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Court of Appeals No. 54510-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HONG MEI ZHEN,

Appellant,

v.

TACOMA POLICE DEPARTMENT,

Respondent

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Petitioner Hong Mei Zhen submits the following arguments and authorities in reply to the State’s Response to her Appeal of the Superior Court’s Order upholding a default judgment taken by the City of Tacoma in a forfeiture proceeding against her property. In all other respects, Ms. Zhen relies upon evidence, arguments, and authorities in the Appellant’s opening brief.

Ms. Zhen’s appeal should be granted because she was entirely deprived of due process in this case. Ms. Zhen was not given proper or adequate notice of the forfeiture proceeding and, after the forfeiture order was sent to her, was not advised of any right to appeal that order.

B. RESPONSIVE ARGUMENT

1. The notice sent to Ms. Zhen was not “reasonably calculated” to reach her and constituted insufficient notice of forfeiture proceedings.
 - a. Statutory Compliance

The Department argues, first that it complied with the letter of RCW 69.50.505 in sending a notice of forfeiture to Ms. Zhen by regular and certified mail to address from which the property was seized in the first place. Ms. Zhen does not argue that the letter of the forfeiture law was violated. However, there is a clear and substantial due process violation in

this case where the Department sent a letter to an address it knew or should have known Ms. Zhen not only no longer occupied but was *expressly forbidden* from visiting. The notice was not at all calculated to reach Ms. Zhen and was violative of her due process rights. The Department cites to *City of Seattle v 2009 Cadillac CTS*, 2 Wn. App. 2d 44, 409 P.3d 1121 (2017) for the proposition that “compliance with the provisions of the forfeiture statute generally satisfies due process standards.” What the Department fails to mention, however, is that *Cadillac* dealt with the timeliness of a forfeiture hearing and did not touch on notice requirements. Further, the Court recognized that in the case of a claim of improper delay unrelated to the hearing deadline, review of the issue under a second-level due process balancing test was appropriate. *Id.*

While the hearing was not delayed in this matter, that is only because the hearing was not held. There was an utter failure on the part of the Department to notify Ms. Zhen that she even had a right to a hearing. Then, the Department, in a *clear* violation of the law and of Ms. Zhen’s constitutional due process rights, failed to notify her that she could contest the default order. The Department’s actions in this case did not satisfy due process, and this Court should go beyond the letter of the law to an analysis under the due process balancing test.

b. Due Process Balancing Test

"The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L. Ed. 1363, 34 S. Ct. 779 [1914]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950).

The Department argues that the balancing test under *Mullane*, not *Mathews v. Eldridge*. 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) applies in this case. Even if the Department is correct, due process has not been afforded to Ms. Zhen under the test articulated in *Mullane*.

In *Mullane*, the United States Supreme Court reasoned:

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. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-315 (U.S. 1950) (internal citations omitted.) However, the *Mullane* Court cautioned, "when notice is a person's due, process which is a mere gesture is not due process." *Id* at 315, *Accord, Dusenbery v. United States*, 534 U.S.

161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).

However, under the facts in both *Dusenbery* and *Mullane*, after sending the required notice of deprivation of property, the government heard nothing back, and so had no reason to believe that anything had gone awry. By contrast, in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 64 L. Ed. 2d 415 (2006), a notice sent via certified mail to a property owner notifying him of a pending forfeiture sale of his property for back taxes owned was returned unclaimed. The *Flowers* Court noted the guidance it had given in *Mullane*, where it had stated,

‘when notice is a person’s due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it,’ and that assessing the adequacy of a particular form of notice requires balancing the ‘interest of the State’ against ‘the individual interest sought to be protected by the Fourteenth Amendment.’

Flowers, 547 U.S. at 230, quoting *Mullane*, 339 U.S., at 314-315.

In evaluating the notice given in the *Flowers* case, the Court found the government’s failure to take additional action after return of a certified letter as undeliverable was insufficient to comply with due process. *Flowers*, 547 U.S. at 229. The Court reasoned that such behavior did not signal an actual desire to inform the property owner of the sale. *Id.* The Court drew an analogy to loss of the notice before delivery:

If the Commissioner prepared a stack of letters to mail to

delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say, "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

Flowers, 547 U.S. at 229.

The Court found that, though the State's calculation of how to reach Mr. Jones may have been reasonable, when the certified letter was returned, the State was on notice that Mr. Jones was "no better off than if the notice had never been sent." *Id.*, citing *Malone v. Robinson*, 614 A.2d 33, 37 (D. C. App. 1992). The Court found that the State's refusal to take further action was unreasonable, and observed that in prior cases, it had required the government to consider information about a recipient of a notice "regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Flowers*, 547 U.S. at 230.

As examples, the *Flowers* Court cited *Robinson v. Hanrahan*, 409 U.S., at 40, 93 S. Ct. 30, 344 L. Ed. 2d 47. (notice of forfeiture proceedings sent to vehicle owner's home was inadequate when the State knew owner was in prison.), and *Covey v. Town of Somers*, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956) (notice of foreclosure by mailing, posting, and

publication inadequate when officials knew property owner was incompetent). Though the Court acknowledged that in those cases the State was aware before notice was sent of the potential issues surrounding service, it reasoned that it is “difficult to explain why due process would have settled for something less if the government had learned after notice was sent, but before the taking occurred, that the property owner was in prison or was incompetent.” *Flowers*, 574 U.S. at 230.

The *Flowers* Court found that it was reasonable for a court to consider what the government had done with information received after service was completed regarding whether a property owner had received actual notice of a pending forfeiture case. *Flowers*, 574 U.S. at 231. This consideration, the Court reasoned, goes directly to the adequacy of the State’s notice procedure, as information received prior to service that, for instance, a property owner had moved, would have resulted in the State changing the address to which notice was sent. *Id.*

In *Flowers*, notice was sent to an address that Mr. Jones had provided and was legally obligated to keep updated. *Id.* Even in the absence of a property tax bill, the Court noted, a property owner is on notice that his property may be subject to seizure for failure to pay taxes. *Id.* at 231-2. Finally, the burden was on Mr. Jones to ensure that anyone who was left in charge of his property would notify him if it were in jeopardy. *Id.* at 232.

Yet, the existence of these burdens did not relieve the State of “its constitutional obligation to provide adequate notice.” *Id.*

Though the Court could not prescribe the form of service, and though the State would not be required to act if there were no reasonable additional steps that it could have taken upon return of the certified letter, the Court nevertheless posited that there were several additional steps the State could have taken to ensure service. *Id.* These steps might have included posting the notice to the front door or re-sending the notice via regular mail or to the occupant of the residence to ensure that it was, at a minimum, opened. *Id.*

The Court concluded that, as *Mullane* had found, “when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.*, at 232, quoting *Mullane*, 339 U.S. at 315.

This case is on point with *Flowers*, and this court should be guided by the Supreme Court's reasoning in that case. Here, as in *Flowers*, Ms. Zhen was sent a notice of forfeiture that never made it to its destination. As in *Flowers*, when the letter was returned, the Department merely shrugged and filed it. No attempt whatsoever was made to send the notice out a second time, to any other address, or to even ensure that the letter reached

Ms. Zhen during one of her numerous court appearances, which took place in the same building that houses the City's offices. Not even when Ms. Zhen *called the Department* to ask about her property was she told that a notice of forfeiture had been sent and came back as undeliverable. The default hearing had not even occurred at this point, and Ms. Zhen would still have had an opportunity to appear to request a hearing. The Department did nothing that would even remotely ensure Ms. Zhen had notice before her cash and her automobile were forfeited to the Department.

Nothing about the notice given in this case was done in a manner that would signal that the Department was "desirous of actually informing" Ms. Zhen of the forfeiture of her property and her right to a hearing on the merits before such forfeiture occurred.

The Department cites to *Dusenbery v United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002) for the proposition that merely sending a notice via certified mail is sufficient notice of a pending forfeiture action, regardless of whether that notice is actually received. *Dusenbery* is distinguishable. In that case, notice was sent to Mr. Dusenbery at his last known residence, the Federal Correctional Institution in Milan, Michigan. Mr. Dusenbery was in fact incarcerated at that facility, and the letter was accepted on his behalf, and for unknown reasons did not reach Mr. Dusenbery. The Court found that the prison procedures for certified mail

were sufficient to ensure likely delivery. Prison staff signed for certified letters at the post office, then entered them in a logbook maintained in the mailroom, and then signed for again by a member of the inmate's unit team before distribution. The FBI thus had no knowledge that the letter failed to reach its destination. In addition to the prison, the FBI sent notices to the address where he was arrested, to an address in Randolph, Ohio, where Mr. Dusenbery's mother lived, and placed a notice in three consecutive Sunday editions of the Cleveland Plain Dealer. *Dusenbery*, 534 U.S. at 164.

Here, a single letter was sent to the address where Ms. Zhen was arrested; an address that the Department knew or should have known was no longer occupied. As opposed to the FBI in *Dusenbery*, the Department here was put on notice that the letter failed to reach its destination. The Department took no further action. No letters were sent to past or contemporaneous addresses. The notice was not published in any paper. The Department did nothing to ensure Ms. Zhen would receive the letter. It did not take action to ensure that Ms. Zhen was informed of the forfeiture short of a single attempt to mail the notice. The *Mullane* Court found the statutorily prescribed notice in that case similarly insufficient. This Court should be guided by *Mullane* and find that the Department's actions in this case do not comply with due process.

c. Public interest does not outweigh Ms. Zhen's Property Interests

State interest in the seizure of property must be balanced against the property owner's individual interest that is protected under the Fourteenth Amendment. *Mullane*, 339 U.S. at 314. As the Department noted, the State has an interest in controlling the narcotics trade. Forfeiture statutes have been found to be an effective deterrent to narcotics enterprises, as it removes the sole motive from those enterprises; the amount of money to be made.

However, the Department's argument is something of a red herring in this case. Here, there has been *no determination* that the cash and vehicle seized were profits of drug dealing. That, of course, would be the purpose of the forfeiture hearing, the very hearing that Ms. Zhen was denied in this case. Without a valid determination that the property seized is in fact proceeds of the narcotics trade, we have only a governmental taking of private property with neither recompense or justification, in plain violation of the 5th Amendment as well as the 14th. The Department has no valid public interest in Ms. Zhen's property without such a hearing.

2. Ms. Zhen was further deprived of due process when she was not notified of her right to appeal the default judgment in a language she could understand.

The Department is correct that there is no affirmative legal

obligation under RCW 34.05.440 to advise a party against whom a default judgment, *specifically*, has been taken of that party's right to appeal the default. However, as the Department also acknowledges, the APA does impose such an obligation upon final orders. RCW 34.05.461(3), to which the State cites, requires a final order to "include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief." As the order in this case was certainly intended to be a final order, it was required, by the APA and by the very tenants of due process, to include this warning. As the Department admits, it did not.

Moreover, the Department is incorrect that Ms. Zhen failed to show prejudice by the failure of the Department to provide this notice. Had Ms. Zhen been able to comprehend the order and had she but known there was an option to move to vacate the order, she could, and would, have acted accordingly. The prejudice in the Department's failure to provide notice is clear: because of this failure, Ms. Zhen is faced with ongoing appellate costs and the continued deprivation of her property.

Under the APA, the party seeking review has the burden of establishing the invalidity of an agency action. RCW 34.05.070(1)(a). Ms. Zhen has done so here, by establishing that the final default order sent to her did not advise her of her right to seek reconsideration or appeal, or the time frame for so doing, in *any* language, let alone a language she could

understand, pursuant to the requirements of RCW 34.05.461(3). In the days of contemporaneous robotic translation, surely it is not an undue burden for an agency to print such notices in a handful of the most frequently spoken languages. Chinese is second only to Spanish in its use in Washington State.¹ That said, had the advisement been included, even solely in English, Ms. Zhen would at the least had an opportunity to obtain a translation and petition for timely redress.

Further, relief may be granted from an agency order when that order “is in violation of *constitutional provisions* on its face or *as applied*.” RCW 34.05.570(3)(a)[emphasis supplied.] Relief may also be granted if the agency has failed to follow a prescribed procedure or the order is arbitrary and capricious. RCW 34.05.570(3)(c) and (i).

Review may also be granted on the basis of erroneous agency action. RCW 34.05.570(4). Relief for “persons aggrieved by the performance of an agency action” may be granted if the action is determined to be unconstitutional. RCW 34.05.570(4)(c)(i).

In a petition for redress under any of these subsections, the Court may only grant relief if the party seeking that relief has been substantially prejudiced by the agency action or order. RCW 35.05.570(1)(d).

¹ <https://statisticalatlas.com/state/Washington/Languages>

Ms. Zhen has shown obvious prejudice in this case, contrary to the Department's claims that she has not. Ms. Zhen, perhaps erroneously, believed that the prejudice – being deprived of her sole chance to petition for return of tens of thousands of dollars and her car – was so obvious that she need not spend more than a sentence or two outlining that prejudice. Yet, the Department appears to require additional explanation. Simply put, Ms. Zhen was not notified that she still, after entry of the default order, had a limited time in which to file a notice of appeal or a motion to vacate the order. She believed in error that the default order was the final order and that she had no further opportunity to seek return of her property, so she took no additional action. Had she been advised that she could appeal or move to vacate the default order, she would have done so. It is perplexing that the Department does not appear to comprehend the severity of this action.

Further prejudice has inured, and was discussed in Ms. Zhen's opening brief, when she pointed out a few of the many arguments that she is now foreclosed from making by virtue of the taking of her property without a hearing or oral argument. The Department appeared to have read, but misconstrued, this portion of the brief, as it argued vociferously against the application of *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) to this case based

on a passing reference in Ms. Zhen's opening brief. Ms. Zhen was not arguing that the tenants of that case, which put the constitutionality of any forfeiture in doubt when considered in light of the 8th Amendment's prohibitions on excess fines, should apply to her motion to vacate the default judgment. Rather, she was simply demonstrating further prejudice to the court. The constitutionality of the forfeiture itself is just one of the many arguments now foreclosed to Ms. Zhen by the Department's improper and unconstitutional actions.

Finally, in defending its actions, the Department also attempts to rely upon a United States Supreme Court holding that Due Process does not require "individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law." Instead, the Court found, a property owner could turn to these state law resources to determine how to regain possession of his property. *City of W. Covina v Perkins*, 525 U.S. 234, 241, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999). Due Process might not require such notice, but Washington State law clearly does. *See, e.g.*, RCW 69.50.505(3), and RCW 34.05.461, discussed *supra*. Thus, the Department appears to argue, no notice of the right to appeal was required upon the entry in this case, as the Supreme Court has found that failure to give notice upon seizure of property is not required. The Department is comparing apples and oranges. First, the

appellants in *Perkins* were English-speaking citizens who were able to contact the police department immediately after seizure and could be deemed to understand the responding officer's statement that they would need a court order to have their property returned. *Perkins*, 525 U.S. at 237.

Second, the Court found that the initial seizure of the property – not a subsequent order forfeiting it – did not require advisement of remedies. A party is put on notice, as the Court reasoned, when their property is seized, and the appellants in *Perkins* were given a list of property taken. *Id.* Conversely, when a forfeiture order is entered and sent out, there is the presumption by the recipient that a court order of this nature is final, and she has no further remedy. The two events are sufficiently contrasting that a ruling applicable to one cannot be applied to the other.

Additionally, the Department would do well to remember that forfeiture is a creature of statute, and that those statutes exclusively control forfeiture proceedings. Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 Wm. & Mary L. Rev. 661 (1977-1978); Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp. L.Q. 169, 183 (1972-1973) (in-depth history of law of forfeiture); cf. O.W. Holmes, *The Common Law* 34-35 (1881). Moreover, as forfeitures are not favored, forfeiture statutes are construed strictly against the seizing

agency. *Snohomish Reg'l Drug Task Force v. Real Prop. Known as 20803 Poplar Way, Lynnwood, Wash.*, 150 Wn. App. 387, 392, 208 P.3d 1189, 1191 (2009). *Perkins, supra*, was a United States Supreme Court opinion construing California forfeiture statutes, not Washington forfeiture statutes, which impose a different notice requirement.

Here, the Washington forfeiture statutes do require notice and a hearing prior to the forfeiture of property. This is what Ms. Zhen was denied, as she was not given appropriate notice and was given no hearing prior to the loss of tens of thousands of dollars and her vehicle. The Department's action in simply filing a returned notice marked as undeliverable is insufficient to ensure due process.

3. There was never a hearing on the merits of the forfeiture action, depriving Ms. Zhen of her property with no chance to be heard.

The Department argues that Ms. Zhen had an adequate opportunity to be heard in this case because the superior court provided her an opportunity for both briefing and oral argument. As was made clear in Ms. Zhen's opening brief, it was not the default judgment process which was lacking, but the forfeiture itself. Ms. Zhen has been deprived of a substantial amount of money and property with absolutely no hearing on the merits. No briefing, and no oral arguments reaching the merits of the

underlying forfeiture have occurred. It is astounding to appellate counsel that a citizen of the United States could be deprived of property by the government without so much as a chance to defend the seizure.

The Department will doubtless respond that Ms. Zhen had that opportunity, as she was mailed an adequate notice of forfeiture, and it is not the fault of the Department that the notice never arrived at its destination. As already argued, however, appellant believes that to satisfy due process prior to such a taking, *some* additional effort on the part of the Department should be required. This is truly the crux of this case and the reason it is before this court. This case makes a travesty of the due process clause, and the default order should not be allowed to stand.

C. CONCLUSION

Ms. Zhen has been erroneously deprived of tens of thousands of dollars in cash and property without so much as a single hearing on the merits. The only oral argument to take place in this case was that concerning the legality of the default judgment. Neither of the judges before whom this case was brought reached the merits of the forfeiture, due to the Department's due process defying actions in ensuring Ms. Zhen was unable to defend her right to the return of her property.

Forfeiture is disfavored. Forfeiture completed without so much as a

hearing should be doubly so. The Department cannot be allowed to simply take a returned notice and file it with a shrug. Just as they would not turn their backs had the mailman dropped the notice in the gutter, as in the example provided in *Flowers*, they should not be allowed under the principles of simple due process, to merely file a returned notice, knowing that the person for whom the notice was intended now stands to lose her property without an opportunity to contest that loss. While the statutes do not require more, due process must.

The Department then deprived Ms. Zhen of her right to appeal or move to vacate the default order. The order was sent to the correct address, and Ms. Zhen received it. She could have contested the default order, *had she known she had a right to do so*. But, despite a clear obligation to do so under the APA, the Department failed to advise Ms. Zhen of her right to seek a vacation of the order or to appeal the default. Nowhere on the default order did this advisement appear, either in English or in the only language Ms. Zhen speaks, Chinese. Even if a translation requirement cannot be read into the statute, the requirement that the Department advise Ms. Zhen of further remedies could not be clearer. The Department failed to comply with the statute, and its failure to do so deprived Ms. Zhen of constitutional due process rights in appealing or moving to vacate the default order. Due solely to the Department's failure in this regard, Ms. Zhen was unable to

timely file a motion to vacate. The forfeiture in this case must be vacated,
and this matter set on for a hearing.

RESPECTFULLY SUBMITTED this 11th Day of May 2020

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

HONG MEI ZHEN,

No. 54510-1-II

Appellant,

Appealing from: 19-2-09348-5

v.

CERTIFICATE OF SERVICE

TACOMA POLICE DEPARTMENT

Respondent.

I hereby certify that I am employed at The Law Offices of Smith and White, PLLC, and am a person of such age and discretion as to be competent to serve papers. On May 11th, 2020, I, Danely Bravo, served and filed the following documents:

- Reply Brief of Appellant

To the following parties:

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Clerk of Court of Appeals Division II of the State of Washington
950 Broadway, Suite 300
(Via COA Electronic Filing Portal)

Dated this 11th day of May, 2020.



Danely Bravo

THE LAW OFFICES OF SMITH AND WHITE, PLLC

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