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State of Washington  
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No. 54510-1-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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HONG MEI ZHEN, Appellant

v.

CITY OF TACOMA  
TACOMA POLICE DEPARTMENT, Respondent

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

Following a drug investigation, the Tacoma Police Department [hereinafter “the Department”] served a series of search warrants and seized personal property in which Ms. Zhen had an interest. This property consisted of \$51,657.39 United States currency, a 2008 Honda Odyssey van owned by and registered to Ms. Zhen, and miscellaneous grow equipment. The Department seized the property on June 18, 2018 and sought its forfeiture under authority of Ch. 69.50 RCW, Uniform Controlled Substance Act.

RCW 69.50.505(3) requires a seizing agency to serve notice on interested parties within fifteen days of the seizure. On June 28, 2018, the Department mailed notice of the seizure and intended forfeiture to Ms. Zhen at 1335 E. 48<sup>th</sup> St., Tacoma, WA 98404. This address was the location: (1) from which Ms. Zhen was arrested; (2) that appeared on her Department of Licensing records; (3) that appeared on the records associated with the seized Honda Odyssey for which she was the registered and legal owner; and (4) that was reflected (at the time of the Department’s Ex Parte Motion for Order Confirming Forfeiture, *i.e.*, October 31, 2018) in the Corrections Data records of the Pierce County

Jail accessed through South Sound 911. The Department used both certified and regular mail.

The mailed noticed complied with the statutory notice requirements under RCW 69.50.505 and satisfied the *Mullane*<sup>1</sup> test for sufficiency of notice because mailing the notice to the above-described address was reasonably calculated to apprise Ms. Zhen of the seizure and forfeiture proceedings. Although the certified and regular mail were returned to the Department, there were no other practicable steps required of the Department.

After providing notice, the Department obtained an ex-parte default order from the City of Tacoma Hearing Examiner, who is the Tacoma Police Chief's designee to hear drug-related forfeiture cases. The Department then mailed this default order to Ms. Zhen at an address she had provided to Officer Robison on September 11, 2018 when she met with him at Tacoma Police Headquarters. Ms. Zhen then took no action in challenging that order for approximately 178 days.

The Department provided statutorily and constitutionally sufficient notice to Ms. Zhen by using 1335 E. 48<sup>th</sup> St., sending notice via certified

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<sup>1</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950)

and regular mail, and by serving a copy of the valid default judgment. This Court should affirm.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

- 1.) The lower court did not err in upholding the default judgment because due process does not require actual notice and notice was provided in conformance with state law.
- 2.) The lower court correctly reviewed the decision of the Hearing Examiner by sitting in its appellate capacity under the Administrative Procedure Act and provided Ms. Zhen a meaningful opportunity to be heard.

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

On June 18, 2018, following a drug investigation, the Department seized U.S. currency, a Honda Odyssey, and miscellaneous grow equipment under RCW 69.50.505. [CP 42]. Because Ms. Zhen had interests in the property, on June 28, 2018 the Department mailed her notice of the seizure and intended forfeiture of the currency, van, and grow equipment.<sup>2</sup> [CP 29-30; 34-35]. The Department mailed its notice using

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<sup>2</sup> The Department had also seized other property not for forfeiture purposes. Any property not intended for forfeiture was not included on the Department's notice of seizure and intended forfeiture.

both certified and regular mail, addressed to Ms. Zhen at 1335 E. 48<sup>th</sup> St., Tacoma, WA 98404. [CP 29-30; 34-35].

This address was the location: (1) from which Ms. Zhen was arrested; (2) that appeared on her Department of Licensing records; (3) that appeared on the records associated with the seized Honda Odyssey for which she was the registered and legal owner; and (4) that was reflected (at the time of the Department's Ex Parte Motion for Order Confirming Forfeiture, *i.e.*, October 31, 2018) in the Corrections Data records of the Pierce County Jail accessed through South Sound 911. [CP 31]. Both the certified and regular mail were returned to the Department. [CP 30].

After receiving no written claim, on October 31, 2018 the Department moved the City of Tacoma Hearing Examiner to confirm the default under RCW 69.50.505(4). [CP 27-40]. The Hearing Examiner granted the Department's motion and issued an Order Confirming Forfeiture on November 6, 2018. [CP 41-44]. The Department mailed a copy of that order to Ms. Zhen on November 8, 2018 at 2539 S. Raymond St., Seattle, WA 98108. [CP 69].

The Department only became aware of this Raymond St. address when Ms. Zhen provided the address to Officer Robison on September 11, 2018. [CP. 30-31]. The Department did not have this address when it mailed the original notice of seizure and intended forfeiture, but had it by

the time it sought default. [CP 30-31]. The default order was in English and did not reference any appeal rights. [CP 41-44]. Ms. Zhen waited approximately 178 days before challenging the default order. [CP 102].

The Hearing Examiner denied her motion to vacate the default order. [CP 109]. Ms. Zhen challenged that order before the Pierce County Superior Court, which was sitting in its appellate capacity under the Washington Administrative Procedure Act, Chp. 34.05 RCW. [CP 2-4]. After a hearing with briefing and oral argument, the court denied the motion to vacate the order. [CP 140]. Ms. Zhen now appeals [CP 141-142].

#### IV. ARGUMENT

1. THE SUPERIOR COURT DID NOT ERR IN DENYING MS. ZHEN'S MOTION TO VACATE THE DEFAULT JUDGMENT BECAUSE THE DEPARTMENT MAILED TIMELY NOTICE TO AN ADDRESS REASONABLY CALCULATED TO NOTIFY MS. ZHEN OF THE PROCEEDINGS.

*A. The Department fully complied with RCW 69.50.505 by mailing notice to Ms. Zhen within fifteen days of the seizure.*

In reviewing the default judgment here, an appellate court “sit[s] in the same position as the superior court, applying the relevant standards of review from the Administrative Procedure Act (APA) directly to the

record.”<sup>3</sup> The agency’s legal conclusions will be reviewed de novo while factual issues are reviewed for substantial evidence.<sup>4</sup> Any unchallenged fact on appeal is a verity.<sup>5</sup>

RCW 69.50.505 establishes the procedural framework to secure civil seizure and forfeiture of drug-related property. This statute requires an agency to serve notice that the property is subject to forfeiture on the owner, or other interested person(s), within fifteen days of the seizure of the property. RCW 69.50.505(3).<sup>6</sup> The notice of seizure for unsecured personal property ...

... may be served by any method authorized by law or court rule including but not limited to service by certified mail with return receipt requested. Service by mail shall be deemed complete upon mailing within the fifteen day period following the seizure.

*Id.* Mailing notice within fifteen days of the seizure is statutorily complete service.

The Department seized the currency, van, and grow equipment on June 18, 2018 during the execution of a search warrant in a drug case.

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<sup>3</sup> *Fox v. WA State Dept. of Ret. Systems*, 154 Wn.App. 517, 523, 225 P.3d 1018 (Div. I, 2009); *rev. denied* 169 Wn.2d 1012, 236 P.3d 895 (2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992), *recon. denied*.

<sup>6</sup> Forfeitures involving real property and perfected security interests have particularized service requirements. RCW 69.50.505(3). This case does not involve real property or a security interest.

[CP 42]. Ten days later on June 28, 2018, the department mailed notice to Ms. Zhen. [CP 34-35]. Because service is complete upon mailing, the Department complied with the service requirement of RCW 69.50.505. “[C]ompliance with the provisions of the forfeiture statute generally satisfies due process standards.”<sup>7</sup>

*B. By mailing notice to an address listed across multiple databases using both certified and regular mail, the Department provided notice that was reasonably calculated under the circumstances to notify Ms. Zhen of the proceedings and to provide her an opportunity to object.*

*i. Mullane v. Cent. Hanover Bank & Trust Co.<sup>8</sup> establishes the test for determining sufficiency of notice under the due process clause.*

Ms. Zhen concedes that the Department followed the statutory requirements, but argues without authority that it violated the spirit of the forfeiture statute. This argument appears to be based upon due process. However, by providing statutorily compliant notice that was reasonably calculated to apprise Ms. Zhen of the proceedings and give her an opportunity to object, the Department provided appropriate due process and complied with the spirit of the law.

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<sup>7</sup> *City of Seattle v 2009 Cadillac CTS*, 2 Wn. App 2d 44, 48, 409 P.3d 1121 (Div. I, 2017).

<sup>8</sup> *Mullane v. Cent. 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.” *Mullane v. Cent. Hanover Bank & Trust Co.*<sup>9</sup> *Mullane* establishes that for due process purposes “[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”<sup>10</sup> A court will balance the government’s interest against the individual’s interest.<sup>11</sup> Actual notice is not a requirement of due process. *Jones v. Flowers*.<sup>12</sup>

Whether the default order or the notice requirements of RCW 69.50.505 violate due process is a legal question that is reviewed de novo. *Pal v. WA State Dept. of Social and Health Serv.*<sup>13</sup>

Ms. Zhen wrongly argues that the due process balancing test set forth in *Mathews v. Eldridge*<sup>14</sup> applies here. See BRIEF OF APPELLANT, 8-9.<sup>15</sup> The *Mathews* balancing test requires ...

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<sup>9</sup> 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950).

<sup>10</sup> *Id.* at 315.

<sup>11</sup> *Id.* at 314.

<sup>12</sup> 547 U.S. 220, 226, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).

<sup>13</sup> 185 Wn.App. 775, 781, 342 P.3d 1190 (Div. II, 2015).

<sup>14</sup> *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

<sup>15</sup> Curiously, Ms. Zhen does go on to reference the correct *Mullane* test for notice elsewhere, but never explains which test (*Mathews* or *Mullane*) this court should use and

“... consideration of three distinct 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.

Ms. Zhen’s reliance upon this case is misplaced because *Mathews* was focused upon the procedural due process requirements for a hearing and not the requirements for giving notice of the hearing.<sup>16</sup> As the Washington Supreme Court has explained, “an analysis of the three factors under *Mathews* determines the formality and procedural requisites of ... [a required] *hearing*.”<sup>17</sup> Ms. Zhen argues that *Mathews* is the appropriate test for procedural due process and states that the Washington Supreme Court adopted this test. BRIEF OF APPELLANT, 8-9. Because *Mathews* does not address the sufficiency of service of *notice* of the right to a hearing, *Mathews v. Eldridge*<sup>18</sup> has no import here.

The United States Supreme Court agreed with this view, rejecting application of the *Mathews* test in a similar notice case and specifically

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simply cites *In re Young* as proof that *Mathews* has been adopted. See e.g., Brief of Appellant, pg. 10.

<sup>16</sup> *Id.* at 349.

<sup>17</sup> *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 82, 838 P.2d 111 (1992), *clarified on denial of recon.* 845 P.2d 1325 (Mem) (Feb. 12, 1993)[emphasis added].

<sup>18</sup> *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

followed the *Mullane, supra*, test (notice reasonably calculated under the circumstances) as the appropriate test for analyzing the sufficiency of notice. *Dusenbery v. U.S.*<sup>19</sup> This Court has also followed the *Mullane* test in addressing constitutional adequacy of notice. *Pal*, 185 Wn.App. at 783-84.<sup>20</sup> So has Division Three. *Ryan v. WA Dept. of Social and Health Serv.*<sup>21</sup> Further, the Washington State Supreme Court cited *Mullane* as the appropriate test for due process of notice in *Duskin v. Carlson*.<sup>22</sup>

Ms. Zhen cites in support of her *Mathews* argument, to *In re Young*.<sup>23</sup> BRIEF OF APPELLANT, 8-9. However, this case, like *Mathews*, addressed the *type* of proceedings necessary to satisfy due process and not the sufficiency of notice of the hearing. Further, *In re Young* pre-dates the U.S Supreme Court's decision in *Dusenbery* and the Washington Supreme Court's decision *Duskin*, both of which applied *Mullane* to determine the sufficiency of notice.

- ii. The notice given by the Department satisfies due process under *Mullane* because the steps taken were reasonably calculated to provide notice and the Department had no better address information for Ms. Zhen.

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<sup>19</sup> 534 U.S. 161, 167-68, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002).

<sup>20</sup> *Pal* cites case law citing *Mathews* for general procedural due process rule and then cites case law citing *Mullane* in addressing what is required for sufficient notice.

<sup>21</sup> 171 Wn.App. 454, 287 P.3d 629 (Div. III, 2012).

<sup>22</sup> 136 Wn.2d 550, 557, 965 P.2d 611 (1998).

<sup>23</sup> 122 Wn.2d 1, 857 P.2d 989 (1993), *superseded by statute*

Under *Mullane*, mailed notice meets due process requirements if it is reasonably calculated to notify the party and provide an opportunity to participate, considering the reasonableness of the balance between private and government interests<sup>24</sup>. Here, mailing notice to Ms. Zhen at 1335 E. 48<sup>th</sup> St. by regular and first class mail was reasonably calculated to notify her because this address: (1) is the location where she was arrested; (2) appeared on her Department of Licensing Records; (3) appeared as the address associated with the seized Honda Odyssey; (4) was listed as an address in jail records at the time of the Department's motion for default, and (5) is the only good address that the Department had at the time notice was mailed. [CP 31].

Additionally, the Department's use of regular mail in conjunction with certified mail enhanced the likelihood that notice would be received because regular mail does not require that someone be home to accept the mail and, even if a person has moved, the new occupant might forward the mail to the former owner's address. *See Flowers, supra* (noting that use of certified mail only may make actual notice less likely because the letter cannot be left at the address to which it is delivered).<sup>25</sup>

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<sup>24</sup> *Tulsa Prof. Collection Services, Inc. v. Pope*, 485 U.S. 478, 484, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) ("The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.").

<sup>25</sup> 547 U.S. at 234-235.

iii. The property interests of Ms. Zhen do not outweigh the governmental interest in seizure and forfeiture of personal property used to facilitate drug activity.

Under the *Mullane* test a court will also balance the interests of the state against the interests sought to be protected by the fourteenth amendment.<sup>26</sup> Here, there are no liberty or real property interests at stake. And nothing about the personal property seized [money, a car, and grow equipment], distinguishes this case from any other seizure of personal property authorized under the provisions of RCW 69.50.505. The interest of a person in the use of a vehicle is not so compelling as to outweigh the substantial interest of the government in controlling the narcotics trade.<sup>27</sup>

The seizure and forfeiture of personal property, such as a vehicle, for violation of the narcotics laws foster the public interest.<sup>28</sup> The government has a strong interest in deterring drug crimes by targeting, and seizing and forfeiting the profits generated by the commercial production and distribution of controlled substances.” *City of Sunnyside v. Gonzalez*.<sup>29</sup> The Department also “has a strong financial incentive to seek forfeiture because the seizing law enforcement agency is entitled to

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<sup>26</sup> *Mullane*, 339 U.S. at 314

<sup>27</sup> *U.S. v. One 1971 BMW 4-Door Sedan*, 652 F. 2d 817, 821 (1981).

<sup>28</sup> *Id.* at 821.

<sup>29</sup> 188 Wn.2d 600, 608, 398 P.3d 1078 (2017).

keep or sell most forfeiture property.”<sup>30</sup> The Department uses forfeited drug property “exclusively for the expansion and improvement of controlled substances related law enforcement activity.”<sup>31</sup> Forfeited property assists law enforcement’s drug interdiction efforts.

Additionally, reliance upon the statutory notice requirements established by the State Legislature allows law enforcement agencies to approach these cases in a consistent and systematic manner. The legislature has balanced the government interests against the property interest of the claimants and established a heightened notice requirement for seizure of real property and property with a security interest. Relying on the mailed notice standard for personal property actions allows for an inexpensive and easily identifiable process for an agency to employ consistently and appropriately balances the competing interests. The balance of interests weighs in favor of the Department. As such, the notice used by the Department satisfied due process under *Mullane*.

In some instances, the courts will consider if additional means are required to satisfy due process.<sup>32</sup> For example, “when initial personal

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<sup>30</sup> *Id.* at 617 (citing RCW 69.50.505(7)).

<sup>31</sup> RCW 69.50.505(10).

<sup>32</sup> See, *Ryan*, 171 Wn.App. at 472 (For notice to be constitutional, due process can require an agency “to consider unique information known about an intended recipient in determining whether notice is reasonably calculated to succeed); and, *Jones*, 547 U.S. at 225 (For example, when a case involves real property, a returned, unclaimed notice of a tax sale will require additional reasonable steps, if practicable, to provide notice).

notice letters are returned undelivered, the government must make reasonable additional efforts to provide personal notice.” *U.S. v. Ritchie*.<sup>33</sup> However, “[w]hat additional efforts are reasonable will depend on the circumstances of the particular case.”<sup>34</sup> Importantly, “if there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.”<sup>35</sup> “What steps are reasonable in response to new information depends upon what the new information reveals.”<sup>36</sup>

The Department had no reason to believe that Ms. Zhen would not receive notice at 1335 E. 48<sup>th</sup> St. This was an address listed across multiple databases for her. [CP 31]. The Department did not have any reason to suspect she did not live there. While the Department later became aware of a different address for Ms. Zhen on September 11, 2018, this occurred long after the notice of seizure was mailed on June 28<sup>th</sup>.

When the mail was returned to the Department, the Department was not aware of any different address to which notice should be mailed. The record reflects that Ms. Zhen submitted a photograph of a driver’s license that indicates it was issued on July 11, 2018 and shows an address

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<sup>33</sup> 342 F.3d 903, 911, 56 Fed.R.Serv.3d 577 (9<sup>th</sup> Cir., 2003).

<sup>34</sup> *Id.*

<sup>35</sup> *Jones*, 547 U.S. at 234.

<sup>36</sup> *Id.* at 234.

of 1509 S. Massachusetts St. [CP 59]. July 11, 2018 was within the fifteen-day window for effective notice to be sent. However, it would not be reasonable to assume that the Tacoma Police Department should have been aware that Ms. Zhen would be issued a driver's license by the State Department of Licensing with a different address on July 11<sup>th</sup>, 14 days after the notice of forfeiture was mailed. The Department did not become aware of an updated address until it was provided to the Department on September 11, 2018. [CP 30-31]. By that time, she provided the Department a *completely different* address than the 1509 S. Massachusetts St. address on her driver's license issued in July.<sup>37</sup> *Id.*

Because the Department: (1) timely mailed notice to Ms. Zhen at an address reflected across multiple databases; (2) used both certified and regular mail to do so; (3) had no information to believe that was not a valid address for her; (4) has interests in relying upon the statutory notice scheme and deterring drug crimes generally; (5) and had no additional reasonable steps it could take following return of the notice that were practicable, due process was satisfied.

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<sup>37</sup> The Department's later research showed Ms. Zhen updated her address with the Department of Licensing on August 31, 2018.

C. Even if Ms. Zhen's Conditions of Release from Superior Court are relevant, they also confirm 1335 E. 48<sup>th</sup> St. as a valid address for official notice.

Ms. Zhen's conditions of release in her criminal case do not change the due process analysis for two reasons. First, even assuming that such conditions were relevant, the fact that Ms. Zhen was prohibited from residing at 1335 E. 48<sup>th</sup> St. does not affect the validity of that address for official mailings to her.

The relevant conditions of release form requires a defendant's signature under language that reads, in part, "I agree and promise to appear before this court or any other place as this court may order upon notice delivered to me *at my address stated below.*" *Id.* [CP 52-53][emphasis added]. The address ultimately listed is 1335 E. 48<sup>th</sup> St. Tacoma, WA 98404 USA. *Id.* [CP 52-53]. 1335 E. 48<sup>th</sup> St. is the same address to which the Department sent its notice of seizure and intended forfeiture. [CP 34-35]. Under Ms. Zhen's own proffered relevant document, a valid address for official mailings for her was 1335 E. 48<sup>th</sup> St.

Second, Ms. Zhen's privity arguments are not germane. Ms. Zhen cites to *Barlindal v. City of Bonney Lake*, 84 Wn.App. 135, 925 P.2d 1289 (Div. II, 1996) in arguing that the Department was in privity with the Pierce County Prosecutor's Office and therefore should have been aware

of the conditions of release in her criminal case.<sup>38</sup> Brief of Appellant, 11-12. But *Barlindal* addresses the application of collateral estoppel following suppression of evidence in a criminal case. Simply put, it is about issue preclusion, not sufficiency of notice, and therefore it does not apply.

*D. Although the Department served Ms. Zhen a copy of the default order in English and did not include appeal rights, Ms. Zhen does not meet her burden to demonstrate substantial prejudice.*

The Department specifically complied with the service requirements of the Administrative Procedure Act when it mailed a copy of the default order to Ms. Zhen at the address she provided the Department.

“(1) Failure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party’s right to an adjudicative proceeding, and the agency may proceed to resolve the case without further notice to, or hearing for the benefit of, that party, *except that any default or other dispositive order affecting that party shall be served upon him or her or upon his or her attorney, if any.*”

RCW 34.05.440(1)[emphasis added].

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<sup>38</sup> She also alleges an updated address in the court file, but never specifies what address this may be.

In her appellant brief before this Court, Ms. Zhen cites no legal authority for the proposition that such default order must convey any subsequent appeal rights or that it must be translated into a separate language. She carries the burden to demonstrate error. RCW 34.05.570(1)(a). Because of this failure to cite any authority, this Court should decline to consider these arguments. RAP 10.3(a)(6). *See also, Cowiche Canyon Conservancy v. Bosley*.<sup>39</sup>

However, should this Court determine that reaching this issue is appropriate Ms. Zhen is correct in that the default order did not include reference to applicable timeframes for reconsideration or appeal. RCW 34.05.461(3) does require inclusion of “a statement of the available procedures and time limits for seeking reconsideration or other administrative relief” in a final order.<sup>40</sup> The Model Rules of Procedure also require “a statement describing the available post-hearing remedies.” WAC 10-08-210(6). Courts have found due process violations in not providing any appeal hearing rights<sup>41</sup> and in failing to cite to the deadline

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<sup>39</sup> 118 Wn.2d 801, 809, 828 P.2d 549 (1992), *recon. denied*, (declining to consider arguments regarding standing with no reference to the record or authority).

<sup>40</sup> RCW 34.05.461(3).

<sup>41</sup> *State v. Green*, 157 Wn.App. 833, 239 P.3d 1130 (Div. I, 2010)(discussing procedural due process violation in not providing appeal rights in initial administrative decision by school authority to revoke parent’s license to enter school property).

for filing an appeal<sup>42</sup>. Tolling of the timeframe for appeal can occur where an agency does not comply with procedural requirements, unless substantial compliance by the agency prevents tolling. *Felida Neighborhood Ass'n. v. Clark County*.<sup>43</sup>

However, Ms. Zhen has the burden to demonstrate she is entitled to relief under the parameters established in the APA.<sup>44</sup> She further must have been substantially prejudiced.<sup>45</sup> She cites no authority, nor any specific portion of the APA in her argument that failure to include appellate rights in the default order entitles her to a new hearing in this case. More importantly, the U.S. Supreme Court has held that due process is satisfied if the remedial procedures are available to the property owner through public sources.<sup>46</sup> As such, this Court should find that she has not carried her burden regarding this issue.

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<sup>42</sup> *Pal*, 185 Wn.App. at 786 (finding due process violation in failing to adequately cite to relevant appeal deadline).

<sup>43</sup> 81 Wn.App. 155, 162-163, 913 P.2d 823 (Div. II, 2009), *rev. den.* 129 Wn.2d 1028 (1996)(discussing impact of lack of adequate notice of agency action and lack of appeal rights and remanding for determination of whether substantial compliance or doctrine of laches prevented review).

<sup>44</sup> RCW 34.05.570(1)(a).

<sup>45</sup> RCW 34.05.570(1)(d).

<sup>46</sup> *City of W. Covina v Perkins*, 525 U.S. 234, 241, 119 S. Ct. 678, 681-682 (1999)( they [Respondents] contend the City deprived them of due process by failing to provide them notice of their remedies and the factual information necessary to invoke the remedies under California law. When the police seize property for a criminal investigation, however, due process does not require them to provide the owner with notice of state law remedies).

Ms. Zhen also cites no authority that translation of the default order was a legal requirement. Using English only in the default order did not violate Ms. Zhen’s due process rights. *See e.g., Toure v. U.S.*<sup>47</sup>; *And see, Carmona v. Sheffield.*<sup>48</sup> Ms. Zhen also fails to carry her burden to demonstrate substantial prejudice in receiving a default order only in the English language. As such, this Court should decline to grant any relief predicated upon these arguments.

*E. Because the Department timely served notice and mailed Ms. Zhen a copy of the default judgment, the Hearing Examiner did not abuse his discretion in denying the untimely motion to vacate and Ms. Zhen fails to demonstrate that CR60 should apply.*

“The decision to set aside a default judgment is discretionary.” *Graves v. Dept. of Employment Sec.*<sup>49</sup> “An abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.”<sup>50</sup> The Office of the Hearing Examiner Rules of Procedure [“HEXRP”], along with the APA, govern the process by which the Tacoma Police Department seeks to enforce its pursuit of

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<sup>47</sup> 24 F.3d 444 (2<sup>nd</sup> Cir., 1994)(declining to find a due process violation where the Drug Enforcement Administration mailed notice of seizure in English language to a native French speaking inmate).

<sup>48</sup> 475 F.2d 738 (9<sup>th</sup> Cir., 1973)(addressing California’s use of only English language in notices in context of unemployment benefits).

<sup>49</sup> 144 Wn.App. 302, 309, 182 P.3d 1004 (Div. II, 2008).

<sup>50</sup> *Id.*

civil drug-related asset forfeitures. [CP 101-102]. The Hearing Examiner is the designee of Tacoma’s chief law enforcement officer and is the appropriate entity from which to seek confirmation of forfeitures in personal property seizure cases initiated by the Department. [CP 101]. HEXRP 1.19 allows for default orders. [CP 102].

Ms. Zhen reads HEXRP 1.19 too narrowly by focusing only on the “hearing” portion of the rule. In relevant part for purposes of this case, the rule states “[a] default order shall be final unless, within seven (7) days of service, good cause is shown by the party against whom it was entered.”<sup>51</sup> Although this language falls within the middle of the rule, and comes after the rule addresses a failure to appear at a hearing, nothing in the rule suggests that it is limited to *only* failing to appear at a hearing.

The APA also specifically contemplates default orders when a claimant fails to timely file a written claim.<sup>52</sup> And under Chp. 69.50 RCW, if a person fails to timely notify the seizing agency of her claim in writing “the item seized *shall* be deemed forfeited.”<sup>53</sup> Absent a timely claim, personal property is statutorily deemed forfeited and the Department simply confirms that default with an appropriate motion before the Hearing Examiner.

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<sup>51</sup> HEXRP 1.19.

<sup>52</sup> RCW 34.05.440(1).

<sup>53</sup> RCW 69.50.505(4)[emphasis added].

In addition, the Department was not required to provide notice of the default motion itself; it was authorized to proceed *ex parte* to confirm the forfeiture and was only required to serve a copy of the order itself.<sup>54</sup>

The default judgment obtained herein was authorized by the HEXRP, the APA, and RCW 69.50.505. The Department mailed her notice of the default judgment it obtained. Ms. Zhen failed to take any action in challenging this order for some 178 days. Because the Department timely served the initial notice and validly served the default order, the Hearing Examiner did not abuse his discretion in denying Ms. Zhen's untimely motion to vacate.

Ms. Zhen also devotes a lengthy portion of her opening brief arguing the considerations a court should use when ruling on a motion to vacate a default judgment under CR 60(b). However, she fails to explain why this Court should utilize CR 60 in lieu of the statutorily provided review matrix established in Ch. 34.05 RCW. Ms. Zhen fails to carry her burden that CR 60 should control or inform this Court's review.

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<sup>54</sup> RCW 34.05.440(1)(specifying failure to make a claim is a default and the agency is permitted to move forward *without further notice to, or hearing for the benefit of* the defaulter, except the agency must serve the default order itself)[emphasis added].

F. This Court should decline to address *Timbs v. Indiana* because Ms. Zhen has not provided sufficient argument to demonstrate its applicability.

Ms. Zhen makes references to an Eighth Amendment challenge and argues that she has “significant arguments” while citing to *Timbs v. Indiana*, found at 139 S.Ct. 682, 203 L.Ed. 2d 11 (2019). BRIEF OF APPELLANT, PG. 20. Although she later discusses authorship of the opinion and correctly identifies the case holding as the Eighth Amendment applies to the States, outside of a few sentences and a parenthetical regarding *Timbs*, Ms. Zhen never makes any “significant” argument about how or why *Timbs* controls the outcome of this case. This Court should decline to “review such complex issues based on passing mention in an appellant’s brief.”<sup>55</sup>

G. Ms. Zhen does not demonstrate how the “interests of justice” standard fits into the review parameters of the APA and therefore she does not meet her burden in demonstrating relief is appropriate.

Under the guise of an argument made in the “interests of justice”, Ms. Zhen again argues that CR 60(b) and relevant case law thereto should guide this Court’s review. However, she again does not carry her burden in explaining why this case does not fall within the statutorily defined

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<sup>55</sup> *Graves*, 144 Wn.App. at 312 (declining to review claims of alleged violation of equal protection and various alleged due process violations in an unemployment benefits default order review case).

review matrix of the APA, Chp. 34.05 RCW. The only case regarding the argument of interests of justice cited by Ms. Zhen was *Beckett v. Cosby*, 73 Wn.2d 825 (1968). BRIEF OF APPELLANT, PG. 25.

But *Beckett* addressed whether a trial court abused its discretion in denying a motion to vacate a default judgment in a breach of contract case. It does not address default judgments obtained in drug forfeiture proceedings, which are subject to the APA. Absent from Ms. Zhen's briefing is how *Beckett* applies in the context of review of an administrative decision and why this case is a "classic example" of injustice. BRIEF OF APPELLANT, PG. 25. As explained *supra*, the Department fully complied with its service obligations regarding notice and provided a copy of the default judgment to Ms. Zhen. Her inaction upon receipt of that information for some 178 days should not be permitted to usurp the finality of the agency action herein.

2. THE SUPERIOR COURT PROVIDED SUFFICIENT APPELLATE REVIEW BECAUSE IT PROVIDED AN OPPORTUNITY TO PRESENT ARGUMENT ORALLY AND IN WRITING.

A full hearing on the merits of this case was not required before obtaining a default order because the Department timely served notice of

seizure and intended forfeiture of personal property, and Ms. Zhen failed to make a timely claim.<sup>56</sup>

Ms. Zhen appears to primarily rely upon *Flory v. Dept. of Motor Vehicles*<sup>57</sup> for her contention that she did not receive a true hearing in the superior court. But *Flory* is inapposite in that the statute at issue there specifically prevented any type of oral argument before an administrative body making a security determination in a traffic accident case.<sup>58</sup> Unlike *Flory*, Ms. Zhen *did* receive a hearing before the Pierce County Superior Court wherein her interests were represented by Counsel.

Counsel on her behalf submitted briefing, the Department submitted a response, and Ms. Zhen submitted a reply. At the hearing itself, Counsel made oral argument and Counsel for the Department offered a response in rebuttal. The court questioned both attorneys and gave both the opportunity to present their cases. At the conclusion of the hearing, the court denied the motion to vacate and the attorneys prepared the order for the court's signature.

The court issued a ruling and there was a Memorandum of Journal Entry for the December 13, 2019 hearing entered in the Pierce County Legal Information Network Exchange (LINX). Ms. Zhen did not

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<sup>56</sup> RCW 34.05.440(1).

<sup>57</sup> 84 Wn.2d 568, 527 P.2d 1318 (1974)

<sup>58</sup> *Id.* at 570-71.

designate this journal entry in the Clerk's Papers nor did she provide a verbatim transcript of this hearing. Her failure to provide all relevant Clerk's Papers or provide for a transcript of the hearing impedes this Court's review of this issue. However, this hearing afforded Ms. Zhen the opportunity to present her arguments and objections both orally and in writing and therefore did not violate due process.





# CITY OF TACOMA PROSECUTION DIVISION

April 14, 2020 - 3:56 PM

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**Appellate Court Case Title:** Hong Mei Zhen, Appellant v. Tacoma Police Department, Respondent  
**Superior Court Case Number:** 19-2-09348-5

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