No. 34755-9-III

SUPREME COURT OF THE STATE

OF WASHINGTON

95157-8

STATE OF WASHINGTON,

Respondent,

vs.

ANTONIO CRAWFORD,

Petitioner.

PETITION FOR REVIEW

RICHARD D. WALL
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I. Identity of Petitioner:

Antonio Crawford, Appellant, asks this court to accept review of the decision designated in Part B of this motion.

II. Decision to be Reviewed:

The Unpublished Opinion of the Court of Appeals, Division III, filed September 26, 2017, a copy of which is attached hereto.

III. Issues Presented for Review:

1. Is Property Subject to Forfeiture Under RCW 69.50.050 on the Grounds that it Was Acquired Through Illegal Drug Sales When the Hearing Examiner Makes Specific Findings that the Source of the Property is "Not Known" or is "Unexplained"?

ANSWER: No. RCW 69.50.050 requires the seizing agency to establish by a preponderance of the evidence that seized property is specifically connected to illegal drug manufacturing, transactions, or distribution.

2. Does the Failure of a Party to Provide Detailed Responses to Discovery Requests Constitute Proof as to a Fact or Issue as to Which the Opposing Party Has the Burden of Proof at Trial?

ANSWER: No. The failure of a party to adequately answer discovery requests may result in the exclusion of evidence at trial, but does not by itself constitute evidence of the existence of any fact.

IV. Statement of the Case:

This appeal arises out of the seizure of funds from several bank accounts and cash from a safety deposit box belonging to Petitioner/Appellant Antonio Crawford. The seizure was made after Crawford was arrested for allegedly selling a quantity of oxycodone pills through a third party to a confidential informant, who was working for Detective Lloyd Hixson of the Spokane Regional Safe Streets Task Force ("Task Force"). Crawford was charged in state court with felony delivery of a controlled substance. He was acquitted by a jury.

At the forfeiture hearing, the Task Force presented testimony from two witnesses who had received consideration in the form of favorable treatment with respect to criminal charges pending against them. One of the witnesses testified that Crawford had sold oxycodone pills to him at various times over a 14 month period. The other witness testified that she had made trips to Southern California at Crawford's request and brought back pills to him. No additional charges were ever brought against Crawford in connection with those alleged transactions.

The Task Force also presented evidence at the hearing detailing activity on Crawford's bank accounts over a period of time, including testimony from Jennifer Boswell, a forensic accountant. Ms. Boswell gave a detailed description of the various deposits and withdrawals from those accounts and was able to show that some of the funds deposited into those accounts came from Crawford's employment. Boswell was not able to identify the source of much of the funds deposited into Crawford's accounts and did not provide any testimony regarding how any of the funds withdrawn from those accounts were used by Crawford.

Crawford was not called to testify at the hearing. However, answers provided by Crawford in response to interrogatories were admitted at the hearing without objection. In those responses, Crawford stated that he obtained the funds deposited into his accounts from a variety of sources, including employment, tax refunds, student loans, and loans/gifts from family. Crawford was not called to testify at the hearing.

Following the hearing, the Hearing Examiner entered extensive findings of fact and conclusions of law. The Hearing Examiner found that Crawford had engaged in the distribution of oxycodone pills over an extended period of time by purchasing pills from a source in Southern California and reselling the pills in Washington. The Hearing Examiner also made the following Findings of Fact with regard to the funds seized from Crawford's bank accounts and safety deposit box:

#128. Between September 10, 2012, and December 10, 2012, Antonio Crawford made 13 cash deposits totaling $5,395.17 into his Wells Fargo saving 9590 account or Wells Fargo checking 4613 account. The deposits were mostly in increments of $100, and ranged up to $1,500. The $5,474.17 amount does not include a $39 money order purchased by Crawford, and $40 **from an unknown source**, deposited into such accounts; which, added to the $5,395.17 , provide a total sum of $5.474.17 that was deposited into Crawford's accounts **from unknown sources** during the indicated time period. See Exhibits 5, 17, and 19; and testimony of Jennifer Boswell.

#129. Assuming that $1,020.15 of the $5,474.17 deposited into Crawford's accounts in the form of cash or money orders could have come from checks from ADG that Antonio Crawford received during the last quarter of 2012, and did not deposit into his local bank accounts (i.e. $1.479.31 less $459.61), this still leaves approximately $4,500 in cash or money orders **from unknown sources** that Crawford deposited into his accounts during the last quarter of 2012.

#137. Assuming that $280.75 and $1,826.87 of the cash deposits in 2013 could have come from checks Antonio Crawford received from ADG or from school loans, respectively, that Antonio Crawford received in 2013 and did not deposit into his local bank accounts, and adding in the approximately $730 in cash that Antonio Crawford received from Urban Blends in 2013, for a total of $2,837.62, this leaves a sum of $22,441.67 (i.e. $25,279.29 less $2,837.62) **not shown to be derived from legitimate sources** that Crawford deposited by cash or money order into his accounts in 2013.

#161. On October 10, 2014, through October 31, 2014, Antonio Crawford made four (4) electronic transfers totaling $4,235.70, **from an unknown source** at JP Morgan Chase bank, into his Numerica Credit Union 8150 saving account. On November 6, 2014 Crawford deposited two (2) $1,000 sums from Neighbors Credit Union, **from an unknown source**, into his Numerica Credit Union 8150 checking account; and on the same day, transferred $1,000 back to Neighbors Credit Union.

162. On November 4, 2014, Antonio Crawford deposited a $3,000 check **from an unknown source** at Citbank into his Numerica 8150 checking account.

#165. The December 2014 statement for the STCU checking 2650 account shows an increased balance of $8,535.49 in the account as of December 31, 2014; the same amount that the January 2015 statement for the account shows was seized by the SRDTF on January 9, 2015. This is exactly $2,000 more than the ending balance present in the account on March 11, 2014; and indicates that Crawford deposited an additional $2,000 into the account **from an unknown source** sometime after March 11, 2014 and before December 1, 2014. See Exhibit 17.

#169. On June 25, 2014, Antonio Crawford **cashed out a certificate of deposit, which Jennifer Boswell could find no history for**, for $5,006.88; and deposited the funds in his Wells Fargo 9590 account, which deposit increased the balance in the account from $2,569.74 to $7,576.62.

#170. On October 31, 2014, Antonio Crawford **cashed out a certificate of deposit, for which no history was provided**, for $5,302.85; and deposited the funds in his Wells Fargo 9157 account.

#175. On October 2-3, 2014, Antonio Crawford deposited $25,000 in U.S. currency, consisting of 250 $100 bills, in a safety deposit box; **all in unexplained income**.

(Emphasis added)

Despite finding that the Task Force had not presented sufficient evidence to show the source of various funds deposited into Crawford's accounts, the Hearing Examiner concluded that all of the seized funds were forfeitable under RCW 69.50.505 as either the proceeds of drug sales, or as property exchanged for illegal drugs, or property used to facilitate an illegal drug transaction.

The Superior Court upheld the forfeiture. On appeal from that decision, Crawford argued that the Task Force had failed to carry its burden of establishing by a preponderance of the evidence that the seized funds were subject to forfeiture because the specific findings made by the Hearing Examiner did not support his conclusions (or ultimate findings of fact) that the funds were connected to drug sales. Crawford also argued that the analysis used by the Hearing Examiner amounted to a shifting of the burden of proof by requiring him to prove that all of the seized property had come from "legitimate" sources.

In rejecting Crawford's appeal, Division III reasoned that the hearing examiner had not shifted the burden of proof, but had merely found the funds seized from Crawford's account did not come from a "legitimate source." As stated by the court:

> Mr. Crawford contends that by finding only that some of the monies seized from Mr. Crawford's accounts and safe deposit boxes came from unexplained sources, the hearing examiner impermissibly shifted the burden to Mr. Crawford to prove that the funds came from a source that did not make them forfeitable. But it is more accurate to say that the hearing examiner found that the funds did not come from any legitimate source identified by Mr. Crawford in discovery, (*Crawford v. Spokane Reg'l Safe Streets Task Force*, slip opinion, p. 15)(Emphasis added)

Seizing on language from this Court's recent opinion in *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 609-11, 398 P.2d 1078 (2017), the same panel of judges that had been overturned in *Gonzalez* reasserted its view that the Hearing Examiner's methods did not result in a shifting of the burden of proof, but simply made a reasonable inference from the lack of evidence explaining where the seized funds had come from that the funds in question probably came from drug sales

> . . . [T]here is substantial evidence that Mr. Crawford was involved in extensive drug trafficking during the relevant period of time. It is easily and

> reasonably inferred that drug trafficking was the most likely direct or indirect source of Mr. Crawford's currency as well as a resource he could use to facilitate his drug trafficking. (*Crawford v. Spokane Reg'l Safe Streets Task Force*, slip opinion, p. 16)

Crawford now seeks review by this Court.

V. Argument Why Review Should Be Accepted:

This appeal presents a significant question of law of exceptional importance to the citizens of this State. The ability of a state agency to seize and retain a citizen's property without proof that the rightful owner or possessor has committed any crime is an extraordinary use of power that should be confined only to those circumstances specifically provided for by statute. The exercise of such power can be devastating in that such seizures often encompass, as was the case here, all or nearly all of property in the claimant's ownership or possession, leaving the claimant without resources to challenge the seizure. Thus, the seizing agency often is able to keep the seized property simply by default.

In addition, seizures under RCW 60.50.505 can be made upon a showing of the relatively low standard of probable cause. Thus, it is likely that a substantial percentage of seizures would not be upheld if subjected to judicial review. At the same time, claimants who have been deprived of substantial resources as a result of a seizure may be unwilling or unable to challenge the seizure for various reasons, including that they may be preoccupied with defending criminal charges brought against them.

In order to strike a proper balance between the power to forfeit property used or acquired through illegal drug activity and the right of citizens not to have property taken arbitrarily or without due process, RCW 60.50.505(1)(g) allows for forfeiture only when

the property seized has been shown to be connected to an illegal transaction or series of transactions in at least one of three way: (1) the property was furnished or intended to be furnished in exchange for a controlled substance, (2) the property was acquired in whole or in part with proceeds traceable to illegal drug distribution, or (3) the property is money, negotiable instruments, or securities intended to be used to facilitate an unlawful exchange of a controlled substance. *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 609-11, 398 P.2d 1078 (2017). The burden of proving such a connection rests entirely upon the seizing agency and must be established by a preponderance of the evidence. *Id.*, at 615-16.

The question raised in this appeal is whether that burden has been met when the hearing examiner does not find such a connection exists based on specific facts, but instead finds only that the claimant was involved in illegal drug sales and at the same time was in possession of money that came from unknown or otherwise unexplained sources. In other words, can the state forfeit property simply by showing that the claimant was involved in illegal drug activities and had property in the form of cash or bank deposits that is not shown to be from a "legitimate" source?

In upholding the Hearing Examiner's decision in this case, the Court of Appeals seized on that part of the *Gonzalez* opinion stating that the claimant's possession of multiple cell phones, thousands of dollars in cash without a substantial source of income, and a car with out-of-state plates that was not registered in his name "could support a reasonable inference that he had obtained the car and money through some unlawful means, or at least in some way that he would not admit to publicly." *Gonzalez*, 188 Wn.2d at 615. The Court of Appeals interpreted this statement to mean that, once a

claimant has been shown to have been involved in illegal drug transactions, the claimant's failure to explain how he/she obtained the seized property would support a conclusion that the property was forfeitable.

Even if such an inference would otherwise be permissible, RCW 69.50.050, as interpreted by *Gonzalez*, does not allow a forfeiture on that basis alone. By its express language, RCW 69.50.050(5) places the burden of proof on the seizing agency throughout the proceedings, and this Court has interpreted RCW 69.50.050(1)(g) as requiring proof of a specific connection between the property and the illegal drug activity. *Gonzalez*, 188 Wn.2d at 615-16.

The Court of Appeals avoided this problem by framing the issue in this case as being whether there was substantial evidence to support the Hearing Examiner's ultimate findings, not whether the specific findings made by the Hearing Examiner supported ultimate findings of fact and conclusions. Rather than look to the actual findings made by the Hearing Examiner, the Court of Appeals simply looked at Crawford's alleged failure to explain how he had obtained the property and concluded that the absence of such evidence supported an inference that the property was obtained by illegal means. In doing so, the Court of Appeals found it necessary to make the following statement:

> [T]here is substantial evidence that Mr. Crawford was involved in extensive drug trafficking during the relevant period of time. It is easily and reasonably inferred that drug trafficking was the most likely direct or indirect source of Mr. Crawford's currency as well as a resource he could use to facilitate his drug trafficking. Moreover, though its prehearing discovery, the Task Force was able to show that Mr. Crawford had been required to disclose any legitimate source of the funds and had been unable to do so. That is *proof*, not shifting the burden of proof. (*Crawford v. Spokane Reg'l Safe Streets Task Force*, slip opinion, p. 16) (Emphasis in the original)

Putting aside for the moment the Court of Appeal's mischaracterization of Crawford's answers to interrogatories, the foregoing statement raises several troubling issues. First, even if the inference drawn by the Court of Appeals is a permissible one, it does not, by itself, meet the standard established in *Gonzalez,* which requires the seizing agency to show a specific connection between the property seized and one or more drug transactions. *Gonzalez*, 188 Wn.2d at 615-16. Under Gonzalez, it is simply not enough to show that the claimant was involved in drug dealing and then assume that any and all property owned or possessed by the claimant had some unspecified connection to that activity unless some other explanation is provided by the claimant. Second, the assertion that a litigant's failure to respond to a specific discovery requests constitutes "proof" as to any factual matter is both novel and bizarre.

The remedy for a party's failure to adequately respond to discovery is a matter within the discretion of the trial court and may include even the extreme sanction of prohibiting the party from offering any undisclosed evidence at trial. *In re Estate of Foster,* 55 Wash.App. 545, 548, 779 P.2d 272 (1989). However, a failure to make discovery does not constitute proof of any fact. Thus, even if Crawford had refused or failed to answer particular discovery requests, such failure could not be used as proof that the seized property was subject to forfeiture. The seizing agency would still need to offer evidence showing a connection between the property and Crawford's illegal drug activity. That evidence would need to be sufficient to support specific findings by the Hearing Examiner that the property was traceable to the proceeds of drug sales, was used or intended to be used to facilitate drug sales, or was exchanged for drugs. The Hearing

Examiner did not make any such findings, but instead found only that the source of much of the funds deposited into Crawford's accounts was unknown or unexplained.

In response to interrogatories, Crawford stated that he acquired the funds in question from school loans, employment, the sale of real property, gifts or loans from family, and tax refunds. The Task Force never asked Crawford to explain or clarify those answers and did not call Crawford or any of his family as witnesses. The record is devoid of any other actions taken by the Task Force to obtain additional information either from Crawford or others regarding the source of funds deposited to his accounts. Nevertheless, the Court of Appeals reasoned that Crawford's failure to provide a better or more thorough explanation of funds had come from somehow constituted "proof" that the funds came from drug dealing. No doubt, future litigants will cite this portion of the Court of Appeals opinion for the proposition that a party can meet its burden of proof on a particular issue at trial simply by asking the right questions in discovery and then later claiming that the response to those questions was incomplete or unsatisfactory in some way.

There is simply no reasonable way to describe what both the Hearing Examiner and the Court of Appeals did in this case other than to call it what it is - burden shifting. Although the hearing examiner was not able to find any connection between any particular deposit to or withdrawal from Crawford's accounts to any drug transaction or series of transactions, he nevertheless concluded that all of the money in all of Crawford's accounts was forfeitable because the source of the funds was unknown or unexplained. The Court of Appeals affirmed the Hearing Examiner's reasoning, but added to it the idea that the discovery process can be used to impose on an opposing party the obligation to

disprove a fact on which a party has the burden of proof. The methodology employed by the Hearing Examiner and the Court of Appeals here is contrary to both the express language of RCW 60.50.505 and this Court's holding in *Gonzalez*.

In *Gonzalez,* the claimant was arrested for driving on a suspended license. A subsequent search of his vehicle yielded a user amount of cocaine and approximately $6,000 in cash. The claimant testified at the hearing and provided an explanation as to how he had obtained the car, the source of the cash, and its intended use. The hearing examiner found the claimant's testimony not to be credible and ruled in favor of forfeiting both the car and the cash.

The Superior Court reversed the Hearing Examiner. The Superior Court was then reversed by the same panel from Division III that decided the present case. In holding that the City had met its burden in the *Gonzalez* case, the panel noted that Sgt. Bailey of the Sunnyside Police Department had testified the car and cash could be traced to illegal drug sales because, in his experience, it was not uncommon for a person to drive a car with contraband from one place to another and to receive the car and cash as payment. The panel then declared that, since the Hearing Examiner was not required to believe the claimant's testimony, there was substantial evidence to support the Hearing Examiner's ultimate finding of fact that the car and cash could be traced to drug sales.

In reversing the Court of Appeals, this Court noted that the City's burden under RCW 69.50.050 was to show that the car and cash were specifically connected to drug manufacturing, transactions, or distribution. Simply showing that the claimant did not have a believable explanation for how he had acquired the car and the cash was not enough to satisfy that burden. *Id.*, 188 Wn.2d at 615-16.

Here, Division III attempts to distinguish this case from *Gonzalez* by focusing on Crawford's failure to challenge the Hearing Examiner's findings that he was engaged in substantial drug dealing over a period of time, whereas in *Gonzalez* there was little or no evidence of any drug dealing. What Division III ignores is that *Gonzalez* makes clear that RCW 69.50.050 requires substantial evidence and findings by the hearing examiner of both illegal drug activity and a connection between that activity and the seized property.

In essence, Division III's analysis collapses the two requirements of the statute into one by reasoning that evidence of drug dealing by a claimant supports a reasonable inference that any and all property acquired or held by the claimant during the relevant time frame came from that activity or was used to conduct that activity, unless the claimant can convince the hearing examiner that it came from a "legitimate source." As stated by Division III:

> Here, by contrast [to *Gonzalez*], there is substantial evidence that Mr. Crawford was involved in extensive drug trafficking during the relevant period of time. It is easily and reasonably inferred that drug trafficking was the most likely direct or indirect source of Mr. Crawford's currency as well as a resource he could use to facilitate his drug trafficking.

Put another way, once the seizing agency shows that a person has been involved in illegal drug sales, the burden shifts to the claimant to show that the seized property in the form of cash or bank account deposits came from a "legitimate" source. Otherwise, it will be inferred that the property was the proceeds of, or otherwise connected to, such sales. This type of burden shifting is exactly what the statute does not allow. RCW 69.50.050(5) specifically states that "[i]n all case, 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. "

Had the legislature intended to require a claimant to prove seized property came from or was acquired through "legitimate" sources once it was shown the claimant had engaged in illegal drug sales it could have easily done so in plain and simple language. The legislature chose instead to place the burden on the seizing agency to establish a connection between the seized property and the illegal activity. That choice recognizes the summary nature of forfeiture proceedings that allow law enforcement agencies to deprive persons of potentially all their property, real and personal, based only on a preliminary showing of probable cause.

This Court should accept review of this appeal and re-affirm its holding in *Gonzalez* that the state has the burden of proving facts necessary to support a forfeiture under RCW 69.50.505, including facts showing a specific connection between seized property and illegal drug manufacturing, transactions, or distribution. The Court should further clarify that the state's burden cannot be met simply by showing that the manner in which the claimant obtained the seized property is unknown or unexplained.

VI. Conclusion:

For the foregoing reasons, this court should accept review, reverse the decision of the Court of Appeals and order the seized property returned to the Claimant.

Respectfully submitted this 25th day of October, 2017.

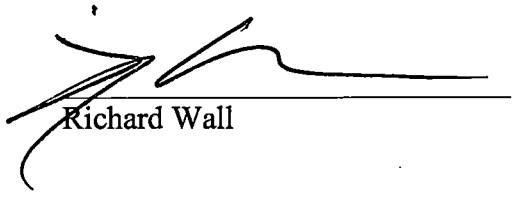
Richard D. Wall, WSBA#16581
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2017, a true and correct copy of the foregoing PETITION FOR REVIEW was served on the following:

Hand Delivered:

James Kaufman
Spokane County Deputy Prosecuting Attorney
1115 W. Broadway
Spokane, WA 99260



Richard Wall

FILED
SEPTEMBER 26, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ANTONIO CRAWFORD, Appellant, v. SPOKANE REGIONAL SAFE STREETS TASK FORCE, Respondent.	)	No. 34755-9-III UNPUBLISHED OPINION

SIDDOWAY, J. — Antonio Crawford appeals the superior court's refusal to reverse a hearing examiner's decision ordering forfeiture under the Uniform Controlled Substances Act, chapter 69.50 RCW, of over $80,000 in United States currency from Mr.

Crawford's bank accounts and safe deposit boxes. The Spokane Regional Safe Streets Task Force, which seized the currency, presented evidence that Mr. Crawford was involved in extensive drug trafficking before the money was seized. Its forensic accounting demonstrated that little of the seized money could be explained by the legitimate sources of income and assets Mr. Crawford disclosed in discovery. Because this is substantial circumstantial evidence supporting the hearing examiner's findings, we affirm.

FACTS AND PROCEDURAL BACKGROUND

After four days of hearings, Spokane County Hearing Examiner Michael C. Dempsey, ordered forfeiture to the Spokane Regional Safe Streets Task Force of United States currency seized in seven installments from the person, bank accounts, or safe deposit boxes of Antonio Crawford.[1] Administrative Record (AR) at 59. The hearing examiner made extensive factual findings in his 42-page, single spaced findings, conclusions and order. Rather than obtain a transcript of the proceedings, Mr. Crawford represents in his opening brief that the parties stipulated that the hearing examiner's recitation of the testimony was substantially accurate and they agreed to rely on his findings of fact as a complete and accurate summary of the evidence. Br. of Appellant

[1] It was the Spokane Regional Drug Task Force that actually seized Mr. Crawford's property; it was consolidated into the Spokane Regional Safe Streets Task Force during the course of the proceedings.

at 6. Those findings are the basis of the following history of the Task Force investigation, the seizures, and the forfeiture proceeding.

In May 2014, Lewis Pardun was arrested for shoplifting and possessing controlled substances. In exchange for law enforcement's promise to not pursue the charges against Mr. Pardun, he agreed to become a confidential informant for the Task Force. Mr. Pardun informed Task Force members that he could purchase controlled substances from Mitch Lawler, whose source of supply for oxycodone was Mr. Crawford.

In June 2014, Task Force members asked Mr. Pardun to set up a controlled buy from Mr. Lawler. The buy was arranged to take place at a Walmart store in Spokane Valley. At around 2:35 p.m., while under surveillance, Mr. Pardun drove to the store with $870 of prerecorded buy money to purchase 30 oxycodone pills from Mr. Lawler. A 2011 Chevrolet Impala owned by Mr. Crawford pulled into the parking lot and Mr. Lawler got out on the front passenger side wearing a backpack. Mr. Lawler walked to Mr. Pardun's car, got in on the passenger side, got out a few minutes later, and walked into the Walmart store. Mr. Crawford then left his Impala and walked into the Walmart store. Surveillance video showed the two men enter the men's restroom. Both then left the Walmart store separately, and Mr. Crawford drove off in his Impala, alone. The pills Mr. Pardun purchased from Mr. Lawler were turned over to the Task Force and confirmed to be oxycodone.

Following the controlled buy, Task Force members interviewed Mr. Lawler, who admitted to being addicted to heroin and to illegally selling drugs to support his habit. He said his exclusive supplier of oxycodone was Mr. Crawford. Investigation by the Task Force of Mr. Crawford's criminal history revealed prior felony convictions, including a conviction for the sale of cocaine; a conviction for the manufacture, delivery, or possession with intent to sell controlled substances; and a California conviction for transporting or selling narcotics or controlled substances.

In August 2014, the Task Force began surveillance of Mr. Crawford's activities. One incident at a Zip Trip store involved Mr. Crawford in his Impala along with two other vehicles and their occupants entering and exiting vehicles and making hand exchanges, consistent with the illegal sale of controlled substances.

Mr. Crawford was arrested on November 12, 2014, for delivery of a controlled substance based on his participation in Mr. Pardun's controlled buy at the Walmart store in June. He had $1,000 cash in his front pants pocket at the time of his arrest. The Task Force at the same time obtained an order freezing Mr. Crawford's 15 local bank and credit union accounts. Also in November 2014, the Federal Bureau of Investigation subpoenaed records for the 15 accounts held by Mr. Crawford at Spokane banking institutions.

Two months after Mr. Crawford's arrest, the Task Force seized $25,000.00 in cash from a safe deposit box rented by Mr. Crawford and $54,948.17 in currency from several

bank and credit union accounts controlled by Mr. Crawford. Mr. Crawford timely notified the Task Force of his claim of ownership or right to possession to all property seized in November 2014 and thereafter. The Spokane County sheriff appointed Mr. Dempsey to act as a hearing examiner in the proceeding for forfeiture of the currency.

In March 2015, the criminal case against Mr. Crawford went to trial. Mr. Lawler testified that Mr. Crawford supplied him with the oxycodone pills he sold to Mr. Pardun in June 2014, and instructed Mr. Lawler to meet him in the restroom after the deal to avoid detection because there was no camera in the restroom. Mr. Pardun also testified at Mr. Crawford's trial, consistent with what Task Force members had seen and been told by him in June. Despite this evidence, a jury acquitted Mr. Crawford.

The forfeiture proceeding moved forward, with the parties engaging in discovery. Among the subject matters inquired into by interrogatories served on Mr. Crawford and to which he responded was his employment history and all sources of income or assets. The Task Force also requested and obtained copies of his tax returns.

Shakayla Delcambre testified at Mr. Crawford's forfeiture hearing. She testified that she had known Mr. Crawford for approximately two years and between May 2013 and August 2014 had made between 20 and 30 trips to California for him. On those trips, a man would pick her up from the airport, take her to a hotel, and give her blue oxycodone pills to conceal in a condom inside her body. She testified that the amount

she carried would vary, but one time she carried 5,000 pills.[2] Most of the time Mr. Crawford would pick her up at the airport on her return and take her to her house where she would go inside, extract the pills from her body, and give them to Mr. Crawford. A GPS[3] tracker placed on Mr. Crawford's car confirmed that on at least one occasion his car was at the Spokane International Airport 6 minutes before Ms. Delcambre's flight arrived and then, 20 minutes later, was near Ms. Delcambre's home.

Ms. Delcambre also testified that in 2014 she served as a middlewoman in her boyfriend's purchase of a substantial amount of oxycodone (although less than 100 pills) from Mr. Crawford.

Mr. Crawford had previously been arrested in 2002 in Spokane for delivery of crack cocaine. In an interview after that arrest, Mr. Crawford admitted to a detective that he had sold crack cocaine since 1989 and had sold heroin over the preceding six months. He admitted he made an average of $2,000 per month selling the controlled substances. Also in that interview, Mr. Crawford told the detective he was purchasing a home in Spokane and some of the money used for the down payment was comingled with money he earned from selling the controlled substances.

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[2] Testimony from Messrs. Pardun and Lawler supported a street value for 30 mg oxycodone pills in 2014 of $29-$30 a pill.

[3] Global Positioning System.

The hearing examiner found that although Mr. Crawford had obtained a business license for a sole proprietorship called "Crawford Entertainment" that he claimed provided entertainment and event and concert promotion services, he never listed any business activity on its annual return in 2013 and had paid no excise tax for the business in 2014. In response to an interrogatory, Mr. Crawford admitted Crawford Entertainment had not conducted any business or generated any income. The hearing examiner found the business to be fictitious.

Mr. Crawford's girlfriend and part-time employer in and after December 2013 at her coffee shop also testified in the forfeiture hearing. Payroll stubs indicated that Mr. Crawford earned $675.54 in 2013 and $7,219.64 in 2014 from his coffee shop employment.

Mr. Crawford stated in interrogatory answers that none of the currency seized by the Task Force was associated with the exchange of a controlled substance. He claimed he acquired the money through school loans, employment, the sale of real property, gifts or loans from family members, and tax refunds. He stated that he earned $9.32 an hour working as a research assistant between September 2012 and August 2014 and $9.47 an hour working as a custodian between September 2014 and the time of the hearing. He stated he had earned $10.00 per hour working at his girlfriend's coffee shop between December 2013 and the time of the hearing.

Regarding funds that Mr. Crawford claimed were proceeds from the sale of a house, the hearing examiner found that the proceeds likely came from the sale of the house he purchased in 2002. While those proceeds were from the sale of an asset other than drugs, the hearing examiner found that Mr. Crawford's admission that he purchased the house with comingled money from employment and illegal drug dealing subjected the home proceeds to forfeiture.

The hearing examiner found that Mr. Crawford changed the way he hid or disguised illegal drug proceeds after he was arrested and convicted in 2002. At the time of his 2002 arrest, the United States Drug Enforcement Administration seized $8,000 in illegal drug proceeds from his home. The hearing examiner found that after his release from prison in 2012, Mr. Crawford opened multiple bank accounts and spread the proceeds from his illegal drug trafficking business and legitimate income and receipts among them, to help disguise the illegal funds.

The hearing examiner found that between September 1, 2012 and November 12, 2014, Mr. Crawford had approximately $82,000.00 in unexplained income. He found that all of the $80,948.17 seized by the Task Force met the criteria for forfeiture under RCW 69.50.505(1)(g). He ordered the monies forfeited in an order entered on December 9, 2015, and that was corrected in minor respects a few days later. A motion for reconsideration filed by Mr. Crawford was denied.

Mr. Crawford petitioned the superior court for review, contending that "[t]he Findings of Fact . . . are not supported by substantial evidence and the Conclusions of Law . . . are contrary to the provisions of RCW 69.50.050." AR at 7. The court affirmed the hearing examiner. Mr. Crawford appeals.

ANALYSIS

Judicial review of agency decisions in forfeiture proceedings is governed by the Administrative Procedure Act (APA), Title 34 RCW. RCW 69.50.505(5). We review the hearing examiner's order, not the decision of the superior court. *City of Sunnyside v. Gonzalez*, 188 Wn.2d 600, 607-08, 398 P.3d 1078 (2017). Mr. Crawford bears the burden of showing the forfeiture order was erroneous. *Id.* at 608.

The APA authorizes courts to grant relief from an agency order in an adjudicative proceeding in only nine enumerated instances. RCW 34.05.570(3). Mr. Crawford's petition for judicial review relies two: that the order is not supported by substantial evidence and that the agency has erroneously interpreted or applied the law. RCW 34.05.570(3)(d), (e).

Where the sufficiency of the evidence is challenged, we must be satisfied that the seizing law enforcement agency presented a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the hearing examiner's order. *Gonzalez*, 188 Wn.2d at 612. The claimant must carry the burden of showing otherwise. *Id.*

We review de novo whether an agency erroneously interpreted and applied the law. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). Mr. Crawford's challenge to the hearing examiner's application of the law is that he allegedly shifted the burden of proof to Mr. Crawford to prove that the seized property was obtained from legitimate sources. *See* Reply Br. at 10. We address the challenges in turn.

Sufficiency of evidence

"RCW 69.50.505(1)(g) has three distinct clauses, that allow forfeiture of the following":

> [(1)] [a]ll 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.

Gonzalez, 188 Wn.2d at 609-10 (alterations in original). As in *Gonzalez*, it is not entirely clear in this case which of the clauses is at issue. In his ultimate findings of fact,[4] the

[4] Mr. Crawford devotes part of his briefing to arguing that the hearing examiner erred by labeling these as findings of fact rather than as conclusions of law. Where findings are mislabeled, the error is inconsequential; we simply treat them on appeal as

hearing examiner states that the Task Force established by a preponderance of the evidence that the currency seized met one or more of the criteria described in the three clauses.

Mr. Crawford assigns error to these ultimate findings of fact, numbered 206 through 210.[5] They state:

> 206. The [Task Force] established by a preponderance of the evidence that the $25,000 seized from Antonio Crawford's safety deposit box was money furnished or intended to be furnished in violation of RCW Chapter 69.50; money intended to be used to facilitate a violation of RCW Chapter 69.50; and/or proceeds acquired in whole or in part with proceeds traceable to an exchange or series of exchanges by Crawford in violation of RCW Chapter 69.50, i.e. proceeds from the sale of his house that are traceable to moneys furnished to Crawford in exchange for a controlled substance commingled with money that Crawford derived from legitimate income.

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what they are. *E.g., Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

In this case, findings 206 through 210 *are* findings of fact: they state the hearing examiner's determination that evidence showed the seized currency fit one or more of the factual criteria that would make it forfeitable. *See Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 340, 24 P.3d 424 (2001) ("'If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact.'" (quoting *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986))). Because the findings directly address the statutory criteria for forfeiture, they are "ultimate" findings of fact, as the Supreme Court observed in *Gonzalez*. *See* 188 Wn.2d at 613.

[5] The Task Force argues that Mr. Crawford did not properly assign error to the findings under RAP 10.3(a)(4) and we should therefore treat them as verities on appeal. But we generally excuse a party's failure to assign error where the briefing makes the nature of the challenge clear. *Noble v. Lubrin*, 114 Wn. App. 812, 817, 60 P.3d 1224 (2003); *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). Mr. Crawford's briefing does so here.

207. The [Task Force] established by a preponderance of evidence that Antonio Crawford, between September 1, 2012 and December 1, 2014, deposited approximately $57,000 (i.e. excluding the $25,000 seized from his safety deposit box) that was not derived from legitimate income or other funding sources into his 15 local bank/credit union accounts; and that such moneys were furnished or intended to be furnished in exchange for a controlled substance in violation of RCW Chapter 69.50, proceeds acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of RCW Chapter 69.50, or moneys used or intended to be used to facilitate a violation of RCW Chapter 69.50.

208. The [Task Force] established by a preponderance of evidence that Antonio Crawford used or intended to use the monies that he obtained from legitimate sources, such as employment or school loans, and deposited into his 15 local accounts, to facilitate a violation of RCW Chapter 69.50; by intentionally co-mingling such monies with the $57,000 in illegal moneys or proceeds that he deposited into his accounts, in order to disguise and "launder" such illegal monies or proceeds, and to avoid detection by law enforcement.

209. The $8,802.66, $16,120.71, $1.24, $15,365.47 and $14,658.09 in [United States] currency, totaling $54,948.17, seized from Antonio Crawford's bank accounts in January 2015 are moneys furnished or intended to be furnished by or to Crawford, or others, in exchange for a controlled substance in violation of RCW Chapter 69.50, and/or moneys used or intended to be used to facilitate a violation of RCW Chapter 69.50.

210. The [Task Force] established by a preponderance of evidence that the $1,000 in [United States] currency seized from Antonio Crawford on November 12, 2014, incident to his arrest, was money furnished or intended to be furnished in exchange for a controlled substance in violation of RCW Chapter 69.50, or a combination of legitimate money that Crawford intentionally commingled with illegal drug proceeds in order to facilitate a violation of RCW Chapter 69.50.

Clerk's Papers (CP) at 47-48.

The burden of proof is on a seizing agency to establish by a preponderance of the evidence that property is subject to forfeiture. RCW 69.50.505(5). The agency "may meet its burden through direct or circumstantial evidence." *Sam v. Okanogan County Sheriff's Office*, 136 Wn. App. 220, 229, 148 P.3d 1086 (2006). Because buyers and sellers will often avoid creating and retaining direct evidence of illegal drug dealing, proof is likely to be by circumstantial evidence. "Circumstantial evidence is evidence of facts or circumstance from which the existence or nonexistence of other facts may be reasonably inferred from common experience." *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008).

Mr. Crawford stated in response to prehearing discovery that the money in his accounts came from the sale of real estate, employment, tax refunds, school loans, and gifts or loans from family. While the Task Force's forensic accountant found this to be true as to a relatively small amount in the accounts, the evidence supports the conclusion that Mr. Crawford comingled the legitimate monies with a larger amount of money forfeitable under the criteria provided by RCW 69.50.505(1)(g). A preponderance of evidence established that Mr. Crawford was an active drug dealer. The forensic accountant demonstrated that monies in the accounts were not explained by the only gainful employment and other legitimate sources he identified.

For example, the hearing examiner found that between September 10, 2012 and December 10, 2012—a three month period—Mr. Crawford deposited checks from

employment into his accounts. But he also deposited approximately $4,500 in cash or money orders from unexplained sources into the same accounts. During this period of time, Mr. Crawford was living in a halfway house and, according to Mr. Lawler, was dealing large quantities of oxycodone.

In 2013, Mr. Crawford deposited checks and cash in the amounts of $280.75, $1,826.87, and $730.00 from legitimate sources. However, that still left a sum of $22,441.67 in deposits into those same accounts that was unexplained. During this period of time, Mr. Lawler testified that Mr. Crawford supplied him with large quantities of oxycodone pills to deal, and Ms. Delcambre testified that she acted as Mr. Crawford's drug mule, smuggling oxycodone from California to Spokane.

In 2014, Mr. Crawford's net income should have been reported as $12,075.35 for his work as a research assistant, custodial services, and coffee shop employee. But he had $58,000.00 in unexplained income or funds in 2014. Again, according to Mr. Lawler, Mr. Crawford was supplying him with large quantities of oxycodone pills during this time frame. And according to Ms. Delcambre, she continued to make frequent trips to California to smuggle large quantities of oxycodone pills back to Spokane for Mr. Crawford.

This circumstantial evidence supports the hearing examiner's inference that the monies seized from Mr. Crawford met the criteria supporting forfeiture under RCW 69.50.505(1)(g), either as "furnished . . . by [a] person in exchange for a controlled

substance" in violation of chapter 69.50 RCW, or as the proceeds of the home Mr. Crawford "acquired in whole or in part with proceeds traceable to an exchange or series of exchanges in violation of this chapter," or as money "used or intended to be used to facilitate any violation of this chapter."

Allocating the burden of proof

Mr. Crawford contends that by finding only that some monies seized from Mr. Crawford's accounts and safe deposit boxes came from unexplained sources, the hearing examiner impermissibly shifted the burden to Mr. Crawford to prove that the funds came from a source that did not make them forfeitable. But it is more accurate to say that the hearing examiner found that the funds did not come from any legitimate source identified by Mr. Crawford in discovery, Mr. Crawford was extensively engaged in drug trafficking during the relevant period of time, and it was reasonable to infer from this circumstantial evidence that the currency was more likely than not "furnished . . . by [a] person in exchange for a controlled substance," or the proceeds of the home Mr. Crawford "acquired in whole or in part with proceeds traceable to" drug transactions, or was money "used or intended to be used to facilitate any violation of this chapter"—all forfeitable circumstances under RCW 69.50.505(1)(g).

The Supreme Court's decision in *Gonzalez* reversed an unpublished decision of this court and is a good illustration of when a seizing agency's case falls short of its burden of proof. In that case, as the Supreme Court explained, the hearing examiner

determined that Mr. Gonzalez's testimony was not credible (a determination entitled to deference) and that "Gonzalez had multiple cell phones, thousands of dollars in cash without a substantial source of income, and a car with out-of-state plates that was not registered in his name," all of which "could support a reasonable inference that he had obtained the car and the money through some unlawful means, or at least in some way that he would not admit to publicly." 188 Wn.2d at 615. The problem, according to the Court, was that "there [was] no evidence that he obtained it as payment for participating in drug transactions." *Id.* at 616. The only controlled substance-related evidence was that a user's amount of cocaine was discovered in Mr. Gonzalez's car. A user's amount of cocaine does not prove any of the criteria for forfeiture provided by RCW 69.50.505(1)(g) or support a reasonable inference that a person's currency or other assets meet that criteria.

Here, by contrast, there is substantial evidence that Mr. Crawford was involved in extensive drug trafficking during the relevant period of time. It is easily and reasonably inferred that drug trafficking was the most likely direct or indirect source of Mr. Crawford's currency as well as a resource he could use to facilitate his drug trafficking. Moreover, through its prehearing discovery, the Task Force was able to show that Mr. Crawford had been required to disclose any legitimate source of the funds and had been unable to do so. That is *proof*, not shifting the burden of proof.

The forfeiture order is affirmed.[6]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

[6] Mr. Crawford requested an award of attorney fees under RCW 69.50.505(6) if he substantially prevailed in the appeal, but he does not.