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NO. 95013-0

SUPREME COURT
OF THE STATE OF WASHINGTON

OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM;
CLALLAM COUNTY SHERIFF BILL BENEDICT;
CLALLAM COUNTY SHERIFF'S DEPARTMENT; AND
CLALLAM COUNTY

Appellants,

v.

REAL PROPERTY KNOWN AS
(1) JUNCTION CITY LOTS 1-12 INCLUSIVE, BLOCK 35;
(2) LOT 2 OF THE NELSON SHORT PLAT LOCATED IN
JEFFERSON COUNTY; AND
ALL APPURTANCES AND IMPROVEMENTS THEREON, OR
PROCEEDS THERE FROM

Respondents *in rem*,

STEVEN L. FAGER;
DBVWC, INC.; AND
LUCILLE M BROWN LIVING TRUST
Interested Parties.

AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Mark Cooke, WSBA #40155
Nancy Talner, WSBA #11196
American Civil Liberties Union of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonprofit, nonpartisan organization with over 80,000 members that is dedicated to the preservation and defense of constitutional and civil liberties. It has particular interest and expertise in the areas of drug policy, criminal justice, and civil asset forfeiture. The ACLU’s interest in this matter is further detailed in the statement of interest contained in its Motion for Leave to File Amicus Curiae Brief filed herewith, which is hereby incorporated by reference.

II. INTRODUCTION

In 2001, the Washington state legislature amended the state’s statute governing civil asset forfeiture in drug cases so that property owners who prevail in proceedings to forfeit their property are entitled to attorneys’ fees “reasonably incurred.” Laws of 2001, ch. 168, § 1(f).¹ In this case, the actions taken by Steven Fager, DBVWC Inc., and the Lucille Brown Living Trust (hereinafter “property owners”) and the attorneys’ fees incurred in order to prevail in the forfeiture action, including defending criminal charges while the forfeiture action was stayed, were reasonable. This court should rule that prevailing property owners in forfeiture actions can recover attorney fees incurred as part of a related criminal matter, such as a suppression proceeding, so long as they were reasonably related to the forfeiture action.

¹ Available at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/2001pam1.pdf>.

A plain reading of the statute at issue in this case, RCW 69.50.505(6), does not limit recovery of fees to those accrued solely during the proceedings of the forfeiture action. The statute states: “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.” Reading the statute as precluding recovery of fees for the parts of the closely related criminal case that directly implicated the forfeiture would be unreasonable because forfeiture actions are frequently pursued in conjunction with criminal charges, and there are compelling reasons dictating that the criminal matter be dealt with first. For example, collateral estoppel is applicable for a property owner who first wins suppression in a criminal case, and the suppression means they will also prevail in the forfeiture action. The same is not true if the suppression is dealt with in the forfeiture case first, because courts have held that evidentiary hearings in forfeiture actions are not grounds for estoppel in a criminal case. *State v. Longo*, 185 Wn. App. 804, 812, 343 P.3d 378 (2015). This means the bulk of the legal work regarding suppression is conducted during the criminal case, and it serves the necessarily intertwined purpose of contributing to prevailing in the stayed forfeiture action. This process makes sense from a judicial efficiency perspective as well; suppression is litigated first in the criminal proceeding where it will have collateral estoppel effect on the stayed forfeiture, so suppression does not need to be litigated twice. In other words, the attorney fees in the suppression component of the criminal case are

directly related to the forfeiture action and are thus “reasonably incurred” as part of the property owner’s strategy to defend against forfeiture of their property.

Alternatively, if the court determines that RCW 69.50.505(6) is ambiguous, legislative intent, relevant case law, and principles of statutory construction lead to the same conclusion—that the property owners in this case are entitled to all reasonably incurred fees. The legislative intent for the 2001 law change is clear. As stated by Governor Locke in his partial veto message, “this bill will provide greater protection to citizens whose property is subject to seizure[.]” Laws of 2001, ch. 168. This court has also established that the attorney fee provision at issue should be “read liberally,” in light of the legislative intent. *Guillen v. Contreras*, 169 Wn.2d 769, 778, 238 P.3d 1168 (2010). The court should also look to related principles of statutory interpretation, such as the rule of lenity, which courts have applied in non-criminal, but related civil actions. *U.S. v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10, 112 S. Ct. 2102, 119 L. Ed. 2d 308 (1992).

Interpreting the statute to support an award of fees reasonably incurred in the related criminal case also aligns with the strong policy arguments for holding the government accountable in forfeiture cases to deter unlawful seizures. As this court has noted specifically in the forfeiture context, “an individual may lose valuable property even where no drug crime has actually been committed, and ... the government has a strong financial incentive to seek forfeiture because the seizing law

enforcement agency is entitled to keep or sell most forfeited property.”
City of Sunnyside v. Gonzalez, 188 Wn.2d 600, 617, 398 P.3d 1078
(2017). Taking these established statutory construction principles together,
RCW 69.50.505(6) should be interpreted to allow for recovery of all
reasonably incurred attorney fees in forfeiture actions, even if they were
partially accrued in a closely related criminal case. The court should rule
accordingly.

III. STATEMENT OF THE CASE

The facts of this case go back over a decade to 2007, when the
Olympic Peninsula Narcotics Enforcement Team (“OPNET”) began
investigating the property owners for suspected marijuana crimes.² In
2009, OPNET obtained warrants to examine utility records and to conduct
thermal imaging, based on claims that they could smell marijuana coming
from the property. The evidence obtained from these warrants was used to
obtain a search warrant for the properties, where a marijuana grow was
found.³ Criminal charges were filed for manufacturing and possession of
marijuana by the Jefferson County Prosecutor and a forfeiture action was
simultaneously filed against the property by Clallam County.

Over the next several years, OPNET’s case unraveled as courts
ruled that the evidence seized in the case needed to be suppressed because
of a series of violations of the law by OPNET. In upholding the

² This brief statement is based on the criminal and civil decisions below and the briefing of the parties.

³ Although never adjudicated, the defendants planned to bring a medical marijuana affirmative defense.
Respondents Brief in the Court of Appeals at p. 4.

suppression in the criminal case, Division II of the Court of Appeals found that OPNET recklessly disregarded the truth when claiming they could smell marijuana coming from the property and government mismanagement under CrR 8.3(b) “because the video recordings of the thermal image search had apparently been destroyed despite numerous attempts by the defense to obtain them.” *State v. Fager*, 185 Wn. App. 1050, No. 44454-2-II, No. 44460-7-II, 2015 WL 563081, at *2 (2015) (unpublished).⁴

While the criminal case proceeded, the forfeiture action was stayed. This decision was driven by the fact that prevailing on suppression in the criminal case would also mean prevailing in the forfeiture case. The property owners incurred significant attorney fees in connection with the suppression issue, and the trial court ultimately found they were owed \$293,185.64, plus an additional \$2,000 for having to respond to objections to the proposed findings of fact. (CP 540). A significant portion of these fees reflect the work done for the criminal suppression issue – which included a nine-day hearing. The fees ruling was also appealed and OPNET argued that only certain property owners were entitled to fees in the amount of \$20,571.92 (roughly 7% of the fees that the trial court ordered) because any fees from the criminal case were not allowed pursuant to RCW 69.50.505(6).⁵ The unpublished Division II Court of

⁴ Available at <https://www.courts.wa.gov/opinions/pdf/D2%2044454-2-II%20%20Unpublished%20Opinion.pdf>.

⁵ See Brief of Appellants, at 9-10, available at <https://www.courts.wa.gov/content/Briefs/A08/950130%20COA%20App's%20Brief.pdf>.

Appeals opinion found that only certain property owners were entitled to reasonable attorney fees and remanded to determine that amount. The opinion was unclear concerning how to interpret RCW 69.50.505(6). This Court then granted review.

IV. ARGUMENT

RCW 69.50.505(6) allows for recovery of attorney fees in a civil forfeiture action accrued as part of a related criminal matter. The statute provides for recovery of fees “reasonably incurred by the claimant[,]” and the steps the property owners took in this case were reasonable. This fits the plain meaning of the statute. Alternatively, if the court finds the statute ambiguous, the fee award should be allowed based on the intent of the legislature, relevant case law, and principles of statutory construction. Otherwise, property owners will be unfairly punished and risk losing thousands of dollars in attorneys’ fees even though they were following a reasonable course of action in defending the forfeiture action. Such a result would contradict the policy and purpose of the statute. If law enforcement is not held accountable for bringing meritless forfeiture actions, they are more likely to occur. As this Court has recently seen in *Guillen v. Contreras* and *City of Sunnyside v. Gonzalez*, unlawful seizures do occur. Allowing recovery for attorney fees in a related criminal case as part of a forfeiture defense is an important deterrent. To find otherwise would be unreasonable and against the intent of the legislature.

A. RCW 69.50.505(6)'s Plain Meaning Allows for Recovery of All Reasonable Attorneys' Fees Reasonably Incurred, Including Fees From a Related Criminal Case.

RCW 69.50.505(6) states in relevant part:

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

OPNET focuses on the first part of the sentence “in any proceeding to forfeit property,” and asserts that only fees exclusively from the forfeiture proceeding are recoverable, i.e. the attorneys’ fees would have to be directly linked to the forfeiture case number. This interpretation does not make sense when reading the entire sentence because it would severely restrict the scope of “fees reasonably incurred by the claimant.” The statute does not include language that says fees reasonably incurred by the claimant are only those within the confines of the forfeiture proceedings, although the legislature could have included that qualification. Instead, the recovery is based on the reasonableness of the costs more broadly. The property owners in this case are a perfect example of when the reasonable course of action for defending the forfeiture action required spending money to defend a related criminal matter first. The plain meaning of RCW 69.50.505(6) accounts for this situation and the fees in the related criminal matter that are directly tied to the forfeiture action should be recoverable.⁶

⁶ All parties seem to agree that attorney fees in the criminal matter that have no relevance to the forfeiture action, such as appearing at arraignment or a bond hearing, are not recoverable.

As noted above, the property owners in this case made an entirely reasonable decision to stay the forfeiture proceedings and deal with the suppression issues in the criminal matter first. This was a reasonable decision both because collateral estoppel is applicable in the forfeiture case when a property owner prevails on suppression in the criminal case, and because it furthers judicial economy by avoiding the need to litigate the same issue twice. As described in *Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 142, 925 P.2d 1289 (1996), in which a criminal case overlapped with a forfeiture case, “collateral estoppel, or issue preclusion, bars relitigation of an issue after the party estopped has had a full and fair opportunity to present its case.” That is what occurred here. The suppression of evidence in the criminal case resulted in dismissal of the charges altogether, and OPNET was estopped from relitigating the suppression in the forfeiture case. As stated in Division II’s opinion in this case, “It is well established that collateral estoppel prohibits the use of unlawfully obtained evidence in a civil forfeiture proceeding. *Deeter v. Smith*, 106 Wn.2d 376, 378-79, 721 P.2d 519 (1986) (unlawfully obtained evidence in a criminal case is inadmissible in a civil forfeiture proceeding); *Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 142, 925 P.2d 1289 (1996) (doctrine of collateral estoppel applies when issue decided in criminal case is identical to issue presented in civil forfeiture proceeding); *City of Des Moines v. Pers. Prop Identified as \$81,231 in U.S. Currency*, 87 Wn. App. 689, 701, 943 P.2d 669 (1997) (conclusive determination of search and seizure in criminal case barred challenging the

seizure in the civil forfeiture proceeding).” *OPNET v. Real Prop.*(*In re Steven L. Fager*), 199 Wn. App. 1008, No. 75635-4-I, 2017 WL 2242306 at *7 (2017) (unpublished).⁷

The property owner’s actions in this case are even more reasonable in light of the fact that courts have held that “collateral estoppel is not available to preclude a criminal prosecution based on an evidentiary ruling in a civil forfeiture proceeding.” *Longo*, 185 Wn. App. at 812.

In light of the collateral estoppel rules, staying the forfeiture case to deal with the criminal matter first is really the only reasonable and responsible thing to do—few, if any, property owners (or lawyers providing advice to their clients) would choose to do otherwise. Additional reasons why this is the only reasonable course of action are described in the amicus brief of the Washington Association of Criminal Defense Lawyers filed in this case. As a result, a plain reading of RCW 69.50.505(6) must envision that the fees incurred for the suppression work in the criminal case were “reasonably incurred” by the property owners as part of their efforts to defend against the forfeiture, and the trial court should be affirmed.

B. If RCW 69.50.505(6) is Ambiguous, Legislative Intent, Relevant Case Law, and Principles of Statutory Construction Require Recovery of All Reasonable Attorneys’ Fees Reasonably Incurred, Including Fees From a Related Criminal Case.

⁷ Available at <https://www.courts.wa.gov/opinions/pdf/756354.pdf> . *OPNET* is unpublished and is not cited as binding precedent but only to aid in the analysis. See GR 14.1(a).

If a “statute is susceptible to more than one reasonable interpretation, it is ambiguous[.]” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). If the court determines that RCW 69.50.505(6) is ambiguous, legislative intent, relevant case law, and principles of statutory construction lead to the same result as the plain meaning analysis – that the property owners in this case are entitled to all reasonably incurred fees.

1. The 2001 Legislative Changes to RCW 69.50.505 Were Intended to Protect Property Owners from Unlawful Seizures.

House Bill 1995 as originally introduced in the 2001 legislative session would have required a criminal conviction against a property owner before property could be forfeited, increased the burden of proof for seizures to the clear and convincing evidence standard, limited the scope of property that could be forfeited, and reworked how proceeds from forfeitures would be distributed—including funding for drug treatment. H.B. 1995, 57th Leg., Reg. Sess. (Wash. 2001).⁸ It did not include the attorney fee provision at issue in this case. *Id.* According to the original House Bill Report for the legislation, testimony in favor of the bill included a belief that the law at the time “unfairly places the burden of proof on the claimant. Oftentimes the claimant’s property is forfeited even when no criminal charges are ever filed. ... The seizing agencies have a

⁸ Available at <http://lawfilesexternal.wa.gov/biennium/2001-02/Pdf/Bills/House%20Bills/1995.pdf>.

direct conflict of interest. There is no incentive to reign in police misconduct.” H.B. Rep. 57-1995, Reg. Sess., at 5 (Wash. 2001) (House Judiciary Comm.).⁹ Testimony against the bill noted that “[r]equiring a conviction before forfeiture would make the law unworkable.” *Id.* The legislative process ensued and the record appears to indicate that the bill was amended to address concerns from opponents, which consisted primarily of law enforcement representatives. *Id.* at 6.

The end result of the legislative process was a compromise bill. It did not include the original bill’s conviction requirement before allowing civil asset forfeiture and it did not adopt the heightened clear and convincing evidence standard. However, the final bill did provide stronger protections in two specific areas. First, it established that in all cases, the burden of proof is on the law enforcement agency to prove that the property is subject to forfeiture. The second added protection was the attorney fee provision, “where the claimant substantially prevails, the claimant is entitled to reasonable attorney’s fees reasonably incurred by the claimant.” These substantial changes to the bill responded to law enforcement concerns, while at the same time fundamentally changing the civil asset forfeiture process in drug cases to protect property owners from unlawful seizures. Evidence of this overall intent is seen in the Governor’s

⁹ Available at <http://lawfilesexternal.wa.gov/biennium/2001-02/Pdf/Bill%20Reports/House/1995.HBR.pdf>.

partial veto message of the bill, which notes “this bill will provide greater protection to citizens whose property is subject to seizure...Drug dealers should not be allowed to benefit from their illegally gotten wealth, but we must not sacrifice citizens’ rights in our efforts to fight drug trafficking.” Laws of 2001, ch. 168 (Governor’s note on partial veto).

Supporting the point that the legislative purpose of the 2001 bill is consistent with the trial court’s ruling on attorney fees here, it should be noted that several of the collateral estoppel cases discussed above predate the 2001 legislative changes. Thus, in crafting the attorney fee provision of the 2001 bill, the legislature would have known that it was common for parts of a related criminal case to be dealt with first, while the forfeiture action was stayed. As a result, in those cases where a criminal matter, such as suppression, is dealt with in the criminal case first, they would have known that property owners were “reasonably incurring” attorney costs that were also relevant to the forfeiture action.

2. Relevant Case Law Calls for a Liberal Interpretation of RCW 69.50.505(6) to Protect Property Owners from Unlawful Seizures.

The Court has also already ruled that RCW 69.50.505(6) should be read liberally since it was “intended to protect people whose property was wrongfully seized[,]” albeit in the context of deciding who is a prevailing party. *Guillen*, 169 Wn.2d at 780. In reaching that conclusion the Court noted “granting attorney fees whenever claimants substantially prevail on

some issue, or receive more than nominal relief, may be necessary to accomplish” the legislative purpose. *Id.* at 778. That same logic should apply in this case. The legislature intended to protect people, like the property owners in this case, from wrongful seizures. One way the legislature carried out this purpose was to allow for recovery of attorney fees reasonably incurred. If the court finds that attorney fees are limited solely to the confines of the forfeiture action, and not related criminal matters, the property owners will lose hundreds of thousands of dollars and the state will bear minimal costs. Such a ruling would be counter to what this court established in *Guillen*, which calls for a liberal reading of RCW 69.50.505(6).

Numerous courts have also held that “[f]orfeitures are not favored and such statutes are construed strictly against the seizing agency.” *Snohomish Reg’l Drug Task Force v. Real Prop.*, 150 Wn. App. 387, 392, 208 P.3d 1189 (2009). *See also, City of Walla Walla v. \$401, 333.44*, 164 Wn. App. 236, 246, 262 P.3d 1239 (2011) (citing *Bruett v. Real Prop.*, 93 Wn. App. 290, 295, 968 P.2d 913 (1998) (citing *U.S. v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226, 59 S. Ct. 861, 83 L. Ed. 1249 (1939))) (“Forfeitures are not favored; they should be enforced only when within both the letter and spirit of the law.”). This principle should apply in this case and RCW 69.50.505(6) should be construed in a manner

that disfavors forfeiture and against the seizing agency, supporting the award of attorney fees to the prevailing property owners.

3. Other Principles of Statutory Construction also Weigh in Favor of Interpreting RCW 69.50.505(6) in Support of an Attorney Fee Award Covering the Relevant Parts of the Related Criminal Matter.

Although this case deals with civil asset forfeiture, it is intertwined with a related criminal matter. Forfeiture actions pursued under RCW 69.50.505 stem from a “violation of this chapter [RCW 69.50],” which are almost always criminal, as was the case here. For this reason, the court can consider principles of statutory interpretation, including the rule of lenity. In *Thompson/Center Arms Co.* the U.S. Supreme Court held that the rule of lenity can be applied outside a strictly criminal context, such as a tax case that had criminal applications. The Court noted the rule of lenity “is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.”

Thompson/Ctr. Arms Co., 504 U.S. at 518 n.10. This rationale has been applied in the civil forfeiture context as well. In *One 1973 Rolls Royce*, the United States Court of Appeals, Third Circuit, found that the rule of lenity can be applied when interpreting an ambiguous asset forfeiture statute. *U.S. v. One 1973 Rolls Royce*, 43 F.3d 794, 819 (3d Cir. 1994).

The same logic applies in this case. If RCW 69.50.505(6) is ambiguous, the rule of lenity can be helpful in determining the meaning of

the statute. The property owners will experience great harm if they are not allowed to recover fees reasonably incurred in the criminal case. The rule of lenity should be applied to prevent such an outcome.

Also relevant is the broader policy context surrounding civil asset forfeiture practices and the need to hold the government accountable for unlawful seizures. As stated by this Court, “the government has a strong financial incentive to seek forfeiture because the seizing law enforcement agency is entitled to keep or sell most forfeited property.” *City of Sunnyside*, 188 Wn.2d at 617. Independent analysis has shown the Washington forfeiture laws favor law enforcement more than many other states. The Washington section of the Institute for Justice’s 2015 report “Policing for Profit – The Abuse of Civil Asset Forfeiture,” notes:

“Washington’s civil forfeiture laws are among the nation’s worst, earning a D-. State law only requires the government to prove by a preponderance of the evidence that property is associated with criminal activity in order to forfeit it. Furthermore, innocent owners bear the burden of demonstrating that they had nothing to do with the criminal activity associated with their property in order to recover it. Washington law enforcement agencies retain 90 percent of forfeiture proceeds—a considerable incentive to police for profit.”¹⁰

One way to prevent abuses of this system is to hold the state accountable when unlawful seizures occur by allowing for recovery of all reasonably incurred attorneys’ fees.

¹⁰ Dick M. Carpenter II et al., Inst. for Justice, *Policing for Profit – Abuse of Civil Asset Forfeiture* (2nd Ed. 2015) (Washington specific information available at <http://ij.org/pfp-state-pages/pfp-Washington/>) (last visited April 18, 2018).

V. **CONCLUSION**

For the reasons set forth herein, this Court should hold that RCW 69.50.505(6) allows for the recovery of all reasonably incurred attorneys' fees, including the fees from the relevant part of the related criminal matter. To find otherwise would be unreasonable and contrary to the legislature's words and intent.

Respectfully submitted this 26th day of April, 2018.

By: /s/Mark Cooke

Mark Cooke, WSBA #40155
Nancy Talner, WSBA #11196
American Civil Liberties Union of
Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184
mcooke@aclu-wa.org
talner@aclu-wa.org

*Attorneys for Amicus Curiae
American Civil Liberties Union of
Washington*

DECLARATION OF SERVICE

I, Kaya McRuer, hereby certify that on the date below, I caused the foregoing AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON to be served on the following in the manner indicated:

Via E-Service Through the Court Portal:

Counsel for Appellant

Brian Wendt, WSBA 40537
Mark B. Nichols, WSBA 32848
223 East 4th Street, Suite 11
Port Angeles, WA 98362
bwendt@co.clallam.wa.us

Counsel for Respondent

James R. Dixon
216 1st Ave. South, Suite 202
Seattle, WA 98104-3454
james@dixoncannon.com
litigators@dixoncannon.com

Michael A. Patterson, WSBA 7976
Daniel P. Crouner, WSBA 37136
Patterson Buchanan Fobes
& Leitch, Inc., P.S.
2112 Third Avenue, Suite 500
Seattle, WA 98121
map@pattersonbuchanan.com
dpc@pattersonbuchanan.com

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

DATED this 26th day of April, 2018 at Seattle, Washington.

/s/Kaya McRuer
Kaya McRuer, Legal Assistant

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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