 P.3d 1 (2013) (article 1, section 7). "Probable cause exists when the affidavit in support of the search warrant 'sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.' " *Gudgell*, 20 Wn. App. 2d at 174 (quoting *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

A search warrant that has become stale at the time of its issuance or execution is invalid. *See State v. Friedrich*, 4 Wn. App. 2d 945, 955, 425 P.3d 518 (2018). Whether information in a search warrant affidavit is stale depends on the circumstances of each case. *State v. Lyons*, 174 Wn.2d 354, 361-62, 275 P.3d 314 (2012). Some length of time naturally passes between observations of suspected criminal activity and the presentation of an affidavit to an issuing magistrate or judge. *Id.* at 360. But when the passage of time is so prolonged that it is no longer

probable that a search will uncover evidence of criminal activity, the information underlying the affidavit is deemed stale. *Id.* at 360-61.

The test for staleness is based on common sense and requires consideration of the totality of the circumstances. *State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004). "[I]nformation is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized." *Id.* The passage of time is only one factor to be considered along with other relevant circumstances. *Id.* Other factors for assessing staleness include the nature and scope of the alleged criminal activity, the length of the activity, and the type of property to be seized. *Id.*

We review a trial court's assessment of probable cause de novo, giving deference to the magistrate's determination. *State v. Denham*, 197 Wn.2d 759, 767, 489 P.3d 1138 (2021). We consider only the information contained in the affidavit supporting probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). We resolve all doubts in favor of the warrant's validity. *Maddox*, 152 Wn.2d at 509.

B. STALENESS ANALYSIS

Chen and Lao argue that the superior court and district court erred in concluding that the information in the affidavit supporting the search and seizure warrant regarding their bank accounts was not stale. We disagree.

The issue here is whether the facts stated in the warrant affidavit supported the determination that some of the proceeds Chen and Lao accumulated from their illegal activities between 2016 and January 2020 remained in their bank accounts in December 2020. *See Maddox*, 152 Wn.2d at 506. We conclude that the common sense inference from the information

in the December 2020 affidavit is that illegal proceeds remained in the bank accounts at the time of the search and seizure.

First, Luciano's affidavit supports the common sense conclusion that proceeds from illegal activities were in Chen and Lao's bank accounts in January 2020. Luciano stated that from 2016 through 2019, Chen and Lao had $225,000 in unreported income, spent $72,000 more than their legitimate income on living expenses, and had $154,000 in increased cash on hand and asset acquisitions. Although Luciano did not specify the amount of increased cash on hand, he clearly concluded that there was some amount of cash on hand in the bank accounts that related to illegal activities.

Chen and Lao repeatedly claim that Luciano's affidavit established that any illegal proceeds already had been spent by the end of 2019. But the affidavit language does not support this claim – Luciano did not state that Chen and Lao had spent all the illegal proceeds. In fact, he opined in the affidavit that "[a]ny bank balance represents illegal proceeds." Clerk's Papers at 42.

Second, Luciano's affidavit supports the common sense conclusion that at least some proceeds from illegal activities remained in Chen and Lao's bank accounts in December 2020. The parties debate whether Chen and Lao would have used the illegal proceeds or the legitimate income in the bank accounts to pay expenses during 2020. But this issue is immaterial because it is undisputed that Chen and Lao commingled the illegal proceeds and the legitimate income. As noted in *Maddox*, the type of property to be seized is an important factor regarding staleness. 152 Wn.2d at 506. Once money is commingled in a bank account, it is impossible to determine the source of any particular amount. Because there was no practical distinction between Chen and Lao's legitimate income and their illegal proceeds once they were commingled, the common

sense inference is that the money was spent on a pro rata basis. Therefore, unless the account balances went to zero at some point after January 2020, some of the illegal proceeds necessarily remained in those accounts.

We conclude that the information in the warrant affidavit supported a common sense determination that Chen and Lao had "continuing and contemporaneous possession" of at least some illegal proceeds in their bank accounts in December 2020. *See Maddox*, 152 Wn.2d at 506. Therefore, we hold that the district court and the superior court did not err in concluding that the information supporting the December 2020 search and seizure warrant was not stale.

CONCLUSION

We affirm the superior court's order affirming the district court's forfeiture order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.
MAXA, J.

We concur:

Cruser, J.
CRUSER, A.C.J.

Price, J.
PRICE, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHIN FU CHEN and MY TIEU LAO, Petitioners, v. CHUCK E. ATKINS, Sheriff of Clark County, CLARK COUNTY SHERIFF'S OFFICE, and CLARK COUNTY, WASHINGTON, Respondents. In the Matter of the Forfeiture of Personal Property to wit: Bank of America Account #7024: $5,963.47 Bank of America Account #1451: $75,429.42 Bank of America Account #8810: $7,685.18	No. 57002-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Petitioners move for reconsideration of the unpublished opinion filed on May 9, 2023 in this case. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Cruser, Price

FOR THE COURT:

Maxa, J.

MAXA, J.

A-14

COPIES OF RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

RCW 69.50.505 (Edited)

Seizure and forfeiture.

(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.....

.

(2) ..... 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;

.....

(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. .....

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 commission 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;

.....

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 7 of the Washington State Constitution

Invasion of home or private affairs prohibited

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

ROGER A. BENNETT, ATTORNEY AT LAW

July 25, 2023 - 12:02 PM

Transmittal Information

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Appellate Court Case Title:	Chin Fu Chen, et al, Petitioners v Chuck E. Atkins, et al, Respondents
Superior Court Case Number:	21-2-01771-1

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