January 5, 2023

RE: Civil Asset Forfeiture Under RCW 69.50.505 et. seq.

The following will detail the legal process and governing law, probable cause and legal burden for civil asset forfeitures in the State of Washington under RCW 69.50.505 et. seq. This memorandum will also cover the changing legal landscape after the *Gonzalez* case that the Washington Supreme Court decided in 2017. Finally, I will provide some real-world practical aspects that I've encountered during my legal career of being involved in handling civil asset forfeitures under RCW 69.50.505 et. seq. for Yakima County and the Yakima County Law Enforcement Against Drugs (LEAD) Narcotics and Gangs Taskforce. It is important to note that the following are my direct experiences, and as discussed at the meeting today, different jurisdictions may not exactly do things the way that we do them. The following though should give you a good summary and understanding of existing forfeiture law in Washington under RCW 69.50.505.

Process & Governing Law:

Civil forfeitures in Washington are primarily governed by RCW 69.50.505 et. seq. There are some other statutes that are sometimes used as well to forfeit, such as money laundering states, but typically most civil asset forfeitures are conducted under alleged violations of RCW 69.50.505 et. seq.

The purpose of forfeiture proceedings is to punish individuals who participate in the illegal dealing of controlled substances. *Deeter v. Smith*, 106 Wash.2d 376, 378, 721 P.2d 519 (1986). Property connected to such a violation is "subject to seizure and forfeiture and no property right exists in it." RCW 69.50.505.

Until 2003, former Washington civil asset law required that a seizing agency had the initial burden of showing probable cause to believe that seized items were the proceeds of or intended to be used in illegal drug activities. *Barlindal v. City of Bonny Lake*, 84 Wash. App., 135, 141, 925 P.2d 1289 (1996)(citing *Rozner v. City of Bellevue*, 116 Wash.2d 342, 350, 804 P.2d 24 (1991): RCW 69.50.505(b)(4). Once the seizing agency established probable cause to seize the item, the burden shifted to the claimant to prove by a preponderance of the evidence either that the property was not used or intended to be an illegal drug activity, or that it was used without the owner's knowledge or consent and thus they were an "innocent owner." *Adams County v. One 1978 Blue Ford Bronco*, 74 Wash. App. 702, 706, 875 P.2d 690 (1994).

In 2003, the Washington Legislature changed the burden of proof required, "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. See RCW

69.50.505(5). See also *City of Walla Walla v. $401,333.44*, 150 Wash.App. 360, 367-68, 208 P.3d 574 (2009).

Washington civil asset forfeiture law is mainly derived from federal asset forfeiture law, and there are several pertinent cases that have helped to define current court interpretations of time period requirements, due process, and what constitutes a substantial nexus of a violation of RCW 69.50.505 to constitute a valid legal civil forfeiture. An important point to note is that the statutes are strictly construed by Courts and all statutory requirements have to be met. The government seizing agency is estopped from proceeding in a civil forfeiture action if it fails to follow statutory procedures. *State v. Alaway*, 64 Wash. App. 796, 799-800, 828 P.2d 591, review denied, 119 Wash. 2d 1016, 833 P.2d 1390 (1992).

Probable Cause:

Under Washington civil asset forfeiture law, "probable cause requires the existence of a reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a person of ordinary caution in the belief…" that the property was used or intended to be used in violation of the Uniform Controlled Substances Act (USCA). *Barlindal*, 84 Wash.App. at 141, 925 P.2d 1289 (quoting *Adams County*, supra, at 706); *Escamilla v. Tri-City Metro Drug Task Force*, 100 Wash. App. 742, 999 P.2d 625 (2000).

RCW 69.50.505 provides that law enforcement may seize property when probable cause exists to believe that the property is intended to be used for illegal drug activity or represents proceeds of illegal drug sales. Normally, within 15 days of the seizure, the seizing agency must provide notice to any interested parties or persons. RCW 69.50.505(c). A person claiming an interest in seized personal property must notify the seizing agency within 45 days. (RCW 69.50.505(e). Normally their failure to do so, is fatal upon their claim for the asset, and the seizing agency will default late filed claims after the statutory notice period expires.

A person filing timely notice "shall be afforded a reasonable opportunity to be heard as to the claim or right." But the statute does not specify when this hearing must commence. RCW 69.50.505(e). RCW 69.50.505(c) provides that "proceedings for forfeiture shall be deemed commenced by the seizure." See also RCW 34.05.413(5) which permits commencement of forfeiture upon notice of a future hearing.

There are different timing considerations for personal property and real property. The processes for civil forfeiture are somewhat different. I will primarily discuss personal property here.

RCW 34.05.413(5) provides: "An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted."

Normally, when property is seized under RCW 69.50.505 without a prior adversarial hearing, due process requires that a hearing is held within 90 days. *Tellevik v. 31641*

W. Rutherford St. 125 Wash.2d 364, 371-72, 884 P.2d 1319 (1994)(*Tellevik II*); *Tellevik v. 31641 W. Rutherford St*., 120 Wash.2d 68, 87, 838 P.2d 111, 845 P.2d 1325 (1992)(*Tellevik I*); *Espinoza*, 87 Wash.App. at 865, 943 P.2d 387. Subsequent case law has defined that a hearing has been scheduled within 90 days. (Unless the claimant signs a stipulated agreement tolling the statute and waiving the speedy civil trial due to having a pending criminal matter for self-incrimination and statements against interest factors). See *Valerio v. Lacey Police Department*, 110 Wash. App. 163, 172, 39 P.3d 332 (2002) and *Escamilla v. Tri-City Metro Drug Task Force*, 100 Wash.App. 742, 999 P.2d 625 (2000).

Applying this provision, Division I of the Court of Appeals has held that the 90 day hearing requirement derived from this section is fulfilled and due process is satisfied when the seizing agency notifies the claimant within the 90 day period that some stage of the hearing will be conducted, unless the claimant shows prejudice. *In re Forfeiture of One 1988 Black Chevrolet Corvette Automobile*, 91 Wash.App.320, 324, 963 P.2d 187 (1997), adopting the balancing test from *United States v. Eight Thousand Eight Hundred and Fifty Dollars* ($8,850) in U.S. Currency, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed. 2d 143 (1983). In other words, the hearing "commences" when the agency or hearing officer notifies a claimant that some stage of the hearing will be conducted. *Black Corvette*, 91 Wash. App. At 323, 963 P.2d 198.

For matters that are held after the 90 day time period window, but are scheduled within the 90 days, usually courts rely on a four part test as was set forth in *Valerio*, and the *1988 Black Chevrolet Corvette* case. They look at the following: (1) the length of the delay, (2) the reason for the delay, (3) the claimant's assertion of his right to a hearing, and (4) whether the claimant suffered any prejudice. Ultimately, it is up to a judicial officer to decide if a delay in a hearing and the ultimate hearing that occurs after 90 days is reasonable and meets due process. As a practical matter, to avoid this issue, I normally request that a claimant *stipulate* to an agreed order that waives this time requirement, allows the parties to attempt to negotiate in good faith under ER 408, and usually results in an amicable resolution to the seizure v. formal litigation. Another reason I do this is that normally as I will discuss below, there is also pending criminal litigation, and it is advantageous for the claimant to agree to stay the civil proceeding pending the resolution of the criminal proceeding against them.

Current forfeiture landscape after City of Sunnyside v. Gonzalez:

The Washington State Supreme Court case *City of Sunnyside v. Gonzalez*, 188 Wash.2d 600, 398 P.3d 1078 (2017) really changed the forfeiture landscape and in my opinion have made civil forfeitures much more difficult. The Court clarified that RCW 69.50.505 et. seq. generally does not contemplate forfeiture when the only violation is mere possession of a controlled substance; the violation usually must involve drug manufacturing or transactions. RCW 69.50.505(1)(b),(d),(g),(h). See also *City of Sunnyside*, at 608.

The Court found that although the claimant had likely obtained his vehicle and assets to be seized through illegal means, the City of Sunnyside had failed to establish a substantial nexus between an alleged RCW 69.50.505 et.seq. violation and the attempted seizure. The Court ultimately reversed the seizure and awarded attorney fees and costs as well as return of the seized assets to the claimant.

The Court found that RCW 69.50.505(1)(g) has three distinct clauses, which allow forfeiture of the following:

(1) 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.
(2) 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…, and
(3) All moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this chapter.

The Washington Supreme Court emphasized in *Gonzalez* that the seizing agency had the burden of establishing substantial evidence to support a claim of a civil violation. The Court rejected the City's contention that it had satisfied this evidentiary burden by showing that the assets were more likely than not involved in some criminal activity. The Court specifically found that for a civil asset forfeiture under RCW 69.50.505 et. seq. to be valid, it must satisfy an actual violation of the statute. Thus, the Court found that although the claimant had drugs on them and the money was coated in cocaine, that although the claimant was guilty of possession, there was no evidence that his drug related activities ever had or ever would include drug manufacturing, transactions or distribution.

The Court ultimately found for the claimant and awarded substantial attorney fees and costs under RCW 69.50.505(6); RAP 18.1(a).

Practical considerations:

From a practical matter, it has been my personal observation and belief that most civil forfeiture asset proceedings during my career are usually tied to a criminal investigation of a suspect that reveals alleged criminal activity and violations of RCW provisions. Typically law enforcement will find probable cause to establish that either proceeds from illegal activity are being used to procure or purchase the alleged items to be seized, or that the items that were purchased with legitimate funds are being used with a substantial nexus in the operations of a drug operation that violates RCW 69.50.505.

Until 2017, law enforcement would sometimes bring forth probable cause for forfeiture from some other alleged criminal violation, and Courts would be open to that. Now after the Gonzalez decision though, it's been my experience that Courts seem more and more to strictly construe the facts and although the presumption of correctness hasn't

changed, Courts seem almost to be following more of a clear, cogent and convincing standard v. preponderance.

The biggest deterrent for Law Enforcement Agencies in civil forfeitures, is the real potential if they ultimately do not prevail in the prosecution of the asset forfeiture, to be on the hook not only to return the asset, but also to pay reasonable costs and attorney fees to the claimant. Depending on the length of litigation, and if they hired an attorney, this can result in considerable costs to an agency. Although hearsay, I did hear that the *Gonzalez* case ultimately cost the City of Sunnyside over 300k in payment of reasonable attorney fees, (including costs at the administrative hearing level, trial court level, Division III level and ultimately State of Washington Supreme Court), and costs they paid for an outside legal counsel to represent the City. Some municipalities do that as they do not have a dedicated attorney that handles these matters.

Most civil forfeitures are held via an administrative agency hearing. RCW 69.50.505 et. seq. allows law enforcement agencies to appoint a designee to serve as the civil hearings officer. Sometimes they are retired Police Chiefs, or Chief Civil Deputy Sheriffs. Other municipalities will have their Municipal Court judicial officers handle the administrative hearings.

A party has the legal right to remove the civil asset forfeiture to District Court by timing removing it pursuant to a statutory process. If that is done, then it is held usually via a District Court Commissioner. The ruling may then be appealed to Superior Court, and so on. The rules of evidence are followed at all stages of the hearings.

Staying of Civil Forfeiture Hearings:

From a practical standpoint, because most of these civil forfeitures also involve criminal allegations which may have been filed against the Defendant/Claimant, I usually advise the Criminal DPA to offer a stipulated agreed order to be signed that tolls the statute of limitations on the civil forfeiture and then allows the matter to be stayed from litigation until the criminal litigation is done. There are important reasons for offering to do this. An example is if the civil asset hearing were to be heard first, any statements made against interest, and/or evidence offered in the civil asset litigation hearing could potentially then be used by the State in a criminal proceeding. Thus, it is almost always advantageous for the criminal defendant to agree to a stay in the civil proceedings pending resolution of the criminal proceedings.

The RCW is written so that the claimant can recover fees and costs, but not the seizing agency. So this is something that really must be taken into consideration by Law Enforcement before deciding if they are going to conduct a civil asset forfeiture. Not doing so, can be very costly.

Innocent Owners & Strawpersons:

One attempted affirmative defense that is often attempted by a claimant in a forfeiture hearing is they will allege that they are an “innocent owner” of the property to be seized

and didn't have direct or indirect knowledge of the alleged violation of RCW 69.50.505 et. seq. Typically, someone's girlfriend or boyfriend, or family member or friend will also file and try to allege that the property is in fact theirs. As stated above, the burden is on the seizing agency, so there are times when we are pretty confident that this claimant is lying, but the agency hasn't done enough investigation. Typically, in those situations, I will attempt to work out a return of the asset to the claimant in exchange for a stipulated agreed release of liability. Sometimes if they are represented by legal counsel, they will want an agreed amount of reasonable fees and costs in addition to return of the asset. All of those negotiations are subject to ER 408, and ultimately, I usually try to recommend to clients to make settlements that seem like reasonable business decisions based upon a legal analysis.

The RCW provision and case law does establish though actual innocent owners and/or those without knowledge of the forfeiture may allege *potentially* successful claims. Ultimately these claims are decided by the trier of fact through hearings or summary judgment motions.

Real property:

Real property is similar to the personal property civil forfeiture process discussed above. In addition, the process normally also requires a lis pendens to be filed against the real property and those proceedings must occur in Superior Court where the property is located. The proceedings in both are in rem, or against the property, not the claimant(s).

For real property proceedings, I usually will have the agency pay for a title report from a title company to be able to ascertain all interested parties to be able to give proper notice to. I also will then do an examination with the County Auditor where the property is located to try to ascertain what the property is assessed at for ad valorem property tax purposes, and what lien(s) and/or encumbrances it has on it. Sometimes, I will also either do my own market analysis estimating what the property may be worth if sold with a bargain and sale or quit claim deed, or will have a licensed real estate agent provide me a market analysis estimate of what the property may be worth.

It is important to do a cost/benefit analysis with regards to whether it makes business sense to proceed with attempting a civil forfeiture against real property that there may not be sufficient equity to foreclose against, and also to consider that these typically do have much more litigation involved, so there is a substantial increased risk of loss in payment of reasonable costs and attorney fees if the seizing agency loses.

Additionally, usually these properties have an innocent bank lien holder with a mortgage which must be taken into account. So we would go to foreclose against the legal interest that the claimant had in the property, but then ultimately have to pay off the bank or other party with an owner contract. Example, Real property is worth 200k, but has a 160k mortgage on it, the property only has a 40k potential equity if seized, but then we would have to take into account payment of 9-10 percent in real estate agent

fees and excise taxes paid and closing costs. We also then have to take into account the risk of loss in carrying the property until sold, and payment of insurance, utilities, and someone to mow the lawn, snow removal etc. We also would then have to look if there are others that will claim a community property interest in the property as an innocent owner etc. Ultimately in a situation such as this, usually I would recommend against civil forfeiture as the property's potential equity doesn't work v. the risk of loss and the costs of litigation v. potential return.

From a practical matter as well, usually in these situations, the claimant stops making payments to the bank and/or owner and the owner will initiate their own forfeiture proceeding. In these situations, we usually don't proceed as we don't usually have sufficient financial assets to be able to cure the default of the owner with the alleged violation. The thought is as well, that the bank or innocent owner will seize the property and that will achieve the same legislative purpose of removing the real property from future potential illegal activity.

Ultimately, this is a business decision weighing the evidence supporting the forfeiture, the value of the asset, any innocent parties, any encumbrances. Yakima County does not have a hard-and-fast rule, but the federal government for example requires at least a 25 percent I believe equity in the property above the assessed value before they will even consider forfeiture.

Potential Audit Areas:

In the following, I will make a few suggestions that the State Auditor's Office may want to look at as potential areas to consider conducting audits regarding civil forfeitures. These are just suggestions but areas which may be useful to do audits.

- Tracking civilly forfeited vehicles and what their ultimate disposition is. Did the seizing agency dispose of them in a commercially reasonable manner and receive reasonable market value for them?
- Tracking if procurement laws of Washington are being followed by agencies in connection with trading in seized vehicles or other civil forfeited assets?
- Auditing narcotic "buy money" in connection with investigations that lead to civil forfeitures.
- Ensuring that ultimate assets that are forfeited by an agency end up in the seizing agency fund. For Yakima County, we have two seizure funds, one for state seizures and the other for federal seizures. I believe that is standard in most jurisdictions. It is my understanding that we have to ultimately remit portions of each fund each year to the State of Washington and federal government.
- Use of global settlements and ensuring that separate civil settlements are done not comingled with criminal actions.
- Tracking the number of civil forfeitures where the claimant is pro se v. those with an attorney.

- Tracking the ultimate case disposition of both pro se v. represented litigants.
- Tracking the total number of civil forfeitures that occur under an administrative agency hearings officer v. the percentage that are removed to District Court. (I think most that are removed to District Court are represented v. those that are not.
- Tracking seizures and ultimate forfeited property based on racial demographic if known of the claimant and/defendant to examine if there is a disproportionate share of BIPOC claimants impacted by seizures and forfeitures?
- Tracking on cases that have an attorney representing a claimant, are they the same as the criminal case? (Same attorney, or different attorney). This sometimes comes up because a defendant will receive indigent defense for the criminal matter, but then have to pay for a civil attorney themselves, or work out a a payment arrangement.
- Percentage of civil forfeitures that also involved criminal charges filed and what the ultimate outcome of the criminal charges were v. civil forfeiture litigation?
- Tracking of funds ultimately forfeited by agency and where they ultimately were spent?

Conclusion:

It is my hope that this memorandum has helped explain and give a better understanding of civil forfeitures, related case law and practical aspects of forfeitures. In my opinion the law changed in 2017 under the *Gonzalez* case, and judicial officers seem to be more hesitant to award forfeitures than prior. Because RCW 69.50.505(6) and case law grants reasonable costs and attorney fees to a successful claimant in a forfeiture hearing, I always try to advise clients to only seize assets that there is a clear substantial nexus between an alleged violation and RCW 69.50.505 et. seq. I also advise that even in cases where a clear violation has occurred, if an asset is burdened with a lien, or other potential claims of innocent ownership, it usually is a prudent business decision not to attempt a seizure and/or to attempt to negotiate an agreed resolution to the seizure with the claimant(s) to avoid potential liability to reasonable costs and attorney fees if we were to lose in litigation.

Please let me know if you have any questions, with the above information that I have provided. Thank you.

Respectfully,

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