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## ARGUMENT

### **I. THE OFFICERS VIOLATED MS. MARKHAM’S FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES AND HER STATE CONSTITUTIONAL RIGHT TO PRIVACY.**

#### A. Introduction and Standard of Review

Warrantless searches and seizures are *per se* unconstitutional, subject only to a few limited exceptions. U.S. Const. Amend. IV;<sup>1</sup> Wash. Const. Article I, Section 7; *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eislefeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). An arrest warrant provides authority only for a limited intrusion; after executing the warrant, police must “promptly leave.” *State v. Hatchie*, 161 Wn.2d 390, 402 *and n.* 8, 166 P.3d 698 (2007).

When the government seeks to introduce evidence seized without a search warrant, it bears the “heavy burden” of establishing an exception to the warrant requirement by evidence that is “clear and convincing.” *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The validity of a

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<sup>1</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.*

B. By ordering Ms. Markham to come out of Mr. Teitzel's home, the officers unreasonably and unlawfully invaded the home (after Mr. Teitzel had already exited the home).

While arresting Mr. Teitzel outside the shed in which he lived, the officers unlawfully invaded his home by ordering Ms. Markham to come out of the home. *See, e.g., State v. Young*, 123 Wn.2d 173, 184-185, 867 P.2d 593 (1994) (the home can be invaded without physical intrusion); *State v. Holeman*, 103 Wn.2d 426, 693 P.2d 89 (1985) (same).

Respondent (apparently) does not dispute that officers invaded the home. Brief of Respondent, pp. 19-21. Accordingly, the narrow question is whether the invasion was (a) reasonable under the Fourth Amendment, and (b) done with the "authority of law" required by the state constitution. U.S. Const. Amend. IV, Wash. Const. Article I, Section 7.

1. The arrest warrant did not provide authority for the invasion under either the Fourth Amendment or Article I, Section 7.

The arrest warrant did not provide justification for the invasion, because Mr. Teitzel was outside before the intrusion occurred. RP (8/3/09) 16-18. As Respondent implicitly acknowledges, an arrest warrant

justifies invasion into a home to search for the person named in the warrant, but only when the suspect is actually inside the residence. Brief of Respondent, p. 19, *quoting Hatchie, supra*.

2. The invasion was not authorized as a “protective sweep” under the Fourth Amendment.

Respondent asserts that the invasion was justified as part of a “protective sweep.” Brief of Respondent, p. 21. In limited circumstances, the Fourth Amendment allows a protective sweep following an arrest—but only if the search is limited to immediately adjoining areas or if officers hold a reasonable belief, based on specific and articulable facts, that the area to be swept harbors an individual “posing a danger to those on the arrest scene.” *Maryland v. Buie*, 494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). Some federal courts have extended the rule to allow search of a residence when the arrest occurs outside the residence. *See, e.g., United States v. Colbert*, 76 F.3d 773 (6<sup>th</sup> Cir. 1996).

Even if the “protective sweep” rationale can justify intrusion based on an arrest occurring outside a residence, nothing here suggested that the two women inside Teitzel’s home were armed or dangerous. At worst, they were co-conspirators planning a drug deal who banged the door shut during Teitzel’s arrest. RP (8/3/09) 55. Although the officers may have been concerned for their safety—Deputy Young, in particular, feared that

someone might come out of the shed shooting (RP (8/3/09) 76, 78, 79)—this concern was not based on specific and articulable facts establishing that the occupants posed a danger to those outside the structure. *Buie, supra*. An intrusion of this sort cannot be justified by “generalized suppositions about the behavior of a particular class of criminal suspects.” *DeMayo v. Nugent*, 517 F.3d 11, 15 (1<sup>st</sup> Cir. 2008) (internal quotation marks and citations omitted).

The warrantless intrusion was also unreasonable under the Fourth Amendment. *Buie, supra*. Accordingly, the evidence must be suppressed. *Eisfeldt, supra*. Ms. Markham’s conviction must be reversed and the case dismissed with prejudice. *Id.*

3. The invasion was not authorized as a “protective sweep” under Article I, Section 7.

Respondent cites only cases decided under the Fourth Amendment, and provides no authority suggesting a protective sweep of a home may be justified under Article I, Section 7 when the arrest occurs outside the residence. Brief of Respondent, pp. 21-27. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

It is “well established” that Article I, Section 7 differs “qualitatively” from the Fourth Amendment, “and in some areas provides

greater protections than does the federal constitution.” *State v. Surge*, 160 Wn.2d 65, 70-71, 156 P.3d 208 (2007). Accordingly, a *Gunwall* analysis is unnecessary. *Id.* (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). Thus the only question, when analyzing an issue under Article I, Section 7, is whether that provision “affords enhanced protection in the particular context.” *Surge*, at 70-71. In order to “determine the existence and scope of the jealously guarded exceptions that provide ‘authority of law’ absent a warrant,” courts examine “the constitutional text, the origins and law at the time our constitution was adopted, and the evolution of that law and its doctrinal development.” *State v. Valdez*, 167 Wn.2d 761, 773, 224 P.3d 751 (2009). Applying these factors here, the Court should not recognize a “protective sweep” exception under Article I, Section 7; nor should it authorize entry of a home under such an exception following an arrest outside. Wash. Const. Article I, Section 7.

First, the constitutional text explicitly protects against governmental invasion of the home. Wash. Const. Article I, Section 7. This argues against a “protective sweep” exception extending throughout a person’s home, whether the arrest occurs inside or outside. *See, e.g., Young*, at 185 n. 2 (“[I]n examining our state constitution’s explicit protection of the *home*, the fact the search occurs at a home is central to the analysis.”) (Emphasis in original).

Second, the U.S. Supreme Court did not recognize a “protective sweep” exception to the warrant requirement until 1990. *Buie, supra*. The Court found the roots of the exception in *Terry v. Ohio* and *Michigan v. Long*, both decided in the latter half of the twentieth century. *Id.*, at 332 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)). Thus in 1889, when Washington’s constitution was adopted, the “protective sweep” exception was more than a century in the future.

Third, Washington courts have never recognized a “protective sweep” exception to the state constitution’s warrant requirement. Nor has any Washington decision allowed officers to intrude into a home following an arrest occurring outside the home. In addition, Washington courts have been hesitant to expand the scope of permissible searches based on concerns for officer safety. For example, officer safety does not justify seizure of a non-arrested passenger’s purse following arrest of the driver. *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002).

For these reasons, the Court should not recognize a “protective sweep” exception to Article I, Section 7, and should not allow officers to intrude into a person’s home in conjunction with an arrest occurring outside the home. The warrantless invasion violated Ms. Markham’s right to privacy without authority of law. Wash. Const. Article I, Section 7.

Accordingly, the evidence must be suppressed. *Eisfeldt, supra*. Ms. Markham's conviction must be reversed and the case dismissed with prejudice. *Id.*

C. Ms. Markham was arrested without probable cause.

Any search incident to arrest must be preceded by a lawful custodial arrest based on probable cause. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). Probable cause is not established unless officers have facts sufficient to cause a reasonable person to believe that an offense has been committed. *Id.* "[M]ere suspicion" or proximity to others who are guilty of criminal activity is inadequate. *State v. Chavez*, 138 Wn.App. 29, 34, 156 P.3d 246 (2007); *State v. Little*, 116 Wn.2d 488, 505, 806 P.2d 749 (1991) (citing *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)).

An arrest occurs whenever a reasonable person would believe, under the circumstances, that he or she was under arrest. *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). A reasonable person would believe she was under arrest when ordered out of a home by armed officers, directed to put down an object, instructed to keep her

hands from her pockets, and grabbed by the arm.<sup>2</sup> *Reichenbach*.

Accordingly, Ms. Markham was arrested before the officers observed the contents of her pockets. RP (8/3/09) 19-21, 56-60.

At the time of the arrest, officers lacked probable cause: at best, they had “mere suspicion”—based on fragments of a conversation, in which it was difficult to ascertain who said what—that the occupants of the shed were planning a drug delivery at another location.<sup>3</sup> *Chavez*, at 34; RP (8/3/09) 86-88, 99, 105, 107-108. In the absence of probable cause, the arrest was unlawful, and the search violated Ms. Markham’s rights under the Fourth Amendment and Wash. Const. Article I, Section 7. *Moore, supra*. The evidence must be suppressed and the case dismissed with prejudice. *Id*.

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<sup>2</sup> Similar facts resulted in a finding of arrest in *State v. Werth*, 18 Wn.App. 530, 535, 571 P.2d 941 (1977). Respondent mischaracterizes the holding of *Werth*, and implies that *Werth* is no longer good law. Brief of Respondent, pp. 33, 34. *Byers*, the case upon which the *Werth* court relied, has been overruled only to the extent it “suggests that an arrest occurs whenever a suspect is not free to go.” *State v. Williams*, 102 Wn.2d 733, 741 n. 5, 689 P.2d 1065 (1984) (overruling *State v. Byers*, 88 Wn.2d 1, 6, 559 P.2d 1334 (1977)).

<sup>3</sup> Respondent correctly points out that Haggerty’s testimony implicated all three occupants of the shed in the conversation. Brief of Respondent, p. 5-6. However, the record does not unequivocally establish complicity on the part of both women.

D. The officers seized Ms. Markham without a reasonable suspicion that she was involved in criminal activity or that she was armed and dangerous.

A seizure occurs following an officer's display of authority whenever a reasonable person would not feel free to leave or otherwise disregard the officer's request. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009); *State v. Beito*, 147 Wn.App. 504, 509, 195 P.3d 1023 (2008). In this case, Ms. Markham was seized when she was ordered out of Teitzel's house in the presence of armed officers, directed to remove her hands from her pockets, told to drop her wine bottle, and (ultimately) grabbed by the arm. RP 18-22, 56-61, 79, 90-95. *Harrington*, at 663-670; *see also, e.g., State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999) *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007); *State v. Martinez*, 135 Wn.App. 174, 179, 143 P.3d 855 (2006); *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988).

When they seized Ms. Markham, the officers did not have specific and articulable facts giving rise to an objectively reasonable belief that she was engaged in criminal activity or was armed and presently dangerous. *State v. Xiong*, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008); *State v. Allen*, 138 Wn.App. 463, 470, 157 P.3d 893 (2007). "[M]ere suspicion" that she was involved with drugs did not justify the seizure; nor did a generalized

concern for officer safety. *Chavez*, at 34; *State v. Parker*, 139 Wn.2d 486, 501, 987 P.2d 73 (1999); *see also, e.g., State v. Setterstrom*, 163 Wn.2d 621, 626-627, 183 P.3d 1075 (2008).

The seizure violated Ms. Markham's rights under the Fourth Amendment and Article I, Section 7. Accordingly, her conviction must be reversed and her case dismissed with prejudice. *Harrington, supra*.

**II. THE ADMISSION OF MS. MARKHAM'S UNWARNED CUSTODIAL STATEMENT VIOLATED HER FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.**

Custodial interrogation occurs whenever a person in custody is subjected to "either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). A person is "in custody" for *Miranda* purposes whenever, under the circumstances, a reasonable person would have felt unable to terminate the interrogation and leave.<sup>4</sup> *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Where the state seeks to admit custodial statements, it bears the "heavy burden" of proving that the statements were obtained following a knowing, intelligent, and voluntary

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<sup>4</sup> This standard differs from that used under the Fourth Amendment.

waiver of the right to counsel and the right to remain silent. *Miranda*, at 475.

Here, Ms. Markham was in custody for *Miranda* purposes when she was asked about the substance in her pocket. RP (8/3/09) 22. She had been ordered out of the shed, instructed to put her wine bottle down, directed to remove her hands from her pockets, and physically seized by the officers. RP (8/3/09) 18-23, 56-62. Under these circumstances, a reasonable person would not have felt free to terminate the interaction. *Keohane, supra*. Because the question was not preceded by *Miranda* warnings, her response was inadmissible. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (citing *Miranda, supra*); *State v. Nelson*, 108 Wn.App. 918, 924, 33 P.3d 419 (2001).

Respondent erroneously claims that *Miranda* warnings preceded Deputy Young's initial question. Brief of Respondent, pp. 2, 45-46. But the evidence established the contrary. Deputy Young testified that (a) Ms. Markham was advised of her rights after being handcuffed, and (b) that she was handcuffed after he'd asked her what the substance was and obtained an incriminating response:

Q. And what did you do after you located the baggy?

A. I placed her in handcuffs and Officer Haggerty – I informed the other officers “Hey, I believe she’s got some substance

on her.” We started reading her—Officer Haggerty read her her Miranda warnings.

...

Q. Did anyone ask her what it was?

A. I did.

Q. And what did she say?

A. She told me it was drugs.

Q. Okay. So after that what happened?

A. We placed her in handcuffs, patted her down for further weapons or further substance, and located more methamphetamines in her right jacket pocket.

RP (8/3/09) 61.

Deputy Young’s testimony—that Ms. Markham was placed in handcuffs after “[s]he told [him] it was drugs,” and that *Miranda* warnings were provided after she was handcuffed—establishes the sequence of events from his point of view. RP (8/3/09) 61. The only other officer who mentioned the administration of *Miranda* warnings did not explain when the warnings were provided. RP (8/3/09) 94-95. Given the testimony, Ms. Markham’s statement should have been suppressed. *Seibert, supra*.

Deputy Young’s version of events is potentially complicated by Officer Mallory’s recollection. Mallory testified (without any reference to *Miranda* warnings) that Deputy Young asked Ms. Markham about the substance and obtained an incriminating response *after* she was handcuffed. RP (8/3/09) 22. He added that the handcuffs were then removed so officers could take the coat, and refastened once the coat had been seized. RP (8/3/09) 22. The conflicting testimony highlights the

prosecution's failure to clearly establish whether Ms. Markham received *Miranda* warnings before or after she was asked about the item in her pocket. Because the "heavy burden" rested with the government to establish the proper sequence of events, this failure requires suppression. *Miranda, supra*.

Respondent also suggests that the officers were excused from administering *Miranda* warnings prior to asking questions because the detention was justified as an investigatory stop. Brief of Respondent, p. 46- 50. This argument improperly conflates Fourth Amendment standards (used for analyzing warrantless searches and seizures) with the *Miranda* "in custody" standard (which is based in the Fifth and Sixth Amendments). *See, e.g., United States v. Revels*, 510 F.3d 1269, 1273 (10<sup>th</sup> Cir. 2007) (describing the two inquiries as "analytically distinct.")

Because the prosecution failed to overcome the presumption that her custodial statements were inadmissible, Ms. Markham's conviction must be reversed, her statement suppressed, and the case remanded for a new trial. *Seibert, supra*.

**III. THE TRIAL JUDGE MISCHARACTERIZED CERTAIN FINDINGS AS LEGAL CONCLUSIONS (AND VICE VERSA), AND ADOPTED SOME FINDINGS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.**

Ms. Markham rests on the argument made in her Opening Brief.

**CONCLUSION**

Ms. Markham's conviction must be reversed. The evidence and her statement must be suppressed, and the case dismissed with prejudice.

Respectfully submitted on May 24, 2010.

**BACKLUND AND MISTRY**

  
Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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15946 153rd Ave. SE  
Yelm, WA 98597

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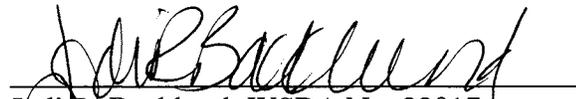
Thurston County Prosecuting Attorney  
2000 Lakeridge Dr. S.W., Building 2  
Olympia, WA 98502

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 24, 2010.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant