IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, vs. JOSE FIGUEROA MARTINES, Respondent.	No. 90926-1 PETITIONER'S RESPONSE TO MOTION TO STRIKE

1. IDENTITY OF MOVING PARTY

The State of Washington seeks the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

Martines's "Motion to Strike Issue Not Raised in Trial Court or Court of Appeals" should be denied. The "issue" is whether the affidavit and warrant in this case may be read in tandem to ascertain whether the warrant authorized a test of the defendant's blood. Ironically, Martines's motion unwittingly confirms a central theme of the State's arguments in its Petition for Review, to wit: that

the Court of Appeals' decision exceeded the proper scope of appellate review, and addressed the incorporation argument in its opinion without proper briefing. Thus, the State never had a meaningful opportunity to address the argument until a motion to reconsider. Because the Court of Appeals opinion is published, and because the Court of Appeals' reasoning might affect the State's arguments in this Court or on remand, the State must address the issue now.

3. FACTS RELEVANT TO MOTION

As described in this factual section, Martines's arguments to suppress evidence that he was intoxicated by drugs shifted shape from the trial court to the Court of Appeals, and the Court of Appeals took the arguments in still other directions.

In the trial court, Martines filed a brief entitled "Motion to Suppress Evidence of Drugs or Drug Testing." CP 7-12. The first five pages recited boilerplate search and seizure law, including a statement in passing that "[r]eference to the warrant affidavit may cure ... a defect [in particularity], but only if the affidavit is physically attached to the warrant and explicitly incorporated by reference."

However, this statement was not followed by any assertion that the warrant and affidavit should not be considered in tandem, and the ½ page substantive portion of the motion said nothing about particularity or the adequacy of the warrant. CP 11. Rather, it simply argued:

> Here, the police and witnesses smell and see signs of alcohol only. There's never any mention of drugs, no signs of drugs, and no DRE investigation. The Court should suppress any evidence of drugs, because there was no probable cause to test for drugs, only alcohol.

CP 12.

The motion was discussed at some length in the trial court but there was no evidentiary hearing. 1RP 31-53. Defense counsel reasoned that there was probable cause to issue a warrant but "I don't think there was probable cause to perform a drug test as opposed to just the alcohol test." 1RP 31. He seemed to acknowledge that the warrant anticipated both drawing the blood and testing the blood, but he argued there was no probable cause to test the blood for *drugs*. Id. at 31 ("And a judge signed off on a blood draw within four hours and subsequent testing at the toxicology lab.") The prosecutor argued that the only thing needed was probable cause to believe the defendant was intoxicated; no

special information was needed to establish drug use. 1RP 33-38. Ultimately, the court ruled that the implied consent statute (RCW 46.23.083) provides that a person who drives in Washington impliedly consents to tests of breath or blood, that probable cause must exist to believe the person is intoxicated, and that no special finding or evidence was needed to check for drugs in addition to alcohol. 1RP 52-54. There was never any discussion about whether the search warrant affidavit could supplement the warrant. It simply was not an issue.

On appeal, Martines argued for the first time that extracting and testing blood are separate searches, and that he was entitled to raise this argument for the first time on appeal because the record was sufficient to support the argument. Br. of Appellant at 6, n.2. He led the State and the Court of Appeals to believe that the warrant and the affidavit could be read together, saying, "the form search warrant document does incorporate the sworn complaint," referring to the search warrant affidavit which references alcohol and drug testing. Br. of Appellant at 9 (citing Appendix A). Later, he argued that "[w]here a search warrant *affidavit* fails to authorize an evidentiary search on the basis of probable cause the evidence

obtained as a result should be suppressed." Id. at 10 (italics added). He tacked on a 2 ¼ page argument essentially restating the argument made in the trial court, that there was no probable cause to check his blood for drugs . Id. at 10-12.

The State responded by arguing that numerous authorities made clear that police may test items lawfully obtained pursuant to a warrant, and that testing Martines's blood for drugs was certainly appropriate under that case law. Br. of Respondent at 7-19.

At oral argument, counsel's argument again shifted back and forth, but he started out by observing that

> the trooper quite properly sought and obtained a warrant for the taking of blood from Mr. Martines and the testing of that blood for alcohol. The trooper did not seek a warrant for the testing of that blood for drugs, and he certainly wasn't granted a warrant for the testing of that blood for drugs.

Recording of Oral Argument, at 00:56 – 1:25.[1] In response to a direct question from one judge, he confirmed that he was *not* challenging the test results for alcohol. Id. at 1:45 - 2:00.

Regarding the warrant and the affidavit, counsel said

> When one reads the warrant in a commonsense manner in conjunction with the affidavit for the warrant which was

[1] http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index-.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20140415 (last accessed 11/19/14).

> specifically incorporated into the warrant, one can say that the warrant authorized alcohol testing.

Id. at 3:10 - 3:26. In response to a question from the court, counsel admitted that he could not say whether the affidavit was physically attached to the warrant. Id. at 3:27 - 4:40. Shortly thereafter, counsel said, "I did not ask the court to not consider what was in the affidavit." Id. at 5:55 – 5:59.

Counsel barely touched upon the argument that became the basis for the Court of Appeals' opinion—that no testing at all (alcohol or drugs) was authorized because testing is a separate search. Id. at 6:00 - 6:25. At the end of his time, counsel said that the warrant did not authorize testing for *drugs* (as opposed to alcohol) and that his "most important" argument was the argument made in the trial court, i.e. that even if the warrant authorized drug testing, there was no *probable cause* to test for drugs. Id. at 6:25 - 6:50.

Apparently regretting the approach he had taken up to that point, counsel for Martines submitted after oral argument what amounted to a supplemental brief, entitled "Statement of The Record and Further Authorities Following Argument." See

Appendix A. Approximately 1 ½ pages of single-spaced text were devoted to answering the warrant/affidavit issue raised by the Court of Appeals at oral argument. The document specifically says that the warrant and affidavit were faxed as a unit to the Seattle Municipal Court for filing along with an inventory and return of warrant. Appendix A at p. 2.

The remaining part of the single-spaced post-argument document was devoted to a CrR 2.3 argument that counsel candidly admitted had never been raised in the trial court or in his Court of Appeals briefing. Appendix A, at p. 4, n.1. The Court of Appeals never called for a response to these newly-minted arguments, nor did it authorize additional briefing by either party.

In its opinion, the Court of Appeals said that a search warrant must *expressly* authorize blood testing of any sort; it was not sufficient to authorize extraction of blood. Even though this requirement had never been announced before, and even though this argument was never advanced in the trial court or in briefing at the Court of Appeals, the Court of Appeals refused to consider the affidavit together with the warrant.

In its motion to reconsider, the State pointed out, *inter alia*, that an appellate court should not presume a set of facts that would undercut the trial court's ruling, especially where the issue was never litigated below. Motion to Reconsider, at 23-25. It was important to consider the affidavit in tandem with the warrant because together the documents make abundantly clear that the only reason police wanted Martines' blood was to test it. Under such circumstances, the warrant must be understood as granting authority to both take and test the blood. The motion was denied without comment. The State preserved this issue in its Petition for Review. Petition, at 8-10.

4. GROUNDS FOR RELIEF AND ARGUMENT

Martines tries by motion to cut off further discussion on a point of fact that he never established in the trial court and that he seemed to concede in his opening brief, and at oral argument. In other words, Martines wants to exploit a gap in the record, on a factual point that he initially conceded, to deprive the State of any meaningful opportunity to litigate the matter. His motion should be rejected. The issue of whether the warrant incorporated the

affidavit did not arise until the Court of Appeals posed a question at oral argument, it was not material to the issues as framed in the trial court and in the Court of Appeals briefing, and it did not become material until the Court of Appeals announced that warrants had to contain express language that has never before been required. In light of that new requirement, it became more important to examine the affidavit and warrant together. It is only fair that the State should be permitted to address those new arguments.

Moreover, the Court of Appeals opinion is published, and it suggests that the State had a duty to inquire whether the affidavit was physically attached to the warrant, even when that issue was never litigated in the trial court, where the warrant expressly incorporates the affidavit, and even where defense counsel admits that the documents were filed as a unit in the Seattle Municipal Court. Appendix A, at 2. The State should have the opportunity to challenge those assertions and their legal import.

Finally, had the State not raised this issue in its Petition for Review, and if the case is remanded to the trial court, Martines

would surely argue that failure to challenge the Court of Appeals opinion on this basis foreclosed the argument on remand.

For these reasons, the State respectfully asks that Martines's motion to strike be denied. This Court is, of course, free to reject the State's arguments but, given the shifting shape of Martines's arguments in the trial court and in the Court of Appeals, and given the novelty of the Court of Appeals opinion, the arguments should be considered on their merits.

Submitted this 19th day of November, 2014.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON, Respondent, v. JOSE MARTINES, Appellant.	No. 69663-7-I STATEMENT OF THE RECORD AND FURTHER AUTHORITIES FOLLOWING ARGUMENT (RAP 10.8)

In answer to the Court's questions at oral argument held Tuesday, April 15, 2014, regarding Mr. Martines' argument that the Fourth Amendment's "particularity" requirement was not satisfied in this case (AOB, Part D.3, pp. 7-10, citing inter alia Andresen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)), and the Court's question regarding the procedures of CrR 2.3, appellant submits the following:

- **State v. Stenson, (1997) 132 Wn.2d 668, 696, 940 P.2d 1239, certiorari denied, 118 S.Ct. 1193 (1997)** (constitutional violation of the Fourth Amendment's "particularity" requirement for search warrants includes rule that such violation may only be "cured" where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with suitable words or reference) (citing State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993)).

Statement of Additional Authorities

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In answer to the Court's question, the record in Mr. Martines' case indicates that the Search Warrant at issue did incorporate the search warrant affidavit by employing language to that effect. Exhibit 20, which is in the Court of Appeals' possession having been designated on appeal by Mr. Martines, is a FAX from the Washington State Patrol to the Seattle Municipal Court several days after the June 16, 2012 incident; it includes (by FAX) the search warrant, and affidavit for search warrant. CP 20 (also supplementally designated on appeal as Supp. CP 94-103 [Sub # 69, designated 6/26/13). This document was included as Appendix A to Appellant's Opening Brief to this Court. The warrant states that it is issued "upon the sworn complaint heretofore made and filed and/or the testimonial evidence given in the above-entitled Court and incorporated herein by this reference[.]").

However, the mere fact that a FAX of the warrant and the warrant affidavit was sent by the Washington State Patrol to the Seattle court as a single multi-page document does not establish that certain pages were ever physically attached to other pages, such that the State could argue that any particularity violation in the warrant pages themselves could be deemed cured or harmless.

The Respondent State of Washington did not respond in its briefing to Mr. Martines' argument that the search warrant in this case failed the Fourth Amendment's particularity requirement, by arguing that the particularity deficiency in the warrant was somehow cured by the affidavit.

Instead, the State contended that Mr. Martines' particularity argument was made by him in order to avoid the weight of authority indicating that the testing of a person's blood for physiological information is not a "search." Brief of Respondent, at p. 18 (contending that "[p]erhaps in recognition that the weight of authority is against him,

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Martines attempts to characterize his argument as an attack on the particularity of the warrant.").

In order to provide any potentially available additional information in answer to the Court's inquiry, appellant on Tuesday April 15, 2014, commenced the process of obtaining the docket in King County District Court case # BUR 0125512 from the Burien court in order to determine if the original search warrant and search warrant affidavit were filed in that court, and thereafter to obtain them. The result of this process will be provided to this Court immediately.

- **Criminal Rule 2.3(d)** (court rule regarding warrants of search and seizure), which provides in part:

> **Execution and Return With Inventory.** The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

- **State v. Ollivier, 178 Wn.2d 813, 852 and n. 16, 312 P.3d 1 (2013)** (stating that CrR 2.3(d) means that if an officer takes property pursuant to the warrant, then the officer, before departure with the property, shall give a copy of the warrant to the person from whose premises the property is taken or post a copy of the warrant) (citing 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.12(a) (5th ed.2012)).

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The record in Mr. Martines' case indicates that the following documents were filed in Mr. Martines' Superior Court file:

*(1) **"Inventory and Return of Property Taken Under Search Warrant"** dated June 17, 2012, which indicates that Mr. Martines "Refused to Sign" in completion of the section entitled **"Acknowledged by Person from whom blood was extracted:** [signature space] ."*

*(2) **"Receipt for Property Taken"** dated June 17, 2012, which indicates "Refused to Sign" in completion of the section entitled **"Acknowledged by Person from whom blood was extracted:** [signature space] ."*

These documents are attached hereto as attachment (1) and attachment (2), respectively.[1]

DATED this 18 day of April, 2014.

Respectfully submitted,

OLIVER R. DAVIS (WSBA 24560)
Attorney for Appellant
Washington Appellate Project

[1] Mr. Martines concedes that no CrR 2.3 issue was raised in the trial court, but the matter is part and parcel of the federal Fourth Amendment requirement of particularity of the warrant itself. See Groh v. Ramirez, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (the Fourth Amendment requires particularity in the warrant, not in the supporting documents, and the high function of the Fourth Amendment's particularity requirement is "not necessarily vindicated" when some other document not delivered or posted says something about the objects of the search); cf. State v. Temple, 170 Wn. App. 156, 162, 285 P.3d 149 (2012) (rule is ministerial in nature rather than flowing directly from Fourth Amendment).

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Attachment 1

12008882

STATE OF WASHINGTON
King COUNTY District COURT

STATE OF WASHINGTON, Plaintiff, v. Martines, Jose Figeroa, Defendant.	NO. BURB125512 INVENTORY AND RETURN OF PROPERTY TAKEN UNDER SEARCH WARRANT

A sample of blood consisting of 2 tubes was extracted from the person of, Martines, Jose Figeroa in the County of King June 17th, 2012, at 0504 (time) by Alexey Kosinaya, who is employed by Valley Medical Hospital as a ☐ physician ☐ registered nurse ☐ licensed practical nurse ☐ nursing assistant as defined in chapter 18.88A RCW ☐ physician assistant as defined in chapter 18.73 RCW ☐ health care assistant as defined in chapter 18.135 RCW ☑ technician trained in withdrawing blood.

Acknowledged by Person from whom blood was extracted: Refuse to Sign

Date: June 17th, 2012 Time: 0504

Acknowledged by Person who extracted the blood: Alexey Kosinaya

Date: June 17th, 2012 Time: 0504

Distribution—Original filed with Court Clerk within 3 days of service of warrant; 1 copy (Prosecutor), 1 copy (Officer).

Attachment 2

12008882

STATE OF WASHINGTON
King COUNTY District COURT

STATE OF WASHINGTON, Plaintiff, v. Martines, Jose Figeroa, Defendant.	NO. BUR0125512 RECEIPT FOR PROPERTY TAKEN

The following property was taken from the person of Martines, Jose Figeroa pursuant to a Search Warrant having the same cause number:

A sample of blood consisting of 2 tubes.

Acknowledged by Person from whom blood was extracted: Refuse to Sign

Date: June 17th 2012 Time: 0504

Acknowledged by Person who extracted the blood: Alexey Kusinga

Date: June 17th, 2012 Time: 0504

Distribution—Original Receipt left with the person from whom the blood was drawn or left with medical staff if person is unavailable; 1 copy (Court Clerk); 1 copy (Prosecutor); 1 copy (Officer); 1 copy (person who extracted the blood).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 69663-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Erin Becker, DPA
King County Prosecutor's Office-Appellate Unit

☐ appellant

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 18, 2014

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the respondent, at Oliver@washapp.org, containing a copy of the Petitioner's Response to Motion to Strike, in State v. Jose Figueroa Martines, Cause No. 90926-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of November, 2014.

L Brame

Name:
Done in Seattle, Washington

OFFICE RECEPTIONIST, CLERK

To: Brame, Wynne
Subject: RE: State v. Jose Figueroa Martines, Supreme Court No. 90926-1

RECEIVED 11-19-14

From: Brame, Wynne [mailto:Wynne.Brame@kingcounty.gov]
Sent: Wednesday, November 19, 2014 1:44 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Whisman, Jim; Oliver Davis (oliver@washapp.org); wapofficemail@washapp.org
Subject: State v. Jose Figueroa Martines, Supreme Court No. 90926-1

Please accept for filing the attached documents (Petitioner's Response to Motion to Strike) in State of Washington v. Jose Martines, Supreme Court No. 90926-1.

Thank you.

James M. Whisman
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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at James Whisman's direction.