

HONORABLE FRED VAN SICKLE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHAWN HUSS, a single man, and )
others similarly situated )
Plaintiff )
Vs )
SPOKANE COUNTY, a municipal )
Corporation )
Defendant )

Cause No. CV 05 180 FVS

MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
(FRCP 12(b)(6)) ALTERNATIVELY
FOR SUMMARY JUDGMENT

NOTED FOR HEARING
JANUARY 13, 2006 @ 11:30

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1 Comes now Spokane County, by its attorneys and moves the Court to enter  
2 an order of dismissing this cause with prejudice pursuant to FRCP 12(b)(6) on  
3 the grounds that the Plaintiff fails to State a Claim; alternatively, if the Court  
4 considers any Affidavit or Declaration on file in this cause, to grant Summary  
5 Judgment dismissing the cause with prejudice.  
6

7 Spokane County contends that there is no material dispute of fact and that  
8 Spokane County is entitled to judgment as a matter of law.

9 Respectfully submitted this 28<sup>th</sup> day of November 2005,  
10

11 /s/ James H. Kaufman

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SHAWN HUSS, a single man, and )	Cause No. CV 05 180 FVS
others similarly situated )	
)	
Plaintiff )	<b>STATEMENT OF FACTS</b>
)	<b>SUPPORTING MOTION TO</b>
Vs )	<b>DISMISS FOR FAILURE TO</b>
)	<b>STATE A CLAIM</b>
SPOKANE COUNTY, a municipal )	<b>(FRCP 12(b)(6))</b>
Corporation )	<b>ALTERNATIVELY FOR</b>
)	<b>SUMMARY JUDGMENT</b>
Defendant )	<b>(LR 56.1(a))</b>
)	

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STATEMENT OF FACTS SUPPORTING MOTION TO DISMISS FOR  
FAILURE TO STATE A CLAIM (FRCP 12(b)(6))  
ALTERNATIVELY FOR SUMMARY JUDGMENT

1  
2 The following facts are uncontroverted:

3 1. On or about May 14, 1999 the Washington legislature passed RCW  
4 70.48.390, amending RCW 70.48, which authorized city, county, and regional jails  
5 to take a \$10.00 booking fee from the person of each individual booked (S.H.B.  
6 1143, (1999)).  
7

8 2. On or about May 7, 2003, the 58<sup>th</sup> legislature of Washington amended  
9 RCW 70.48.390 to allow counties to collect “jail’s actual booking costs or one  
10 hundred dollars, whichever is less.” (S.H.B. No. 1232 (2003)).  
11

12 3. On or about February 24, 2004 the Spokane County Board of  
13 Commissioners passed Resolution 04-0160 authorizing the Spokane County Jail to  
14 develop and implement a procedure to collect a booking fee from persons booked  
15 in the Spokane County Jail in accordance with RCW 70.48.390.  
16

17 4. The Spokane County Jail adopted a policy which authorizes the collection  
18 of an intake fee. Federal inmates are charged the federal daily rate, while non-  
19 federal inmates are charged the jail intake fee--\$89.12 as of May 2004.

20 5. Any funds in the possession of the person being booked into jail are taken  
21 from the person at the time of booking along with guns, knives prescription drugs  
22 etc.  
23

1 6. If the person does not have adequate fees on their person at the time of  
2 booking, a charge is assessed to the person's account.

3 7. On or about October 31, 2004, the Plaintiff was arrested based on a  
4 domestic violence complaint.

5 8. Plaintiff has not contended that the Spokane City Police did not have  
6 probable cause to arrest him.

7 9. Plaintiff was taken to the Spokane County Jail and routinely booked into  
8 jail.

9 10. In the process of booking him into jail his personal property was routinely  
10 taken from him, including the sum of \$ 37.00 in his wallet.

11 11. Subsequently the domestic violence charges were dropped.

12 12. RCW 70.48 390 provides that if the person is not charged or is acquitted,  
13 or if the charges are dismissed, that no fee shall be charged and any funds shall be  
14 returned to the person.

15 13. In compliance with changes in State law [Engrossed House Bill 1530,  
16 Laws of 1001, ch119] on September 11, 2001, the Spokane County Board of  
17 Commissioners, adopted a new procedure and designated Spokane County Risk  
18 Manager or his/her designee as the agent appointed by Spokane County to receive  
19 any claims made against Spokane County.  
20  
21  
22  
23

1 14. Plaintiff has never filed any claim with the Spokane County Risk Manager.

2 Respectfully submitted this 28<sup>th</sup> day of November 2005,

3  
4 /s/ James H. Kaufman

5 JAMES H. KAUFMAN WSBA 7836  
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MEMORANDUM SUPPORTING
MOTION TO DISMISS FOR
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(FRCP 12(b)(6))
ALTERNATIVELY FOR
SUMMARY JUDGMENT

[NOTED FOR ORAL ARGUMENT]

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MEMORANDUM SUPPORTING MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM (FRCP 12(b)(6))
ALTERNATIVELY FOR SUMMARY JUDGMENT

1 **SUMMARY OF ARGUMENT**

2 I. THE PLAINTIFF CANNOT CLAIM PUNITIVE DAMAGES FROM  
3 A SUBDIVISION OF A STATE.

4 II. THE PLAINTIFF CANNOT CLAIM THAT AN  
5 UNCONSTITUTIONAL TAKING OF PROPERTY PROHIBITED BY THE  
6 FIFTH AMENDMENT HAS OCCURRED BECAUSE PLAINTIFF HAS  
7 FAILED TO EXHAUST HIS STATE ADMINISTRATIVE REMEDIES.

8 III. NO RIGHTS OF THE PLAINTIFF SECURED BY THE “DUE  
9 PROCESS” CLAUSE OF THE FOURTEENTH AMENDMENT HAVE BEEN  
10 VIOLATED.

11 IV. PLAINTIFF CANNOT MEET HIS HEAVY BURDEN OF  
12 PROVING THAT SPOKANE COUNTY RESOLUTION 04-0160 AND RCW  
13 70.48.390 ARE UNCONSTITUTIONAL ON THEIR FACE.

14 **ARGUMENT**

15 I. **THE PLAINTIFF CANNOT CLAIM PUNITIVE  
16 DAMAGES FROM A SUBDIVISION OF A STATE.**

17 The request of the Plaintiff for punitive damages is patently frivolous  
18 because it is hornbook law that a municipality may not be held liable for damages  
19 when sued under 42 USCA § 1983. *City of Newport v Fact Concerts*, 453 U.S.  
20 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). Plaintiff has conceded this issue in  
21 his motion to file a second amended complaint.  
22  
23



1           **II. THE PLAINTIFF CANNOT CLAIM THAT AN**  
2           **UNCONSTITUTIONAL TAKING OF PROPERTY**  
3           **PROHIBITED BY THE FIFTH AMENDMENT HAS**  
4           **OCCURRED BECAUSE PLAINTIFF HAS FAILED TO**  
5           **EXHAUST HIS STATE ADMINISTRATIVE REMEDIES.**

6           The State of Washington and the County of Spokane have provided an  
7           adequate procedure for recovering any property, whether real or personal,  
8           allegedly wrongfully taken by the government by providing that any claimant  
9           must first file a claim with the designated agent of the County, which in the  
10          instant case is the Office of Risk Management.

11          The landmark case addressing this issue is *Williamson County Regional*  
12          *Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-197, 105  
13          S.Ct. 3108, 3120-3122, 87 L.Ed.2d 126 (1985) wherein the Court held:

14          A second reason the taking claim is not yet ripe is that respondent did  
15          not seek compensation through the procedures the State has provided  
16          for doing so. The Fifth Amendment does not proscribe the taking of  
17          property; it proscribes taking without just compensation. *Hodel v.*  
18          *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 297,  
19          n. 40. Nor does the Fifth Amendment require that just compensation  
20          be paid in advance of, or contemporaneously with, the taking; all that  
21          is required is that a "reasonable, certain and adequate provision for  
22          obtaining compensation" exist at the time of the taking. *Regional Rail*  
23          *Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974) (quoting  
24          *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659  
                (1890)). See also *Ruckelshaus v. Monsanto Co.*, 467 U.S., at 1016;  
                *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18, 21 (1940);  
                *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). **If the government has**  
                **provided an adequate process for obtaining compensation, and if**

1 resort to that process "[yields] just compensation," then the  
2 property owner "has no claim against the Government" for a  
3 taking. *Monsanto*, 467 U.S., at 1013, 1018, n. 21. Thus, we have held  
4 that taking claims against the Federal Government are premature until  
5 the property owner has availed itself of the process provided by the  
6 Tucker Act, 28 U.S.C. § 1491. *Monsanto*, 467 U.S. at 1016-1020.  
7 Similarly, if a State provides an adequate procedure for seeking  
8 just compensation, the property owner cannot claim a violation of  
9 the Just Compensation Clause until it has used the procedure and  
10 been denied just compensation. [473 U.S. 172, at 195, 105 S.Ct.  
11 3108, at 3121 emphasis added].

12 It is uncontroverted that Plaintiff has not filed any claim with the Spokane  
13 County Risk Management office and, as he concedes in his motion to amend the  
14 complaint for a second time, the Plaintiff has no cause of action for violation of  
15 the Fifth Amendment. (See attached Affidavit of James H. Kaufman)

### 16 III. NO RIGHTS OF THE PLAINTIFF SECURED BY THE 17 "DUE PROCESS" CLAUSE OF THE FOURTEENTH 18 AMENDMENT HAVE BEEN VIOLATED

#### 19 Procedural Due Process

20 Throughout his complaints, Plaintiff repeatedly argues that impounding the  
21 funds which a person has with them when they are booked into the jail is an  
22 unconstitutional "seizure" or "taking" of personal property because the Plaintiff  
23 was not given adequate notice that his personal property is going to be taken  
24 when he is booked into jail.

1 Every day throughout the United States people are incarcerated and the  
2 government routinely takes their, guns, knives, prescription drugs, jewelry, belts  
3 razors, controlled substances and even cash when these persons are booked into  
4 custody.

5  
6 Quite obviously the Supreme Court has repeatedly held that a pre-  
7 deprivation hearing need not be granted when to do so would be inconsistent with  
8 the countervailing state interest of overriding significance. See, *Mackey v*  
9 *Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979) wherein the Court  
10 held that the delay which would be created by the requirement of a hearing prior to  
11 the temporary suspension of a driver's license for refusal to submit to a  
12 breathalyzer test would compromise the states interest in public safety.  
13 Consequently, "due process" is satisfied with the availability of a prompt post-  
14 suspension hearing. And the same is true in this cause.

15  
16 In order to recover those items the State of Washington has enacted a  
17 comprehensive statutory procedure whereby any citizen may file a claim against  
18 any governmental entity in order to have their personal property promptly returned.

19  
20 Obviously, all citizens are presumed to know that this law exists and  
21 Plaintiff fails to cite any case from any jurisdiction whatsoever, holding that the  
22 United States Constitution requires that some type of special individualized notice  
23

24 **MEMORANDUM SUPPORTING MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM (FRCP 12(b)(6)  
ALTERNATIVELY FOR SUMMARY JUDGMENT**

1 must be given to each and every citizen who fails to inquire what they have to do  
2 in order to have their property returned.

3 At the same time it must be kept in mind that the State has every right to  
4 charge inmates for keeping them. The decision to refund or waive such financial  
5 impositions if the charges against an individual are dismissed is a matter of grace--  
6 --not of right. And the individual has to assume responsibility for recovering this  
7 entitlement. Namely, RCW 70.48.390 is a matter of state statutory entitlement, not  
8 a Constitutional right as Plaintiff contends.  
9

### 10 Substantive Due Process

11 Since Plaintiff admittedly cannot prevail under a Fifth Amendment *takings*  
12 claim he has sought to fill this lacuna by resort to due process clause of the  
13 Fourteenth Amendment. However, *Parratt v Taylor*, 451 U.S. 527, 101 S.Ct.  
14 1908, 65 L.Ed.2d 410 (1981) is dispositive. In *Parratt* an inmate filed a § 1983  
15 action against prison officials alleging that they had negligently lost certain hobby  
16 materials he had ordered by mail and thus deprived him of property without due  
17 process of law. The Court held that the prison officials were acting under color of  
18 law, the lost materials were “property” and that the loss amounted to a  
19 “deprivation”. But the Court went on to hold that those three elements [which are  
20 the only elements the Plaintiff has] do not establish a violation of the Fourteenth  
21  
22  
23

1 Amendment because the Fourteenth Amendment protects only against deprivations  
2 “without due process of law”. Since the State of Nebraska provided a post  
3 deprivation remedy, just as the State of Washington does in this case, there was no  
4 violation of the Federal Constitution.

5  
6 Likewise in *Hudson v Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 68 L.Ed.2d  
7 420 (1984), a state inmate brought a § 1983 action alleging that a prison guard had  
8 engaged in an unreasonable “shakedown” of his cell and had intentionally  
9 destroyed some of the inmate’s personal property in the process of searching. The  
10 Court, citing *Parratt* held that the inmate had an adequate post deprivation remedy  
11 by filing a claim pursuant to State law and consequently there could be no violation  
12 of the Fourteenth Amendment.

13  
14 Spokane County submits that both of these cases are squarely in point. In  
15 summary, *throughout his amended* Complaints the Plaintiff seeks to raise the  
16 “takings” issue as a substantive or procedural due process claim. However, any  
17 such contention is foreclosed by the *en banc* decision of the Ninth Circuit in  
18 *Amendariz v Penman*, 75 F.3d 1311 (9<sup>th</sup> Cir. 1996), wherein the court began by  
19 pointing out that “[t]he use of substantive due process to extend constitutional  
20 protection to economic and property rights has been generally discredited” (*at*  
21 *1318-1319*) and then went on to adopt the statement of Justice Rehnquist in his  
22

23  
24 **MEMORANDUM SUPPORTING MOTION TO DISMISS  
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1 plurality opinion in *Albright v Oliver*, 510 U.S. 266, 114 S.Ct. 807, 813, 127  
2 L.Ed.2d 114 (1994) wherein Justice Rehnquist stated: that when there is a  
3 specific constitutional amendment addressing an issue (in this case *the takings*  
4 *clause* of the Fifth Amendment) that amendment and *not the more generalized*  
5 *notion of “substantive due process” must be the guide for analyzing these claims.*

7 The real significance of *Amendariz* lies in the fact that the en banc Court  
8 overruled a specific holding in *Sinaloa Lake Owners Ass'n v. City of Simi Valley*,  
9 864 F.2d 1475 (9<sup>th</sup> Cir. 1989) even though the claimants had not exhausted their  
10 state remedies and could not raise a “taking” claim for the destruction of their dam,  
11 that they could raise the substantive and procedural issues relating to lack of notice  
12 etc. before the *taking* transpired.

1       **II.    PLAINTIFF CANNOT MEET HIS HEAVY BURDEN OF**  
2       **PROVING THAT SPOKANE COUNTY RESOLUTION 04-**  
3       **0160 AND RCW 70.48.390 ARE UNCONSTITUTIONAL ON**  
4       **THEIR FACE.**

5       In his complaints, Plaintiff repeatedly reiterates that RCW 70.48.390 and  
6       Spokane County Resolution 04-0160 are *unconstitutional on their face* but offers  
7       no citation of authority nor focused argument.  However, the thrust of the  
8       Plaintiff's objection appears to be that it is unconstitutional for the State of  
9       Washington to charge booking fees to persons of modest means when they are  
10      incarcerated.

11      Be that as it may, the Supreme Court has repeatedly held that any person  
12      raising a facial constitutional challenge to any state or federal statute confronts "a  
13      **heavy burden**" in advancing their claim.

14      In *Rust v Sullivan*,<sup>1</sup> 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233  
15      (1991), the Court held:

16      Petitioners are challenging the *facial* validity of the regulations.  Thus,  
17      we are concerned only with the question whether, on their face, the  
18      regulations are both authorized by the Act and can be construed in  
19      such a manner that they can be applied to a set of individuals without  
20      infringing upon constitutionally protected rights.  Petitioners face a  
21      **heavy burden** in seeking to have the regulations invalidated as

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22      <sup>1</sup> *Rust* was a facial challenge to DSHS regulations limiting the ability of Federal  
23      fund recipients to engage in abortion related activities.  The Court upheld the  
24      statute.

1 facially **unconstitutional**." A facial challenge to a legislative Act is,  
2 of course, the most difficult challenge to mount successfully, since the  
3 challenger must establish that no set of circumstances exists under  
4 which the Act would be valid. The fact that [the regulations] might  
5 operate unconstitutionally under some conceivable set of  
6 circumstances is insufficient to render [them] wholly invalid." *United*  
7 *States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct.  
8 2095 (1987). (Emphasis added)

9 Facial invalidation "is, manifestly, strong medicine" that "has been  
10 employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*,  
11 413 U.S. 601, 613, 93 S.Ct. 2908; 37 L.Ed.2d 830 (1973); see also *FW/PBS, Inc. v.*  
12 *Dallas*, 493 U.S. 215, 223, 110 S.Ct. 596; 107 L.Ed.2d 603 (1990) (noting that  
13 "facial challenges to legislation are generally disfavored").

14 Plaintiff clearly has not come close to meeting that burden.

15 WHEREFORE: Spokane County respectfully requests this Court to dismiss  
16 this cause with prejudice.

17 Respectfully submitted this 28<sup>th</sup> day of November 2005,

18 /s/ James H. Kaufman

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