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

REPLY 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…

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

A. The *Domestic Mail Manual* does not give an addressee constructive possession of in-transit mail; thus, it does not create a possessory interest in such mail for Article I, section 9's purposes. 3

1. Contrary to defendant's view, this court in *State v. Casey* and *State v. Barger* did not delete "right to control" from the definition of constructive possession. 4

2. Although defendant had the *ability* to redirect or to put a hold on the package in question, he did not have a *right* to control it in those ways; therefore, he did not constructively possess the package while it was in transit. 8

B. Alternatively, even if defendant had a possessory interest in the package, its removal from the sorting bin did not significantly interfere with that interest. 10

C. The question whether the government must have probable cause and a warrant to temporarily seize property to investigate possible criminal activity is properly before this court 14

D. Contrary to defendant's argument, he did not have a protected possessory interest in the package under the Fourth Amendment. 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

State v. Barger,
349 Or 553, 247 P3d 309,
adh'd to as modified on recons, 350 Or 233 (2011) 4, 5, 7, 8, 10

State v. Barnes,
120 Or 372, 251 P 305 (1926) 8

State v. Casey,
346 Or 54, 203 P3d 202 (2009) 4, 5, 6, 8

State v. Harrell,
353 Or 247, 297 P3d 461 (2013) 9

State v. Juarez-Godinez,
326 Or 1, 942 P2d 772 (1997) 13

State v. Oare,
249 Or 597, 439 P2d 885 (1968) 7, 10

State v. Weller,
263 Or 132, 501 P2d 794 (1972) 7

United States v. Jacobsen,
466 US 109, 104 S Ct 1652, 80 L Ed 2d 85 (1984) 15, 16

United States v. Jefferson,
566 F3d 928 (9th Cir 2009) 16

United States v. LaFrance,
879 F2d 1 (1st Cir 1989) 16

Constitutional and Statutory Provisions

Or Const, Art I § 9 ..... 3, 4, 5, 6, 10, 11, 12, 14

US Const, Amend IV 3, 14, 15, 16

REPLY BRIEF OF
PETITIONER ON REVIEW, STATE OF OREGON

INTRODUCTION

Defendant acknowledges that, for constitutional purposes, a seizure of property occurs only when the government significantly or meaningfully interferes with a person's possessory interest in the property. And he agrees with the state that a person has such a possessory interest only if the person actually or constructively possesses the property, and that the answer to the "seizure" question in this case turns on whether defendant had constructive possession of the package that Officer Castaneda pulled from a sorting bin and moved across the room at a postal facility. Defendant simply disagrees with the state's argument that he had no possessory interest in the package, and that Castaneda therefore did not seize it.

Defendant contends that, under the state constitution, he had a possessory interest in the package because he constructively possessed it. In his view, he—as the addressee on the package—had constructive possession because, "by the terms of the United States Postal Service *Domestic Mail Manual*, [he] had a right to direct and control delivery of the package." Resp BOM 1. He further contends that Castaneda's mere movement of the package out of the sorting bin significantly interfered with his possessory interest in the package by "stopp[ing] its normal course of delivery." Resp BOM 25.

As explained below, however, the *Domestic Mail Manual* gives an addressee only the *ability*, not the *right*, to redirect or to put a hold on in-transit mail by requesting those nonguaranteed services—a fact that undermines defendant's constructive possession theory. Defendant therefore had no possessory interest in the package that Castaneda pulled from the sorting bin, and, consequently, Castaneda could not have seized the package. Moreover, even if defendant were correct that an addressee's ability to request the redirection of or a hold on in-transit mail is sufficient to create a constitutionally cognizable possessory interest in such mail, a police officer's mere movement of a package within a postal facility—with no resulting delay of the reasonable or guaranteed delivery time—did not interfere with that interest. For that alternative reason, there was no seizure under the state constitution when Castaneda pulled the package from the sorting bin.

Additionally, contrary to defendant's argument, the question of what standards apply under the state constitution to the government's temporary investigative seizure of property is properly before this court. Even though the state did not present that question to the Court of Appeals, that court chose to decide it anyway, holding that probable cause and a warrant are required for the government to lawfully seize property for investigative purposes. That holding represents the controlling rule of law on an important state constitutional question and, accordingly, this court should review it.

Finally, for purposes of the federal constitution, defendant suggests that, under existing United States Supreme Court precedent, he had a protected possessory interest in the package that Castaneda removed from the sorting bin, and that the officer's action effected a Fourth Amendment seizure. But defendant misreads the Supreme Court decision on which he relies, which left open the question presented here. That decision is consistent with the "no seizure" theories that the state has advanced under the Fourth Amendment.

ARGUMENT

A. The *Domestic Mail Manual* does not give an addressee constructive possession of in-transit mail; thus, it does not create a possessory interest in such mail for Article I, section 9's purposes.

Defendant identifies just one ground for his argument that—under Article I, section 9 of the Oregon Constitution—he, as the addressee on the "Maxi-pad Barnt" package, had a protected possessory interest in the package while it was in transit. Defendant asserts that the provisions in the *Domestic Mail Manual* enabling an addressee to request the redirection of or a hold on in-transit mail created such an interest. Resp BOM 22. He contends that, under those provisions, "he had a right to control and direct the package from the moment the sender deposited the package with the Postal Service"—a right to control the package that, he reasons, gave him constructive possession of it and thus a

possessory interest under Article I, section 9. Resp BOM 24.[1] But, as explained more fully below, the *Domestic Mail Manual* merely gives an addressee the *ability* to redirect or a place a hold on in-transit mail; it does not guarantee an addressee the *right* to those things. That *ability* alone is insufficient to give an addressee like defendant constructive possession of in-transit mail.

1. Contrary to defendant's view, this court in *State v. Casey* and *State v. Barger* did not delete "right to control" from the definition of constructive possession.

The state begins with defendant's characterization of its proposed rule of law with respect to possessory interests under Article I, section 9. He contends that the state has proposed the following rule: "[A] defendant must actually possess [property] or have actually exercised the right to possess [it] in order to assert a possessory interest in it." Resp BOM 17. He bases that contention on the state's citation to *State v. Casey*, 346 Or 54, 203 P3d 202 (2009), and *State v. Barger*, 349 Or 553, 247 P3d 309, *adh'd to as modified on recons*, 350 Or 233 (2011), for the traditional definition of constructive possession, which the parties agree is key to this court's decision whether defendant had a

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[1] Defendant periodically refers to a mail "recipient's contractual right to control a package in transit with a mail carrier" and "the contractual rights guaranteed to the recipient." Resp BOM 19, 41. But he never explains from what contract those rights derive or the nature of those rights. Accordingly, the state will address only the addressee "rights" defendant contends derive from the *Domestic Mail Manual*.

constitutionally protected possessory interest in the package that Officer Castaneda moved from the postal facility's sorting bin. Defendant reads *Casey* and *Barger* as holding that, for purposes of possession crimes, constructive possession does *not* include the unexercised right to control the property in question. Based on that understanding of those cases, he believes the state is proposing an unacceptably narrow definition of construction possession for determining whether a possessory interest exists under Article I, section 9. Defendant misreads both of the cases and misconstrues the state's position. Neither case deletes the "right to control" component from the definition of constructive possession, and the state does not contend otherwise.

In *Casey*, the defendant had been convicted of being a felon in possession of a firearm. 346 Or at 56. On appeal, he challenged the trial court's denial of his motion for judgment of acquittal, arguing that the state's evidence was insufficient to establish his constructive possession of a firearm that a guest left on a counter inside the defendant's residence. *Id*. at 56-58. This court agreed. *Id*. at 64. Defendant asserts that in *Casey* this 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." Resp BOM 17. That rejection, defendant contends, reflects this court's conclusion that, in a prosecution for felon in possession, "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." *Id*. In defendant's view, *Casey* therefore adopts a more narrow definition of constructive possession (excluding "right to control") than the one this court should apply for determining whether an Article I, section 9 possessory interest exists. But *Casey*, correctly read, does not narrow the definition of constructive possession in the way that defendant posits.

In *Casey*, "the parties' debate [concerning whether the defendant possessed his guest's gun] focuse[d] on whether [the] defendant constructively possessed the gun—namely, whether he 'exercise[d] dominion or control' over it." 346 Or at 59-60. This court analyzed "four potential factual bases for finding that [the] defendant constructively possessed [his guest]'s gun," one of which was when the guest left the gun on the counter as he and the defendant stepped out of the defendant's residence to talk to the police." *Id*. at 60. Regarding that factual basis, the court concluded that the evidence could not support a finding of constructive possession:

> There is nothing to suggest that, in putting his gun on the counter, [the defendant's guest] acted any differently from a guest who temporarily puts his or her hat on the host's hat rack; that is, the evidence in the record suggests only that [the defendant's guest] put his gun aside briefly while he spoke with the police. That act is not enough to suggest that [the defendant's guest] entrusted his gun to [the] defendant, left the gun in [the] defendant's custody, *or somehow gave [the] defendant the right to exercise dominion or control over it*.

Id. at 61 (emphasis added). Defendant apparently reads the italicized portion of that passage as rejecting "right to control" as a basis for finding constructive possession. That reading is incorrect. This court was saying only that the evidence could not support a finding that the defendant had a right to control his guest's gun (and that he thus constructively possessed it). Contrary to defendant's view, this court was not deleting "right to control" from the definition of constructive possession.

Defendant similarly misreads *Barger*. There, the question was whether the defendant had committed the crime of encouraging child sexual abuse when he accessed a website that contained digital images of child sexual abuse—more particularly, whether the defendant could "be found to have knowingly 'possess[ed] or control[led]' digital images of child sexual abuse, within the meaning of [the pertinent criminal statutes], based solely on evidence showing that, at some time in the past, he intentionally accessed those digital images using his computer's Internet browser and—by reasonable inference—looked at them[.]" 349 Or at 555-58. The *Barger* court rejected the state's argument that the defendant's "*ability* to direct or influence the images (by, for example, showing that he had the ability to save, copy, print, or e-mail them)" fit the description of "constructive possession in terms of a 'right' to control the object in question" found in *State v. Oare*, 249 Or 597, 599, 439 P2d 885 (1968); *State v. Weller*, 263 Or 132, 501 P2d 794 (1972); and *State v. Barnes*, 120 Or 372,

380, 251 P 305 (1926). *Barger*, 349 Or at 563-64 (emphasis in original). Specifically, the court disagreed with the state's view that when those "cases described constructive possession in terms of the 'right' to control a thing, [the court] meant nothing more than a bare and practical 'ability' to exercise a directing or restraining influence." *Id*. at 564. Thus, far from "explicitly reject[ing] the broader definition of constructive possession used in other contexts (encompassing the '"right" to control a thing')," as defendant contends, Resp BOM 16, the *Barger* court reaffirmed that "right to control" is part of the definition of constructive possession. Moreover, the court made clear that "the mere fact that * * * [a] person * * * has a physical *ability* to exercise some directing or restraining influence over [an object], is insufficient to establish constructive possession of the object." *Barger*, 349 Or at 565 (emphasis in original). Thus, *Barger*, like *Casey*, supports the state's (and defendant's) view that the traditional definition of constructive possession, which applies to the possessory interest issue presented in this case, includes "right to control."

2. Although defendant had the *ability* to redirect or to put a hold on the package in question, he did not have a *right* to control it in those ways; therefore, he did not constructively possess the package while it was in transit.

As noted, the parties agree that whether defendant had a constitutionally cognizable possessory interest in the "Maxi-pad Barnt" package while it was in

transit depends on whether he constructively possessed it during that period. Further, the parties agree on the definition of constructive possession. But agreement ends at defendant's contention that he constructively possessed the package because the *Domestic Mail Manual* gave him the "right" to redirect or to place a hold on the package (*i.e.*, a "right" to control it) while it was in transit. As explained in the state's opening brief, defendant had no such right; the provisions relating to the "Package Intercept" service (the service on which defendant relies for the claimed right of an addressee to have mail redirected or held) is not a guaranteed service. Pet BOM 23. A "right" to something does not exist in the absence of some guaranteeing source. *See, e.g., State v. Harrell,* 353 Or 247, 249, 297 P3d 461 (2013) (noting the "constitutional *right* to a jury trial *guaranteed* by Article I, section 11, of the Oregon Constitution (emphasis added)).

The *Domestic Mail Manual* gave defendant only the *ability* to redirect or place a hold on the package by requesting that service—a service that the Postal Service would provide only if it were able to accommodate the request (one that defendant in fact never made). *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 Feb. 18, 2016)). Defendant does not dispute this description of the Package Intercept service—one that defeats the notion that he had a *right* to control the in-transit package,

that he thus constructively possessed it, and that he therefore had a protected possessory interest in it under Article I, section 9. Defendant's mere ability to redirect or place a hold on mail through a request to the Postal Service did not give him "something akin to a *legal* right" to control the package in the sense required for constructive possession. *Barger*, 349 Or at 564 (explaining *Oare*) (emphasis in original).

In sum, defendant fails to show that the *Domestic Mail Manual* provides a basis for his claimed possessory interest in the package at the point that Officer Castaneda removed it from the sorting bin. In fact, when Castaneda did that, defendant had no possessory interest with which government could interfere, and thus there could be no Article I, section 9 seizure of the package.

B. Alternatively, even if defendant had a possessory interest in the package, its removal from the sorting bin did not significantly interfere with that interest.

Even if defendant were correct that he had a possessory interest in the package when Castaneda removed it from the sorting bin (an interest that defendant describes as the right to redirect or to place a hold on in-transit mail, as set forth in the *Domestic Mail Manual*), the officer's action would not have significantly interfered with that interest and therefore effected an Article I, section 9 seizure. Specifically, defendant fails to explain how the package's removal from the bin prevented him from requesting either the redirection of or a hold on the package.

Defendant instead explains that "when Officer Castaneda took the package out of the stream of mail, he exerted absolute and exclusive dominion and control over the package." Resp BOM 28. He contends that, when Castaneda did that, "the package had no chance of returning to the normal stream of delivery or of delivery by a mail carrier," and thus an Article I, section 9 seizure occurred.[2] *Id.* at 29. The necessary premise of that argument is that *any* movement of a piece of mail out of the normal stream of mail—whether or not the movement affects timely delivery—has constitutional significance (*i.e.*, it amounts to an Article I, section 9 seizure). That premise would be correct only if an addressee enjoyed the right to control precisely how a letter or package moves through the mail stream, including how it is routed, how it is carried, and how and by whom it is delivered. But defendant neither

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[2] Defendant states that "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." Resp BOM 29. That is inaccurate. Helton testified that a package pulled from the sorting bin for investigation typically would be returned to "the sorters" within "a few minutes at most" if the drug-dog inspection and the computer checks revealed nothing to warrant Helton's further attention; the package thus would be "sent out with the expected dispatch" with no delay in delivery time. (Tr 21-22). Helton did not testify that the "Maxi-pad Barnt" package would have been treated differently had the drug dog not alerted to it. And although Officer Castaneda testified that he would not have changed anything about the investigation even without the dog's alert here (Tr 94), he did not dispute Helton's testimony concerning the typical handling of packages that had cleared both the drug-dog inspection and the computer checks.

makes that argument nor cites any authority suggesting that it has merit. Instead, he contends—without analysis—that "the law enforcement arrest of the package seen in this case not only significantly interfered with [his] possessory interest in it, the seizure completely extinguished his right to control [it]." Resp BOM 29.

Ultimately, all that defendant offers is that an Article I, section 9 seizure occurred because his "ability to exercise his possessory interest" was "completely thwarted" when "Officer Castaneda took exclusive dominion and control of the package, * * * 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." Resp BOM 29. But in making that assertion, defendant fails to identify the "possessory interest" that he believes Castaneda's action prevented him from exercising. That alone is reason for rejecting his argument that the officer seized the package.

In any event, if defendant is referring to a possessory interest created by an addressee's alleged "right" to redirect or to place a hold on the package, as already noted Castaneda's action did not prevent him from requesting either of those services. If defendant is suggesting that he had a right to actual possession of the package as it sat in the sorting bin, he unquestionably had no right of access to the airport postal facility and, furthermore, made no attempt to gain possession of the package when it was there. (Tr 31). And if defendant is

suggesting that Castaneda's purpose in removing the package from the bin is relevant to the seizure analysis, he cites no authority for that proposition, and the state is aware of none. Indeed, the purpose of any government interference should have no relevance to that analysis. A possessory interest in property is defined in terms of actual or constructive possession (both of which depend on dominion or control over property), and the constitutional significance of any government interference with respect to either type of possession necessarily turns on the degree to which a person's dominion or control is infringed. *See State v. Juarez-Godinez*, 326 Or 1, 5, 942 P2d 772 (1997) ("Not all governmental intrusions trigger the protections guaranteed by Article I, section 9, of the Oregon Constitution."). The *purpose* of the government's intrusion has no bearing on that analysis.

Finally, if defendant is asking this court to adopt a rule under which the slightest movement of a letter or package out of the "normal stream of mail" (however that is defined) constitutes a seizure, even though the movement does not delay the mail's delivery, this court should decline the invitation. Such a rule elevates to constitutional significance inconsequential movements of mail in a postal facility based on the notion that a person has the right to require the Postal Service to handle mail addressed to him or her in a specifically defined (*i.e.*, "normal") way. The state can think of no source for such a right, and defendant has identified none. Furthermore, under that approach, the following

absurd result, for example, appears inescapable: the postmaster would have to comply with constitutional standards relating to governmental seizures merely to redirect a package to a different delivery truck (a departure from the normal delivery path) for workload or scheduling reasons.

C. The question whether the government must have probable cause and a warrant to temporarily seize property to investigate possible criminal activity is properly before this court.

Defendant argues that this court should not review the Court of Appeals' holding that the government is prohibited from temporarily seizing property to investigate for possible criminal activity unless it is acting pursuant to probable cause and a warrant. That is so, defendant contends, because the state did not present that question to the Court of Appeals.

Although the state indeed did not raise the issue of what standards apply to temporary, investigative seizures of property under Article I, section 9 (limiting itself to the argument that no seizure occurred), the Court of Appeals unnecessarily decided that issue and announced a controlling rule of law on a significant state constitutional question. Under those circumstances, this court should review the Court of Appeals' probable cause/warrant holding.

D. Contrary to defendant's argument, he did not have a protected possessory interest in the package under the Fourth Amendment.

Regarding the issue whether defendant had a Fourth Amendment possessory interest in the "Maxi-pad Barnt" package, defendant's main

argument is that he had such an interest based on *United States v. Jacobsen*, 466 US 109, 104 S Ct 1652, 80 L Ed 2d 85 (1984). But as explained below, *Jacobsen* does not support that conclusion.

In *Jacobsen*, Federal Express employees had "observed a white powdery substance" during their examination of a damaged package. 466 US at 111. "They summoned a federal agent, who removed a trace of the powder, subjected it to a chemical test and determined that it was cocaine." *Id*. The principal question before the Supreme Court was "whether the Fourth Amendment required the agent to obtain a warrant before he did so." *Id*. Along with holding that the government's conduct in viewing and testing the contents of the package did not violate the Fourth Amendment, the Court held that the government reasonably seized the package when federal agents asserted "dominion and control over the package" by permanently taking it into custody before a delivery could be made. *Id*. at 119-21. But the Court did not decide whether, as a general matter, an addressee on in-transit mail has a possessory interest in such mail from the moment it is sent, or whether law enforcement's minor movements of in-transit mail to investigate possible criminal activity (like that which occurred in defendant's case) constitutes a seizure. Defendant's suggestion to the contrary is inaccurate.

At bottom, *Jacobsen* does not conflict with the view that "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). Thus, the state properly relies on *Jefferson* as support for its principal argument that, because defendant had no possessory interest in the "Maxi-pad Barnt" package before its guaranteed delivery time, Officer Castaneda did not seize it. Nor does *Jacobsen* conflict with the view that an addressee's possessory interest in in-transit mail is so minimal before the guaranteed delivery time that a police officer's detention of in-transit mail, without delaying its timely delivery, is not a seizure. *United States v. LaFrance*, 879 F2d 1, 7 (1st Cir 1989). In short, *Jacobsen* does not undermine the state's alternative *LaFrance*-based argument that the package was not seized.

CONCLUSION

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

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 18, 2016, I directed the original Reply 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 3,942 words. 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).

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