IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant, Petitioner on Review,	SC No. S063426
v.	CA No. A153361
MAX BARNTHOUSE, aka Max Davis Barnthouse, Defendant-Respondent, Respondent on Review.	Trial Court No. 120431515 (Multnomah County)

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from the Order
of the Circuit Court for Multnomah County,
Honorable CHRISTOPHER J. MARSHALL, Judge

Opinion Filed: May 20, 2015
Author of Opinion: Nakamoto, Judge
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge

Continued …

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INTRODUCTION

As the addressee and the intended recipient of a package sent by United States Postal Service Priority Mail, Max Barnthouse held a protected privacy and possessory interest in the package during its shipment with USPS under Article I, section 9 of the Oregon Constitution and the Fourth Amendment to the United States Constitution. By the terms of the United States Postal Service *Domestic Mail Manual*, Mr. Barnthouse had a right to direct and control delivery of the incoming package once the sender deposited it with the carrier. As a result, he had constructive possession of the package during its course of delivery and the right to be free from the government seizure of the package.

The state significantly interfered with Mr. Barnthouse's possessory interest and, therefore, seized the package, when a law enforcement officer removed it from the sorting line. At that moment, the law enforcement officer exerted absolute and exclusive dominion and control over the package and extinguished Mr. Barnthouse's possessory interest. He seized the package to make a special police delivery of it to Mr. Barnthouse and to extract his consent to search, thereby avoiding judicial oversight and the warrant requirement. At the moment of seizure, he foreclosed any chance of a normal delivery to Mr. Barnthouse.

The court should not reach the state's third question presented – whether reasonable suspicion is sufficient to support the warrantless seizure of an in-transit mail package. The state did not raise the issue before the Court of Appeals and the issue is not properly before this Court. Were the court to do so, the pre-existing Oregon rule, requiring probable cause and a warrant to justify a seizure, must govern law enforcement seizures of packages in transit with the USPS. The law enforcement activity at issue is not a brief investigatory detention. Nor was it a step taken to address reasonable suspicion that the package poses a present danger of harm to human life. Rather, the law enforcement practice of seizing a "suspicious" package in transit with USPS was designed to allow for the search of the package without probable cause and a search warrant.

The Fourth Amendment places a lesser importance on possessory interests, whereas, it is well-established that under Article I, section 9 of the Oregon Constitution, possessory interests are equal to privacy interests. The Oregon rule cannot otherwise mirror the Fourth Amendment standard, which allows brief investigatory detentions of packages in the mail based on reasonable suspicion.

The new rules of law proposed by the state in its opening brief eviscerate Oregon's existing constitutional standards for government seizures by carving out a singular context in which police may unilaterally interfere with and take control of our historically sacred mail communications without judicial

oversight. This Court should, instead, adopt the rules of law proposed by the defendant, which respect and uphold our existing constitutional jurisprudence.

PROPOSED RULES OF LAW

First proposed rule of law

Mr. Barnthouse, as the addressee and intended recipient of the United States Postal Service Priority Express package, held a possessory interest in the package during its course in the mail. That interest is protected by both Article I, section 9 of the Oregon Constitution and the Fourth Amendment to the United States Constitution.

Second proposed rule of law

When Officer Castenada removed the package from the sorting line, his action constituted a seizure under Article I, section 9 of the Oregon Constitution and the Fourth Amendment to the United States Constitution. It was at that moment that he exercised absolute and exclusive dominion and control over the package and extinguished Mr. Barnthouse's possessory interest.

Third proposed rule of law.

If the Court chooses to consider the third question presented, the Court should hold that when law enforcement or agents thereof take a package in transit with the United States Postal Service, such action constitutes a seizure that must be supported by probable cause and a warrant under Article I, section 9 of the

Oregon Constitution and by reasonable suspicion under the Fourth Amendment of the United States Constitution.

SUMMARY OF FACTS

This Court is bound by the trial court's factual findings, so long as those findings are supported by evidence in the record. *State v. Juarez-Godinez*, 326 Or 1, 7, 942 P2d 772 (1997). "If findings of historical fact are not made on all pertinent issues and there is evidence from which such facts could be decided more than one way, we will presume that the facts were decided in a manner consistent with the court's ultimate conclusion." *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993).

The Expected Course of Express Mail

Items shipped as "Express Mail" through the USPS to Portland, Oregon arrive at the postal sorting center early in the morning. *State v. Barnthouse*, 271 Or App 312, 315, 350 P3d 536, *rev allowed*, 358 Or 69 (2015). Postal employees open the mailbags and empty the items into a large sorting bin. *Id*. The postal employees then handle the mailed items, look at the address labels, and route them to their final destination. *Id*. Items are sorted into mailbags that are designated for dispatch to a specific post office, where they are handed off to a mail carrier for delivery, typically, either by noon or by 3:00 p.m. that day. *Id.*

While the public are not allowed in the air cargo center, Postal Inspector Scott Helton testified that there "is a time along this path of delivery, that they

public could intercede." *Id.* For example, "a customer could go to their local post office and say I'm expecting an express mail package, if you could hold it out and let me pick it up early in the morning, I know that postal employees will provide that service for customers. * * *." *Id*.

Law Enforcement Handling of Mailed Packages

Postal Inspector Scott Helton is a federal law enforcement agent and, as a member of an inter-agency interdiction team, oversaw the seizure of the package at the postal air cargo center *en route* to Mr. Barnthouse. *Id*, 314-315. One of Inspector Helton's and the interdiction team's primary duties involves intercepting packages containing drugs or drug money. *Id* at 315.

The typical routine of the inter-agency interdiction team is for law enforcement agents to "stand next to the [sorting] bins and inspect their contents for packages that they believe may contain contraband," as the postal employees are sorting through the bins. *Id* at 315. They look for exterior indicators that they deem indicative of packages containing drugs or drug money. *Id* at 316.

If the exterior indicators are present, and the interdiction team decides to investigate a package, a law officer stops the normal processing by the postal employee, takes the package out of the sorting bin and places it aside with the other packages that the team is "holding out for that day." *Id* at 315. While the subsequent investigation typically involves a dog sniff, the package is set aside for further investigation "*whether or not* [the dog] alerts to it." *Id* at 315

(emphasis in original). Inspector Helton testified that once a package is taken from the sorting line in this manner, it is "under [his] control in a law enforcement sense" and there is "no chance it's going to get back into the stream of mail." *Id* at 316. Postal employees are "prohibited from tampering with or attempting to deliver" the packages that the interdiction team has set aside. *Id* at 317. Helton testified that the postal employees know that those are "my packages, and I need to hold onto those." *Id*.

Officer Helton testified that, as part of the "follow up investigation," the team tries to "make contact with the intended recipient." *Id* at 317. An interdiction team member from Portland Police, Officer Castaneda, testified that the law enforcement team takes each package to the delivery address, then they "knock on the door with the package, usually accompanied by a postal inspector, and try to get consent to open the package . . . ." *Id* at 317.

The law enforcement officers know that it is USPS policy to obtain a search warrant to open packages coming through the mail. *Id* at 317. Inspector Helton and Officer Castaneda testified that it would be possible to obtain a warrant through telephonic application with a judge to seize and search a package within a matter of hours. *Id* at 317-318. Inspector Helton explained, however, that the team's typical plan is for a law enforcement officer to take selected packages to the recipient's address to seek their consent to search, without judicial approval. Inspector Helton reasoned that the plan falls within an

exception to the warrant requirement because it extracts the recipient's consent to search. *Id* at 317.

Law Enforcement Interdiction of Mr. Barnthouse's Package

At around 6 a.m. one morning, Postal Inspector Scott Helton, Portland Police Officer Randy Castaneda, and Portland Police Officer Scott Groshong, along with other law enforcement members of the interdiction team, were inspecting express mail packages as a postal employee sorted them for delivery. *Id* at 318. Officer Castaneda noticed the package at issue, addressed to "Maxipad Barnt" at the defendant's address, and took the package out of the sorting bin and placed it aside for a dog sniff. *Id.* Officer Castaneda testified that after the dog alerted, he "took custody" of the package and gave it to Inspector Helton. *Id.* The package remained separated from the normal mail. Inspector Helton and other law enforcement officers then took the package to the delivery address for a "knock and talk" delivery and request for Mr. Barnthouse's consent to search. *Id* at 319.

"Nobody had attempted to obtain a search warrant during the three-and-a-half-hour period between the positive dog-alert and arriving at defendant's residence." *Id* at 319. When defense counsel asked Officer Castaneda why he did not apply for a warrant, he responded, "I – I – there's other ways of opening the package." *Id* at 319. The *Barnthouse* Court of Appeals highlighted the following relevant colloquy with Officer Castaneda:

> "'[DEFENSE COUNSEL:] You didn't have to go through the trouble of trying to get a search warrant, did you?
>
> '[CASTANEDA:] No, I did not.
>
> 'Q Okay. Instead, you went to the residence and tried to talk your way in and to try to get consent.
>
> 'A Correct.'"

Id at 319.

Trial Court's Findings and Conclusions

In a pretrial motion, Mr. Barnthouse argued that, "beginning with the initial detention of the package, the police made a series of warrantless seizures in violation of both Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution. *Barnthouse*, 271 Or App at 321. The trial court granted Mr. Barnthouse's motion to suppress.

First, the trial court found an unlawful seizure. *Id* at 322. Specifically, the Court found that Officer Castaneda "seized" the package when he set it aside for special law enforcement delivery, because at that moment, the officer had "already determined, according to his testimony that regardless of the dog sniff test results, * * * that this package was set aside for a delivery by the police officer and the postal employee, and that the plan was already set in place that that's what was going to happen with this package." *Id* 322-323.

Second, the Court found that when Officer Castaneda seized the package, he lacked probable cause or reasonable suspicion to do so. *Id* at 323. This

conclusion remains undisturbed because the state failed to challenge it in the Court of Appeals. *Id.* (stating that "[t]he state does not renew its argument that, under Article I, section 9, reasonable suspicion may support the warrantless investigative detention of an in-transit express mail package.").

ARGUMENT

A. Introductory Principles

The questions before the Supreme Court of Oregon include "all questions properly before the Court of Appeals" that the appellant or respondent claim were wrongly decided. ORAP 9.20(2). *Estate of Schwarz v. Philip Morris, Inc.*, 348 Or 442, 456-57, 235 P3d 668 (2010) ("ORAP 9.20(2) defines the scope of this court's discretion to consider questions on review."). Oregon Rule of Appellate Procedure 9.20(2) also allows the Court to consider issues that were before the Court of Appeals, even if not raised by the appellant's Petition for Review.

The Court should analyze the questions presented first under state law before reaching the federal constitutional arguments. In *Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981), the Oregon Supreme Court so stated:

> "The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."

Id. at 614.

B. Article I, section 9 Rules of Law

1. Possessory Interest

When the state seizes property without a warrant, as it did here, the state bears the burden of demonstrating that the circumstances of the seizure fit within an exception to the warrant requirement, or that the defendant lacked any possessory interest in the item seized. *State v. Howard,* 204 Or App 438, 441, 129 P3d 792 (2006); *State v. Galloway*, 198 Or App 585, 591, 109 P3d 383 (2005); *see also State v. Tucker*, 330 Or 85, 88-89, 997 P2d 182 (2000) ("a defendant is not required to assert a protected property or privacy interest on which the state intruded. Rather . . . the burden is on the state to prove that the warrantless search did not violate a protected interest of the defendant."). The state does not claim an exception to the warrant requirement, but instead, claims that Mr. Barnthouse lacked a possessory interest in the package before its expected delivery time has passed.

In its brief, the state argues that this Court has never articulated a definition of "possessory interest" for Article I, section 9 purposes, and states that this Court "has gone no further than to recognize that actual possession establishes a protected possessory interest . . . ." Pg. 14. In so advocating, the state glosses over several Oregon cases in which the Court articulates the basis and scope of possessory rights under Article I, section 9, and arrives at a specious conclusion.

In fact, the constellation of rules developed by Article I, section 9 jurisprudence paints a clear picture of the rule of law that should apply in this context – an addressee and intended recipient of the mailed package has a possessory interest in the package during its course through the mail. In so holding, the Court of Appeals in *Barnthouse*, 271 Or App 312 (2015), aptly harmonizes Oregon case law regarding the extent and nature of possessory interests and federal precedent applying Fourth Amendment standards.

a. *State v. Kosta*, 304 Or 549 (1987)

First, the state fails to address the only case in which the Oregon Supreme Court mentioned, but did not decide, whether an addressee or intended recipient holds a possessory interest in an in-transit package, *State v. Kosta*, 304 Or 549, 748 P2d 72 (1987). In *Kosta*, the court held that a defendant did not have a cognizable privacy or possessory interest in a package seized in-transit because the defendant was neither the addressee nor the intended recipient of the package.[1]

The police in *Kosta* had intercepted a package on a Federal Express delivery truck based on an anonymous tip that a package containing cocaine would be delivered by the carrier to a specified address in Portland and that the

[1] The Court explicitly withheld opinion on "the extent to which Oregon law authorizes and the Oregon Constitution limits warrantless detentions of property without probable cause and exposure of packages or containers containing suspected contraband to trained narcotics detection dogs." *Id* at 557, fn. 3.

recipient's name may be Tracy Van Horn. *Id* at 551. The police subsequently seized a package matching the description given and addressed to John Morino in care of Van Horn. After a drug dog made a positive alert, the police obtained a telephonic warrant, opened the package and confirmed the contents as cocaine. The police then resealed the package and posing as Federal Express employees, delivered the package to Van Horn. After his arrest, Van Horn told the officers that the package was not intended for him and telephoned the intended recipient, Hershal McGraw. McGraw then sent his runner, Kosta, to pick up the package. Police arrested Kosta after he took possession of the package from Van Horn and Kosta confirmed that he knew the contents of the package. Kosta moved to suppress the evidence acquired as a result of the police interception of the Federal Express truck.

Considering whether the police violated Kosta's rights *at the time of the initial detention*, the Court explained that a defendant need not assert an ownership interest in property in order to claim a protected interest in the object. *Id* at 553. However, since Kosta could not claim that he was "the addressee, the intended recipient or an individual with an otherwise identifiable interest at the time of the detention of the package," he lacked standing to challenge the seizure. *Id* at 554. The premise laid by the Court directs one logical conclusion: the addressee, intended recipient or anyone with an otherwise identifiable interest has a privacy and possessory interest in a package during its shipment under

Article I, section 9 of the Oregon Constitution. *And see State v. Goin*, 101 Or App 503, 791 P2d 149 (1990) (implicitly recognizing that the intended recipient had a protected privacy interest in the package directed to him; but, finding no "search" when a private party opened the package because the third party had not seen the address label directing it to defendant and so did not intentionally intrude into defendant's privacy).

b. Neither Actual Possession nor Unfettered Access Is a Condition Precedent to a Possessory Interest

The recipient need not actually possess or have a present ability to possess or control an incoming package in order to assert an Article I, section 9 possessory interest.

The Oregon Supreme Court in *State v. Smith***,** 327 Or 366, 963 P2d 642, (1998) and in *State v. Juarez-Godinez*, 326 Or 1, 942 P2d 772 (1997), dealt directly with the extent and scope of a person's Article I, section 9 possessory rights and established that one need not have actual possession, have physical access to or even actively exercise his/her right to control property in order to retain a constitutionally protected possessory interest.

In *State v. Smith***,** 327 Or 366, 963 P2d 642, (1998), the defendant argued that his Article I, section 9, possessory interest in a storage unit was violated when the police, acting through the unit manager, padlocked the unit at a time when the defendant was in jail. The Court explained:

> "Neither do we agree with the state's suggestion that the seizure was constitutionally insignificant because defendant was in jail and in no position to exercise his possessory rights in the storage unit. The fact that one cannot personally exercise one's possessory rights does not preclude a conclusion that such rights have been violated."

Smith, 327 Or at 377 n. 7, 963 P2d 642.

Likewise, a defendant need not have an immediate right of access in order to retain a possessory interest in property. In *State v. Juarez–Godinez*, 326 Or 1, 942 P2d 772 (1997), the Oregon Supreme Court acknowledged that a defendant under arrest and therefore unable to drive his car away, still retained a possessory interest in the car. Police had stopped defendant on the highway for exceeding the speed limit. The police believed that the defendant thereafter failed to display a valid driver's license, arrested him and placed him in the back of his patrol car. A back-up officer arrived on scene and his dog alerted to the car. A warrant was issued and, in the ensuing search, the police discovered controlled substances. The defendant moved to suppress the evidence, arguing, in part, that the police had unlawfully detained his car. The Oregon Supreme Court found that even though, as a consequence of his arrest, the "defendant was unable to drive the car away . . . he retained a possessory interest in the car and, in normal circumstances, could have transferred possession of it to one of his passengers and directed that it be driven away." *Id.* at 7, 942 P2d 772.

c. Constructive Possession Can Establish a Possessory Right

Constructive possession of property can give rise to an Article I, section 9 possessory interest. *See State v. Bernabo*, 224 Or App 379, 387, 197 P3d 610 (2010) ("A defendant who has actual or constructive possession of property immediately before it is searched has a constitutionally protected possessory interest in that property"). A person's control or right to control an effect evidences constructive possession. *See State v. Weller*, 263 Or 132, 501 P2d 794 (1972) (quoting *State v. Oare*, 249 Or 597, 599, 439 P2d 885 (1968); *and see State v. Sherman*, 270 Or App 459, 461, 349 P3d 573 (2014), (quoting *State v. Leyva*, 229 Or App 479, 483, 211 P3d 968 (2009) ("A defendant constructively possesses something when he or she exercises control over it or has the right to do so."). The right of control "may be exercised jointly with other persons, it need not be exclusive . . . ." *State v. Coria*, 39 Or App 507, 511, 592 P2d 1057, *rev den*., 286 Or 449 (1979), *and see Sherman, supra* at 461 (so citing *Coria*). Constructive possession "may be established by circumstantial evidence" and can be jointly held. *Sherman, supra* at 462. For example, the Court found a defendant constructively possessed drugs concealed inside his girlfriend's body, where circumstantial evidence of his drug dealing and the location of drugs in her body showed "joint control" over the drugs. *Id* at 463.

The state, however, proposes the Court adopt a more narrow definition of "constructive possession" as it is defined when "possession" is an essential

element to a criminal charge. In support, the state cites *State v. Barger*, 349 Or 553, 247 P3d 309, 311 (2011), in which the Court deciphers what the legislature meant by the phrase "possesses or controls" in ORS 163.686, which criminalizes encouraging child sexual abuse in the second degree (i.e., possession of child pornography). *Id,* 247 P3d at 311, 312. The Court concluded that in order to convict a person of possessing child pornography, the state must prove that the defendant actually *exercised* influence or control over the images. *Id* at 562-563, 247 P3d at 314-315. In so finding, the Court explicitly rejected the broader definition of constructive possession used in other contexts (encompassing the "'right' to control a thing"). Whereas constructive possession may be described as the "'right' to control a thing," and is "useful in discussing the distinction between 'ownership,' 'possession,' and mere 'custody' of property, . . . [it] is not helpful here." *Id* at 564, 247 P3d at 315, fn omitted.

In further support, the state cites *State v. Casey*, 346 Or 54, 203 P3d 2020 (2009), in which the Court analyzed the statutory definition of "possess" as it applies to a violation of ORS 166.270, criminalizing felon in possession of a firearm. The Court explained that the concept of "constructive possession" "expands the scope of [criminal] possession statutes to include instances where actual possession cannot be shown but where there is a strong inference that actual possession did exist at one time." *Id* at 60, *citing* Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and*

Have Not, 58 Va L Rev 751, 755 (1972). In other words, to prove that a defendant actually possessed a firearm, the state may rely on the concept of constructive possession only to prove that at one point the defendant actually possessed or actually exercised dominion or control over the firearm. The Court rejected the trial court's finding that proof of the defendant's "*right* to exercise control" over the firearm could support a jury finding that he, in fact, had possessed the firearm.

Such narrow construction of the statutory term "possession" in the criminal law context should not direct how this Court casts its net in determining what circumstances give rise to a constitutional possessory *right*. *Casey* and *Barger* deal with "possession" as an element of a crime, where the rule of lenity applies to require narrow construction of statutory terms so as not to impact the defendant's due process rights to have notice of prohibited conduct. Were the Court to adopt the state's proposed limitation on possessory rights in the constructive possession context, however, it would require overturning directly contrary precedent. *Smith*, *supra*, and *Juarez-Godinez*, *supra*, require rejection of the state's analysis and proposed rule of law that a defendant must actually possess or have actually exercised the right to possess in order to assert a possessory interest in it. *See also State v. Tanner*, 304 Or 312, 745 P2d 757 (1987) (concluding that where there remains a possibility that defendant would reclaim effects from a bailee, even where defendant had no immediate right of access, the defendant could claim a protected privacy interest in the effects).

The state's reference to the standards for "possession" that must be met to levy a property tax is more helpful to the issue at hand. The Court's opinion in *Power Resources Cooperative v. Dept of Revenue*, 330 Or 24, 996 P2d 969 (2000), weighs against applying *Barger* and *Casey* here, and in favor of recognizing the recipient's possessory right in an incoming package. In finding that the petitioner power company held a taxable possessory right in its non-exclusive contractual right to use the electric transmission system, the Court stated:

> "(1) although a 'possessory' interest always is marked by some degree of control and some degree of exclusivity, neither absolute control nor absolute exclusivity is required; and (2) the test for the existence of a possessory interest necessarily varies with the nature of the property at issue."

Id at 31.

In so stating, the Court acknowledged that determining the existence of a possessory interest is a fact-based inquiry, and the Court cannot simply apply the definition of possessory interest applicable in one context to another. Certainly, "'Possession * * * is a variable term which may mean different things for different purposes.' 1 American Law of Property, § 3.3, p 180." *Sproul et al v. Gilbert et al*, 226 Or 392, 404, 359 P2d 543 (1961). Second, the Court acknowledged that a person need not have *exclusive* or absolute possession or control over property in order to assert a possessory interest. Accordingly,

neither the sender's limited possessory rights nor the USPS temporary custody of a package in-transit is fatal to a recipient's simultaneous possessory interest.

d. A Right to Control Evidences Constructive Possession

The recipient's contractual right to control a package in transit with a mail carrier evidences constructive possession. As the Court recognized in *Barger*, the "right" or power to control property evidences constructive possession in some contexts. *Barger*, 349 Or 553, 563-564, 247 P3d 309, (2011), *citing State v. Oare*, 249 Or 597, 599, 439 P2d 885 (1968) (holding in marijuana possession case, "[e]vidence of the control or the right to control is necessary to constructive possession); *and State v. Weller*, 263 Or 132, 133, 501 P2d 794 (same). Since "control" is not statutorily defined, the Court in *Barger* and in *Barnthouse* used the common meaning of the term, as set out in *Webster's Third New Int'l Dictionary* 496 (unabridged ed 2002), "'to exercise restraining or directing influence over: REGULATE, CURB.'" *Barnthouse*, 271 Or App at 328, quoting *Barger*, 349 Or at 559. The Court in *Barger* went further and stated "when a person has a property interest in some item places that item in the custody of another person, he or she can retain constructive possession by retaining the *power* to control the item, regardless of whether he or she actively exercises that power." *Barger*, 349 Or at 566, fn 12.

Likewise, according to two garbage cases, *State v. Galloway*, 198 Or App 585, 109 P3d 383 (2005), and *State v. Howard*, 342 Or 635, 157 P3d 1189 (2007)[2] a defendant's contract-based right to retain control over property evidences an Article I, section 9 possessory interest.

In *State v. Galloway*, 198 Or App 585, 109 P3d 383 (2005)[3], the Court held that defendants maintained a possessory interest in garbage cans left at the curb. The relevant facts included that "defendants contracted with garbage collection companies to collect their residential garbage at the curbs in front of their homes at specific times." And, defendants complied with the contract when they placed the cans at the curbs in front of their homes. In recognizing the defendants' possessory interest in the cans, the Court explained, that pursuant to the terms of their contract,

> "defendants placed their garbage cans and the contents of those cans in a particular place in order to facilitate a limited purpose, viz, pick-up and disposal by a designated collection company. Defendants did not implicitly authorize anyone else to paw through their garbage and view or take items of garbage. Rather, they placed their garbage in cans by the curb with the understanding that the garbage collection company – and only the garbage collection company – would remove the bags from the cans and carry the bags away."

Id at 595.

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[2] This case was a consolidated appeal with Ms. Howard's co-defendant, Mr. Dawson.

[3] This case was a consolidated appeal with Mr. Galloway's co-defendant, Ms. Hoesly.

The Court rejected the state's contention that the defendants had abandoned their protected interests in the cans, drawing, in part, on the defendants' intertwined expectations of privacy and control. The Court stated,

> "[D]efendants did, in fact, manifest an intent to retain control over the cans and their contents vis-à-vis the world at large. By securing garbage inside a closed, opaque container such as a trash can, contracting with a garbage collection company to take it away, and placing the cans, with their contents, at the specified collection point in anticipation of collection, defendants manifested an intent to maintain control over the contents until such time as the garbage company took it away."

Id, 109 P3d at 389.

In a subsequent garbage search case, *State v. Howard*, 342 Or 635, 157 P3d 1189, the police intercepted the garbage after the sanitation company had retrieved it from the defendant's property. The defendants did not argue that they retained either an ownership or possessory interest in the garbage once it had been picked up. The Court, therefore, held that the defendants had no possessory interest in the garbage once it was in the sanitation company's sole control. In so holding, the Court explained that it could not identify "any other subconstitutional right or relationship that would prohibit the sanitation company from [giving the garbage to the police]. For instance, defendants have not claimed that their contract with the sanitation company limited what the company could do with the garbage once the company took possession of it." *Id* at 640-641.

The USPS *Domestic Mail Manual* evidences the recipient's right to control an incoming package. The USPS *Domestic Mail Manual*, Section 508, entitled "Recipient Services," outlines the rights of the recipient in the matter at hand and makes clear that "[a]ddressees may control delivery of their mail." USPS, Mail Manual, Section 508.1.1.1, Delivery to Addressee at 689. The recipient has the ability to direct a package upon the sender depositing it with USPS. For example, a recipient may exercise the "Hold For Pickup" service for Priority Mail Express "at the time of mailing," which "allows mailpieces [sic] to be held at a designated Post Office location for pick up by a specified addressee or designee." USPS, Mail Manual, Section 508.7.2.1 at 721. In addition, a recipient can "redirect" a package "back to the sender's address, to a Post Office as a Hold For Pickup, or to a different domestic address." USPS, Track & Manage, Track Your Package, "I need to redirect a package," *available at*: https://www.usps.com/manage/welcome.htm.

e. Summary of Oregon Rules of Law Bearing on Possessory Rights.

Even if the Court does not adopt the clear implication given in *Kosta*, *supra*, that an addressee or recipient holds a possessory right in an in-transit package, the following legal principles that have been developed in applicable cases and discussed above direct the court to the same conclusion:

- A defendant need not assert an ownership interest in property in order to claim a protected possessory right. *Kosta*, *supra*;

- An intended recipient or addressee has an Article I, section 9 privacy interest in a package addressed to him. *Goin*, *supra*. A person need not have actual possession, be in a "position to exercise his possessory rights," or have immediate right to access property in order to hold a protected possessory right. *Smith, supra*; and *Juarez-Godinez, supra*;

- Constructive possession can establish a possessory right. *Bernabo, supra*. Constructive possession can be shown by circumstantial evidence. *Sherman, supra.* Control or the right or power to control property, i.e., to exercise restraining or directing influence, evidences constructive possession. *Barger*, *supra*; *Weller, supra*; *Galloway, supra,* and *Howard, supra*

- A person in constructive possession may have a joint right to control with another person. *Coria, supra, and Sherman, supra.* Likewise, a person need not have exclusive possession or control over property in order to assert a possessory right. *Power Resources Corp, supra,* and *Tanner, supra.* A person need not actually exercise a right to control to maintain a possessory right in property entrusted to another. *Barger, supra*.

f. Application of Law to Mr. Barnthouse Shows He Had a Possessory Right in the Package

Mr. Barnthouse was the addressee and intended recipient of the package.[4] As such, Mr. Barnthouse constructively possessed the incoming package because by the terms of the USPS *Domestic Mail Manual*, he had a right to control and direct the package from the moment the sender deposited the package with the Postal Service.[5] *Compare Galloway, supra* and *Barger, supra*

Law enforcement recognized Mr. Barnthouse's right to control his incoming mail. Inspector Helton's testimony confirmed a recipient's possessory interest in the package during its course in the mail and before the time for delivery has

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[4] A recipient's claim of a possessory interest in an incoming package does not fail simply because he denies connection to the package. Where the surrounding circumstances otherwise evidence a possessory interest, a person has standing to challenge police conduct under Article I, section 9. *See State v. Morton*, 326 Or 466, 953 P2d 374 (1998) (defendant denied ownership in or knowledge of the contents of a container, but could still claim possessory interest because other evidence showed defendant had been in possession of the container); *and see State v. Knox*, 160 Or App 668, 984 P2d 294 (1999) (affirming *Morton*); *State v. Standish*, 197 Or App 96, 103, 104 P3d 624 (2005) ("If a defendant has actual or constructive possession of property immediately before it is searched, the defendant has a constitutionally protected possessory interest in that property.").

[5] Despite this evidence, the state still disputes that the recipient has any right to exercise dominion or control over an in-transit package, in part, because no evidence shows that the sender intended to entrust the package to the recipient. State Brief, pg. 19. The Court in *Casey*, *supra*, and in *State v. Daniels*, 348 Or 513, 234 P3d 976 (2010) concluded that a guest does not constructively possess property of the homeowner, when no evidence suggests the owner ceded to or shared control over the property with the guest. Unlike the facts in *Casey* and *Daniels*, by addressing the mailpiece to the recipient, the sender does not cede the right to possess and control the mailpiece to the recipient the moment it is deposited in the mail. *See Domestic Mail Manual*, Section 508.

passed. As previously stated, Helton testified that there is "a time along this path of delivery that the public could intercede," and that "a customer could go to their local post office and say I'm expecting an express mail package, if you could hold it out and let me pick it up early in the morning, I know that postal employees will provide that service for customers." *Barnthouse*, 271 Or App at 330.

The *Domestic Mail Manual* and Inspector Helton's testimony make clear that the addressee of an Express Mail package has a right to control and exert a restraining and directing influence over an incoming package.

Mr. Barnthouse's interest in the package is not undermined by the fact that the sender had entrusted Postal Service to carry and deliver the package to him. Under *Sherman*, *Smith*, *Juarez-Godinez, Power Resources Corp* and *Tanner*, Mr. Barnthouse need not have been in exclusive control over the package or in an immediate position to exercise his possessory rights. Nor is his possessory interest diluted by the joint right to control the package that he may have shared with the Postal Service or the sender. *Compare Sherman.*

Moreover, Officer Castaneda's stated plan to request Mr. Barnthouse's consent "was a recognition of defendant's possessory interest." *See Juarez-Godinez,* 326 Or at 7-8.

2. Seizure

Officer Castenada seized Mr. Barnthouse's package when he took it out of the sorting line and stopped its normal course of delivery in favor of a law

enforcement investigation and knock-and-talk delivery. It was at that moment that he exercised absolute and exclusive law enforcement dominion and control over the package, thereby completely extinguishing Mr. Barnthouse's possessory interest.

a. Legal Principles

Under Article I, section 9, property is "seized" when there is a significant interference with a person's possessory or ownership interests in the property. *State v. Juarez-Godinez*, 326 Or 1, 6, Fn. 4, 942 P2d 772 (1997); *State v. Kosta*, 304 Or 549, 553, 748 P2d 72 (1987). The significance of the interference generally turns on the degree of physical control that the police exercise over an object, societal conventions, and the length of time the police exercise control. "The seizure of an article by the police and the retention of it (even temporarily) is a significant intrusion into a person's possessory interest in that 'effect.'" *State v. Kosta*, 304 Or 549, 553, 748 P2d 72 (1987), quoting *State v. Owens*, 302 Or 196, 207, 729 P2d 524, 531 (1986).

The police need not actually possess and control property, as they did with the package *en route* to Mr. Barnthouse, in order for their actions to constitute a seizure. Rather, even the police securing property constitutes a seizure. For example, in *State v. Dowdy*, 117 Or App 414, 844 P2d 263 (1992), the Court held that when police "secured" the defendant's motel room for 3 ½ hours following a lawful stop, the room was "seized." *Id* at 418, citing *State v. Matsen/Wilson*,

287 Or 581, 588, 601 P2d 784 (1979) (holding that when police "secure the premises," they have seized them).[6] In *State v. Sargent*, 123 Or App 481, 489, 860 P2d 863 (1993), the Court held that securing a premises by "a continued occupation following a lawful entry" was a seizure.

In *Smith*, *supra*, the Court found a seizure where the police secured defendant's storage unit at a time the defendant was not able to exercise his possessory rights. The Court explained,

> "Padlocking the unit represented significant interference with respect to the unit. At least in theory, it deprived defendant of the use of the unit and access to its contents."

Id at 376, 963 P2d 642; *compare State v. Whitlow*, 241 Or App 59, 64, 250 P3d 24 (2011) (finding that the detention of defendant's vehicle, which remained under the control of its occupants, did not violate Article I, section 9, unlike the seizure in *Smith* where officers padlocked defendant's property.) Likewise, Mr. Barnthouse need not have been in a position to exercise his possessory rights in order for Officer Castenada's actions to constitute a seizure.

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[6] In *Matsen/Wilson*, the police, through a protracted period of surveillance, developed probable cause to search a residence that was being used for drug trafficking. Officers had not yet obtained a search warrant when the individual they suspected of being the primary drug supplier for the operation unexpectedly arrived at the house. At that point, police officers entered the residence and "froze the premises." *Id*. at 584. On review, the Court of Appeals characterized the police action as a "search and seizure," requiring a warrant or exigent circumstances. "The state failed to prove that destruction of contraband or the escape of the defendants was imminent." *Id*. at 587.

A detention for a dog sniff can constitute a seizure when it curtails defendant's rights to control the property. In *State v. Juarez–Godinez,* 326 Or 1, 942 P2d 772 (1997), after the in-custody defendant refused consent to search his car, the officer told him that another officer and a drug dog were coming to search the car. The Court held that by telling the defendant that a drug detection dog was on the way, the officer's show of authority "curtailed defendant's rights to transfer possession of, and direct the movements of, the car." *Id.* at 8, 942 P2d 772. Accordingly, the Court held the detention of the car, while awaiting a dog sniff, significantly interfered with the defendant's possessory interest in the car and therefore constituted a seizure. Under normal circumstances, the defendant could have transferred possession of the car to one of his passengers and direct that it be driven away. *Cf. State v. Whitlow*, 241 Or App 59, 64, 250 P3d 24 (2011) (finding the 60 to 90 second traffic stop not a "significant interference" with property, unlike the detention of defendant's vehicle for nearly an hour in *Juarez-Godinez*).

b. Officer Castenada Seized the Package When He Took It Out of the Sorting Line.

The physical intrusion at issue here cannot be fairly characterized as a "temporary investigatory detention," and was certainly not "*de minimis*." Rather, when Officer Castenada took the package out of the stream of mail, he exerted absolute and exclusive police dominion and control over the package.

Officer Castaneda and Inspector Helton both testified that from the moment Officer Castaneda took the package out of the sorting bin, the package had no chance of returning to the normal stream of delivery or of delivery by a mail carrier. The postal employees knew that the package was under law enforcement control and as such, they were prohibited from tampering with or attempting to deliver the package in its normal course. When Officer Castaneda took exclusive dominion and control of the package, he did so intending that his law enforcement team would retain control over it long enough to acquire the recipient's consent to search at a "knock and talk" delivery and thereby bypass judicial scrutiny. Doing so completely thwarted Mr. Barnthouse's ability to exercise his possessory interest. *Compare Owens*, *supra*, *Juarez-Godinez*, *supra*, and *Matsen/Wilson*, *supra.* Under *Juarez-Godinez* and *Smith*, the law enforcement arrest of the package seen in this case not only significantly interfered with Mr. Barnthouse's possessory interest in it, the seizure completely extinguished his right to control. [7]

3. Probable Cause and Warrant Requirement

The trial court found that law enforcement lacked reasonable suspicion and probable cause to seize Mr. Barnthouse's package. The state has abandoned the issue. The state has not challenged the trial court's conclusion either in the Court

[7] Under *Dowdy* and *Matsen/Wilson,* even a less intrusive, temporary detention to secure the package would have amounted to a seizure.

of Appeals or in its Opening Brief. In footnote 8, in Section D of the state's Argument, it makes clear that "the state does not address the issue whether, under the totality of the circumstances, Officer Castaneda had reasonable suspicion that the package he pulled from the sorting bin was associated with criminal activity." If the court finds that Mr. Barnthouse had a possessory interest in the package in-transit and that Officer Castaneda seized the package when he exercised exclusive dominion and control, the court should not consider whether reasonable suspicion is sufficient to permit law enforcement to seize packages in transit with the Postal Service. As previously stated, ORAP 9.20(2) excludes this issue from the Court's consideration because the state did not raise the issue in the Court of Appeals. *See Barnthouse*, 271 Or App at 323.

If, however, the Court were to nevertheless address the issue, it should apply the existing Oregon constitutional standard – law enforcement must have probable cause and a judicially authorized warrant to support a seizure, absent probable cause and exigent circumstances. Certainly, the irrevocable seizure of a package in a manner that completely abrogates the recipient's possessory rights, as seen in Mr. Barnthouse's case, can only be justified by probable cause and a warrant.

Warrantless detention of property, even if temporary, violates Article I, section 9 absent an exception to the warrant requirement. *State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994). There should be no exception for seizures of

packages in transit with the Postal Service, even if supported by reasonable suspicion or probable cause.

The Court of Appeals in *Kosta*, however, decided that a "temporary detention of a package before its delivery does not violate Article I, section 9, if the detention is for a reasonable time and any further inquiry is limited in intensity and scope to the reasons that aroused the reasonable suspicion." 75 Or App 713, 718, 708 P2d 365 (1985). The Oregon Supreme Court, in *State v. Kosta*, 304 Or 549, at fn. 3, explicitly withheld opinion on "the extent to which Oregon law authorizes and the Oregon Constitution limits warrantless detentions of property without probable cause and exposure of packages or containers containing suspected contraband to trained narcotics detection dogs."

The Court of Appeals decision in *Kosta* should not determine the rule of law in the *Barnthouse* case because it was based on a misguided application of *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968) and *State v. Valdez*, 277 Or 621, 561 P2d 1006 (1977), to the seizure of packages in the mail. The appellate court in *Kosta* reasoned that since investigatory detentions of persons on less than probable cause are permitted under *Terry v. Ohio* and *Valdez*, so should investigatory detentions of property. *Kosta*, 75 Or App at 718. *Terry* and *Valdez* are not properly analogous to the facts in *Barnthouse* for two reasons. First, the *Barnthouse* case involves the complete seizure of property, compared to the investigatory stop of limited duration in *Terry* that is based on the officer's

reasonable suspicion that the person has committed or is about to commit a crime. Second, the officer's need to intercept packages containing drugs or drug money cannot compare to the immediate and urgent need in *Terry* for the officer to dispel a present danger to the public and to human life.

The United States Supreme Court, in *Terry v. Ohio,* held that police may stop and frisk for weapons persons who they have reasonable suspicion to believe have committed or are committing a crime, and who may be presently armed and dangerous. 392 US at 30. The "sole justification" for allowing a stop and search based on less than probable cause was for "the protection of the police officer and others nearby." 392 US at 29. The Court underscored this limitation on its holding by also stating that "[w]e do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." 392 US at 20.

Likewise, the Oregon legislature, in enacting ORS 131.615, authorized the temporary stop of persons when the police have a reasonable suspicion that the person *has committed a crime*. *See State v. Valdez,* 277 Or 621, 561 P2d 1006 (1977). ORS 131.615 was enacted by the Oregon legislature five years after the *Terry* decision, in 1973. The Supreme Court of Oregon, in *Valdez,* determined that the statute codified the *Terry*-stop:

> "Of the commentaries of the Commission which drew the Proposed Code, the one relevant to this particular section is found at pages 26 and 27 of its

official report We there find the following remarks concerning what was intended by the Commission:

> 'Subsection (1) proposes a codification of the peace officer's ability to stop a person as close to the *Terry* and *Cloman*[8] rationale as possible while giving the courts leeway to interpret the protean situations that arise and giving the officer limited 'stopping powers.'"

277 Or at 625.[9]

The seizure in *Terry* and allowed by ORS 131.615 is limited. An officer who reasonably suspects a person has committed a crime may *stop* the person only for a limited duration to investigate the circumstances that aroused the officer's suspicion. Reasonable suspicion does not justify an arrest, and if the officer fails to acquire probable cause, the officer must release the person. The practice of the interdiction team in *Barnthouse* is to irrevocably seize packages from the stream of mail upon suspicion that they contain drugs or drug money. There is no chance the package will be released if the officers fail to develop probable cause. Such a seizure is not the kind of limited investigatory detention discussed in *Terry* and *Valdez*. Rather, it is a full arrest of the package and one

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[8] In *State v. Cloman*, 254 Or 1, 456 P2d 67 (1969), the Court held that police can stop a car to determine the identity of the vehicle and its occupants if they have reasonable suspicion that the car or its occupants have a connection with criminal activity.

[9] The *Valdez* court, however, pointed out that the statute does not whole-heartedly adopt the *Terry*-stop rationale, noting that the legislature deleted "or is about to commit" from the final draft of the statute. *Valdez*, 277 Or at 630, Fn. 4.

that completely extinguishes the recipient's possessory right to control its delivery.

The police in *Kosta* took the package out of the Federal Express sorting line for a dog sniff. When the positive dog alert confirmed suspicions raised by other indicators, the police obtained a warrant before searching the package and conducting a knock and talk delivery. Whereas the seizure of the package in *Kosta* may have been minimally analogous to a stop of a person based on reasonable suspicion that a crime had been committed, the seizure in *Barnthouse* is analogous to a full-blown arrest.

Second, a package suspected of containing drugs or drug money *en route* to its recipient does not present the same dynamics and dangers as a person who is suspected of committing or having committed a crime. There is no immediate need for a law enforcement officer to interdict the package before seeking judicial approval to do so. Indeed, the Court in *Terry* warned against extension its justification for the stop of persons to situations where law enforcement had the ability to get a warrant. "The police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry*, 392 US at 20. Such judicial approval proved impractical in *Terry* because the officer reasonably believed to have caught a crime in action and the perpetrator to be presently armed and dangerous. By contrast, nothing stands in the way of

law enforcement seeking judicial approval to seize and/or search an in-transit package believed to carry contraband.

If, however, the officers have reasonable suspicion that the package is dangerous to the public because it contains explosive devices or substances that present a danger of death or serious physical injury to the public or to the mail carriers, than the officers can detain the package to investigate the danger. The federal postal regulations codify the constitutional principal that officers may seize and investigate packages that present an imminent risk to human life. Under 39 CFR 233.11(a), when the Postal Inspector determines

> "there is a credible threat that certain mail may contain a bomb, explosives, or other material that would endanger life or property, including firearms . . . , the Chief Postal Inspector may, without a search warrant or the sender's or addressee's consent, authorize the screening of such mail by any means capable of identifying explosives, nonmailable firearms, or other dangerous contents in the mails."

But, the issue presented in *Barnthouse* does not involve an exigency; nor does it involve circumstances that endanger officer safety or the safety of others. There is, therefore, no need for expanding police authority to seize packages suspected of containing drugs or drug money.[10]

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[10] Other Oregon cases support this conclusion. For example, in *State v. Dupay*, 62 Or App 798, 801, 662 P2d 736 (1983), officers stopped the defendant at the Portland International Airport, based on reasonable suspicion that he had narcotics in his shoulder bag. Officers approached the defendant in the airport, and the defendant agreed to speak with the officers. *Id* at 801-802. After he denied consent to search his shoulder bag, the officers held the shoulder bag for about one hour and 20 minutes until a drug detection dog arrived and sniffed the unopened bag. *Id* at 802. When the dog alerted, the officers applied for a

C. Fourth Amendment Rules of Law

The United States constitutional analysis varies from the foregoing analysis only in that under the Fourth Amendment, an officer may temporarily detain an in-transit package if supported by reasonable suspicion. This Court, however, should not adopt the Fourth Amendment rule of law as the rule of law in Oregon.

In construing the Oregon Constitution, Oregon courts "may adopt a higher standard under the Oregon Constitution than that enunciated by the United States Supreme Court." *State v. Dixson*, 87 Or App 1, 22, 740 P2d 1224 (1987); *State v. Cromb*, 220 Or App 315, 322, 185 P3d 1120 (2008). The Oregon Supreme Court has given "recurring reminders" that our state courts remain free "to interpret our own constitutional provision regarding search and seizure and to impose higher standards on searches and seizures under our own constitution than are required by the federal constitution." *State v. Caraher*, 293 Or 741, 750-751, 653 P2d 942 (1982) (omitting internal citations). The court in *Caraher* explained:

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telephonic warrant and subsequently searched the bag pursuant to a warrant. The trial court held that the police had the right to detain the bag temporarily for investigative purposes. The Court of Appeals disagreed and held that the warrantless seizure of the shoulder bag was unlawful. *Id* at 802-803, and see *Juarez-Godinez*, 326 Or at 6 (temporary detention of a vehicle for a dog sniff constitutes a seizure); *and see Smith*, 327 Or at 376 (temporary detention of a storage unit constitutes a seizure, even though the defendant was not in a position to exercise his possessory rights at the time of seizure).

> "This is part of a state court's duty of independent constitutional analysis. That a state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional standards is beyond question. Indeed, the states are 'independently responsible for safeguarding the rights of their citizens.'"

Id.

In the instant case, established Oregon jurisprudence makes clear that Article I, section 9 extends greater protection to mailed items than the Fourth Amendment. In *State v. Smith*, 327 Or 366, 376, 963 P2d 642 (1998), this Court rejected the idea that under Article I, section 9, possessory rights deserve any less protection than privacy rights, stating, "We do not agree with the state's suggestion that possessory rights deserve less protection than privacy rights. Whatever other jurisdictions may have said about the subject, it is clear that Article I, section 9, speaks to both types of interests, and that with few well-recognized exceptions, a warrant is required when only possessory rights are implicated." By comparison, possessory interests, relative to privacy interests, are considered of "secondary" importance under the Fourth Amendment. *Id*, *citing Segura v. United States*, 468 US 796, 806, 104 S Ct 3380, 82 Led2d 599 (1984) ("suggesting that invasion of possessory rights are less significant than invasions of privacy rights").

1. Possessory Interest

Sealed packages sent through the United States Postal Service are entitled to full protection under the Fourth Amendment to the United States Constitution. *United States v. Jacobsen*, 466 US 109, 114, 104 S Ct 1652, 80 LEd2d 85 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable"). "Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles . . . . Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized as is required when papers are subjected to search in one's household." *United States v. Van Leeuwen*, 397 US 249, 251 (1970), *quoting Ex parte Jackson*, 96 US 727, 24 S Ct 877, 24 LEd 877 (1877).

A recipient's Fourth Amendment possessory interest derives from the privacy interest in mail. *See United States v. Van Leeuwen*, 397 US 249, 253, 90 SCt 1029, 25 LEd2d 282 (1970) (explaining that a person has a privacy interest in letters and packages even after the items are mailed, thus, "[t]he significant Fourth Amendment interest [is] in the privacy of first-class mail."). The Court in *State v. Eichers*, 853 NW2d 114 (Minn. 2014), interpreting Fourth Amendment

standards, explained that the privacy interest described in *Van Leeuwen* "may implicate whether mail can be detained, as the Court also noted that Congress cannot encumber the flow of the mail 'by setting 'administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail' to him." *Id* at 120, citing *Van Leeuwen, supra* at 251-52.

Indeed, Congress granted the Postal Service a range of powers related to the delivery of mail by 39 USC §404, but specifically directed the Postal Service to create classes of mail "sealed against inspection" and restrained its power to inspect that mail, stating, in part, "No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee." *Id* at §404(b).

The United States Supreme Court, in *Jacobsen*, 466 US 109, 104 S Ct 1652 (1984), distinguished between the two protections the Fourth Amendment offers in the context of mailed packages. One involves "searches," and protects an expectation of privacy. The other involves "seizures," which protects against "meaningful interference with an individual's possessory interests in that property." *Jacobsen*, 466 US at 113.

In *Jacobsen,* the Court considered an addressee's Fourth Amendment guarantees regarding a package sent to them via private freight carrier. The package was damaged during shipment, revealing a white powdery substance. The private carrier summoned federal agents, who "took custody of the package from Federal Express after they arrived." *Jacobsen,* 466 US at 120, Fn 18. The case did not involve a delay beyond the guaranteed delivery time.

With respect to the addressee's protected possessory rights in the package, the Court characterized the in-transit detention of the package as a "seizure", in part, because governmental authorities had exerted "dominion and control over the package for their own purposes . . . ."[11] In so stating, the United States Supreme Court acknowledged that a recipient holds a constitutionally protected possessory interest in the mailed item against unreasonable seizures *during* its course in the mail, and *before* the time for delivery has passed. *Id* at 120-121, Fn. 18.

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[11] However, after considering the "nature and quality of the intrusion," the Court found the seizure reasonable because the addressees did not retain a privacy interest in the package after the private carrier had exposed and examined its contents, and the package remained unsealed at the time of the federal agents' seizure. *Id* at 120-121 (stating "the fact that, prior to the field test, respondents' privacy interest in the contents of the package had been largely compromised is highly relevant to the reasonableness of the agents' conduct . . . Under these circumstances, the package could no longer support any expectation of privacy . . . ." The Court further explained that because the FedEx employees who conducted the initial detention and search of the package were private actors, their actions did not implicate the Fourth Amendment. *Id.* at 115.

The state, however, argues that a recipient's possessory interest in a package should not attach until after the time for delivery has passed, citing *United States v. Jefferson*, 566 F3d 928 (9th Cir 2009). In *United States v. Jefferson*, 566 F3d 928 (9th Cir 2009), a three-judge Ninth Circuit panel reached an aberrant conclusion when it held that a recipient's protected possessory rights are not triggered until after the time for delivery passes. Id at 934. In so stating, the *Jefferson* Court did not have before it the specific evidence available to the Court in *Barnthouse* of the contractual rights guaranteed to the recipient.

In *Jefferson*, the Postal Inspector was actively investigating the defendant and had requested that the postal clerk detain any packages to be delivered to Jefferson's address. 566 F3d at 931. Consequently, when the package arrived for Jefferson on April 6, 2006, which was scheduled for delivery by 3:00 p.m. on April 7, 2006, the clerk notified the Postal Inspector. The next morning, the Inspector arrived with a law enforcement team, inspected the package and submitted it to a dog sniff. *Id* at 932. Law enforcement applied for and obtained a search warrant, opened the package pursuant to the warrant and located methamphetamine. *Id* at 932. Two hours after the expected delivery time, law enforcement made a controlled delivery of the package to Jefferson's address. *Id* at 932.

In holding that the Fourth Amendment did not protect the recipient's possessory interest in the package until after the time for delivery had passed, the

Jefferson panel explicitly adopted the First Circuit's reasoning in *United States v. LaFrance*, 879 F2d 1 (1st Cir. 1989), stating: "The First Circuit observed that 'a possessory interest derives from rights in property delineated by the parameters of law, in this case, contract law." *Id*. at 7; *see also Rakas v. Illinois*, 439 US 128, 143 n. 12, 99 S Ct 421, 58 LEd2d 387 (1978) ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."). The First Circuit in *LaFrance* had relied on a "hornbook contract law" principle "that where a delivery time is agreed upon, a court should not intrude to imply a (different) reasonable time for delivery." *LaFrance*, 879 F2d at 7.

The Court in *LaFrance* and the panel in *Jefferson* limit the application of their opinion by reference to "hornbook contract law". "Hornbook law" does not reflect the evidence shown in the *Domestic Mail Manual* and in Officer Helton's testimony of a recipient's right to control delivery of an incoming package.

The Court in *State v. Eichers*, 853 NW2d 14 (Minn. 2014), provides this Court with an additional justification for rejecting Ninth Circuit precedent:

> "[F]ocusing only on the interest in a timely delivery, such as the Ninth Circuit has, and thus finding a seizure only in cases of late deliveries, fails to recognize other legitimate possessory interests that individuals have in mailed packages. In particular, we find persuasive the Eighth Circuit's identification of a possessory interest in having the carrier retain custody

> in the package, because . . . it speaks to a person's reasonable expectations for how the property might be handled when in the carrier's custody."

853 NW2d at 122 (2014).

2. Seizure and Reasonable Suspicion Standard

Similar to the Oregon constitutional analysis, under the Fourth Amendment, a "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property," including when law enforcement decides to "exert dominion and control over the packages for their own purposes . . ." *United States v. Jacobsen*, 466 US 109 (1984).

Only upon reasonable and articulable suspicion of criminal activity, may postal authorities detain mailed items for further investigation. *United States v. Jacobsen*, 466 US 109, 104 S Ct 1652 (1984); *United States v. Aldaz,* 921 F2d 227, 229 (9th Cir 1990), *cert. denied,* 501 US 1207, 111 S Ct 2802, 115 LEd2d 975 (1991), *cf. United States v. Jefferson*, 566 F3d 928 (9th Cir 2009) (discussed *infra*).

In *Jacobsen*, *supra*, 466 US 109, 104 S Ct 1652 (1984), the Court found a constitutionally significant seizure where law enforcement asserted "dominion and control" over a mailed package during its course in the mail. 466 US at 120-121. When the federal agents arrived at the Federal Express facility, they took control of the package and field-tested the white powder. *Id.* at 112. Upon a positive field test for cocaine, federal agents then rewrapped the package,

obtained a warrant to search the recipient address, executed the warrant and arrested the defendants before the time for delivery had passed. *Id.* at 112. In analyzing whether the federal agents ran afoul of the Fourth Amendment, the Court first found that "the agents' assertion of *dominion and control* over the package and its contents did constitute a 'seizure' . . . ." *Id.* at 120-121 (emphasis added).

Likewise, federal circuit courts around the nation have required that even a brief investigatory detention of in-transit mail by law enforcement be supported by a reasonable and articulable suspicion that the mailed item contains evidence of criminal activity. *See, e.g. United States v. LaFrance*, 879 F2d 1, 4 (1st Cir 1989)[12] (temporary detention of Federal Express package did not violate the Fourth Amendment because the seizure was justified by reasonable suspicion); *United States v. Alexander*, 540 F3d 494, 500-01 (6th Cir 2008), *cert den*. 129 S Ct 1923, 173 LEd2d 1070 (2009) (holding that reasonable suspicion justified detaining the package pending a dog sniff); *United States v. Robinson*, 390 F3d 853, 869-70 (6th Cir 2004) (stating that law enforcement needs reasonable suspicion to detain a package for further investigation, such as examination by a drug-detection dog); *United States v. Mayomi*, 873 F2d 1049, 1053-54 (7th Cir

[12] The appellant cites *LaFrance* in support of its position that the recipient holds no possessory interest in a package until the time for delivery has passed. However, the language in *LaFrance* cited by appellant concerns the reasonableness of the duration of detention, and not whether the initial detention amounted to a constitutionally significant seizure.

1989) (applying *Van Leeuwen, supra,* and holding that the temporary detention of mailed items did not violate the Fourth Amendment "because the packages were detained based on reasonable suspicion that they contained contraband"); *United States v. Aldaz,* 921 F2d 227, 229 (9th Cir 1990), *cert. denied*, 501 US 1207, 111 S Ct 2802, 115 LEd2d 975 (1991) (so stating); *United States v. Ramirez,* 342 F3d 1210, 1212 (10th Cir 2003) (stating that "certain packages may be detained for investigative purposes when the authorities have reasonable suspicion of criminal activity."); *United States v. Banks*, 3 F3d 399, 401, 403 (11th Cir 1993) (holding that a "reasonable, temporary detention of a reasonably suspicious postal package . . . for the time necessary to obtain a drug detection canine or otherwise conduct an investigation does not violate the Fourth Amendment."); *United States v. Morones*, 355 F3d 1108, 1111 (8th Cir 2004) (holding that the officer exercised meaningful interference with the defendant's possessory rights when he held the package pending the canine sniff, even though detention would not have delayed the package's ultimate forward progress).

In holding that law enforcement detention of a mailed item can amount to a seizure, even where the detention does not impact the on-time delivery of the package, the Supreme Court of North Dakota in *State v. Ressler,* 701 NW2d 915, 920, 2005 ND 140 (N.D. 2005) explained:

> "We believe the *Morones* and *Jacobsen* rationale is sound. It seeks to recognize and validate the minimal, yet ever-present, possessory rights an individual maintains in shipped articles. Further, it provides some

> mechanism to check what would otherwise be a nearly unrestrained power of government to temporarily confiscate any shipped package."

Id. at 920.

CONCLUSION

Mr. Barnthouse held a possessory right in the package in transit with the United States Postal Service under Article I, section 9 of the Oregon Constitution and the Fourth Amendment of the United States Constitution. He was the intended recipient and addressee of the package. From the moment the sender deposited the package in the mail to him, he had the right to control delivery and direct the movements of the package. The *Domestic Mail Manual* and the officer's testimony regarding his right to control are evidence of his ability to do so. Under Oregon jurisprudence, and even under the *LaFrance* and *Jefferson* cases, this contractual right to control demonstrates Mr. Barnthouse's constructive possession of and possessory interest to the package.

The officer in this case unquestionably seized Mr. Barnthouse's package the moment he took it out of the sorting bin. He did not temporarily detain the package. Rather, he exercised exclusive dominion and control of the package, testifying that at that moment, there was no chance of the package returning to the sorting line or returning to its course of normal delivery. He took the package with the intention to avoid applying for a warrant that must be based upon probable cause. The interdiction team's actions with regard to Mr. Barnthouse's

package was consistent with their usual practice of making a special law enforcement delivery of a package in order to elicit the recipient's consent to search. The team knew of the warrant requirement, was familiar with the warrant procedures, and had ample time to seek a warrant before the expected time for normal delivery. Instead, law enforcement seized Mr. Barnthouse's package to avoid judicial scrutiny. In so doing, law enforcement exercised absolute dominion and control over the package in a manner that completely extinguished Mr. Barnthouse's possessory rights. As is made clear by the case law, this complete interference with Mr. Barnthouse's rights amounted to a seizure under Article I, section 9 of the Oregon Constitution, and under the Fourth Amendment of the United States Constitution.

If the Court agrees that Mr. Barnthouse had a possessory interest in the package at the time Officer Castenada took it from the sorting line, and that the law enforcement exclusive control of the package amounted to a seizure, then the Court should affirm the trial court's order and the holding of the Court of Appeals. The issue of whether reasonable suspicion or probable cause may justify the seizure of an in-transit package is not properly before the court. There is no reason for the Court to depart from established constitutional jurisprudence. In the absence of exigent circumstances, seizures of property must be supported by probable cause and a warrant.

The state's proposed rules of law offend our constitutional jurisprudence. If adopted, law enforcement could take control of our Postal Service and mail delivery without any judicial oversight or scrutiny. If we are to uphold our existing and well-established constitutional standards, law enforcement must not be permitted to exert exclusive control over mailed packages without probable cause and a search warrant. As Justice Kenneth O'Connell admonished in a dissenting opinion to *State v. Chinn,* 231 Or 259, 295-96,373 P2d 392 (1962), "Article I, § 9, Oregon Constitution, and the Fourth Amendment should be construed in light of these dangers, 'so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers.' *Gouled v. United States*, 255 US 298, 304, 41 S Ct 261, 263, 65 LEd 647, 650 (1921)."

Respectfully submitted,

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ORAP 5.05(2)(d) CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 12,026 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 10th day of February, 2016.

s/ Stephen A. Houze
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF ON THE MERITS OF RESPONDENT ON REVIEW on:

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DATED this 10th day of February, 2016.

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