No. 47315-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RAFAEL GUTIERREZ MEZA,

Petitioner.

PETITIONER'S AMENDED OPENING BRIEF

Timothy K. Ford, WSBA #5986
Tiffany M. Cartwright, WSBA #43564
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

ATTORNEYS FOR PETITIONER

ORIGINAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

I. INTRODUCTION

In June 2014, the State charged Rafael Meza with one count of first-degree theft. At the same time that it filed the Information, the State filed a two-page *ex parte* motion seeking to freeze all the funds in Mr. Meza's credit union account. Without citation to any legal authority, the State asserted that such a freeze was justified because it believed the funds were "evidence in a felony offense."

In fact, the State at most had probable cause to believe that $15,000 related to the alleged offense had passed through the account two months earlier. The funds in the account at the time of the freeze order were not shown to be traceable to the alleged offense, but were from various sources related to Mr. Meza's paving business. Nonetheless, the trial court granted the State's motion and froze Mr. Meza's account the same day. Since that time, Mr. Meza has been unable to access any of the funds in that account to pay for his defense.

In February 2015, the trial court denied Mr. Meza's motion to vacate the order freezing the funds in his account. Mr. Meza sought discretionary review of that denial, and a Commissioner of this Court granted discretionary review, finding that the trial court committed probable error when it refused to vacate the Order freezing funds, which substantially limited Mr. Meza's freedom to act by restricting his access to

money for living expenses, the operation of his business, and the costs of his defense.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order Freezing and Holding Funds in his credit union account, dated June 27, 2015.

2. The trial court erred in entering the Order of February 13, 2015, denying Mr. Meza's Motion to Vacate the Order Freezing and Holding Funds in his credit union account.

Issues Pertaining to Assignments of Error

1. Do trial courts have the authority of law to order *ex parte*, and without any trial or evidentiary hearing, that all funds in a criminal defendant's bank account be frozen? (Assignments of Error 1 and 2.)

2. If so, may a trial court enter such an *ex parte* order to seize funds without probable cause to believe that those funds are evidence or proceeds of a crime, and without a particular designation of certain funds to be seized? (Assignments of Error 1 and 2.)

3. Even if so, must a trial court release any funds which have not been seized by statutory and constitutional process to enable the defendant to use those funds to prepare his defense against the criminal charges? (Assignment of Error No. 2.)

III. STATEMENT OF THE CASE

On June 27, 2014, Petitioner Rafael Meza was charged with one count of first degree theft. CP 1–3.[1] The affidavit of probable cause that accompanied the Information alleged that "Mr. Meza swindled $75,000 from Mr. [John] Armstrong, in that he sold to Mr. Armstrong an asphalt plant that he had, in fact, sold to another person almost six months earlier." CP 12.

The probable cause affidavit further alleged that in August 2013, Mr. Meza agreed to sell an asphalt plant to a Mr. Cliff Mansfield for $95,000, and that Mr. Mansfield made partial payments toward that purchase from October 2013 through January 2014. CP 9, 11. These payments were wired or deposited into Mr. Meza's account at Twin Star Credit Union. CP 11. Then, in March 2014, after Mr. Mansfield failed to make payments for two months, Mr. Meza allegedly verbally agreed to sell the plant for $75,000 to Mr. Armstrong instead of Mr. Mansfield. CP 7. Mr. Armstrong wired a "security deposit" of $15,000 to Mr. Meza's account at Twin Star Credit Union on April 11, 2014. *Id.*

[1] At the time Mr. Meza filed his opening brief, the Clerk's Papers had not been prepared or indexed, so Mr. Meza relied on citations to the Appendix filed with his motion for discretionary review. The only changes to this amended brief are the substitution of citations to the Clerk's Papers ("CP") and the Verbatim Report of Proceedings for the previous citations to the Appendix.

The affidavit further recited that Mr. Armstrong says he later flew to Seattle and paid Mr. Meza the remaining balance in cash,[2] although he has no receipt or other evidence that such a payment was made. CP 8. The affidavit states that despite receiving this cash payment from Mr. Armstrong, Mr. Meza accepted additional payments from Mr. Mansfield, which were wired to the Twin Star Credit Union account. CP 11. Once the agreed upon price was paid, on June 18, 2014, Mr. Meza gave Mr. Mansfield a bill of sale. CP 9.

In summary, the affidavit stated that Mr. Armstrong made one wire transfer of $15,000 to Mr. Meza's Twin Star Credit Union account. It is undisputed that the rest of the money in the account came from Mr. Mansfield, the legitimate buyer of the asphalt plant, or from other customers of Mr. Meza's paving business.

---

[2] Although Mr. Armstrong told Lewis County Sheriff's Deputy Justin Rogers that he paid the "remaining amount" in cash, CP 8, he later claimed in his civil suit against Mr. Meza and Mr. Mansfield that he only paid $55,000 in cash, leaving $5,000 of the purchase price still to be paid. *See* CP 43.

There is no evidence that any money from this alleged cash payment ever entered the Twin Star account. A search warrant was issued for the records of the Twin Star account the day before the arrest, and showed no cash deposits of that amount or anything close. *See* CP 11. Nor was any such cash found in searches of Mr. Meza's business and home at the time of his arrest. RP 11:14–17.

The Information charged Mr. Meza with one count of theft from "John Armstrong." CP 1–2. The same day that it filed the Information, the State filed a two-page "Motion for an Order Freezing and Holding Funds." CP 4–5. Without citation to any legal authority, the State asked the court to "freeze and hold all accounts in the name of Rafael Gutierrez Meza and specifically, all funds in account number 16632800," alleging the funds "are evidence in a felony offense." CP 4. The State represented that its request was based on "the facts contained in the affidavit of probable cause filed herewith." CP 5. The State cited no legal authority in support of its request, but simply alleged that the funds were evidence. CP 4. The trial court granted the motion that same day, *ex parte*, and ordered the Credit Union to freeze and hold all funds in Mr. Meza's account "as evidence in a criminal proceeding." CP 14–15.

After being arraigned and obtaining counsel, Mr. Meza filed a motion to vacate the order freezing and holding funds. CP 16–21. In support of this Motion, Mr. Meza produced documentary evidence confirming that Mr. Mansfield purchased the plant and that Mr. Meza had transferred and delivered the plant to him after he made the final installment payment of the agreed upon purchase price. CP 36–61. In its response, the State produced nothing contrary and abandoned its argument that the funds were "evidence." Instead, without any new proof or

documentation, it claimed for the first time (and contrary to the language of the Order freezing the account) that the funds were seized under Criminal Rule 2.3(b) as "the fruits of crime." CP 62–67. It also newly claimed that all of the money from Mr. Armstrong *and* Mr. Mansfield (who now owns the asphalt plant) was "stolen property" that could properly be seized to be returned to its allegedly rightful owners. CP 64–65.

The trial court denied Mr. Meza's Motion to Vacate the Order freezing his funds, ruling that it was lawful to freeze all the money in that "particular account" because "[t]here was the probable cause to believe that it was related to the crime." CP 99–100. The court held that although the funds were not seized pursuant to a search warrant that complied with CrR 2.3, it nonetheless had constitutional authority to issue the freeze order based on the holding in *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010). CP 101–102.[3]

[3] After the court's ruling on the motion to vacate, and Mr. Meza's rejection of its plea bargain offer, the State amended its information to add one count of first degree theft, two counts of second degree theft, and one count of money laundering with respect to the payments from Mr. Mansfield. The State did not file an additional affidavit of probable cause. Mr. Meza moved to dismiss the counts related to payments from Mr. Mansfield under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1985) and CrR 8.3(c). *See* Notice of Change of Circumstances filed by Respondent on May 16, 2015. On May 13, 2015, the trial court granted Mr. Meza's motion and dismissed all the charges related to Mr. Mansfield. *Id.*

Like the original charge, the pending charges against Mr. Meza therefore stem solely from the payments he allegedly received from Mr. Armstrong.

Mr. Meza also sought discretionary review of the trial court's Order denying his motion to vacate the Order Freezing and Holding Funds in his credit union account. Court Commissioner Eric B. Schmidt issued a ruling granting and accelerating review on May 18, 2015.

IV. ARGUMENT

A. The Trial Court Erred When It Entered, And When It Refused to Vacate, the Order Freezing and Holding the Funds in Mr. Meza's Credit Union Account.

To seize money in a person's bank account is to deprive that person of property, which requires due process under the Fourth and Fourteenth Amendments to the United States Constitution and Article I sections 3 and 7 of the Washington Constitution. *See State v. Marks*, 114 Wn.2d 724, 727–28, 790 P.2d 138 (1990) (discussing suppression of evidence where cash was seized outside the scope of a search warrant); *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007) (bank accounts implicate privacy interests under Article I section 7 and seizure of records requires warrant or subpoena). Additionally, Washington Constitution Article I section 7 requires "authority of law" for governmental seizures of private property. *See State v. Johnson*, 75 Wn. App. 692, 702, 879 P.2d 984 (1994) (holding that Article I section 7 provides greater protection for private property than the Fourth Amendment).

In this case, the trial court held that the "authority of law" allowing the seizure of Mr. Meza's bank account was Criminal Rule 2.3(b)—although that authority was never cited, and its procedural requirements were not complied with, in the Motion to Freeze or the Order itself. In support of this ruling, the trial court relied on *State v. Garcia-Salgado*, in which the Washington Supreme Court upheld an order for a defendant to submit to DNA testing issued under CrR 4.7 after a contested hearing. 170 Wn.2d at 176. The *Garcia-Salgado* Court held that although the DNA testing constituted a search and was thus subject to constitutional warrant requirements, the search "may be made pursuant to an order entered under CrR 4.7(b)(2)(vi)"—which specifically authorizes court orders that "require or allow the defendant to: . . . permit the taking of samples of or from the . . . defendant's body"—so long as that order met the other constitutional requirements for a search warrant. 170 Wn.2d at 188.[4]

Here, the Order Freezing and Holding Funds was not issued under CrR 2.3 or the separate authority of any other statute or court rule. The "Legal Authority" section of the State's Motion requesting the freeze order did not actually cite any legal authority—it merely asserted that the funds "were evidence in a felony offense" (an assertion the State has since

[4] Because the search in *Garcia-Salgado* was of a defendant's body, it was also subject to additional requirements not relevant here. 170 Wn.2d at 188.

disavowed). *See* CP 4, 62–67. The Order Freezing and Holding Funds was not one authorized by CrR 4.7 and was not issued in the kind of adversarial omnibus proceeding to which that Rule applies.

Although the State now claims that the Order was issued under CrR 2.3, it did not meet any of the procedural requirements of that Rule: it was directed to a credit union, not a peace officer; it ordered the credit union to freeze all of Mr. Meza's accounts, rather than requiring a peace offer to search for and seize particular things; no inventory was made of the assets that were frozen; and no return on the warrant was served on the owner or person in possession, or filed with the court.

Even if CrR 2.3(b) could provide the requisite "authority of law," the Order did not meet the constitutional requirements for a search and seizure. The affidavit filed with the Information did not establish probable cause to believe that the funds in the account were evidence or fruits of a crime, and the Order did not describe with particularity that only certain funds should be seized.

Finally, CrR 2.3(b) cannot provide authority to seize funds that are not the actual "fruits of the crime." Here, the State did not seize the same money that was allegedly stolen; it seized a bank account containing fungible electronic currency, into which only one allegedly ill-gotten

payment—Mr. Armstrong's $15,000 "security deposit"—had been deposited and intermingled with other, lawful funds.

1. The "freezing" order was not a search warrant.

Article I, section 7 of the Washington Constitution "is qualitatively different from the Fourth Amendment and provides greater protections." *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). It "is grounded in a broad right to privacy and protects citizens from governmental intrusion into their private affairs without the authority of law." *Id.* (internal quotation marks omitted). Unless a "carefully drawn exception" applies, "the authority of law required by article, I section 7 is a valid warrant." *Id.* at 868–69.

The State has never disputed that freezing Mr. Meza's credit union account was an intrusion into his private affairs. It has never argued that an exception to the warrant requirement applies. And there is no dispute that the State's Motion to Freeze the account and the Order granting it neither cited CrR 2.3 nor complied with its requirements for obtaining or executing a search warrant. The Motion never characterized the order as a search warrant; the Order was not directed to a "peace officer" as required by CrR 2.3(c); the Order imposed an indefinite blanket freeze on Mr. Meza's accounts, rather than directing a seizure within a specified period of time, as required by CrR 2.3(b); and there was no inventory of the funds

seized returned to the court, as required by CrR 2.3(d). There was not even a written record of the amount seized.

The State first identified its claimed legal authority for its actions when Mr. Meza filed a Motion to Vacate the order freezing his accounts. Then the State made two new arguments: first, that the authority for the freeze came from CrR 2.3(b), because the freeze order was the equivalent of a search warrant; and second, that despite drawing its authority from CrR 2.3, the State did not have to comply with its requirements based on the holding in *Garcia-Salgado*. CP 62–63.

Garcia-Salgado did not go that far. In that case, the order directing the defendant to provide a cheek swab was authorized by a separate Court Rule, CrR 4.7, and the State complied with that rule. 170 Wn.2d at 181–82. The Supreme Court specifically noted that "[b]y court rule, a trial court may order a criminal defendant to permit the State to take samples from the defendant's body." *Id.* at 183. The Court held that in that context, the CrR 4.7 order could substitute for a warrant requirement so long as it met the constitutional requirements of a neutral magistrate, probable cause, and particularity. *Id.* at 188.

But in this case, the State has never identified a single rule, statute, or other legal authority authorizing a court to freeze a criminal defendant's

assets in the manner it did here.[5] Instead, its argument is that it could have achieved the same result with a search warrant issued under CrR 2.3—even though it did not ask for one or comply with any of that Rule's procedural requirements. *Garcia-Salgado* did not hold that prosecutors and trial courts can simply ignore the court rules at their discretion, make up their own rules for seizing private property, and then argue after the fact that it makes no difference because they could have done the same thing another way. If that were so, the court rules would be meaningless.

2. The "freezing" order did not meet the constitutional requirements for a search warrant.

Even if the Order Freezing and Holding Funds could be transformed into a search warrant, the trial court erred when it held that the order satisfied the constitution under *Garcia-Salgado* simply because there is probable cause to believe the money in the account is "related to" a crime. This was error for three reasons:

a. *The funds in Mr. Meza's credit union account are not "evidence" of anything.* The State's original motion to freeze the account stated without elaboration that the funds "are evidence in a felony offense charged under this cause number" (CP 4) and the trial court entered the Order on that basis. CP 14, 102. But before it sought that order, the State

[5] There is authority in Washington law for seizing assets—after a conviction, not before. *See* RCW Chapter 10.105.

had already executed a search warrant and seized the bank records for that account. CP 11. The bank records provide all of the information regarding deposits, wire transfers, and withdrawals that the State might seek to use as evidence in its case against Mr. Meza. *See* CP 4.

The funds in the account themselves, however, are evidence of nothing. They are not held in marked bills or in any form that contains any information about their source. They are held as fungible electronic credits in Mr. Meza's name. There is no possibility—and no physical way—the prosecution could ever place the money itself (as opposed to the separately-seized records showing where money in the account came from and went) into evidence at trial. And the parties' ability to offer the credit union records into evidence and draw inferences from them is in no way dependent on freezing Mr. Meza's access to his money.

To this day, the State has not cited a single legal authority for the proposition that completely fungible electronic currency may be seized as evidence of a crime. In fact, the State appears to have abandoned this argument. Although it was the sole basis for the original freeze order, and the trial court reaffirmed that basis when it denied the motion to vacate, the State did not defend it in front of the trial court or in its opposition to the motion for discretionary review. *See State v. Massey*, 60 Wn. App. 131, 139, 803 P.2d 340 (1990) (arguments are deemed waived or

abandoned when a party fails to pursue them). In the absence of any evidentiary value, the decision to freeze Mr. Meza's access to his money is needlessly punitive, and it does not meet the requirements of the Washington and U.S. Constitutions as set forth in *Garcia-Salgado*.

b. *There is no probable cause to believe that the funds are "fruits of a crime."* CrR 2.3(b). The *Garcia-Salgado* court followed the well-established rule that, when evaluating the validity of a warrant, a court may "consider only the information that was brought to the attention of the issuing judge or magistrate at the time the [order] was issued." 170 Wn.2d at 187 (quoting *State v. Murray*, 110 Wn.2d 706, 709–10, 757 P.2d 487 (1988)). A "prosecutor's assertions cannot support the court's determination of probable cause." *Id.* at 188.

When the trial court issued the order freezing Mr. Meza's bank account, and when it denied the Motion to Vacate, the only sworn testimony before it was the affidavit regarding probable cause filed with the original Information. That Information charged Mr. Meza with one count of theft, based solely on money received from Mr. Armstrong. CP 1. The affidavit stated that Mr. Armstrong wired $15,000 of that money to Mr. Meza's credit union account in April 2014. CP 7. The other money identified in the affidavit came from Mr. Mansfield who, as the affidavit showed, received a bill of sale for the plant after he made his

final payment. CP 9–11. Although the affidavit states that Mr. Meza made withdrawals from the account, it failed to disclose unrelated deposits from Mr. Meza's other customers, and it did not identify the amount or source of any of the money in the account at the time the order was requested on June 27, 2014.

In other words, the only thing that the affidavit shows is that at one point in time, a $15,000 "security deposit" from Mr. Armstrong entered Mr. Meza's account. The affidavit does not establish that the $15,000 was still in the account on June 27, 2014, or that any other money in the account was the fruits of a crime. *See State v. Goble*, 88 Wn. App. 503, 510, 945 P.2d 263 (1997) (probable cause for search warrant requires reason to believe items sought will be present at the time of the search). Nonetheless, the trial court entered an order directing the Credit Union to "freeze and hold *all accounts* in the name of Rafael Gutierrez Meza, and specifically, *all funds* in account number 16632800 . . . until further order of this Court." CP 14 (emphasis added).

After Mr. Meza filed his Motion to Vacate, the State came up with a new theory: that Mr. Mansfield, who received and now owns the asphalt plant he purchased, was also a victim of the crime. The State's theory was based on the premise that Mr. Meza "failed to correct Mr. Mansfield's impression that he had a valid purchase agreement" because

Mr. Armstrong had an "adverse claim" to the asphalt plant after he gave Mr. Meza the security deposit. CP 64–65. The prosecutor represented to the Court that because Mr. Armstrong later sued Mr. Mansfield, and Mr. Mansfield paid him $7,000 to go away, the entire purchase price of the asphalt plant that Mr. Mansfield paid to Mr. Meza was a theft. RP 14:8–19. Based on that assumption, the prosecutor then argued that all of the money in Mr. Meza's account was stolen property, and filed an amended information charging Mr. Meza with four additional counts based on the payments he received from Mr. Mansfield, who received the asphalt plant he paid for at the agreed purchase price.

This was a flawed legal theory, which the trial court later recognized when it dismissed those four additional counts because there was insufficient evidence to establish a prima facie case of the crime charged. *See* note 3, above. But more important for present purposes, it was based on no evidence submitted on "oath or affirmation," as the Fourth Amendment and CrR 2.3 require. The only charges now pending against Mr. Meza—as at the time the order freezing his account was entered—arise from the payments he allegedly received from Mr. Armstrong. And the State admits that the only money from Mr. Armstrong that ever passed through Mr. Meza's bank account was the $15,000 that even Mr. Armstrong described as a "security deposit."

Without the prosecutor's unsupported assertions that the money received from Mr. Mansfield could also be considered fruits of a crime, the affidavit filed with the Information and Motion to Freeze Mr. Meza's account demonstrates at most probable cause to believe that in April 2014, two months before, Mr. Meza's account contained a $15,000 "security deposit" allegedly "swindled" from Mr. Armstrong. The affidavit could not support a determination that *any* of the funds in the account on June 27, 2014—let alone *all* of them—were the fruits of a crime. There was thus no probable cause to seize the account.

c. *The Order did not state with particularity the funds to be seized.* As discussed above, at most there was probable cause to believe the $15,000 security deposit wired by Mr. Armstrong two months earlier was proceeds of a crime, and nothing establishing that the same $15,000 was still in the account. But even if there had been probable cause to seize $15,000 from Mr. Meza's account, that is not what the court ordered. Instead, it ordered the credit union to freeze the entire account, whatever it contained. CP 14.

Even where the warrant power is applicable and properly invoked, a search warrant must limit any "search to the specific . . . things for which there is probable cause to search" because of "the requirement of particularity [which] ensures that the search will be carefully tailored to its

justifications." *State v. Wright*, 61 Wn. App. 819, 824, 810 P.2d 935 (1991); *see Garcia-Salgado*, 170 Wn.2d at 184–85 ("A warrant may issue only where . . . the warrant particularly describes the place to be searched and the items to be seized.").

Because it is hard to distinguish property that is stolen from that which is legitimately owned, "a warrant describing property alleged to have been stolen must be more specific than one describing controlled substances." *State v. Chambers*, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997). "[O]bjects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search." *State v. Neth*, 165 Wn.2d 177, 185, 196 P.3d 658 (2008). A warrant can only authorize seizure of all items of a particular type—such as all of a defendant's funds—if "probable cause exists to seize all items of a particular type described in the warrant . . . ." *State v. Higgins*, 136 Wn. App. 87, 91–92, 147 P.3d 649 (2006) (emphasis added) (quoting *United States v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004)). The fact the Order was not limited to the $15,000 security deposit from Mr. Armstrong or in any other way, and there was not probable cause to seize all the money in Mr. Meza's account, is yet another reason the Order would fail, even if it were a search warrant.

3. The criminal forfeiture statute provides exclusive authority for seizing fungible assets allegedly connected to a crime.

The trial court also erred when it held that Criminal Rule 2.3(b) provided sufficient "authority of law" to seize Mr. Meza's funds. As discussed above, the affidavit did not establish that the $15,000 Mr. Meza allegedly swindled from Mr. Armstrong was in his account when the State seized it. What the State actually sought to do was not to seize "stolen property," but to tie up an equal amount of Mr. Meza's money so that it could later be used for restitution.

There is no authority under Washington law for using a search warrant (or a court order) for this purpose. A defendant's legitimate assets do not become "fruits of a crime" under CrR 2.3(b) simply because the State has accused the defendant of stealing something else. Instead, the only method for confiscating property that the State believes is traceable to a felony offense is the criminal forfeiture statute, RCW 10.105.010. Under that statute, the State may use a court order to seize property that is subject to forfeiture and use that property for restitution. RCW 10.105.101(2), (6). The same is true in federal court, where the federal forfeiture statute, 21 U.S.C. § 853, governs the seizure of property that is "derived from" proceeds of certain felonies. *See* 21 U.S.C. § 853(a), (e).

But unlike the federal statute, Washington's statute does not allow seizure of assets before trial to preserve their availability if they are subject to forfeiture. The statute expressly provides that "[n]o property may be forfeited under this section until *after* there has been a superior court conviction of the owner of the property for the felony in connection with which the property was employed, furnished, or acquired." RCW 10.105.010(1) (emphasis added); *see also* 13B Wash. Prac., Criminal Law § 4302 (2014-2015 ed.) ("This general forfeiture statute only applies *after* the property owner has been convicted of a felony."). The State must also comply with strict procedural requirements within 15 days of seizing the property, and it must prove that the property can be traced to the proceeds of the felony. RCW 10.105.010(3)-(5); *Tri-City Metro Drug Task Force v. Contreras*, 129 Wn. App. 648, 653, 119 P.3d 862 (2005) (property is not subject to forfeiture unless it is traceable). In this case, there is no dispute that the State failed to comply with the statute, and the time limits for following the required procedures have long since run.

This failure is another fatal flaw in the State's seizure position. "[T]he power to order forfeiture is purely statutory," and "there is no authority anywhere for the State's contention that the court ha[s] the inherent power to order forfeiture" outside the procedures authorized by statute. *State v. Alaway*, 64 Wn. App. 796, 800-01, 828 P.2d 591 (1992).

"The government is estopped from proceeding in a forfeiture action if it fails to follow statutory procedures." *Sam v. Okanogan Cnty. Sheriff's Office*, 136 Wn. App. 220, 225, 148 P.3d 1086 (2006); *see also Alaway*, 64 Wn. App. at 801 ("The State having failed to comply with the statute, Alaway is entitled to have his property returned."). The State's failure to comply with the only "authority of law" that might allow the seizure of Mr. Meza's bank account, is another reason the "freezing" order violated the Constitution.

B. The Order Freezing Mr. Meza's Untainted Assets Violated His Rights Under the Sixth Amendment and Washington Constitution Article I § 22.

Because it is now undisputed that at least some of the assets frozen by the State are untainted, the freeze order also violates Mr. Meza's rights under the Sixth Amendment and Article I § 22 of the Washington Constitution. Mr. Meza sought to vacate the Order and filed for discretionary review partly on the basis that the Order restricted his ability to pay for his defense of the charges against him. CP 20; MDR 20. In granting discretionary review, Court Commissioner Schmidt found that Mr. Meza satisfied the second prong of RAP 2.3(b)(2) because "[u]nder the freeze order, Meza cannot access any of the funds in his account, run his business, or pay for his defense counsel, substantially limiting his

freedom to act outside this litigation." Ruling Granting Review and Accelerating Review at p. 6.

The State has responded to these arguments by relying on *United States v. Monsanto*, 491 U.S. 600, 616 (1989) and *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 631 (1989). *See* CP 66–67; Response to Motion for Discretionary Review at p. 18. In those cases, the United States Supreme Court held that a pre-trial freeze of traceable *tainted* assets in a federal criminal prosecution—where pretrial asset forfeiture is expressly authorized by statute—does not violate the Sixth Amendment. *See Monsanto*, 491 U.S. at 603–04; 21 U.S.C. § 853(e)(1)(A). But there is no similar statutory authority here; and even the federal cases do not authorize a freeze on *untainted* assets. At least one federal circuit court has held that the Sixth Amendment prohibits the restraint of untainted assets when they are needed to retain counsel. *United States v. Farmer*, 274 F.3d 800, 804-06 (4th Cir. 2001). [6] And as shown above, here there is no doubt that the State has frozen assets that are untainted.

---

[6] On June 8, 2015, the United States Supreme Court granted *certiorari* in *Luis v. United States*, No. 14-419, which presents the question "[w]hether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments." *See Luis v. United States*, Case File, SCOTUSblog, available at http://www.scotusblog.com/case-files/cases/luis-v-united-states/?wpmp_switcher=desktop (last visited June 9, 2015).

As noted above, the *Monsanto* and *Caplin* decisions do not authorize what the State did in this case, because there is a federal criminal forfeiture statute that allows for pre-trial restraint of forfeitable assets, and there is no analogous statute or other authority in Washington law. But even if there were such authority, the State has not shown that any of the money in Mr. Meza's account at the time of the freeze order was illegally obtained—by probable cause or any other standard. Because Mr. Meza needs his assets to prepare and present his defense, the most fundamental of a criminal defendant's constitutional rights, *In re Oliver*, 333 U.S. 257, 68 S.Ct. 495, 92 L.Ed.2d 682 (1998), the freeze Order thus violated the Sixth Amendment and Article I, Section 22 of the Washington Constitution, as well.

V. CONCLUSION

Freezing the assets of a criminal defendant at the outset of a prosecution is an extreme exercise of State power over someone who has not been convicted of a crime. Because there is no authority of law allowing the State to freeze a defendant's bank account prior to trial, and in any event there is no probable cause to believe that the funds in Mr. Meza's account were evidence or proceeds of a crime, the Court should reverse the decision of the trial court and vacate the Order Freezing and Holding the Funds in his credit union account.

DATED this 2 day of July, 2015.

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

By_____
Timothy K. Ford, WSBA #5986
Tiffany M. Cartwright, WSBA #43564
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that on this 6th day of July, 2015, I caused to be filed this document entitled PETITIONER'S AMENDED OPENING BRIEF with the Clerk of the Court, and I also served a copy on all parties or their counsel of record as follows:

Counsel for the State of Washington

Sheila Weirth
Sara Beigh
Deputy Prosecuting Attorneys
Lewis County Prosecuting Attorney's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532
Sheila.Weirth@lewiscountywa.gov
Sara.Beigh@lewiscountywa.gov

[ ] Via Facsimile
[X] Via First Class Mail
[X] Via E-mail
[ ] Via Messenger
[ ] Via Overnight Delivery

Linda M. Thiel, Legal Assistant