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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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HONG MEI ZHEN,

Appellant,

v.

TACOMA POLICE DEPARTMENT,

Respondent

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

“Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.” *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226, 59 S. Ct. 861, 83 L. Ed. 1249, 1939-1 C.B. 381 (1939). While this case may comply with the letter of the forfeiture statute, RCW 69.50.505, the actions of the City, the City Hearing Examiner, and the Superior Court have utterly failed to comply with the spirit of the forfeiture statute. First, the City violated Ms. Zhen’s procedural due process rights by sending its Notice of Forfeiture to an address the City knew Ms. Zhen had been prohibited from occupying by court order, concurrent with the criminal case that gave rise to the forfeiture proceedings in the first place. The City made no effort to forward the notice when it was subsequently returned by the post office, but merely took a default judgment *ex parte*, without further notice to Ms. Zhen.

The City further violated Ms. Zhen’s substantive due process rights when it sent her the Order of Default informing her that her property had been forfeited to the City. The order, sent to a native Mandarin speaker, was sent in English with no translation, no information advising Ms. Zhen of her right to file a motion to vacate the default order and the deadlines for such a motion.

Ms. Zhen's subsequent motion to vacate the default order was thus found to be untimely by the Hearing Examiner, who appeared to lament that his hands were tied with regard to the substantive due process violations inherent in the Order of Default and accompanying documents, and who likewise found that there was no violation of the statute in any action taken by the City.

Ms. Zhen appealed the decision to the Superior Court, hoping to prevail on the substantive due process arguments that may be more properly before that court. There her due process rights were again violated when the Court, without a hearing, oral argument, explanation or pronouncement, summarily denied Ms. Zhen's motion to vacate the default judgment. Ms. Zhen thus brings her appeal before this court, seeking to have her claim finally and fully heard, and the default judgment vacated.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

### **A. Assignments of Error**

1. The Superior Court erred in refusing to vacate the default judgment due to procedural due process violations in the service of the Notice of Default and substantive due process violations in the Order of Default

Judgment subsequently obtained by the City.

2. The Superior Court process for appeal of the Hearing Examiner's Order denying vacation of default judgment is itself violative of due process as there is no opportunity for a meaningful hearing, and no explanation, orally or in writing, of the basis for the Court's summary denial of Ms. Zhen's motion to vacate the default judgment.

**B. Issues Pertaining to Assignments of Error**

1. Should the default judgement have been vacated when it was entered in violation of Appellant's procedural and substantive due process rights, when the notice was not properly served on Ms. Zhen, and the Order of Default was not in an understandable language and did not prove a instructions for appeal?

2. Did the Superior Court violate Ms. Zhen's due process rights by refusing oral argument on the issues on appeal and issuing an order that gave no basis in law or fact for the summary denial of her motion to vacate the default judgment taken by the City?

### **III. STATEMENT OF THE CASE**

The home and personal safety deposit box belonging to Appellant Hong Mei Zhen was searched pursuant to a warrant and property seized on June 18, 2018. No Notice of Forfeiture (“Notice”) was served at the time of the search. Instead, the Tacoma Police Department (“Department”) mailed a notice of intended forfeiture to the address searched, 1335 East 48<sup>th</sup> Street, Tacoma, WA 98404, on June 28, 2018. By this time, Ms. Zhen had been barred from the residence by order of the Pierce County Superior Court as a result of her arrest in the corresponding criminal case. CP at 52-3. The Notice was returned to the Department, marked as undeliverable, on July 3, 2018, over four months prior to the time the Order Confirming Forfeiture was entered in this case. CP at 34-35, 37, 41-44.

Despite the Department’s involvement in and privity with the City in the criminal matter, the Department made no effort to serve the notice of forfeiture at any other address. The Department did not attempt personal service on Ms. Zhen during her court appearances in the criminal case. Ms. Zhen was in the County City building in response to the criminal matter at least four times between the initial seizure and the grant of default judgment in the above captioned matter, as is evidenced by a mere glance at the docket as it appears in the LINX filing system. CP at 55-57.

The Department was advised that Ms. Zhen is now living at 2539

Raymond Street, yet no attempt was made to serve her at that address. Ms. Zhen also changed her address with DOL to 1509 S. Massachusetts St. Seattle, WA, as early as July 11, 2018, and no later than August 31, 2018. CP at 59. The Department made no attempt to serve Ms. Zhen at the Seattle address. It likewise does not appear that the Department conducted a DOL records search before sending the initial Notice.

The Department, though its representative Keith Echterling, admits that it was in contact with Ms. Zhen's criminal counsel, Kenneth Blanford. Despite this, no attempt made to serve Ms. Zhen through counsel.

Finally, Ms. Zhen contacted the Department within two weeks of October 29, 2018, speaking to Officer Eric Robison, who advised Ms. Zhen that Zhen she can "claim" her gold jewelry but that they had seized her currency—implying that she could make no claim for her currency. The Order Confirming Forfeiture had not yet been entered in this case. The forfeiture was therefore not yet final, contrary to Officer Robison's statements.

All of these contacts save the last occurred well before the expiration of the 45-day period during which Ms. Zhen would have been able to contest the forfeiture proceedings in the above captioned matter. All of these contacts including the last occurred sufficiently in advance of the entry of the Order Confirming Forfeiture that Ms. Zhen would have still been able

to contest the forfeiture and avoid default judgment, had she been properly advised that a forfeiture proceeding was in progress.

Ms. Zhen finally learned of the forfeiture proceeding after the Order Confirming Forfeiture was entered on November 6, 2018, and a copy sent to her current address, which the Department was suddenly able to locate without difficulty. CP at 69.

Ms. Zhen subsequently retained counsel, who moved to set aside the default judgment in this matter in May 2019. The motion was denied by the Hearing Examiner, who found that the City had no obligation to ensure that Ms. Zhen received actual notice of the forfeiture proceeding. While the Hearing Examiner acknowledged that the City could have done more, and that had it done so, actual notice would have been more likely, the Hearing Examiner concluded that there was no authority to impose such requirements on the City under the relevant statutes, and that the City had only to comply with those statutes, which it had done, prior to confirming the forfeiture. Anything beyond statutory compliance, the Hearing Examiner ruled, was for the Courts to decide. The Hearing Examiner further found that though the Order sent was likely constitutionally deficient, constitutional issues were outside the scope of the administrative hearing. CP at 5-23.

Ms. Zhen appealed to the Pierce County Superior Court, advancing

many of the same arguments, in particularly arguments related to constitutional due process, that she had advanced before the Hearing Examiner. On December 13, 2019, the Honorable Jerry Costello denied Ms. Zhen's motion to vacate the default judgment with an order that stated, in its entirety, "The claimant's motion to withdraw the default judgment entered by the City of Tacoma Hearing Examiner for violation of due process is denied." CP at 140. No hearings were held in Superior Court, and the order provided no basis for Judge Costello's ruling. The Court did not order either party to file Findings of Fact or Conclusions of Law. The Court did not enter its own Findings of Fact and Conclusions of Law.

#### **IV. ARGUMENT**

**1. The default judgment in this case was entered in violation of Ms. Zhen's due process rights and should have been vacated by the Superior Court.**

- A. Ms. Zhen never received notice of the forfeiture in this case. The default judgment violates Ms. Zhen's Due Process rights and must be vacated.

The Fourteenth Amendment provides that a state may not deprive persons of "life, liberty, or property" without providing them with "due process of law." U.S. CONST. amend. XIV, §1. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d

571 (2006) (citing *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)). **Substantive due process** protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," . . . or are "implicit in the concept of ordered liberty." *Rochin v. California*, 342 U.S. 165, 169, 96 L. Ed. 183, 72 S. Ct. 205, 25 A.L.R.2d 1396 (1952) quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330, 90 A.L.R. 575 (1934), and *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149 (1937).

State deprivation of a protected interest is unconstitutional unless accompanied by adequate procedural safeguards. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). These include notice and an opportunity to be heard. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). The U.S. Supreme Court explained the test for procedural due process in *Mathews v. Eldridge*. 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) The *Mathews* balancing test requires consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335, 96 S.Ct. 893. The *Mathews* test was

adopted by the Washington Supreme Court. *See, e.g., In re Young*, 122 Wash.2d 1, 43-44, 857 P.2d 989 (1993).

Civil forfeiture under RCW 69.50.505 is an *in rem* action against property that is, in a legal fiction, held guilty and condemned for its involvement in the manufacture, sale, or possession of controlled substances; seizure and forfeiture are civil processes. *State v. Moen*, 110 Wn. App. 125, 38 P.3d 1049, (2002) *aff'd*, 150 Wn.2d 221, 76 P.3d 721 (2003).

A Notice of Forfeiture sent pursuant to RCW 69.50.505 must be sent within fifteen days of a seizure. RCW 69.50.505(3) The Notice must advise the property owner of the seizure and intended forfeiture of the seized property. *Id.* Service may be made by certified mail, return receipt requested. *Id.* If made by mail, service is deemed complete upon mailing within the fifteen-day period following the seizure. *Id.* Jurisdiction in forfeiture cases can only be established when there has been strict compliance with the statute's requirements. *Bruett v. 18328 – 11<sup>th</sup> Ave. NE*, 93 Wn. App 290, 968 P2d 913 (1998) (dismissal of the forfeiture action mandated even though no showing of prejudice, when the seizing agency failed to provide notice in strict compliance with the statutorily prescribed method.)

In this case, the City may have complied with the letter of the law

but has entirely violated the spirit and intent of the statute. The service provisions of the forfeiture statute are designed to ensure that citizens whose property has been seized are notified of the seizure, their right to challenge the seizure, and the timelines for such challenges. *Bruett*, 93 Wn. App. 290, (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, **under all the circumstances**, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (emphasis supplied)). Service statutes are designed to ensure due process. *Wichert v. Cardwell*, 117 Wn.2d 148, 151, 812 P.2d 858 (1991).

Similarly, in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993), the Court held that in the absence of exigent circumstances, due process requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.

There is no evidence of exigent circumstances in this case. There is likewise no evidence that the City took measures that were, in actuality, *reasonably calculated* to give Ms. Zhen actual notice of the seizure and provide her with an opportunity to request a hearing prior to forfeiture to

the City. The City not only did not check DOL records prior to sending its Notice to Ms. Zhen, they took no measures to find *any* address short of the address where the seizure had occurred – and address that the City should have known was no longer a viable address for Ms. Zhen, given her status as a renter and the subsequent discovery of drugs on the property.<sup>1</sup>

Not only *should* the City have known without further input that mailing the Notice to Ms. Zhen at the address where the property was seized was a futile gesture, the City was in privity with the State prosecuting this matter, and information as to Ms. Zhen’s address was readily available. Privity between City and State governments has been found by Washington Appellate Courts in prior forfeiture actions. *See, Barlindal v. City of Bonney Lake*, 84 Wn.App. 135, 141, 925 P.2d 1289 (1996). In *Barlindal*, the City of Bonney Lake and the State government were found to be in privity with each other in a forfeiture proceeding filed by the City after the city police department had investigated and filed reports with the State prosecutor regarding criminal charges. *Id.* at 143-44. The Court reasoned that both parties had participated in the acquisition and execution of the search warrant, either could have filed the forfeiture action, and both would benefit from any monetary gain as a result of the action, similar to the facts

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<sup>1</sup> That Ms. Zhen was a renter was inferable by the fact that no seizure of the real property was sought as to Ms. Zhen.

presented in the above captioned matter. *Id.*

Therefore, the seizing agency, in this case the Tacoma Police Department, should have been aware through its privity with the State of Washington and its case against Ms. Zhen that she had been prohibited from returning to the property that was the subject of the search warrant, and that there was likely a different, better address to send the Notice that is a required condition precedent to the forfeiture of property.

The City argued below that it sent the notice to Ms. Zhen by registered mail within fifteen days of seizure and was thus in strict compliance with the forfeiture statute. and the Hearing Examiner – and apparently the Court – found that the City had so complied. Yet, as noted *supra*, strict compliance with both the letter *and the spirit* of the law is required to sustain a forfeiture action. The City’s actions may have been in strict compliance with the letter of the law, but the City did anything *but* comply with the spirit of the law – to ensure that Ms. Zhen received actual notice of the forfeiture action and could request a hearing to contest the seizure.

Even if the Court finds that the City was not on notice of the trial court’s action prohibiting Ms. Zhen to return to the property where she lived at the time of the seizure, and even if the Court finds that the City had no notice of Ms. Zhen’s move, the City was on *actual* notice of Ms. Zhen’s

relocation upon receipt of the undeliverable Notice.

By this time, Ms. Zhen had updated her address with the Court and with DOL, but the City made no move to attempt to mail the notice of forfeiture to that address, either before or after the Notice was returned to them as undeliverable.<sup>2</sup> Similarly, Ms. Zhen had appeared at the County City Building several times in the criminal matter, but the City made no move to attempt to serve her in person at any of those appearances. The City merely filed the envelope marked, “return to sender... unable to forward,” and proceeded to move for a default judgment.

The City in no way complied with the spirit notice requirements of the forfeiture statute prior to seeking a default judgment in the above captioned matter, as it seems obvious that the statute never contemplated sending a notice to an address that the City is aware is no longer occupied by the property owner. This would be the opposite of an attempt to secure due process for property owners via the notice requirements.

Ms. Zhen did what she could to ensure that she was locatable. That the City made no effort to locate her should have been acceptable, and the default order should never have been ordered on these facts. Ms. Zhen not only updated her address with the Department of Licensing and the Court,

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<sup>2</sup> The City should arguably have sent the Notice to the address on record with the DOL rather than the address where the seizure occurred.

but she called the police station in late October, just prior to the entry of the default judgment. Officer Robison, upon speaking to Ms. Zhen – and presumably reviewing her file – utterly and completely failed to notify Ms. Zhen that a forfeiture action had been instituted and that there was a date set to enter an Order confirming the forfeiture of her property. Instead, the officer merely told her which property she could still pick up, implying by his omission that any avenue to the recovery of other property was foreclosed. Such action on the part of the City appears not only in violation of the spirit of the forfeiture statutes, but a duplicitous attempt to retain property to which the City was not otherwise entitled.

The City then proceeded to add insult to injury, further violating Ms. Zhen's due process rights in the very serving of the Order Confirming Forfeiture. The order was sent in English, without the Mandarin translation Ms. Zhen would require to fully understand its contents. Unlike the Notice of Forfeiture, there was no information included with the Order that advised Ms. Zhen of her right to file a motion for reconsideration or a motion to vacate the default judgment. There was no information regarding any time limits inherent in such a motion. There was nothing in the envelope aside from an order in a language of which Ms. Zhen has a limited grasp and which, even if she were fluent in English, merely informed her that ownership of her property had been transferred to the City. Ms. Zhen was

thus left with the impression that the case had concluded, and she had no method of contesting the forfeiture.

It was only when Ms. Zhen was finally able to speak to her current counsel that she was advised of her rights with respect to the forfeiture action, including her right to appeal the entry of the default order. Ms. Zhen did not understand – in fact could not have been expected to understand – that there was not only a way to recover her property, but an urgency in filing a motion to do so. Upon learning that she could still pursue an action against the City for recovery of her property, Ms. Zhen immediately acted to bring such an action.

Though the hearing examiner found that he could not take action to overturn the default order, his order nonetheless strongly implied that even if the notice had been sufficient, the information sent to Ms. Zhen regarding the default order was constitutionally deficient and in violation of Ms. Zhen’s due process rights. After noting that “...notice/service may be constitutionally deficient *even though* the codified process *was* followed...” CP at 15 [emphasis in original], and identifying this as Ms. Zhen’s claim in this case, the Hearing Examiner found

...Zhen is correct, but not at this level of administrative review. The limitation, however, lies with the Office of the Hearing Examiner, and not with Zhen herself. Zhen cites numerous cases in support of her contention that the Default Order should be set aside because notice was constitutionally

deficient. Determining whether those arguments are correct or not, i.e. whether notice/service in this case was '[r]easonably calculated, under all the circumstances, to inform [Zhen] of an action and h[er] right to object, is beyond the Hearing Examiner's authority.

*Id.*, internal citations omitted.

That the determination whether the notice undertaken in this case complied with constitutional due process protections, regardless of the City's compliance with statutory requirements, may be the proper provenance of the Court. However, there is no evidence that the Superior Court took the Hearing Examiner's words, or the Court's role in determining compliance with due process regardless of compliance with statutory provisions, into consideration when issuing its final ruling. The Court merely refused to vacate the default order, with no further explanation. Appellant presumes, for the sake of simplicity, however, that the Court's ruling was meant to convey that there was constitutional compliance with due process requirements in this case, despite the clear deficiencies shown in the City's actions. Here the Court erred. It is plain from the facts of this case as they apply to the requirements of Constitutional due process, that Ms. Zhen's rights were not respected, and there were numerous due process violations in the service of the Notice and the subsequent service of the Default Order. Due to these violations, the Default Order should have been vacated. Ms. Zhen is entitled to a full

hearing on the merits of this action.

B. The Hearing Examiner erred in determining that the default judgment could not be vacated under HEXRP 1.19 or CR60.

The Hearing Examiner found that he had no authority to overturn the default judgment in this matter under the Hearing Examiner Rules of Procedure (HEXRP) 1.19. That rule states, in pertinent part, “If an applicant, petitioner, or his or her representative *fails to appear at a hearing*, an Order may be entered dismissing the matter .... “ HEXRP 1.19 [Emphasis supplied.]

The plain language of this rule, however, demonstrates that an actual hearing is contemplated prior to the entry of a default judgment. There was no hearing in this case, as the Notice of Forfeiture was never served upon Ms. Zhen, and she was not given an opportunity to request a hearing. The drafters of these rules plainly did not anticipate the *ex parte* entry of a default judgment after no notice whatsoever and no opportunity for a hearing. Instead, a default judgment was contemplated for failure to appear for a duly scheduled hearing, presumably one for which the parties had received notice. It does not appear that this rule confers the authority on the Hearing Examiner to enter a default judgment in the situation presented here. The default judgment, rather than any vacation of the

judgment, was not authorized under the HEXRP.

Claimant also sought vacation of the default judgment under CR 60(b). Under that rule, a court may vacate a judgment for a variety of reasons, including mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining that judgment or order, for newly discovered evidence that could not have been discovered in time to move for a new trial, or any other reason justifying relief from the judgment. CR 60(a) and (b).

While the Hearing Examiner did not have authority to grant a motion for relief under the Court Rules, the Superior Court had such authority. *Haller v. Wallis*, 89 Wn.2d 539, 543 (1978). See Also *Pedersen v. Klinkert*, 56 Wn.2d 313 (1960). The court may vacate a judgment over the objection of the prosecutor. Part of the reason for this is that default judgments are disfavored in the law and determinations on the merits are favored. *Hwang v. McMahonill*, 103 Wn.App. 945 (2000).

A motion to vacate a judgment, though not strictly a motion in equity, is equitable in character, decided using equitable principles and granted on equitable terms. *Roth v. Nash*, 19 Wn.2d 731 (1943). According to the Washington State Supreme Court, a trial court's authority to vacate a judgment under CR 60(b) should be exercised liberally and equitably, to preserve substantial rights and fairly and judiciously accomplish justice

between the parties. *Vaughn v. Chung*, 119 Wn.2d 273, 278 (1992). The *Vaughn* Court added that trial courts have broad equitable powers under CR 60 to grant relief from judgments or orders. *Id.* at 280. (Emphasis supplied.) The standard of review on appeal is manifest abuse of discretion such that no reasonable person could have reached the same decision as the court. *In re Marriage of Burkey*, 36 Wn.App. 487, 489 (1984). Granting relief in this matter would have been reasonable and could not have been construed as abuse of discretion.

The law favors determinations of controversies on their merits and, consequently, default judgments are disfavored. *Lee v. Western Processing Co.*, 35 Wn. App. 466, 667 P.2d 638 (1983); *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040, review denied, 922 P.2d 98 (1996). The party moving to vacate a default judgment must be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) (citing *Hull v. Vining*, 17 Wash. 352, 49 P. 537 (1897)). This is not a mechanical test; whether or not a default judgment should be set aside is a matter of equity. *White*, 73 Wn.2d

at 351. Factors (1) and (2) are primary; factors (3) and (4) are secondary. *Id.* at 352-53.

Appellant was not given an opportunity to review search warrants or other documentation in this matter, as there was never a full hearing on the merits. However, arguments that the appellant believes may apply include whether the City had probable cause for execution of the warrant as against Ms. Zhen, and whether there is evidence that the personal property or the cash seized are proceeds of drug sales or were used in furtherance of those sales. Further, Ms. Zhen has a right to due process before deprivation of her personal property, and due process was utterly lacking in this case, even if compliance with the letter of the forfeiture statute was had. Finally, given the value of the property seized (United States Currency in the amount of \$51,697.00 and personal property valued at tens of thousands of dollars), and given the nature of the charges that comprised the basis for Ms. Zhen's ultimate criminal plea, Ms. Zhen has significant arguments pursuant to the Eighth Amendment of the United States Constitution. *Timbs v. Indiana*, 203 L. Ed. 2d 11, 2019 U.S. LEXIS 1350, 139 S. Ct. 682, 27 Fla. L. Weekly Fed. S 642 (2019) (finding forfeiture of vehicle valued at \$42,000.00 excessive light of felonies comprising defendant's plea.)

There is no question that Ms. Zhen would have immediately submitted a claim had she been timely apprised of the forfeiture action.

However, Ms. Zhen was not even given notice of the action until well after the default judgment had been entered, when the judgment itself was served upon her.<sup>3</sup> Even then, Ms. Zhen was not aware until consulting with an attorney that there was a vehicle for recovery of her property. No instructions were provided regarding appeal of the default judgment or late provision of a claim to the property. Only when she was advised by her attorney that she could still file a motion in this case did Ms. Zhen realize this was an option. She acted immediately upon this option, asking counsel to contest the default, first before the Hearing Examiner and then, when that failed, in the Superior Court, and finally before this Court. Any timely failure to appear in this case can certainly be termed mistake or excusable neglect due to the City's failure to ensure Ms. Zhen was actually provided notice of the forfeiture.

As to any hardship the City may suffer as a result of the vacation of the default judgment, this issue has been examined by the Fourth Circuit in applying the "excusable neglect" standard of Fed. R. Civ. P. 6(b)(2), the federal forfeiture statute, to untimely claims – the root issue in this case. The Court identified some of the factors courts have considered when reviewing untimely claims, including: (1) when the claimant became aware

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<sup>3</sup> Interestingly, the City had no trouble finding Ms. Zhen at her updated address when it came time to serve the default judgment.

of the seizure; (2) whether the claimant was properly served; (3) the likelihood of prejudice to the government; (4) whether the government encouraged the delay or misguided the claimant; (5) whether the claimant at least informed the government of his or her intent to file a claim before the expiration of the 10-day time limit; (6) whether the claimant was appearing pro se; and (7) whether the government complied with the applicable procedural rules. *United States v. Borromeo*, 945 F.2d 750, 753 (4th Cir. 1991) (citations omitted). The *Borromeo* court singled out the degree of prejudice to the government as the most important factor to consider, stating:

It is perhaps more appropriate for our purposes to define what prejudice is not, rather than what it is. **The government is not "prejudiced" solely because [the claimant's] claim may turn out to be meritorious.** The goal of a civil forfeiture action . . . is that all fruits and instrumentalities of drug distribution crimes be forfeited, while preserving the rights of unwitting, innocent owners of such property. The degree to which the government has achieved that goal is not measured by the value of the property forfeited. **If [the claimant's] claim is valid, and the government can restore her property to her while retaining what is properly forfeited, the action is a success; justice and congressional intent are satisfied.**

*Borromeo*, 945 F.2d at 754. [Emphasis supplied]

More recently, a Nevada district court permitted the claimant to file a claim more than seven years after the property was seized on the basis of lack of government prejudice to litigating the claim. *United States v. Real*

*Property Located at Incline Village*, 976 F. Supp. 1321 (D. Nev. 1997).

There is no indication that Ms. Zhen purposely avoided notification of the forfeiture action. She did not refuse the certified letter – she had no chance to do so. Further, no notice of forfeiture was apparently provided to Ms. Zhen at the time the warrant was served. Ms. Zhen’s due process rights were violated by entry of the default judgment based on faulty service. The default judgment must be vacated and a hearing set in this case.

C. The Default Judgment must be vacated in the interests of justice.

The specific judicially created factors to be considered when deciding whether a default judgment should be properly vacated were further developed recently in *Pfaff v. State Farm Mutual Auto Insurance Co.*, 103 Wn. App. 829 (2000). See Also *In re Estate of Stevens*, 94 Wn.App. 20 (1999).

Vacating a default judgment is proper if:

Primary Factors

- (1) there is substantial evidence supporting a prima facie defense to the claim upon which the default judgment was entered;
- (2) the failure of the moving party to timely appear is due to mistake, inadvertence, surprise, or excusable neglect;

Secondary Factors

- (3) the moving party acted with due diligence upon notice of entry of the default judgment; and
- (4) the party in whose favor the default judgment was entered will not suffer substantial hardship.

*Id.* at 832.

The Primary Factors are given more weight than the Secondary Factors. *Shepard Ambulance Inc. v. Helsell, Feterman, Martin, Todd & Hokanson*, 95 Wash. App. 231 (1999). Even if the court finds a weaker showing of evidence on one of the factors, a strong showing of evidence on the other factors will compensate for a weaker showing of evidence on the other factor. *Calhoun v. Merritt*, 46 Wn.App. 616 (1986).

Here, the default judgment resulted from mistake and neglect on the part of the City, not on Ms. Zhen's behalf. The City cannot commit an error of this magnitude and then claim that Ms. Zhen should bear the consequences of its actions, or failure to act. Any mistake on Ms. Zhen's part to appear was solely due to the City's errors outlined *supra*, including but not limited to the City's failure to provide notice of Ms. Zhen's appellate rights along with the Order Confirming Forfeiture. Ms. Zhen has meritorious defenses based upon infirmities in the search warrant and in the probable cause necessary find the property and cash is subject to forfeiture in the first place, as well as the Eighth Amendment challenged referenced *supra*. Given the Department's burden in establishing the conditions

precedent to forfeiture in a hearing on the merits, Ms. Zhen is likely to prevail in this action. The Primary Factors should be considered satisfied.

With regard to the Secondary Factors, it appears that Ms. Zhen's counsel took action immediately upon learning of the default judgment in this case, seeking to vacate that judgment at once. The City will not suffer a substantial hardship by allowing Ms. Zhen a full hearing on the merits, as she would have had absent the default judgment. The City will thus not fare any worse than it would have had the default judgment not been entered. Further, it is presumed that the City did not go to extraordinary lengths and utilize enormous manpower in seeking the default judgment, and so will not be at a disadvantage for a substantial financial outlay already made. Thus, the Secondary Factors are also satisfied.

In addition to these four factors, *the court is also justified in vacating a default judgment where injustice would result* as long as the defendant has a meritorious defense. *Beckett v. Cosby*, 73 Wn.2d 825 (1968). This is a classic example of a case where injustice that would adhere as a result of the court maintaining the current status quo would far outweigh any inconvenience to the City that may result from the Court granting Ms. Zhen a full hearing on the merits of this action. The default judgment should have been vacated, and this matter set for a hearing.

2. **Ms. Zhen has never had an opportunity to be heard on this claim and is hamstrung in her appeal by a Superior Court order that fails to state any basis for its determination that the motion to vacate the default judgment should be denied.**

Due process requires a hearing at some point before a person is deprived of a vested property interest. *State v. Scheffel*, 82 Wn.2d 872, 514 P.2d 1052 (1973). To comply with due process a hearing must be “meaningful” (*Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) and “appropriate to the nature of the case.” *Mullane*, 339 U.S. at 313. Due process includes such requirements of the right to confront adverse witness, the right to present evidence and oral argument, and the right to presentation by counsel. *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), *Flory v. Department of Motor Vehicles*, 84 Wn.2d 568, 571, 527 P.2d 1318 (1974).

The fundamental fairness of an action is inseparable from the notion of due process. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (“[T]he phrase [‘due process’] expresses the requirement of ‘fundamental fairness.’”).

In striking down a former version of the Financial Responsibility Act, the Washington Supreme Court found the statute unconstitutional because it limited the hearing to a review of written materials and prohibited live testimony and argument. *Flory v. Department of Motor Vehicles*, *supra*.

“It scarcely requires any discussion to establish that such a procedure is not a ‘hearing.’ The very word ‘hearing’ connotes a session at which there is an oral presentation, something directed to the sense of hearing.” *Id.* at 571.

“*Flory* holds that a process authorizing a hearing in which the only evidence examined is written, offends due process because these protections require an individual be given the opportunity to confront adverse witnesses and present both evidence and oral argument.” *Weekly v. Department of Licensing, supra*, at 222.

Whether a full hearing on the merits is required before the grant of a default order in a forfeiture case appears to be an issue of first impression in Washington State. However, given the due process and Eighth Amendment concerns inherent in the seizure of private property, combined with the disfavored status of both forfeitures and default hearings under the law, it would seem only just that, when a forfeiture has been challenged, an *actual hearing* would be required before that challenge is summarily denied.

That did not happen in this case. Ms. Zhen first filed a motion to vacate the default order with the Hearing Examiner at the Tacoma Police Department. That administrator reviewed Ms. Zhen’s briefing and that produced by the City, and held that the forfeiture complied with statutory

provisions, therefore the default order was properly entered, and vacation was not an option.

Ms. Zhen appealed the Hearing Examiner's findings to the Superior Court. That court, too, made a decision based, presumably, on the briefing produced by the parties.<sup>4</sup> At no time was Ms. Zhen given an opportunity to be heard in this case before she was abruptly deprived of cash in excess of \$50,000.00 and personal property worth nearly that amount. As the *Flory* Court explained, such a procedure cannot be called a hearing, and in fact offends due process, as it is fundamentally unfair.

Appellant does not mean to suggest that *all* motions for default order should require service of process and a hearing on the merits and is aware of precedent in this state that specifically arrived at the opposite conclusion. However, default orders in Court proceedings are only taken after very specific process requirements have been met to ensure that the party against whom the default is taken has been duly advised of the proceeding against him. Personal service of process is required in all but the most unusual circumstances. CR 4(d), RCW 4.28.080. Service by mail is *only* allowed after other methods of service more reasonably calculated to provide actual

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<sup>4</sup> Again, given the dearth of information in the Court's Order, it is impossible to determine what the Court relied on in making its decision.

notice of the lawsuit have been attempted and failed. CR 4(d)(4), RCW 4.28.080(17).

This is not true in forfeiture proceedings, in which the last resort for service in a civil action is the prescribed method of service, and in which personal service is not required. Nor is there anything in the forfeiture statute requiring any attempt save one to serve the Notice of Forfeiture on the property owner. If that Notice, sent by registered mail, does not reach its destination, the government is required to do nothing more to ensure that the property owner is notified before his property is forfeited to the government. This offends the very notion of fundamental fairness, as well as the requirements of constitutional due process.

A constitutional due process concept that requires a hearing prior to the deprivation of something as simple as a driver's license (*See, e.g., Flory, supra*) cannot be read to allow deprivation of property worth tens of thousands of dollars with no hearing and, in fact, no assurance that the property owner is ever actually notified of the pending action.

This argument is brought into sharper focus by the United States Supreme Court's ruling in *Timbs, supra*. In an opinion authored by Justice Ginsberg, the Court found that the excessive fines clause of the Eighth Amendment applies to states through the Fourteenth Amendment, holding that "[l]ike the Eighth Amendment's proscriptions of 'cruel and unusual

punishment’ and ‘[e]xcessive bail,’ protection against excessive fines guards against abuses of government’s punitive or criminal law-enforcement authority.” *Timbs*, 203 L.Ed.2d at 16. As with the excessive fines clause in the Eighth Amendment, the due process clause of the Fourteenth Amendment “guards against abuses of government’s punitive or criminal-law enforcement authority.”

To this end, the government should be required to do more than simply file a Notice of Service that has been returned as undeliverable. The government must be required to attempt to reach the property owner at an alternate address, presuming one is available through DOL or court records. Such a requirement is not unduly onerous on a government official who has ready access to such records and requires but a brief records check and the addressing of a single new envelope. Such a requirement, though not specifically written into the forfeiture laws, can be read into those laws in order to comply with constitutional due process protections against deprivation of property without notice or opportunity to be heard. Such a requirement would have ensured that Ms. Zhen a hearing in this case and obviated the need for the instant appeal.

## **V. CONCLUSION**

Ms. Zhen has been summarily deprived of property in violation of her due process rights, due to errors and neglect on the part of the City of Tacoma Police Department on all fronts. The Department knew or should have known when they sent the first and only Notice of Forfeiture to the address where the seizure and arrest was conducted that this notice would fail to give Ms. Zhen either actual or constructive notice of the forfeiture proceeding. The Department knew or should have known that Ms. Zhen was prohibited by the Pierce County Superior Court from returning to the property as a result of the drug activities that had allegedly been conducted therein. And the Department was on actual notice that the Forfeiture Notice had not reached its destination when it was returned to them as undeliverable. Yet no further attempt to serve Ms. Zhen was made, despite the ready availability of new addresses in Ms. Zhen's Court and DOL files.

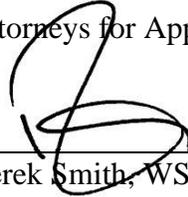
Ms. Zhen was in fact not notified of the forfeiture proceedings until a default order had already been entered, and that order was not sent with notice that the order was appealable. That information was not imparted to Ms. Zhen until months later, when she was finally able to retain counsel. Once Ms. Zhen learned that she had a right to contest the forfeiture, she has acted with due diligence in pursuing the recovery of her property. She should be allowed a full hearing in this case, to present any defenses that

may accrue to her based on a review of the City's discovery. The Court should read a more comprehensive service requirement into the forfeiture statutes and, in comportment with that reading, the default judgment should be vacated and Ms. Zhen should be given an opportunity to present defenses at a full and complete hearing on the forfeiture of her property.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> Day of March 2020

SMITH & WHITE, PLLC

Attorneys for Appellant Hong Mei Zhen

A handwritten signature in black ink, appearing to be 'Derek Smith', written over a horizontal line.

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