IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. JOSE MARTINES, Respondent.	Supreme Court 90926-1 COA No. 69663-7-I RESPONDENT'S MOTION TO STRIKE ISSUE NOT RAISED IN TRIAL COURT OR COURT OF APPEALS

I. IDENTITY OF MOVING PARTY

COMES NOW the RESPONDENT, Jose Martines, through the undersigned attorney, and upon all the files, records, and proceedings herein, moves this Court for the relief designated below.

II. RELIEF SOUGHT

This Court should strike the portions of the Brief of Petitioner that raise a factual and legal matter not litigated in the Superior Court nor properly raised in the Court of Appeals.

III. ARGUMENT IN FAVOR

This Court should strike the portions of the Brief of Petitioner

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

State of Washington in the present case in which the Petitioner contends that the inadequate search warrant, which does not grant any search authority for the search conducted, may be 'cured' if one looks at the search warrant affidavit submitted by the police when seeking the warrant. PFR, at p. 4; see State v. Stenson, 132 Wn.2d 668, 696, 940 P.2d 1239, certiorari denied, 118 S.Ct. 1193 (1997); State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993).

1. The present case involves a search in the form of testing Mr. Martines' drawn blood for physiological data, which search was not authorized by the search warrant that was issued. The issue has been framed, *inter alia*, as one of complete absence of warrant authority, and lack of particularity. Under the Fourth Amendment, search warrants must be issued only

> upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. 4; see State v. Perrone, 119 Wn.2d 538, 546-47, 834 P.2d 611 (1992). Thus the warrant must be particular, and the particularity of the search and type of material therefore cannot be located in the warrant affidavit. Groh v. Ramirez, 540 U.S. 551, 557–58, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (stating that the high function of the Fourth Amendment's particularity requirement

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

demands particularity in the warrant itself, and is not vindicated when some other document not delivered or posted, such as the affidavit, says something about the objects of the search); CrR 2.3(d); State v. Ollivier, 178 Wn.2d 813, 852 and n. 16, 312 P.3d 1 (2013); 2 LaFave, Search and Seizure – A Treatise on the Fourth Amendment, § 4.12(a) (5th ed. 2012).

2. The issue of physical attachment is an issue of fact. The trial court is the proper placer to litigate matters of fact. State v. Hardy, 37 Wn. App. 463, 469, 681 P.2d 852 (1984). Issues of fact are not for the appellate courts. The State's newly-minted claim in its Petition for Review that the affidavit was physically attached to the warrant would be entirely dependent on a host of predicate factual issues – whether the affidavit was attached to the warrant at the time of the warrant's execution, including upon Mr. Martines when his blood was taken, and when the forensic search of the blood was conducted by the toxicologist so as to provide limitation as to what could be searched for, among others. The State long ago forewent its opportunity to establish the facts necessary to even proffer this claim.

3. The defendant's trial-level motion to suppress, in surveying the law in the pertinent area, virtually invited and welcomed the State

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

to raise any factual issue of physical attachment of the warrant affidavit, as a cure for the defective warrant. CP 7 (Defendant Martines' motion to suppress, at p. 5). The State did not do so. In the trial court, the State could have, at the motion to suppress, questioned Trooper Tardiff about attachment, or asked the court to review the paper documents (which in any event bear no indications they were ever attached at any time). The State did not do so. AOB Appendix A, Appendix B; Exhibit 20.

4. Although the Court of Appeals would not have been the proper place to raise this factual issue for the first time, the State never raised any factual issue or legal argument regarding cure of the defective warrant in its Court of Appeals briefing or in its subsequent oral argument to the Court of Appeals.

5. When the Court of Appeals in oral argument wondered aloud about the issue of cure of the warrant by physical attachment, appellant Mr. Martines responded by showing with two filings, that the record failed to show any physical attachment of the warrant affidavit to the warrant, either at the time of execution of the warrant, service of the warrant, or during the search, nor at any time. Filing of April 18, 2014 (attachments 1 and 2); Filing of April 23, 2014. The State filed nothing. The Court of Appeals properly and correctly

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

noted that the State did not make and was not making this argument for "cure" on appeal. Decision, at p. 13 note 2.

6. As the parties to this case bound by the Rules of Appellate Procedure, indigent criminal defendants on appeal, and the State of Washington, are prohibited in a RAP 12.4 motion for reconsideration from presenting new arguments that were not originally proffered to the Court of Appeals. Under RAP 12.4(c), a motion to reconsider should be able to state with particularity that the appellate court has overlooked or misapprehended certain points of law or fact that were placed before it. RAP 12.4(c). The argument that the State seeks to raise before this Court now was not placed before the Court of Appeals then – even though that would have been one tribunal too late anyway. The State failed to raise any issue regarding cure of the defective warrant by physical attachment of some other document such as the affidavit filed in seeking the warrant to the warrant. Subsequently, an issue not properly raised in the Court of Appeals is therefore not properly before this Supreme Court. State v. Johnson, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992).

7. The Petitioner is not entitled to raise new legal arguments in its Petition for Review, and the Court of Appeals properly refused to consider the matter when raised for the first time in the State's

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

motion to reconsider. There is no possible basis for the State to expect exemption from these rules so that it can press its new second theory following its failure to succeed with its first. Even in the Superior Court, where a party may sometimes preserve an issue for the Court of Appeals by raising it in a motion for reconsideration to the trial court, that allowance will never apply where the new issue is dependent on a factual matter not previously litigated. Reitz v. Knight, 62 Wn. App. 575, 581 n. 4, 814 P.2d 1212 (1991). Certainly, a Petition for Review to this Court is not the time to advance new claims of fact that the party could have litigated in the fact-finding tribunal, which is now two entire court systems in the distant past.

IV. CONCLUSION

Based on the foregoing, Mr. Martines respectfully requests that this Court strike that portion of the State's Petition for Review raising a new factual and legal issue of physical attachment of the warrant affidavit to the warrant.

DATED this 17 day of November, 2014.

Respectfully submitted,

OLIVER R. DAVIS (WSBA 24560)
Washington Appellate Project (91052)
Attorneys for Appellant

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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 **Washington State Supreme Court** under **Case No. 90926-1**, 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:

☒ petitioner James Whisman, DPA
[paoappellateunitmail@kingcounty.gov]
King County Prosecutor's Office – Appellate Unit

☐ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 17, 2014

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: paoappellateunitmail@kingcounty.gov; Oliver Davis
Subject: RE: 909261-MARTINES-MOTION

Received 11/17/14

From: Maria Riley [mailto:maria@washapp.org]
Sent: Monday, November 17, 2014 3:31 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: paoappellateunitmail@kingcounty.gov; Oliver Davis
Subject: 909261-MARTINES-MOTION

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Respondent's Motion to Strike

Oliver R. Davis- WSBA #38394
Attorney for Respondent
Phone: (206) 587-2711
E-mail: oliver@washapp.org

By
Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org