

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 REPLY BRIEF

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I. REPLY IN SUPPORT OF PETITIONER

A. The State misrepresents the nature and significance of the funds in Mr. Meza's credit union account.

The State's Response Brief ("RB") defends the order freezing Mr. Meza's account by telling the Court over and over that "[t]he money inside the account is also fruits of crime" (RB 10), "the EFTs [Electronic Funds Transfers] were acquired as a consequence of the defendant's thefts" (*id.*), and "the money left in the account was the illegal proceeds obtained from the buyers" (RB 16).

These statements ignore—and in fact misrepresent—that the only charges pending against Mr. Meza relate to money he allegedly received from Mr. Armstrong, which included only one EFT into Mr. Meza's account, for \$15,000, months before the freeze order was issued. That was so at the time the State sought the order and at the time the trial court denied the motion to vacate it, and it is so today. There were and are no criminal charges against Mr. Meza connected to the money wired into the account by Mr. Mansfield, and the affidavit of probable cause supporting the freeze order did not allege or show that Mr. Meza had committed any crime against Mr. Mansfield. *See* CP 6–13. Almost all the funds in Mr. Meza's account were received from Mr. Mansfield as legitimate proceeds of the sale of the asphalt plant, and the only money from

Mr. Armstrong that ever entered the account was the \$15,000 security deposit wired on April 11, 2014. CP 11. The State’s assertions that “most” of the money in the account was illegal proceeds are simply false.

The State also argues that the freeze order was justified because “[b]etween October 26, 2013 and June 19, 2014, Meza withdrew approximately \$89,000 in cash in over 41 transactions of \$3,000 and \$5,000 each.” RB 3. But again, the State’s own affidavit of probable cause shows that \$105,000 of the money in Mr. Meza’s account (which also contained deposits from other customers) came from the legitimate payments made by Mr. Mansfield. CP 11. It is not a crime for the owner of a small business to make routine withdrawals of legitimate proceeds from the bank account he uses for that business. The only real relevance of Mr. Meza’s withdrawals is to eliminate any probable cause to believe that Mr. Armstrong’s \$15,000 security deposit was still in the account ten weeks later. See Opening Brief (OB) 15–17.

The State also makes an even more farfetched claim that because of the withdrawals from the account—which began long before Mr. Meza even had contact with Mr. Armstrong—“Mr. Meza also appeared on the verge of fleeing the country with the proceeds.” RB 1. Apart from the fact that the trial court did not authorize or uphold the freeze order on this basis, this argument is at best a stretch. The ongoing withdrawals were

matched by ongoing deposits, and they appear to reflect nothing more than the regular course of a small business paying and receiving bills in cash. *See* CP 11. In any event, there is no authority for the proposition that suspicion that a criminal defendant might flee the country authorizes the State to seize his bank account. If there were, every defendant's bank account could be taken, because every defendant could use money to hide or flee.

The State's misleading rhetoric about the funds and activity in Mr. Meza's bank account should not distract the Court from the undisputed fact that when the State froze Mr. Meza's account, only \$15,000 from the alleged theft had ever entered it, and there was no cause to believe that \$15,000 was still there. The order nonetheless prohibited Mr. Meza from accessing any of the money in his account, whatever the source, with no legal authority or precedent for such a seizure.

B. *Garcia-Salgado* and the cases it cites do not authorize the seizure of Mr. Meza's account.

The State does not dispute that freezing Mr. Meza's bank account was an intrusion into his private affairs within the meaning of article I, section 7 of the Washington Constitution, or that the Constitution requires the freeze order to be supported by authority of law in the form of "a valid warrant." *State v. Hinton*, 179 Wn.2d 862, 868–69, 319 P.3d 9 (2014).

Instead, the State argues that *State v. Garcia Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010), allows the seizure of a criminal defendant's bank account (and, presumably, anything else) without a warrant or any other type of order authorized by the court rules, so long as the seizure is based on probable cause and an adequate description of what is to be seized. See RB 4–6. The State claims that there is “no language within the [*Garcia-Salgado*] decision” limiting its holding to seizures that are authorized by a separate statute or court rule, such as CrR 4.7(b), the rule at issue in that case. RB 6.

This assertion is belied by the very first paragraph of the *Garcia-Salgado* opinion, which says the question presented was whether “the order met the requirements of the Fourth Amendment and article I, section 7 because it was entered by a court *pursuant to CrR 4.7(b)(2)(vi) after a contested hearing.*” 170 Wn.2d at 180 (emphasis added). The “analysis” section of the opinion begins “[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 (emphasis added). In the conclusion, the opinion describes its holding this way: “A search that intrudes into the body may be made *pursuant to an order entered under CrR 4.7(b)(2)(vi)* if the order is supported by probable cause based on oath or affirmation,”

and meets other constitutional requirements for body searches. *Id.* at 188 (emphasis added).

This consistent language makes it clear that *Garcia-Salgado* was limited to the context of court-ordered searches or seizures authorized by statute or court rule, which thus have “the authority of law.” It makes sense that, where an order is in compliance with a more specific rule that authorizes a particular type of seizure, there is no need to seek a traditional search warrant under CrR 2.3(b). But where no other statute or court rule authorizes the specific intrusion, allowing any court order to replace a warrant would render CrR 2.3(b) meaningless. Why would the police or prosecution ever bother with obtaining a warrant under CrR 2.3(b) if they could simply make up a new type of court order and the rules for executing it?

The federal cases cited by the State don’t say otherwise. Like *Garcia-Salgado*, these cases uphold only a particular narrow class of searches specifically authorized by another body of law. In *Garcia-Salgado*, that class was body searches authorized by CrR 4.7(b). In the federal cases, that class is x-ray searches at border crossings. *United States v. Mendez-Jimenez*, 709 F.2d 1300, 1302 (9th Cir. 1983); *United States v. Erwin*, 625 F.2d 838, 840 (9th Cir. 1980). In that narrow category of cases, x-ray searches are allowed when there is a “clear

indication . . . that the suspect is concealing contraband within his body,” a standard that is less stringent than probable cause and therefore limited to of border crossings. *Mendez-Jimenez*, 709 F.2d at 1302; see *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308, 87 L.Ed.2d 381 (1985) (“Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant . . .”). It was only in that distinct context that the court in *Mendez-Jimenez* held that “[a] court order compelling a person to submit to an x-ray examination is the equivalent of a search warrant for a body cavity search.” 709 F.2d at 1302 (citing *Erwin*, 625 F.2d at 840). The cases cited by the State say nothing about and have no applicability to searches and seizures away from the border.

C. Issuance of an order seizing property with no authority of law is not a “ministerial” error.

In some desperation, the State also argues that obtaining the freeze order without citing any legal authority, or even attempting to comply with the rules for getting a warrant, was a “ministerial” error that should be held harmless under a line of cases involving motions to suppress evidence because of failures to comply with the procedural rules for execution and return. Those cases hold that such *post facto* technical

errors “do[] not compel invalidation of the warrant or suppression of its fruits.” *State v. Temple*, 170 Wn. App. 156, 162, 285 P.3d 149 (2012) (citing *State v. Parker*, 28 Wn. App. 425, 426–27, 626 P.2d 508 (1981)). These cases do not support the freeze on Mr. Meza’s accounts, for at least two reasons.

First, this is not a suppression motion because no evidence was seized pursuant to the freeze order. All the evidence regarding Mr. Meza’s credit union account and transactions was seized before the State arrested Mr. Meza and froze his bank account, under an actual search warrant. *See* CP 11. Pursuant to that warrant, the State seized records of the deposits and withdrawals made to and from the account. Mr. Meza has not asked to suppress that evidence at trial. He is simply seeking access to the money itself, which cannot be placed in evidence in any event, and would prove nothing if it was. *See* Pet. Op. Br. at 13. Accordingly, cases governing the standard for excluding evidence from use in a criminal case are inapposite.

Second, these cases are also inapplicable because the freeze of Mr. Meza’s account was *not* carried out pursuant to a “valid search warrant.” *Temple*, 170 Wn. App. at 162. This is not a case where the police attempted to comply with the traditional procedure for obtaining a valid warrant, but some technical mistake was made. *Compare, e.g.,*

Parker, 28 Wn. App. at 426 (copy of the warrant given to the defendants was not signed and dated); *State v. Kern*, 81 Wn. App. 308, 318, 914 P.2d 114 (1996) (officer prematurely filed the inventory and return before the records were actually in police custody); *State v. Temple*, 170 Wn. App. at 161 (errors made in the search warrant return and inventory).¹

In contrast, here the State made no attempt to seize Mr. Meza's account using a valid search warrant. If the State wanted to comply with the warrant requirement, it obviously knew how to do so. When it decided to go further and freeze all of the funds in Mr. Meza's account, it did so without even a pretense of legal authority. *See* CP 4–5. Only months later, after Mr. Meza had retained counsel and challenged the freeze order, did the State come up with its *post hoc* rationalization that the freeze order was the functional equivalent of a search warrant/“ministerial error” theory.

Taking personal property in an *ex parte* proceeding without any legal authority is not a “ministerial error.” It is an affront to the Constitution and is not authorized by Washington law.

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¹ In *State v. Grenning*, also cited by the State, the court held that the search was timely, so there was no question of whether an untimely search was a ministerial error. 142 Wn. App. 518, 532, 174 P.3d 706 (2008).

D. The funds in Mr. Meza's account are not evidence, fruits, or instrumentalities of a crime.

Even if a jerry rigged freeze order could replace a search warrant, the State's argument would fail because the funds in Mr. Meza's account were not evidence of a crime, fruits of a crime, or instrumentalities of a crime.

First, the State abandoned its argument that the funds were evidence in its response to the motion to vacate and its opposition to the petition for discretionary review. CP 63; Opp. to Discretionary Review at 9. That argument should be deemed waived. *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).

Even if the argument that the funds were evidence were not waived, it makes no sense. That is so even putting aside the fact (*see* page 7, above) that there is no physical way to put the bits of computer information that correspond to the funds into evidence in court. If those bits could somehow be handed to the jury and the jury could somehow perceive them to equate with a certain dollar amount, how could that have any "tendency to make the existence of the fact that the defendant was receiving payment from two different people for the sale of a single asphalt plant and was using the account to convert his criminal proceeds to

cash” more probable, as the State claims? RB 10 (citing ER 401). The electronic currency in Mr. Meza’s account is not traceable to any particular transaction, and does not itself make the existence of those transactions any more or less probable. It has no evidentiary value whatsoever, and therefore could not be seized as evidence, even with a proper warrant. *See State v. Thien*, 138 Wn.2d 133, 140, 977 P.2d 852 (1999) (probable cause requires reasonable belief that “evidence of the crime can be found at the place to be searched”).

The State relies on *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), for the proposition that fungible electronic currency may be seized as evidence of a crime. RB 11. But that is not what *Daccarett* holds. *Daccarett* is a civil forfeiture case, where the government sought to seize electronic currency because it was property traceable to narcotics trafficking and thus subject to civil forfeiture under 18 U.S.C. § 981. *See Daccarett*, 6 F.3d at 43. The government seized the electronic funds from intermediary banks in New York that were transferring the funds between international banks in Europe and Colombia. *See id.* at 43–45. The defendants argued that the electronic transfers through the intermediary banks were not “seizable properties” because they were merely “electronic communications.” *Id.* at 54. The court rejected that argument and held that bank credits were seizable property, even when held only briefly by

an intermediary bank participating in a wire transfer. *Id.* The court said nothing about the evidentiary value of electronic funds.

We agree that, like those in *Daccarett*, the electronic credits in Mr. Meza’s account are property—property that cannot be taken without due process and authority of law. But that does not mean the electronic banks credits themselves—as opposed to the records of the transactions at issue—are *evidence* of anything.

Second, the State’s argument that the funds are fruits of a crime relies on its false claim that “the EFTs were acquired as a consequence of the defendant’s thefts.” RB 10. As we have shown, only one EFT—the security deposit of \$15,000 from Mr. Armstrong on April 11, 2014—is alleged to be a theft. *See* OB 15; pp. 1–2, above. And there has never been any showing that the \$15,000 transfer from Mr. Armstrong remained in the account at the time of the freeze order. There thus was no probable cause to believe that “fruits” of any alleged crime were in the account when it was frozen, and there is no probable cause to believe there are illegally acquired funds there now.

Third, the State makes a brand new argument that the account could be frozen as an “instrumentality” of the crime, because Mr. Meza withdrew money from the account. RB 11. The Court should not consider this argument because it was raised for the first time on appeal.

See, e.g., Powell v. Sphere Drake Ins. P.L.C., 97 Wn. App. 890, 899, 988 P.2d 12 (1999) (“We generally do not consider arguments raised for the first time on appeal.”). But even if the Court did consider it, the State’s argument reduces to the absurd because it has no limiting principle. Under the State’s theory, it would have the authority to freeze all the funds in any bank account into which a criminal defendant deposited any amount of money alleged to be the proceeds of a crime. If a teenager stole \$50 and deposited it into a college savings account containing \$50,000, the State could freeze the entire account to prevent the suspect “from continuing to use the account to launder and dissipate the evidence and fruits of his criminal activity.” RB 11. The same argument could be made about a car used to drive the stolen funds to a bank; or a house where they were hidden. There is no precedent in Washington law for this type of blanket authority to freeze any assets that have allegedly been commingled with or connected to the proceeds of a theft.

E. The freeze order did not meet the requirements of probable cause and particularity, and those issues are within the scope of this Court’s review.

The State argues that the scope of this Court’s discretionary review is limited to whether “the trial court committed error in ruling that *Garcia-Salgado* authorized the freeze order” and, therefore, questions of probable cause and particularity are not before the Court. RB 12. This is not a fair

reading of the Commissioner's Ruling granting and accelerating review. That Ruling says, without qualification, "Meza's motion for discretionary review is granted." Ruling at 7.

The Motion for Discretionary Review, like the arguments in the trial court, clearly included the probable cause and particularity issues. *See* Mot. Discretionary Review at 10–17. The Commissioner summarized the legal issue accepted for review as whether "the trial court committed probable error in issuing an order seizing Meza's bank account and the funds therein and in later denying his motion to vacate that order." *Ibid.* The only limitation in the ruling was that the Commissioner "decline[d] to address Meza's argument that the criminal forfeiture statute, RCW 10.105.010, is the exclusive means by which the proceeds of a bank account can be seized by the State." *Id.* at 6. But the Commissioner did not exclude even that argument from the scope of review.

Moreover, *Garcia-Salgado* only "authorizes" court orders to function as warrants when they meet the constitutional requirements of probable cause and particularity. *Garcia-Salgado*, 170 Wn.2d at 186. Thus, whether the freeze order met those requirements is inherent in the question whether it was "authorized" by *Garcia-Salgado*.

As we have shown, there was no probable cause to seize Mr. Meza's accounts, as evidence or proceeds. *See* pages 8–10, above. At

most, the affidavit submitted in support of the freeze order established probable cause to believe that \$15,000 allegedly stolen from Mr. Armstrong went into Mr. Meza's account on April 11, 2014. CP 11. But that is not enough to establish probable cause to believe that any identifiable stolen property remained in the account more than two months later on June 27. The State admits that "probable cause requires a nexus between criminal activity and the item to be seized," RB 13, and it does not dispute that "objects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search," *State v. Chambers*, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997). But the State then goes on to argue that because \$120,000 related to the purchase of the asphalt plant went into the account over eight months, and \$89,000 in cash was withdrawn, "[i]t is logical to infer that \$31,000 was still left in the account" and that "the money left in the account was the illegal proceeds obtained from the buyers." RB 16.

The State's math does not add up. The affidavit of probable cause shows that *after* Mr. Armstrong wired the \$15,000 security deposit on April 11, \$50,000 was wired to Mr. Meza's account from Mr. Mansfield, the legitimate buyer of the asphalt plant. CP 11. Thus, if \$31,000 was left in the account as the State assumes, that money is at least "equally consistent with lawful and unlawful conduct," *Chambers*, 88 Wn. App. at

644, and “do[es] not constitute probable cause to search,” *id.*; *see also*, *e.g.*, *State v. Maddox*, 152 Wn. 2d 499, 505, 98 P.3d 1199 (2004) (“Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity *and that evidence of the criminal activity can be found at the place to be searched*” (emphasis added) (citing *State v. Thein*, 138 Wn.2d at 140)). And that is so even apart from the fact that, since there are no criminal charges related to the payments from Mr. Mansfield, it is unclear how more than \$15,000 at *any* point in time could be “the illegal proceeds obtained from the buyers,” as the State repeatedly says. *See* page 1, above.

The State’s argument that it met the constitutional particularity requirement also fails. The State claims that the freeze order “allowed the credit union management to identify with particularity what should be frozen” because it provided the bank with Mr. Meza’s name as well as the specific account number. RB 17. But the State does not dispute that the freeze order applied to all of the funds in that account, not only the \$15,000 the State alleged was stolen. The State also does not dispute that it may only seize all items of a particular type—such as all of the money in a bank account—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). In fact, the State appears to concede that the freeze order may have been “overbroad if some portions are supported by probable cause and others are not.” RB 18.

Lacking any defense to Mr. Meza’s claim that the freeze order fails to satisfy the particularity requirement for a warrant, the State instead claims that this issue is not properly before the Court because Mr. Meza did not bring a separate motion challenging the breadth of the freeze order, as opposed to moving to vacate the order in its entirety. But Mr. Meza has consistently challenged the breadth of the freeze order in his motion to vacate and in his motion for discretionary review. *See, e.g.*, CP 16–17, 78–79; Mot. Discretionary Review at pp. 16–17. And as discussed above (at page 14), the question whether the freeze order meets the constitutional requirement of particularity is inherent in whether it is authorized to function as a warrant under *Garcia-Salgado*. The particularity issue is squarely within the scope of review here and the State has offered no substantive defense of the breadth of the freeze order.

F. Mr. Meza’s other arguments are also within the scope of this Court’s review.

The State similarly does not answer Mr. Meza’s arguments based on Washington’s criminal forfeiture statute and the Sixth Amendment,

claiming they are outside the scope of this Court's review. RB 12. But as we have shown, although the Commissioner declined to address whether the criminal forfeiture issue constituted a second probable error, he ultimately granted Mr. Meza's petition for review in its entirety, and did not exclude either of the two questions presented by Mr. Meza's Motion. *Compare* Mot. Discretionary Review at p. 1 *and* Ruling Granting and Accelerating Review at pp. 6–7. Accordingly, this Court may address all of the issues presented in Mr. Meza's motion for discretionary review. The State's refusal to respond to some of Mr. Meza's arguments should act as a concession of those issues.

Moreover, the criminal forfeiture statute provides important context for reviewing the State's claim that the freeze order functioned as a valid search warrant. Throughout this case, the State has repeatedly cited to cases interpreting the federal criminal and civil forfeiture statutes. *See, e.g.*, RB 11 (citing *Daccarett*, 6 F.3d 37); CP 66–67 (citing *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) and *United States v. Monsanto*, 491 U.S. 600 (1989)). But Washington's statute differs significantly from the federal statutes in that it applies only *after* the property owner has been convicted of a felony. RCW 10.105.010(1). This demonstrates a clear legislative intent to reject the pretrial seizure of traceable assets that are not specifically identifiable stolen property, as is

allowed under federal statute. And even the federal statutes do not allow the seizure of untainted assets that are *not* traceable to a criminal offense, which is what the State is attempting to do in this case. In other words, even if this Court does not reverse based on Mr. Meza's arguments regarding the forfeiture statute, the existence and limited reach of those statutes further demonstrate the unlawful and unprecedented nature of the State's actions.

II. CONCLUSION

If the State prevails on this appeal, it will have the power to freeze the legitimate assets of a criminal defendant whenever it alleges that those assets have been commingled with the alleged proceeds of a crime, even if doing so prevents the criminal defendant from using his legitimate assets to pay for the costs of his defense. Through three rounds of briefing in front of the trial court and this Court, the State has been unable to provide any legal authority or precedent for this type of indiscriminate pretrial seizure under Washington law. The Court should reject the State's attempt to vastly extend its power over criminal defendants without trial or conviction, and it should vacate the order freezing Mr. Meza's credit union account.

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DATED this 10th day of August, 2015.

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

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CERTIFICATE OF SERVICE

I certify that on this 10th day of August, 2015, the Respondent State of Washington was served with a copy of **Appellant's Reply Brief** by email via the COA electronic filing portal to Sheila Weirth and Sara Beigh, attorneys for Respondent, at the following email addresses:

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Dated this 10th day of August, 2015, at Seattle, Washington.


Windy Walker, Legal Assistant

MACDONALDA HOAGUE & BAYLESS

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