IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

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, J.
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge

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Continued…

STEPHEN A. HOUZE #721261
Attorney at Law
1240 Pacwest Center
1211 SW Fifth Avenue
Portland, Oregon 97204
Telephone: (503) 299-6426
Email: stephen@shouze.com

Attorney for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
DAVID B. THOMPSON #95124
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
david.b.thompson@doj.state.or.us

Attorneys for Petitioner on Review

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BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

INTRODUCTION, QUESTIONS PRESENTED, AND PROPOSED RULES OF LAW

A police officer assigned to a drug-interdiction team removed a suspicious package from a sorting bin at a Portland postal facility and allowed a nearby drug-detection dog to sniff it. The dog alerted to the package, indicating the presence of illegal drugs. A few hours later, the officer and a postal inspector took the package to the addressee's (defendant's) residence. There, defendant voluntarily consented to searches of the package and his residence, which revealed evidence of a large-scale, marijuana-distribution operation.

Charged with delivery of marijuana for consideration and unlawful possession of marijuana, defendant moved to suppress the incriminating evidence. The trial court granted the motion, concluding that—for purposes of both the state and federal constitutions—the package was illegally seized when removed from the sorting bin, and that the illegality tainted all of the subsequently discovered evidence. The Court of Appeals affirmed.

This case presents the following questions of state and federal constitutional law, and this court should adopt the following proposed rules of law:

First question presented

Does an addressee have a protected possessory interest in in-transit U.S. mail under Article I, section 9 of the Oregon Constitution or the Fourth Amendment to the United States Constitution?[1]

First proposed rule of law

A person has a possessory interest in a thing or property under Article I, section 9 and the Fourth Amendment only if the person actually or constructively possesses it.[2] Before the reasonable or guaranteed delivery time of a mailed item, an addressee who has not contracted with the United States

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[1] Article I, section 9 provides:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[2] Both Article I, section 9 and the Fourth Amendment use the word "thing" to describe something other than a person that can be seized (property, effects, etc.). In this brief, the state uses "thing" and "property" interchangeably to describe something other than a person that can be seized.

Postal Service (USPS) for delivery of that item has no possessory interest in it, because the addressee does not actually or constructively possess it.

Second question presented

If an addressee who has not contracted with the USPS for delivery of a mailed item has a constitutionally protected possessory interest in it before the reasonable or guaranteed delivery time has passed, under what circumstances does the government's investigative detention of the mail constitute a seizure?

Second proposed rule of law

An Article I, section 9 or Fourth Amendment seizure occurs only if the government's investigative detention of in-transit mail significantly or meaningfully interferes with the addressee's possessory interest in it, which will happen only if the detention delays the reasonable or guaranteed delivery time for that mail.

Third question presented

If an addressee who has not contracted with the USPS for delivery of a mailed item has a constitutionally protected possessory interest in it before the reasonable or guaranteed delivery time has passed, and if the government's brief investigative detention of the mail effects a seizure in the constitutional sense, are probable cause and a warrant required for the seizure to be lawful?

Third proposed rule of law

A brief investigative seizure of in-transit mail does not require probable cause and a warrant to comport with Article I, section 9 or the Fourth Amendment; such a seizure is constitutional if the government has reasonable suspicion that the mail is associated with criminal activity.

SUMMARY OF ARGUMENT

Article I, section 9 and the Fourth Amendment prohibit unreasonable seizures. A seizure of property occurs under those provisions only if the government significantly or meaningfully interferes with a person's possessory interest in the property. A person has a possessory interest in property only if the person actually or constructively possesses it—that is, only if the person has a significant degree of control over it.

Here, a police officer, working with a postal inspector, removed a suspicious package addressed to defendant from a postal facility's sorting bin so that a drug-detection dog could sniff it. The dog alerted to the package, indicating the presence of illegal drugs. The officer and the inspector subsequently took the package to defendant's residence, where defendant voluntarily consented to police searches of the package and his residence. Those searches revealed the evidence of drug trafficking that the trial court and the Court of Appeals concluded was the product of a preceding illegal seizure (*i.e.*, the officer's warrantless removal of the package from the sorting bin). But

when the officer removed the package from the bin, defendant had neither actual nor constructive possession of the package. He had no right or ability to control the mail's movements in the postal facility. Nor, at that point (hours before the guaranteed delivery time for the package), did he have a right to possess the mail. Thus, the officer's brief detention of the mail for a drug-dog sniff did not effect a seizure. Because there was no possessory interest to interfere with, the officer's actions could not constitute a seizure.

Alternatively, even if defendant (as addressee) had a cognizable possessory interest in the in-transit mail, that interest could not conceivably include the right to control the movements of the mail within the postal facility. At most, defendant's possessory interest was a contract-based right (deriving from his status as a third-party beneficiary of the contract between the sender and the USPS) that the mail would be delivered by the guaranteed delivery time. Thus, when the officer removed the package from the sorting bin, which did not delay the delivery time, he did not significantly or meaningfully interfere with defendant's possessory interest in the package. As a result, the officer's act of removing the package from the bin did not effect a seizure.

Because there was no seizure when the officer removed the package from the sorting bin, he did not need any level of suspicion to lawfully detain the package for a drug-dog sniff. The trial court and the Court of Appeals therefore

erred in concluding that the evidence found in the subsequent consent searches derived from a preceding illegal seizure of the package.

Finally, even if removal of the package from the sorting bin was a seizure, probable cause and a warrant were not necessary to make the seizure lawful under Article I, section 9—contrary to the Court of Appeals' holding. A brief investigative seizure of property (here, a piece of mail)—like the brief investigative seizure of a person—is constitutional if the seizure is supported by a reasonable suspicion that the property is associated with illegal activity.

SUMMARY OF FACTS

A. A drug-interdiction team removed a suspicious package from a sorting bin at a postal facility to allow a drug-detection dog to sniff it.

"As part of an inter-agency drug interdiction team, United States Postal Inspector Helton and Portland Police Bureau (PPB) Officers Castaneda and Groshong regularly examine in-transit U.S. mail at a postal air cargo center near the Portland International Airport for packages that might contain illegal drugs or drug money." *State v. Barnthouse*, 271 Or App 312, 314, 350 P3d 536, *rev allowed*, 358 Or 69 (2015). At about 6:00 one morning, Helton and the officers were examining express mail packages as they were being sorted at the center when Castaneda noticed one addressed to "Maxi-pad Barnt." *Id*. at 318. The package had a guaranteed delivery time of noon that day. *Id*. at 331. It had handwritten labeling, was sent from Delaware (a non-medical marijuana state),

had an originating zip code different from the sender's zip code, was paid for by cash or debit card, had no phone number listed for either the sender or the recipient, and had a signed and highlighted signature-waiver box—characteristics the interdiction team considered suggestive of illegal drug or drug-money parcels. *Id*. at 316, 318. Per the team's usual procedure, Castaneda removed the suspicious package from the sorting bin and took it to an area 30 feet away to Nikko, a drug-detection dog. *Id*.

Nikko alerted to the package, indicating the presence of illegal drugs. *Id*. at 318. Castaneda then gave the package to Inspector Helton who, after searching law enforcement databases and finding nothing suggesting that either the sender's address or the recipient's address was associated with any criminal activity, set the package aside with others designated for follow-up investigation. *Id*. at 318-19. Rather than apply for a search warrant at the outset, Castaneda and Helton decided that the team would go to defendant's residence and do a "'knock-and-talk follow-up[]'" for the package to see whether they could obtain consent to search it. *Id*. at 319.

B. The interdiction team took the suspicious package to defendant's residence and obtained his consent to search the package and his bedroom.

Officer Castaneda and Inspector Helton arrived at defendant's residence with the package at 9:30 a.m. *Barnthouse*, 271 Or App at 319. Defendant's roommate and a guest answered Castaneda's knock on the door. *Id*. Both told

Castaneda, who had identified himself as a police officer, that they were not expecting a package. *Id*. But based on the name of the package's addressee, the two believed the package was for defendant, who was not there. *Id*. One gave his cell phone to Castaneda to call defendant. *Id*. at 319-20. In the officer's ensuing conversation with defendant, who said that he was not expecting a package, Castaneda obtained his consent to search it. *Id*. at 320. In the package, Castaneda found several stacks of currency wrapped in a T-shirt. *Id*. After defendant said that the money was neither expected nor his, Castaneda asked him for consent to search his bedroom for evidence of narcotics distribution and money laundering. *Id*. Defendant gave consent, and the ensuing search revealed a large amount of marijuana, packaging materials, a vacuum sealer, and bank currency wrappers for $1,000 and $2,000 stacks. *Id*.; 12/4/12 Tr 92-93.

C. The trial court concluded that the police unlawfully "seized" the package at the airport postal facility and exploited that illegality to obtain defendant's consent to the searches.

Charged with delivery of marijuana for consideration (ORS 475.860) and unlawful possession of marijuana (ORS 475.864), defendant moved to suppress all of the evidence the drug-interdiction team discovered after the package was removed from the airport facility's sorting bin. *Barnthouse*, 271 Or App at 321. He argued that the police unlawfully seized the package under Article I, section 9 and the Fourth Amendment when they removed it from the bin. *Id*. The trial

court agreed that the police had violated the state and federal constitutions in doing that and suppressed the challenged evidence. It ruled that (1) an illegal seizure occurred when Officer Castaneda took the package from the sorting bin for the drug dog's inspection, and (2) the police exploited that illegality in obtaining defendant's consent to search the package and his bedroom. 12/13/12 Tr 55-59, 61-62. The state appealed the suppression order.

D. The Court of Appeals held that the package was illegally seized and that the illegality tainted the evidence obtained in the subsequent consent searches.

The Court of Appeals affirmed. It held that defendant—as the addressee on the package—had an Article I, section 9 possessory interest in it from the moment it was mailed, because he had constructive possession of the package while it was in transit. *Barnthouse*, 271 Or App at 330. It further held that "the government significantly interfered with defendant's constitutionally protected possessory interest in the package [and thus 'seized' it], beginning with the initial removal of it from the stream of mail [at the sorting bin] and continuing through their entire interaction with defendant." *Id*. at 339. Finally, the court held that the package was illegally seized because, "for an in-transit USPS express mail package, the police may not detain such a package without probable cause and a warrant or without the existence of one of the carefully delineated exceptions to the warrant requirement." *Id*. at 334, 346. Accordingly, the court concluded that the trial court properly suppressed the

challenged evidence, because the state had failed to demonstrate that the fruits of the consent searches did not derive from police exploitation of the illegal seizure of the package. *Id*. at 346.

ARGUMENT

Article I, section 9 and the Fourth Amendment prohibit unreasonable government searches and seizures. The principal issue in this case is whether—for purposes of those provisions—government officers *seized* a package addressed to defendant when they removed it from a sorting bin at an airport postal facility so that a drug-detection dog could sniff it. To resolve that issue, this court must determine whether an addressee on in-transit mail has a constitutionally protected *possessory interest* in such mail, and, if so, whether the government action at issue constituted a significant or meaningful interference with that interest.[3] *See State v. Juarez-Godinez*, 326 Or 1, 6, 942 P2d 772 (1997) ("Property is 'seized' for purposes of Article I, section 9, when there is a significant interference, even a temporary one, with a person's possessory or ownership interests."); *United States v. Jacobsen*, 466 US 109,

[3] This case presents a narrow issue: whether an Article I, section 9 or Fourth Amendment seizure occurred at the moment Officer Castaneda removed the package from the sorting bin. Both the trial court and the Court of Appeals held that a seizure—an unlawful one—occurred at that point. *Barnthouse*, 271 Or App at 334, 339; 12/13/12 Tr 55-59. Accordingly, the state's analysis of the seizure issue will focus on that specific point in the chain of events that led up to defendant's consent to the searches that produced the evidence the trial court suppressed.

113, 104 S Ct 1652, 80 L Ed 2d 85 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property.").

Not at issue in this case is the existence of any protected *privacy interest* an addressee has in in-transit mail. If such an interest exists, the government's invasion of that interest would constitute a *search* under Article I, section 9 and the Fourth Amendment. *See State v. Meredith*, 337 Or 299, 303, 96 P3d 342 (2004) ("Under Article I, section 9, a search occurs when the government invades a protected privacy interest."); *State ex rel. Juv. Dept. v. M.A.D.*, 348 Or 381, 388, 233 P3d 437 (2010) ("a Fourth Amendment search occurs when government conduct infringes an individual's reasonable expectation of privacy"). This, however, is not a *search* case. The only issue is whether a *seizure* occurred, that is, whether there was a significant or meaningful interference with a *possessory interest* when a police officer removed the package in issue from a sorting bin at the airport postal facility. That inquiry has nothing to do with a possible privacy interest in the package, or whether such an interest was invaded (such that a search occurred). Privacy interests are irrelevant to the determination whether a possessory interest in a particular thing exists. *See, e.g., Lavan v. City of Los Angeles*, 693 F3d 1022, 1028 (9th

Cir 2012), *cert den*, 133 S Ct 2855 (2013) ("a reasonable expectation of privacy is not required to trigger Fourth Amendment protection against seizures").[4]

Accordingly, in deciding the possessory-interest/seizure questions presented in this case, this court need not—indeed, should not—consider defendant's possible privacy interest in the package at issue. The only questions before this court are defendant's possible possessory interest in the package, and whether any such interest (if it existed) was significantly or meaningfully interfered with.

A. Under Article I, section 9, a protected possessory interest in property exists only if there is actual or constructive possession of the property; under that test, defendant did not have a possessory interest in the package when it was removed from the sorting bin.

"Article I, section 9 protects * * * possessory interests from unreasonable governmental intrusion." *State v. Ainsworth*, 310 Or 613, 617, 801 P2d 749

[4] In upholding the trial court's suppression order, the Court of Appeals incorrectly cited "the strong historical relationship between the USPS and the sanctity of the mails" that "originally gave us the notion of communications privacy" as "additional support" for its conclusion that defendant had a protected possessory interest in the package under Article I, section 9. *Barnthouse*, 271 Or App at 337. Unquestionably, the citizenry's privacy interest in the mails is longstanding and substantial. *Jacobsen*, 466 US at 114 ("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."); *United States v. Van Leeuwen*, 397 US 249, 251, 90 S Ct 1029, 25 L Ed 2d 282 (1970) (first class mail, such as letters and sealed packages, is protected from inspection except in the manner provided by the Fourth Amendment). But that privacy interest is irrelevant to the determination whether an addressee or a sender has a *possessory* interest in in-transit mail.

(1990). The term "possessory interest" is not in Article I, section 9's text; rather, it is a term this court has used to define when a "seizure" of property has occurred in the constitutional sense. *See State v. Smith*, 327 Or 366, 376, 963 P2d 642 (1998) ("Property is 'seized' for purposes of Article I, section 9, when the police significantly interfere with a person's * * * possessory interests in the property.").[5] To have a possessory interest in property, a person must in some manner possess it. "[T]o 'possess' a thing traditionally means to control it[.]" *State v. Barger*, 349 Or 553, 559, 247 P3d 309, *adh'd to as modified on recons*, 350 Or 233 (2011). And the traditionally recognized types of control are "actual possession" and "constructive possession." *Id*. Actual possession is commonly understood to mean physical control over something, whereas constructive possession traditionally means exercising some *other* kind of dominion or control over something. *Id*. In short, to have a possessory interest

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[5] An Article I, section 9 seizure also can occur when the government significantly interferes with an "ownership interest" in property. *Juarez-Godinez*, 326 Or at 6. This case, however, presents no issues concerning an ownership interest; neither defendant nor the lower courts ever suggested that defendant had an ownership interest in the package at issue or that such an interest was in play for purposes of the "seizure" question. *See Barnthouse*, 271 Or App at 325 n 3 ("Defendant does not argue that he had any ownership interest in the package."). Whether a seizure occurred when Officer Castaneda removed the package from the sorting bin depends solely on whether at that point the government significantly interfered with a possessory interest that defendant had in mail.

in something under Article I, section 9, a person must either actually or constructively possess it.

This court has never articulated a full definition of "possessory interest" for Article I, section 9's purposes. In fact, it has gone no further than to recognize that actual possession establishes a protected possessory interest under Article I, section 9. *See State v. Morton*, 326 Or 466, 469-70, 953 P2d 374 (1998) (holding that the defendant, who had been "in personal possession of the container in question only moments before it came into the possession of the police," had a possessory interest in the container under Article I, section 9). But when analyzing "possessory interest" questions in other contexts, the court has implicitly relied on traditional concepts of actual and constructive possession to determine whether such an interest exists. *See, e.g., Power Resources Cooperative v. Dept. of Revenue*, 330 Or 24, 31-32, 996 P2d 969 (2000) (implicitly relying on concepts of actual and constructive possession to decide whether taxpayer had "possessory interest" in real and personal property of the United States, which would allow property to be considered "held" by taxpayer and thus to come within exception to general exemption of federal property from taxation; "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"); *Oregon Summer Home Owners Assn. v. Johnson*, 265 Or 544, 545, 510 P2d 344 (1973) (implicitly recognizing that the

concepts of actual and constructive possession are pertinent to whether a possessory interest exists in property: "[w]hether the person has a possessory interest depends upon whether the person has sufficient control over the premises to warrant the label of possession" (internal quotation marks and citation omitted)); *Witt v. Reavis*, 284 Or 503, 507, 587 P2d 1005 (1978) (implicitly concluding that to have a possessory interest in something, a person must actually possess it or have a *present* right to possess it (a form of constructive possession): "[w]here the fee owner of the dominant parcel acquires the fee subject to an estate for years in the servient parcel, the owner * * * has only a reversionary interest that will become possessory after termination of the estate for years").

In line with that understanding of "possessory interest," this court should now hold that, to have a protected possessory interest in property under Article I, section 9 (which is the prerequisite to a government "seizure"), a person must either actually or constructively possess the property. There is no good reason for the court—in this context—to stray from what appears to be a well-established and reasonable understanding of "possessory interest."

1. Because defendant had neither actual nor constructive possession of the package when the police officer removed it from the sorting bin, he did not at that point have a protected possessory interest in it.

Without question, defendant did not have actual possession of the in-transit package when a police officer removed it from a sorting bin at the USPS's airport facility. That would have required that defendant physically control the package. *See State v. Fries*, 344 Or 541, 545-46, 185 P3d 453 (2008) (a person "may 'have physical possession' of the property, which customarily is referred to as actual possession"; "[a]s a general rule, 'to have physical possession' of property means to have bodily or physical control of it"). Therefore, whether defendant had a possessory interest in the package when it was removed from the sorting bin depends entirely on whether he constructively possessed the package. As explained below, he did not. If he had any sort of control over the package's movements in the mail stream at the airport postal facility, it was not the kind of control necessary to establish constructive possession.

a. This court's analysis of constructive possession in *State v. Casey* supports the conclusion that defendant did not constructively possess the package when it was removed from the sorting bin.

To constructively possess something, a person must "exercise dominion or control over" it. *Fries*, 344 Or at 545 ("even if a person does not have actual possession of the property, he or she may have constructive possession of it if

the person otherwise exercises dominion or control over the property" (internal quotation marks, brackets, and ellipses omitted)). This court's decision in *State v. Casey*, 346 Or 54, 203 P3d 202 (2009), provides useful guidance in analyzing the constructive possession issue in this case: whether, at the point Officer Castaneda removed the package addressed to defendant from the sorting bin, defendant was exercising the dominion or control over the package necessary to establish constructive possession.

In *Casey*, the defendant had been convicted of being a felon in possession of a firearm based on the allegation that he possessed a gun that a guest brought into his residence and left on a counter as he and the guest briefly stepped out of the residence to talk to the police. 346 Or at 56. The question for this court was whether the defendant constructively possessed the gun under the circumstances. *Id.* In reversing the defendant's conviction, this court held that a person who does not know that property is in another's possession cannot constructively possess that property. *Id.* at 60-61; *see also State v. Daniels*, 348 Or 513, 521, 234 P3d 976 (2010) (same).[6] The court further held that a person

[6] In *Daniels*, 348 Or at 521-22, this court held that the evidence was insufficient to support a finding that the defendant constructively possessed methamphetamine the police found in his girlfriend's bag. Although there was evidence that the defendant had previously sold methamphetamine and that the girlfriend's bag was found in the defendant's bedroom, there was no evidence that the girlfriend was more than a social guest or that the defendant knew that the bag was in his bedroom or contained methamphetamine. *Id.* Furthermore,

Footnote continued…

does not constructively possess something simply because he or she is in close proximity to it. *Casey*, 346 Or at 62-63; *see also Daniels*, 348 Or at 522 (same). Nor does one constructively possess something where there is no evidence that it has been entrusted to one's care or custody. *Casey*, 346 Or at 61.

Applying those general principles from *Casey* to this case, defendant did not constructively possess the package that Officer Castaneda removed from the sorting bin. Nothing in the record reflects that defendant arranged or paid for the mailing of the package by the USPS, that he had communicated with the USPS about the package, that he otherwise knew about the package, or that he had been entrusted with the package. Defendant had not contracted with the USPS to deliver the package to him; that contract was between the sender and the USPS only—*i.e.*, the sender was the one who arranged with the USPS for shipment of the package and the one who paid for that service. Thus, defendant could not have had any right that the sender may have had to control the package while it was in transit from Delaware to Oregon.

In concluding that defendant had a possessory interest in the package while it was in transit, the Court of Appeals stressed that "defendant utilized the

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(…continued)
there was no evidence that the defendant had control over or permission to open, or had opened, his girlfriend's bag. *Id*. at 522.

USPS to facilitate a limited purpose, namely, receipt of his property," and that "[b]y using express mail to accomplish that, defendant manifested an intent to retain control over the package and its contents *vis-à-vis* the world at large." *Barnthouse*, 271 Or App at 336. But, as just noted, nothing in the record suggests that defendant had anything to do with the mailing of the package or the use of express mail. Thus, the Court of Appeals incorrectly relied on defendant's purported utilization of express mail as a manifestation of his intent to retain control over the package.

Furthermore, the record contains no evidence that the sender, by mailing the package, or that the USPS, by taking possession of the package to deliver it to defendant per its contract with the sender, either intended to entrust the package to defendant (the addressee) or somehow entrusted the package to him while it was in transit. Relatedly, there is no evidence that defendant exercised dominion or control over the package at the point the sender put the package in the USPS's hands in Delaware or at any point in the package's journey from Delaware to Oregon. Nor is there any evidence that defendant attempted to do so. Indeed, in light of defendant's statement to Officer Castaneda that he was not expecting a package, the record supports the conclusion that defendant did not even know—when the police detained the package at the sorting bin—that the package was headed his way. That circumstance alone precludes a finding of constructive possession.

Finally, that defendant arguably was in close proximity to the package when it was removed from the sorting bin at the Portland International Airport—both physically (the airport is in the same city as defendant's residence) and temporally (the guaranteed delivery time for the package was only about six hours away)—was insufficient to establish his constructive possession of the package. It is undisputed that defendant did not have physical access to the airport postal facility (and did not attempt to enter that facility when the package was there), and that he had no right or ability to direct or control the movements of the package within that facility (he certainly had no right or ability to prohibit its removal from the sorting bin). *See United States v. Hernandez*, 313 F3d 1206, 1210 (9th Cir 2002), *cert den*, 583 US 1023 (2003) (an addressee has no right in "having his package routed on a particular conveyor belt, sorted in a particular area, or stored in any particular sorting bin for a particular amount of time" (internal quotation marks and citation omitted)); *State v. Eichers*, 840 NW2d 210, 223 (Minn App 2013) (Ross, J., concurring), *aff'd on other grds*, 853 NW2d 114 (Minn 2014), *cert den*, 135 S Ct 1557 (2015) ("I assume that any package I send or receive by air will be handled by a dozen people or more. I suppose it will be lifted, tossed, slid, flipped, lowered, and dropped. I suppose that it will be placed in bins, on shelves, in carts, on floors, through chutes, in trucks, on conveyor belts, on dollies, and in cargo holds."). Under those circumstances, defendant could not

have constructively possessed the package at the point it was removed from the sorting bin.

In sum, applying *Casey*'s "constructive possession" principles to the facts of this case, defendant did not have constructive possession of the package when Officer Castaneda took it out of the USPS sorting bin. Defendant had no right to control the package's movement within the postal facility or, for that matter, at any point between there and the post office in Delaware from which the package was mailed.

b. Because defendant had no legal right to possession of the package while it was in transit, before the guaranteed delivery time, he did not constructively possess it when it was removed from the sorting bin.

Moreover, because defendant had no legal right to actual possession of the package at the point it was removed from the sorting bin, well before the guaranteed delivery time of noon that day, he did not then constructively possess the package. Nothing in this record or in any regulation or law suggests that defendant, as the addressee on an express mail package with a noon guaranteed delivery time, had the right to go to the airport postal facility before noon and demand that the USPS give him the package. At best, his right to actual possession of the package would not arise until noon, at which time he, as the third-party beneficiary of the contract between the sender and the USPS, would be in a position to demand possession. *See United States v. Jefferson*,

566 F3d 928, 934 (9th Cir 2009) ("an addressee has no Fourth Amendment possessory interest in a package that has a guaranteed delivery time until such delivery time has passed"); *cf. United States v. LaFrance*, 879 F2d 1, 7 (1st Cir 1989) (addressee's only possessory interest in FedEx package was contract-based expectancy that package would be delivered by scheduled delivery time). Mere expectation of future possession does not constitute a present possessory interest. *See Witt*, 284 Or at 507 ("[w]here the fee owner of the dominant parcel acquires the fee subject to an estate for years in the servient parcel, the owner * * * has only a reversionary interest that will become possessory after termination of the estate for years").

At bottom, defendant had neither the dominion nor the control necessary to establish the constructive possession necessary for him to have an Article I, section 9 possessory interest in the package when Officer Castaneda removed it from the sorting bin well before the guaranteed delivery time. *See State v. Oare*, 249 Or 597, 599, 439 P2d 885 (1968) ("Evidence of the control or the right to control is necessary to constructive possession.").

c. That defendant had the ability to ask the USPS to redirect the package to another address or to hold it at the local post office for pickup did not give him constructive possession of the package while it was in transit.

The Court of Appeals concluded that defendant constructively possessed the package from the moment it was mailed in Delaware. *Barnthouse*, 271 Or

App at 330-31. It based that conclusion on postal regulations and Inspector Helton's suppression-hearing testimony indicating that an addressee has the ability to ask the USPS to hold in-transit mail at a designated post office for pickup or to redirect in-transit mail to a designated post office. *Id.* at 330. According to the Court of Appeals, "the USPS standards and Helton's testimony both indicate that an addressee of an express mail package has something akin to a legal right to control—*i.e.*, to exercise restraining or directing influence over—a package (addressed to the addressee) while the package is in transit." *Id*. That right, the court concluded, "is sufficient to establish an addressee's constructive possession of such a package and, therefore, the addressee's constitutionally protected possessory interest in that package." *Id*. That analysis, however, conflicts with this court's case law.

The postal regulations that the Court of Appeals cited only give the addressee the right to *request* redirection of or a hold on mail. Any suggestion that the services are guaranteed to the addressee if a request is made is inaccurate. For example, the USPS regulations relating to the "Package Intercept" service, which the Court of Appeals emphasized in concluding that a person has constitutionally significant control over a mailed item addressed to him or her, *Barnthouse*, 271 Or App at 330-31, is not a guaranteed service. *See Domestic Mail Manual* Section 5.1.1 ("Interception of eligible mailpieces is not guaranteed.") (available at http://pe.usps.com/text/dmm300/ 507.htm (accessed

Nov. 23, 2015)). The addressee therefore has no "legal right" to demand that mail be redirected or held; the USPS will do that upon request only if it is able to accommodate the request. Nothing in Inspector Helton's testimony suggests otherwise. 12/4/12 Tr 10-63.

In short, although defendant could have requested that the package in question be redirected or held, the USPS would not have been obliged to comply with the request. Because defendant thus had no legal right to *demand* that the package be redirected or held, he could not have had the dominion or control over it that is necessary to establish constructive possession.

Moreover, it is undisputed that defendant did not ask the USPS either to hold or to redirect the package. As noted, he apparently did not even know the package was in the mail. Merely because defendant had the ability to *request* a hold on the package or its redirection to a post office anywhere between Delaware and Oregon did not give him constructive possession of the package. That is clear from *State v. Barger*, 349 Or 553, 559, 247 P3d 309, *adh'd to as modified on recons*, 350 Or 233 (2011).

In *Barger*, this court held that the defendant did not "possess" or "control" images of child pornography that he had called up on his computer screen, even though he had the ability to save, print, post, and transmit the images, but had not done any of those things and had simply viewed the images. 349 Or at 565-66. In so holding, the court emphasized that "there is no

support in this court's cases for the idea that a mere unexercised *ability* to manipulate a thing can constitute constructive possession of it."[7] *Id*. at 565 (emphasis in original). Citing *Casey*, the court further said: "It is clear from that decision that the mere fact that an object is within a person's reach, and that the person thus has a physical *ability* to exercise some directing or restraining

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[7] Without acknowledging that directly contrary language from *Barger*, the Court of Appeals asserted that "a defendant may have constructive possession or control of an item even when that defendant is unable to actively exercise directing or restraining influence over the item." *Barnthouse*, 271 Or App at 329. As support for that proposition, the Court of Appeals cited footnote 12 of *Barger*. *Id*. (citing *Barger*, 349 Or at 566 n 12). In that footnote, this court said:

> Our reservations about the state's attempt to define "control" solely in terms of *ability* to exercise directing or restraining influence should not be interpreted as acceptance of defendant's theory that constructive possession or control requires *active* exercise of such influence in all cases. It is clear, for example, that when a person who 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.

349 Or at 566 n 12 (emphasis in original).

But in this case, defendant did not place the package in the custody of another; the record makes clear that he was merely an addressee on the package, which was in transit without his knowledge solely as the result of the sender's contract with the USPS to have the package delivered by express mail. Hence, although the *Barger* court noted that one who places his property in another's custody or who otherwise retains the "power to control" the property can constructively possess it, the record here reflects no such power in defendant to control the package in question.

influence over it, is insufficient to establish constructive possession of the object." *Id.* (emphasis in original). Thus, *Barger* undermines the Court of Appeals' conclusion that because defendant had the ability to ask the USPS to hold or redirect the package, he constructively possessed it.

2. Because defendant had no possessory interest in the package, no Article I, section 9 seizure occurred when the package was removed from the sorting bin.

In the absence of a protected possessory interest, there can be no governmental seizure. *State v. Howard*, 342 Or 635, 640, 157 P3d 1189 (2007). As demonstrated above, defendant did not constructively possess the package that Officer Castaneda removed from the sorting bin. As a result, defendant did not have a possessory interest in the package under Article I, section 9, and Castaneda did not "seize" it *vis-à-vis* defendant. The trial court and the Court of Appeals erroneously concluded otherwise. And the trial court therefore erroneously suppressed the drug-trafficking evidence obtained in the consent searches that followed Castaneda's detention of the package at the sorting bin.

C. Even if defendant had a cognizable possessory interest in the package, its removal from the sorting bin was not a significant interference with that interest.

Even if defendant had some Article I, section 9 possessory interest in the package while it was in transit (discussed below), Officer Castaneda did not seize it—for constitutional purposes—when he removed it from the sorting bin. Whatever defendant's possessory interest might have been, it did not

encompass a right to control the package's movements within the postal facility, at least so long as those movements did not delay the reasonable or guaranteed delivery time. As a result, Castaneda's removal of the package from the postal facility sorting bin, which did not delay the package's guaranteed delivery time, could not have significantly interfered with whatever possessory interest defendant had in it.

Defendant's possessory interest in the package while it was in transit was, at most, a contract-based, third-party beneficiary right that the package would be delivered to his address by the guaranteed delivery time. *See United States v. LaFrance*, 879 F2d 1, 7 (1st Cir 1989) ("the only possessory interest at stake [for defendant, as the addressee on an express mail package,] before * * * noon [on the date of the guaranteed delivery] was the contract-based expectancy that the package would be delivered to the designated address by morning's end"). The possessory interest was no greater than that; nothing about the agreement between the sender and the USPS somehow gave defendant the ability or right to control the package's every movement in the mail stream as it made its way from Delaware to Oregon. With respect to the third-party beneficiary right of timely delivery, Officer Castaneda's act of taking the package out of the sorting bin so that a drug dog a mere 30 feet away could sniff it did not interfere—significantly or otherwise—with that right; in fact,

Castaneda and Inspector Helton arrived with the package at defendant's residence two-and-a-half hours before the noon guaranteed delivery time.

In short, the brief detention of the package at the sorting bin "had but a *de minimis* impact on a nearly evanescent possessory interest." *LaFrance*, 879 F2d at 7. It was not the significant interference with a possessory interest that is required for a seizure to occur under Article I, section 9. *See Juarez-Godinez*, 326 Or at 8 (holding that Article I, section 9 seizure occurred when "[officer]'s statements [to the defendant] were *and* reasonably could have been interpreted as curtailing, by a show of authority, [the] defendant's rights to transfer possession of, and direct the movements of, [his] car" (emphasis in original)); *State v. Smith*, 327 Or 366, 376, 963 P2d 642 (1998) (padlocking of storage unit to secure it while police obtained search warrant was seizure under Article I, section 9, as padlocking was significant interference with the defendant's possessory interest, by depriving him of use of the unit and access to its contents). The trial court and the Court of Appeals erroneously concluded otherwise. Under this alternative analysis, the trial court erroneously suppressed the challenged evidence.

D. Even if the package was seized under Article I, section 9 when it was removed from the sorting bin, probable cause and a warrant were not required to make the seizure lawful.

Finally, if Officer Castaneda's removal of the package from the sorting bin was a seizure under Article I, section 9, it could be lawful without probable

cause and a warrant. For the following reasons, this court should hold that a brief investigative detention of property (*e.g.*, mail)—if a seizure for constitutional purposes—is lawful without a warrant if the government has a reasonable suspicion that the property is associated with criminal activity.

In the Court of Appeals, the state challenged on two alternative grounds the trial court's conclusion that Castaneda illegally seized the package at the sorting bin: either defendant lacked a protected possessory interest in the package or Castaneda's actions did not significantly interfere with an existing possessory interest. App Br 30-35. The state did not address whether any seizure of the package at the sorting bin would have been lawful. The Court of Appeals nonetheless held that the package was illegally seized at the sorting bin because, "for an in-transit USPS express mail package, the police may not detain such a package without probable cause and a warrant or without the existence of one of the carefully delineated exceptions to the warrant requirement." *Barnthouse*, 270 Or App at 334, 346. But that standard is at odds with this court's longstanding precedent that a brief, warrantless seizure of a *person* to investigate possible criminal activity comports with Article I, section 9 if the seizure is supported by reasonable suspicion of such activity.

Under Article I, section 9, a police officer may lawfully stop—*i.e.*, seize—a person without a warrant to investigate possible criminal activity based on mere reasonable suspicion that the person is committing or has

committed a crime. *State v. Rodgers/Kirkeby*, 347 Or 610, 621, 227 P3d 695 (2010). This court, however, has never addressed whether that same "reasonable suspicion" standard applies to a similar investigative seizure of property. But there is no good reason for crafting a more stringent standard (*i.e.*, probable cause and a warrant) for the brief investigative seizure of property than the standard applicable to the similar investigative seizure of a person (*i.e.*, reasonable suspicion and no warrant). A possessory interest in property is certainly no more worthy of constitutional protection than is a person's interest in liberty and freedom of movement.

On this issue, this court should adopt the reasoning of *United States v. Place*, 462 US 696, 103 S Ct 2637, 77 L Ed 2d 110 (1983). There, the Supreme Court held that the government may, without a warrant and without violating the Fourth Amendment, temporarily seize property (in that case, the defendant's luggage) for investigative purposes based on reasonable suspicion that the property is associated with criminal activity. *Place*, 462 US at 706 (applying the principles of *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968) (warrantless investigative seizure of person lawful under Fourth Amendment if based on reasonable suspicion of criminal activity), to the investigative seizure of property). The Court noted that "[t]he exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the

reasonableness of the type of seizure involved within the meaning of 'the Fourth Amendment's general proscription against unreasonable searches and seizures.'" *Place*, 462 US at 703 (quoting *Terry*, 392 US at 20). The Court then concluded that the same balancing must occur in determining whether the government may, without a warrant and without probable cause, temporarily seize property for investigative purposes. *Id*. The Court observed that where government "authorities possess specific articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the government interest in seizing the luggage briefly to pursue further investigation is substantial." *Id.* The same should be true under Article I, section 9 and for in-transit mail. That strong governmental interest must then be weighed against "the nature and extent of the intrusion upon the individual's [constitutional] rights when the police briefly detain property for limited investigative purposes." *Id*. at 705.

For purposes of that weighing, the *Place* Court recognized that the degree of intrusiveness occasioned by a temporary seizure of property can vary in both its nature and extent:

> The seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner. Moreover, the police may confine their investigation to an on-the-spot inquiry—for example, immediate exposure of the [property] to a trained narcotics detection dog—or transport the property to another location. Given the fact that seizures of property can vary in intrusiveness,

> some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.

Id. at 705-06 (footnotes omitted). Applying that template to the Article I, section 9 question presented in this case, this court must decide how intrusive a brief investigative seizure of in-transit mail is with respect to an addressee's possessory interest in that mail (which is in the hands of a third party, the USPS). The prevailing view under the Fourth Amendment and parallel state constitutional provisions is that a temporary detention of in-transit mail for investigative purposes is constitutionally reasonable when authorities reasonably suspect that it is connected with criminal activity. *See, e.g., United States v. Lux*, 905 F2d 1379, 1382 (10th Cir 1990) (stating Fourth Amendment rule); *State v. Bochkovsky*, 356 P3d 302, 306 (Alaska App 2015) (stating rule under Alaska Constitution).

The view that the reasonable-suspicion/no-warrant standard applies to brief, investigative seizures of in-transit mail recognizes the minimally intrusive nature of such seizures with respect to the possessory interests the addressee and the sender may have in such mail. The degree of intrusiveness in the in-transit mail situation certainly is no greater than that occasioned by the brief, investigative detention of a person on the street. Accordingly, this court should hold that—under Article I, section 9—it is lawful for the government to briefly

seize in-transit mail for investigative purposes if the government reasonably suspects that the mail is associated with criminal activity. The Oregon Constitution does not require the more stringent probable-cause/warrant standard the Court of Appeals adopted.[8]

E. This court should conclude that Officer Castaneda did not effect a Fourth Amendment seizure when he removed the package from the sorting bin.

The trial court ruled that Officer Castaneda seized the package when he removed it from the sorting bin, and that he violated both Article I, section 9 and the Fourth Amendment in making that seizure. If this court agrees with the state that an Article I, section 9 seizure did not occur at the sorting bin, it must then address the same possessory-interest/seizure issues under the Fourth Amendment. As explained below, for the same reasons that no seizure of the package occurred under Article I, section 9, no seizure occurred under the Fourth Amendment.

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[8] Consistently with its approach in the Court of Appeals, the state does not address the issue whether, under the totality of the circumstances, Officer Castaneda had a reasonable suspicion that the package he pulled from the sorting bin was associated with criminal activity.

1. This court should adopt the Ninth Circuit's view that an addressee has no cognizable Fourth Amendment possessory interest in in-transit mail before the reasonable or guaranteed delivery time.

Under the Fourth Amendment, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 US 109, 113, 104 S Ct 1652, 80 L Ed 2d 85 (1984). Although the United States Supreme Court has held that the Fourth Amendment protects mail from unreasonable searches and seizures,[9] it has not directly addressed the existence or nature of an addressee's possessory interest in a mailed item. Courts that have considered the question are split as to whether an addressee has such an interest, and if the addressee does, what the scope of that interest is.[10] Some courts have concluded that an

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[9] *Jacobsen*, 466 US at 114 ("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."); *United States v. Van Leeuwen*, 397 US 249, 251, 90 S Ct 1029, 25 L Ed 2d 282 (1970) (first class mail, such as letters and sealed packages, is protected from inspection except in the manner provided by the Fourth Amendment).

[10] *Compare United States v. Jefferson*, 566 F3d 928, 934 (9th Cir 2009) ("an addressee has no Fourth Amendment possessory interest in a package that has a guaranteed delivery time until such delivery time has passed"); and *People v. Tyus*, 355 Ill Dec 742, 752, 960 NE2d 624, 634 (Ill App 2011), *appeal denied*, 968 NE2d 88 (Ill 2012) ("we agree with *Jefferson* that a package addressee—here, defendant—does not have a fourth-amendment possessory interest in a package that has a guaranteed delivery time until the guaranteed time has passed"); *with United States v. Lux*, 905 F2d 1379, 1382 (10th Cir 1990) (implicitly recognizing an addressee's ever-present possessory

Footnote continued…

addressee has no Fourth Amendment possessory interest in in-transit mail until the reasonable or guaranteed delivery time has passed. Prominent among those courts is the Ninth Circuit Court of Appeals. For the following reasons, this court should adopt that court's Fourth Amendment analysis.

a. The Ninth Circuit's view

The Ninth Circuit has said that, although "the recipient of a mailed item * * * has a reasonable expectation that the mail will not be detained by postal employees beyond the normal delivery date and time," *United States v.*

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in in-transit mail when rejecting the addressee defendant's argument that an express mail package addressed to her was seized in violation of the Fourth Amendment when postal inspectors "removed the package from the mail stream under controlled conditions and had it externally examined by a Los Angeles police officer and his trained drug detection dog," because removal from the mail stream was justified by a reasonable suspicion it contained contraband); *United States v. Alexander*, 540 F3d 494, 500-01 (6th Cir 2008), *cert den*, 129 S Ct 1923 (2009) (similarly recognizing addressee's ever-present Fourth Amendment possessory interest in mailed item when holding that police detective, stationed in airport mail facility, had reasonable suspicion to justify detaining express mail package addressed to defendant pending a dog sniff); and *State v. Kelly*, 68 Haw 213, 708 P2d 820 (1985) (under Fourth Amendment, defendant, "as the addressee of the mailed package, had a possessory interest in the photo album during the time the album was in mail transit").

The courts' different interpretations of *United States v. Van Leeuwen*, where the Supreme Court held that there was no Fourth Amendment violation when law enforcement detained in-transit mail for hours to investigate possible trafficking in illegal coins, have contributed significantly to the split. The significance of *Van Leeuwen* in the possessory-interest/seizure analysis is discussed below.

Hernandez, 313 F3d 1206, 1210 (9th Cir 2002), an addressee has no right to control the handling of mail *before* the delivery deadline:

> [A]n addressee's possessory interest is in the timely delivery of a package, not in having his package routed on a particular conveyor belt, sorted in a particular area, or stored in any particular sorting bin for a particular amount of time.

Id. (internal quotation marks and citation omitted). Thus, in the Ninth Circuit's view, "an addressee has no Fourth Amendment possessory interest in a package that has a guaranteed delivery time until such delivery time has passed." *United States v. Jefferson*, 566 F3d 928, 934 (9th Cir 2009); *see also People v. Tyus*, 355 Ill Dec 742, 752, 960 NE2d 624, 634 (2011) ("we agree with *Jefferson* that a package addressee—here, defendant—does not have a fourth-amendment possessory interest in a package that has a guaranteed delivery time until the guaranteed time has passed"). Because there is no possessory interest to be interfered with in that situation, law enforcement's detention of such a package before the guaranteed delivery time cannot constitute a Fourth Amendment seizure. *Jefferson*, 566 F3d at 934 ("Before the guaranteed delivery time, law enforcement may detain such a package for inspection purposes without any Fourth Amendment curtailment."). Only when the detention delays the timely delivery of the mailed item does a seizure occur. *See United States v. Gill*, 280 F3d 923, 932-33 (9th Cir 2002) (Gould, J, concurring) ("Investigators may inspect mail as they wish without any Fourth Amendment curtailment, so long

as the inspection does not amount to a 'search,' and so long as it is conducted quickly enough so that it does not become a seizure by significantly delaying the date of delivery." (Footnote omitted)).

The Ninth Circuit's view as to an addressee's possessory interest in in-transit mail under the Fourth Amendment is well reasoned. Indeed, its analysis implicitly incorporates the actual-possession/constructive-possession requirement for a possessory interest that underpins the Article I, section 9 analysis set forth above. This court therefore should join the Ninth Circuit and other courts that hold that an addressee on mail that has a guaranteed delivery time has no Fourth Amendment possessory interest in such mail until that delivery time has passed. That holding properly accounts for the status of an addressee with respect to *controlling* in-transit mail, which is the touchstone for determining the scope of an addressee's possessory interest.

"A possessory interest derives from rights in property delineated by the parameters of law, in this case, contract law." *United States v. LaFrance*, 879 F2d 1, 7 (1st Cir 1989). The package at issue in this case was mailed to defendant by express mail, with a guaranteed delivery time of noon on the day that Officer Castaneda removed it from the sorting bin at the airport postal facility. It is settled contract law "that where delivery time is agreed upon, a court should not intrude to imply a (different) reasonable time for delivery." *LaFrance*, 879 F2d at 7. Thus, defendant—as the third-party beneficiary of the

contract between the sender and the USPS for the express mail delivery of the package—had no right to demand possession of the package until noon on the day that Castaneda detained it at the sorting bin. The USPS had obligated itself to no more than timely delivery of the package. *Id*. For that reason, defendant could not have had a cognizable Fourth Amendment possessory interest in the package until the guaranteed noon delivery time had passed. *See Jefferson*, 566 F3d at 935 ("[W]e hold that a package addressee does not have a Fourth Amendment possessory interest in a package that has a guaranteed delivery time until the guaranteed delivery time has passed.").

That conclusion properly accounts for the fact that defendant had no legal right—contract or otherwise—to possess the package before the guaranteed delivery time. And, as discussed above with respect to Article I, section 9, defendant had no right or ability to control the movements of the package within the airport postal facility. Accordingly, Officer Castaneda's detention of the package at the sorting bin before the guaranteed noon delivery time did not effect a Fourth Amendment seizure, because defendant had no possessory interest in the package at that point in time. *See Jefferson*, 566 F3d at 934 ("Before the guaranteed delivery time, law enforcement may detain such a package for inspection purposes without any Fourth Amendment curtailment.").

b. The Ninth Circuit's view comports with the Supreme Court's decision in *United States v. Van Leeuwen*.

The Ninth Circuit's view—that an addressee has no possessory interest in mail before the guaranteed delivery time, and that the government does not seize in-transit mail by detaining it for investigation unless that delays the guaranteed delivery time—is consistent with the Supreme Court's analysis in *United States v. Van Leeuwen*, 397 US 249, 90 S Ct 1029, 25 L Ed 2d 282 (1970). In that case, the Court addressed a seizure-of-mail issue under the Fourth Amendment. The police had detained for 29 hours "suspicious" packages mailed by the defendant, so that they could get a warrant to search them. *Van Leeuwen*, 397 US at 250. After the packages were searched under a warrant, they were resealed and promptly sent on their way. *Id*. The issue was whether that detention violated the defendant's Fourth Amendment right to be free from unreasonable searches and seizures. *Id*. at 251-52. Regarding the initial detention of the packages, the Court said that the Fourth Amendment was not implicated:

> The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Theoretically—and it is theory only that [the defendant] has on his side—detention of mail could at some point become an unreasonable seizure of "papers" or "effects" within the meaning of the Fourth Amendment.

Id. at 252. The Court also said that "[n]o interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited [in the mail]." *Id*. at 253. The Court's ultimate holding, however, was that, "on the facts of this case[,] * * * a 29-hour delay between the mailings and the service of the warrant cannot be said to be 'unreasonable' within the meaning of the Fourth Amendment." *Id*.

The Ninth Circuit has sensibly read *Van Leeuwen* as *not* holding that "*any* detention of mail constitutes a fourth amendment seizure." *United States v. England*, 971 F2d 419, 421 (9th Cir 1992) (emphasis in original). In *England*, which held that no Fourth Amendment seizure occurred when law enforcement detained express mail packages without delaying the packages' timely progress through the mail, the court easily harmonized its holding with *Van Leeuwen*. *Id*. at 420-21. The court correctly concluded that *Van Leeuwen* was "not on point." *Id*. at 420. Viewing *Van Leeuwen* as holding that "the inspectors' reasonable and articulable suspicions justified detaining the packages [at issue in that case] to allow a more thorough investigation," the court distinguished the case on the ground that there the packages' delivery had been substantially delayed:

> Unlike the present case, the delivery of Van Leeuwen's packages was substantially delayed by their detention. As a result, the primary issue before the Court was not whether the detention of Van Leeuwen's packages interfered with his interest in them, but

> whether this interference was justified despite the lack of probable cause.

Id. The Ninth Circuit thus reasonably interpreted *Van Leeuwen* as standing for the proposition that detained mail is considered "seized" for purposes of the Fourth Amendment only if the detention substantially delays its timely delivery. And therefore, to the extent that *Van Leeuwen* required reasonable suspicion of criminal activity before law enforcement could lawfully detain mail for a substantial period of time, the case was inapplicable to the situation in *England*, where delivery of the defendants' packages had not been "substantially delayed by their detention." *Id*.

In summary, the Ninth Circuit has persuasively explained that *Van Leeuwen* does not conflict with its view that an addressee on in-transit mail has no Fourth Amendment possessory interest therein before the guaranteed delivery time.[11] This court therefore should not hesitate to adopt that view,

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[11] Courts holding that an addressee has an ever-present possessory interest in in-transit mail have read *Van Leeuwen* quite differently. They interpret it as holding that *any* detention of mail for investigative purposes is a seizure under the Fourth Amendment—as to both the sender and the recipient—and that the seizure is justified only if supported by at least a reasonable suspicion of criminal activity. *See, e.g.*, *Lux*, 905 F2d at 1382 (citing *Van Leeuwen* for the proposition that "[a] temporary detention of mail for investigatory purposes is not an unreasonable seizure when authorities have a reasonable suspicion of criminal activity"); *Alexander*, 540 F3d at 500-01 ("Following *Van Leeuwen*, we have held that only reasonable suspicion, and not probable cause, is necessary in order to briefly detain a package for further investigation, such as examination by a drug-sniffing dog." (Internal quotation marks omitted.)). In reading *Van Leeuwen* that way, those courts seemingly

Footnote continued…

under which no Fourth Amendment seizure occurred when Officer Castaneda detained the package at issue in this case. That detention occurred well before the guaranteed delivery time, when defendant had no Fourth Amendment possessory interest in the package. Thus, there could not be the meaningful interference with a possessory interest required for a Fourth Amendment seizure to occur. The trial court erred in concluding otherwise.

2. Even if an addressee has a cognizable possessory interest in in-transit mail, brief detention of the mail like that which occurred here is not a meaningful interference with that interest.

If this court finds the Ninth Circuit's approach unsatisfactory, then it should hold that an addressee's possessory interest in in-transit mail is so minimal before the guaranteed delivery time that the government's detention of such mail—without delaying its timely delivery—cannot constitute a Fourth Amendment seizure. Under that view, the detention does not meaningfully interfere with the addressee's possessory interest. *See, e.g., United States v. LaFrance*, 879 F2d 1, 7 (1st Cir 1989) (addressee's only possessory interest in FedEx package was contract-based expectancy that package would be delivered

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give little or no weight to the Court's statements in *Van Leeuwen* that (1) at the point of the packages' initial detention, there was "no possible invasion" of Fourth Amendment interests and (2) "[n]o interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited." 397 US at 252-53.

by scheduled delivery time; thus, where FedEx guaranteed delivery of a package by noon, and where "there was neither interference with the package's normal course nor frustration of the addressee's contractual expectations, the [package's] pre-noon 'detention' had but a *de minimis* impact on a nearly evanescent possessory interest"); *State v. Eichers*, 853 NW2d 114, 123, (Minn 2014) ("because [the addressee on a UPS package] has failed to establish any meaningful interference with a possessory interest he had in the package, we conclude that removing the package from a conveyor belt for the purpose of a dog sniff was not a seizure under either the Fourth Amendment to the U.S. Constitution or Article I, Section 10, of the Minnesota Constitution"); *State v. Ochadleus*, 326 Mont 441, 451, 110 P3d 448, 455 (2005) (recognizing that the defendant addressee had a possessory interest in detained express mail package but holding that, because postal inspector's brief detention of package to take it to nearby DEA office for a drug-dog sniff "did not interfere with [the defendant's] possessory interest in the package, that brief detainment did not constitute a seizure under the Fourth Amendment"); *State v. Daly*, 14 Kan App 2d 310, 319-20, 789 P2d 1203, 1211 (1990) (addressee's "possessory interests in the [in-transit] package were minimal"; because detention of the package for a drug-dog sniff did not delay the package's scheduled delivery, "there was not a seizure of the package under the Fourth Amendment").

This alternative approach correctly reflects that, if an addressee has any possessory interest in in-transit mail, that interest does not include the ability or right to control a mailed item's every movement in the mail stream. *See* 4 Wayne R. LaFave, *Search and Seizure*, § 9.8(e), at 1006 (5th ed 2012) ("Not all police dealings with containers and other items are sufficiently intrusive to require that they be characterized as seizures."); *United States v. Va Lerie*, 424 F3d 694, 701-02 (8th Cir 2005) (*en banc*), *cert den*, 548 US 903 (2006) ("[N]ot every governmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person. It necessarily follows that not every governmental interference with a person's property constitutes a seizure of that property under the Constitution."). The addressee's interest most certainly does not include the right or the ability to control the movement of a package in and out of a sorting bin at a postal facility.

Moreover, this alternative view is consistent with *Van Leeuwen*, as the Indiana Court of Appeals explained in *Rios v. State*, 762 NE2d 153 (Ind App 2002). There, the court held that "[b]riefly setting aside a mailed package for further investigation is not 'meaningful interference' with the recipient's possessory interests in the package where ultimate delivery of the package is not substantially delayed." *Rios*, 762 NE2d at 158. Expressly disagreeing with some courts' view that *Van Leeuwen* held that the government must have a

reasonable suspicion based on articulable facts that a package contains contraband before they may detain the package for investigation, the *Rios* court said: "We do not read *Van Leeuwen* so broadly as to impose a 'reasonable suspicion' requirement for any detention, however brief, of a mailed package for purposes of further law enforcement investigation." *Id*. at 157. The court observed that "the *Van Leeuwen* Court never undertook to decide whether the facts of the case created 'reasonable suspicion' that the packages contained contraband before their detention[;] [i]t only noted the packages were 'suspicious' without stating whether such suspicion was 'reasonable,' and expressly distinguished the detention of the mailed package for further investigation from a protective sweep for weapons upon the existence of 'reasonable suspicion.'" *Id*. (quoting *Van Leeuwen*, 397 US at 252). The court further observed that the "*Van Leeuwen* opinion also held that [(1)] upon the detention of the packages, there was at that point no possible invasion of the right 'to be secure' in the 'persons, houses, papers, and effects' protected by the Fourth Amendment against 'unreasonable searches and seizures,'" and (2) "'[n]o interest protected by the Fourth Amendment was invaded by forwarding the packages [in issue] the following day rather than the day when they were deposited [in the mail].'" *Id*. (quoting *Van Leeuwen*, 397 US at 252-53).

Based on those passages from *Van Leeuwen*, the *Rios* court agreed with the Ninth Circuit that "there is no seizure of a mailed package within the

meaning of the Fourth Amendment when it is briefly detained for further law enforcement investigation and its delivery is not substantially delayed." *Id*. at 158. In short, *Van Leeuwen* is consistent with the view that "[b]riefly setting aside a mailed package for further investigation is not 'meaningful interference' with the recipient's possessory interests in the package where ultimate delivery of the package is not substantially delayed." *Id*. That is a correct analysis.[12]

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[12] The difference in the Ninth Circuit's and the Indiana Court of Appeals' interpretations of *Van Leeuwen* lies in their divergent views as to whether the Supreme Court found a Fourth Amendment seizure in that case. As noted, in *England* the Ninth Circuit read *Van Leeuwen* as holding that the packages had been seized—reasonably—under the Fourth Amendment, but then distinguished *Van Leeuwen* on the ground that the detention of the packages in that case, in contrast to the situation in *England*, substantially delayed the packages' delivery (which the Ninth Circuit obviously saw as the reason for the Supreme Court's conclusion that there was a Fourth Amendment seizure of the packages). Support for that interpretation of *Van Leeuwen* is found in the last paragraph of the opinion, 397 US at 253, which suggests a holding that Van Leeuwen's packages were seized at some point during their 29-hour detention by law enforcement.

On the other hand, in *Rios* the Indiana Court of Appeals apparently read *Van Leeuwen* as holding that there was no Fourth Amendment seizure of the packages. That reading finds considerable support in the Supreme Court's statements that there was no invasion of any Fourth Amendment interest (possessory or privacy interest) when the packages were initially detained or when they were held for a day before being put back into the mail stream. That interpretation appears to be the basis for the Indiana Court of Appeals' agreement "with the Ninth Circuit's assessment of *Van Leeuwen* and its implications for briefly detaining mailed packages for purposes of further law enforcement investigation." *Rios*, 762 NE2d at 158.

At bottom, the Ninth Circuit's and the Indiana Court of Appeals' interpretations of *Van Leeuwen* each provide an analysis of that case that supports the two courts' alternative paths to the conclusion that a brief,

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3. Under the better views of federal law, a Fourth Amendment seizure did not occur in this case.

For essentially the same reasons that Officer Castaneda's removal of the package from the sorting bin in this case was not a seizure under Article I, section 9, it was not a seizure under the Fourth Amendment. Applying the alternative Fourth Amendment analyses set out above to this case, defendant either had no possessory interest in the package when Officer Castaneda detained it or, if defendant did have a possessory interest at that point, Castaneda's actions did not meaningfully interfere with that interest. The trial court therefore erroneously concluded that Castaneda effected a Fourth Amendment seizure at the sorting bin, and it erroneously suppressed the challenged evidence.

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investigative detention of in-transit mail like that which occurred here does not result in a Fourth Amendment seizure.

CONCLUSION

This court should reverse the Court of Appeals' judgment and the trial court's suppression order.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
PAUL L. SMITH
Deputy Solicitor General

/s/ David B. Thompson

DAVID B. THOMPSON #951246
Senior Assistant Attorney General
david.b.thompson@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

DBT:ka3/6927034

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 4, 2015, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Stephen A. Houze, attorney for respondent on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 11,993. I further 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(2)(b).

/s/ David B. Thompson

DAVID B. THOMPSON #951246
Senior Assistant Attorney General
david.b.thompson@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

DBT:ka3/6927034