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NO. 36561-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

RICO DAVIS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge  
The Honorable John O. Cooney, Judge

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BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Rico Davis was unlawfully detained and searched by law enforcement. First, police exceeded the scope of a Terry<sup>1</sup> stop by continuing to detain him after he was no longer suspected of trespass. Second, during that unlawful detention, they frisked him without any reason to believe he was armed or dangerous. During the frisk, police found what appeared to be his wallet and asked if his identification were inside. This prompted Davis to admit his true name and the officers to arrest him on an outstanding Department of Corrections warrant.

At the jail, Davis was subjected to an invasive search, despite the absence of any reason to suspect him of hiding contraband. He was made to strip naked and spread apart his buttocks. A baggie partially protruding from his rectum was pulled out. This search was not authorized by the strip search statute and, alternatively, to the extent the statute purports to apply to Davis, it is unconstitutional.

Based on the contents of the baggie, Davis was convicted of possession of methamphetamine. His conviction must be reversed because the evidence was obtained as the result of the unlawful detention and the two subsequent unlawful searches.

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<sup>1</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion to suppress evidence obtained after the officer exceeded the scope of a reasonable Terry stop. CP 24.

2. The trial court erred in finding it would have been unreasonable for the officers to leave without identifying Davis. CP 23 (Finding of Fact 12).

3. The trial court erred in finding Davis triggered his detention by giving a false name. CP 23 (Finding of Fact 15).

4. The court erred in concluding the officers had a well-founded suspicion Davis was engaged in criminal trespass. CP 24.

5. The trial court erred in failing to suppress the evidence obtained via an unlawful pat-down search for weapons.

6. Counsel's failure to argue the illegality of the pat-down search at the suppression hearing deprived appellant of his constitutional right to effective assistance of counsel.

7. The trial court erred in failing to suppress the evidence obtained via an unconstitutional strip search under article I, section 7 of the Washington Constitution.

8. The statute purporting to authorize automatic warrantless strip searches of all those arrested for certain offenses regardless of

reasonable suspicion is unconstitutional in violation of article I, section 7 of Washington's constitution.

9. In the absence of substantial evidence in the record, the trial court erred in finding that the door was left open during the jail search for security purposes. CP 38 (Finding of Fact 18).

10. In the absence of substantial evidence in the record, the trial court erred in finding the baggie was removed without probing appellant's rectum. CP 38 (Finding of Fact 23).

11. When the improperly admitted evidence is excluded, the remaining evidence is insufficient to convict appellant of possession of a controlled substance.

#### Issues Pertaining to Assignments of Error

1. A warrantless detention under Terry may continue only so long as police have reason to suspect the person of being involved in criminal activity. Davis was detained on suspicion of burglary or trespass. The officer determined Davis had been allowed into the apartment and was willing to leave once he learned his presence was not wanted. But the officer continued to detain Davis in order to identify him. Did the court err in failing to suppress the evidence obtained as a result of this unlawful detention?

2. A frisk for weapons must be justified by reasonable, individualized suspicion that the person is armed or dangerous, presenting a threat to officer safety. The search must be limited to objects of the size and density to be potential weapons. Davis was detained on suspicion of trespass and gave a name the officer suspected was false. During a frisk, the officer located Davis' wallet and asked whether his identification was inside. Did the warrantless frisk violate Davis' constitutional privacy rights when police had no reason to suspect he might be armed or dangerous and did not stop their inquiry upon realizing the object was a wallet, not a weapon?

3. Under article I, section 7 of the Washington Constitution and chapter 10.79 RCW, strip searches must be conducted in private, must not touch or probe a body cavity, and must be based on reasonable suspicion except when the person has been arrested for a drug offense. Did the court err in failing to suppress the evidence found when Davis was searched in a bathroom with the door open to the hallway, the officer pulled out a baggie that was partially protruding from Davis' rectum, and Davis had been arrested on a Department of Corrections warrant, not for a current drug offense?

4. To the extent that RCW 10.79.130(2) authorized the warrantless and suspicionless strip search, is the statute unconstitutional in

violation of Davis' privacy rights under article I, section 7 of Washington's constitution?

C. STATEMENT OF THE CASE

1. Arrest

Police received calls that two men were trying to enter a woman's apartment via the sliding door. 1RP<sup>2</sup> 5-6. Officer Mark Zimmerman was dispatched. 1RP 5-6.

En route, he learned that both men were now inside the apartment. 1RP 5-6. Zimmerman testified dispatch advised him that the two men "had been let inside." 1RP 7. One of the men, Mohammed Jalhoon, was the son of one of the women in the apartment and had an arrest warrant for first-degree robbery. 1RP 8-9.

Zimmerman waited for backup. 1RP 8. The officers then made a plan of approach and knocked on the door about 16 minutes later. 1RP 8. One of the women inside opened the door when the police knocked. 1RP 9. Behind the door, police immediately recognized Jalhoon and arrested him. 1RP 9.

The woman pointed towards the living room. 1RP 9; Ex. 1. Zimmerman understood her as indicating that another unwanted man was in there. 1RP 10. (A language barrier inhibited communication between the women and the officers. 1RP 5-6, 10.) Zimmerman testified his reason for

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<sup>2</sup> There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 23, 2018; 2RP – Nov. 29, 2018; 3RP – Jan. 14, 2019.

responding had not yet ended because “We needed to find out who the other gentleman in the apartment was and why he was there.” 1RP 9.

In the living room, police found Davis sitting on the couch. 1RP 10. Davis rose when Zimmerman entered and “made himself apparent.” 1RP 10. Zimmerman’s body camera recording shows Davis behind a coffee table with a couch and wall behind him. Ex. 1. The way out of the living room was largely blocked by another couch, leaving a narrow walkway between the end of the couch and the wall. Ex. 1. Zimmerman stood in that walkway. Ex. 1. Another officer stood on Davis’ other side at the end of the coffee table. Ex. 1.

Upon seeing Davis, Zimmerman ordered him to put down the champagne bottle he was holding. Ex. 1. Davis did as directed. Ex. 1. Zimmerman proceeded to explain to Davis that his presence was unwanted. Ex. 1. Davis immediately answered, “Oh, I’ll leave.” Ex. 1 at time stamp 17:35. Zimmerman responded, “You got any ID on you?” Ex. 1. Davis said he did not and said if he had known, he would have left. Ex. 1.

Zimmerman testified he asked about Davis’ identity because “at that time we don’t know why the female let him in because – I didn’t know if she had let them in. I just knew they were inside the residence. With the language barrier, I didn’t know if she had asked them to leave, if – what the situation was. And right when we got inside, she was pointing to that

gentleman, “Hey, that guy.” And she looked scared, so I needed to find out why she might be scared of this guy and who he was and why – what purpose he had being in that residence if he didn’t live there.” IRP 14-15.

Zimmerman then told Davis the women were frightened and “that’s why they let you in.” Ex. 1 at 18:00. Davis explained he had no way of knowing that. Ex. 1. Zimmerman then asked Davis for his name, and Davis said his name was Karl P. Davis. Ex. 1 at time stamp 18:14. While still standing in the same position, Zimmerman ran a check on the name and date of birth Davis had provided. Ex. 1 at 18:50. Davis continued explaining that he had no way of knowing that his presence was unwanted. Ex. 1. Zimmerman told Davis it was “no big deal,” and the other officer declared, “No one’s saying you’re committing a crime.” Ex. 1 at time stamp 19:40.

Police compared Davis’ appearance with that of “Karl Davis” and determined it could not be the same person. CP 18; Ex. 1 at time stamp 20:49. They handcuffed Davis and detained him “due to not being able to properly identify him.” CP 18; Ex. 1 at time stamp 22:18. After police frisked Davis, finding his wallet, Davis admitted his true name. CP 18; Ex. 1. Police then arrested Davis on two outstanding felony warrants, one for a burglary offense and the other for the Department of Corrections based on a conviction for possession of a controlled substance. IRP 14; CP 18. After arresting Davis, Zimmerman informed another officer that the only basis to

hold Davis was the warrants. Ex. 1. Zimmerman stated, “as of right now that’s all we got cuz mom let him in.” Ex. 1.

2. Strip search

Once at the Spokane County jail, Davis was ordered into a bathroom for a strip search. CP 100-01. Officer Austin Keller conducted the search. Supp. CP 101. Keller left the door open “so that his actions could be monitored by myself.” CP 100. The area immediately outside the bathroom was a hallway accessible to any corrections officer that happened by. 2RP 17. Davis was asked to “spread the cheeks of his buttocks to facilitate inspection for possible contraband.” CP 101. Officer Austin Keller declared he then saw two small plastic baggies “in the buttocks of Mr. Davis.” CP 101. Keller declared, “I did not need to enter the rectum of Mr. Davis to retrieve the plastic baggies.” CP 101. Davis disputed this assertion with his own declaration that Keller inserted his fingers into Davis’ rectum. CP 35.

3. Procedural posture

Davis was charged with possession of the methamphetamine found in the baggies. CP 1-2. He moved to exclude the evidence as the fruit of an unlawful seizure, arguing he was detained without reasonable suspicion when the officer asked him for identification and ordered him to put down the champagne bottle. CP 8. The court found police had reasonable suspicion to detain Davis and denied the motion. CP 24.

Davis then moved to suppress the evidence as the result of an unlawful body cavity or strip search at the jail. CP 26-32. First, he argued the search was a body cavity search, not a strip search based on Davis' declaration that Officer Keller had penetrated his rectum. 2RP 5. He argued the statute allowing suspicionless strip searches when a person is booked after arrest for possession of drugs does not permit such a search for every subsequent arrest related to this original charge. 2RP 7-8. Davis further argued that the statute is unconstitutional under article I, section 7 of the Washington Constitution to the extent it permits strip searches without individualized suspicion. 2RP 7. Finally, he argued the strip search was not lawful under the statute because it was not conducted in private. 2RP 6. This motion was also denied. CP 38-39.

Davis then agreed to a bench trial on stipulated facts. CP 41-43. The court found him guilty of possession of a controlled substance and imposed a standard range sentence of 12 months and 1 day. CP 49, 70-72. Davis timely filed notice of appeal. CP 58.

D. ARGUMENT

1. POLICE EXCEEDED THE SCOPE OF A VALID TERRY STOP BY CONTINUING TO DETAIN DAVIS AFTER DISPELLING ANY SUSPICION OF A BURGLARY OR TRESPASS.

Assuming without conceding that police were initially justified in briefly detaining Davis based on the call regarding two people trying to enter an apartment, that justification ceased when they no longer suspected him of burglary or trespass. From this point forward, Zimmerman lacked any further reason to suspect Davis of any criminal activity. The evidence obtained as a result of this unlawful detention should have been suppressed.

Under the Fourth Amendment and article 1, section 7 of the Washington Constitution,<sup>3</sup> warrantless seizures are “per se unreasonable.” State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). Nevertheless, brief investigative detention without a warrant may be reasonable so long as the detention is both justified at its inception and reasonably limited in scope. Terry, 392 U.S. 1; State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing State v. Ladson, 138 Wn.2d

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<sup>3</sup> The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” Article 1, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

343, 349, 979 P.2d 833 (1999)); State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). The burden is on the State to prove the detention was justified by “specific and objective facts that provide a reasonable suspicion that the person stopped has committed or is about to commit a crime.” Duncan, 146 Wn.2d at 171; State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

Here, Davis was seized when Zimmerman physically blocked his exit while insisting on identifying him. Ex. 1 at 17:35- 17:40. Any suspicion of burglary or trespass was dispelled because Zimmerman knew Davis had been allowed into the apartment and was willing to leave. Ex. 1 at 17:35- 18:00. Continued detention beyond this point violated Davis’ constitutional rights and requires exclusion of the resulting evidence as the fruit of the poisonous tree. State v. Creed, 179 Wn. App. 534, 545, 319 P.3d 80 (2014).

- a. Davis was seized when Zimmerman physically blocked the exit and insisted on identifying Davis.

Davis was seized from the moment he offered to leave the apartment. Ex. 1 at 17:35. At that time, Zimmerman was standing blocking the only exit. Ex. 1. When Davis offered to leave, Zimmerman did not stand aside. Instead, he asked Davis if he had identification. Ex. 1 at 17:35. At this point, Davis was seized because a reasonable person would not have felt free to leave under the circumstances.

Whether police have seized a person is a mixed question of law and fact. State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). The trial court’s findings regarding the circumstances are entitled to deference, but the question of whether those circumstances constitute a seizure is one of law and is reviewed de novo. Id. (quoting Armenta, 134 Wn.2d at 9). Here, the only finding by the trial court regarding the timing of the seizure is that the trial court found Davis “triggered” his own detention by giving Zimmerman a false name. CP 23 (Finding of Fact 15). To the extent this is construed as a finding that Davis was not detained until the officers learned he was not Karl, this finding is contradicted by the body camera recording and should be rejected by this Court.

A person is seized when “a reasonable person would not feel free to leave, terminate the encounter, refuse to answer the officer’s question, decline a request, or otherwise go about his business.” State v. Carriero, 8 Wn. App. 2d 641, 655, 439 P.3d 679 (2019). This determination is made based on an objective assessment of the circumstances, not on the officer’s subjective intent, unless that intent is conveyed to the person. Id.

Generally, when an officer merely approaches an individual in public, requests to speak with him, and requests identification, no seizure has occurred. State v. O’Neill, 148 Wn.2d 564, 577-80, 62 P.3d 489 (2003) (citing State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998)). “On the

other hand, a seizure occurs if the officer orders the person to sit or wait while he checks the person's warrant status." Carriero, 8 Wn. App. 2d at 658. "When an officer commands a person to halt or demands information from the person, a seizure occurs." Id.

A seizure occurs when an officer immobilizes a person or physically blocks a person from leaving. Id.<sup>4</sup> In Carriero, the officers blocked Carriero's car from leaving an alley. Id. at 659. The alley was not wide enough for two cars to pass. Id. One police car parked in front of Carriero and another behind him such that his car had no way to exit. Id. Then two police officers stood adjacent to each of the car doors. Id. The officers asked for identification and did not suggest Carriero could ignore the request or leave. Id. This Court concluded, "No reasonable person would have ignited his car's engine and sought to maneuver out of a tight alleyway to evade speaking with the officers. Thus, the officers seized Carriero." Id. at 660.

Davis was also seized because no reasonable person would have tried to push his way past Officer Zimmerman to exit the living room. When confronted by Zimmerman, Davis immediately offered to leave. Ex. 1 at

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<sup>4</sup> See also State v. Beito, 147 Wn. App. 504, 509-10, 195 P.3d 1023 (2008) (" Courts have also found, however, that a seizure has occurred when the police immobilized a defendant even without removing the defendant's property or identification from the defendant's presence."); State v. Bennett, 62 Wn. App. 702, 709, 814 P.2d 1171 (1991) (seizure occurred when officer pulled into parking lot behind vehicle so vehicle could not leave); Michigan v. Chesternut, 486 U.S. 567, 575, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988) (no seizure because officers did not activate siren or flashers, command person to halt, display weapons, or operate car in aggressive manner to block or otherwise control person's movement).

17:35. Instead of taking him up on this offer, Zimmerman asked for identification while continuing to stand blocking the exit. Id. By ignoring Davis' offer to leave, Zimmerman implicitly ordered Davis to wait until he had been identified. Ex. 1. Another officer was standing at the other end of the coffee table in front of Davis. Ex. 1. The officers stood in the only pathways leading to the exit as they asked for identification and then tried to verify what Davis told them. Ex. 1. Davis was seized because a reasonable person would not have felt free to push past Zimmerman and ignore his request for identification. Carriero, 8 Wn. App. 2d at 660.

- b. By continuing to detain Davis after learning his companion's mother had let them into the apartment, Zimmerman exceeded the scope of a valid Terry stop.

An investigative detention may not continue any longer than necessary to satisfy the purpose of the stop. State v. Bray, 143 Wn. App. 148, 154, 177 P.3d 154 (2008) (citing State v. Williams, 102 Wn.2d 733 738, 689 P.2d 1065 (1984)). The officers are limited to quickly confirming or dispelling their suspicions. United States v. Sharpe, 470 U.S. 675, 84 L. Ed. 2d 605, 105 S. Ct. 1568, 1575 (1985); see also Florida v. Royer, 460 U.S. 491, 75 L. Ed. 2d 229, 103 S. Ct. 1319, 1325 (1983) (“The scope of the detention must be carefully tailored to its underlying justification.”). In other words, the scope of the detention must be reasonably related to the initial purpose of the stop. Bray, 143 Wn. App. at 154 (citing Williams, 102

Wn.2d at 739). The detention may be extended only if preliminary investigation confirms the officer's suspicions. Bray, 143 Wn. App. at 154 (citing State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)).

Here, Zimmerman's preliminary investigation not only failed to confirm his suspicions of burglary or trespass, but it actually dispelled any suspicion. A person who has been let in, and who is willing to leave if asked, cannot be convicted of burglary or trespass because his presence is not unlawful. See chapter 9A.52 RCW. Once the officer has determined that the person's presence is not unlawful, there is no longer any reasonable suspicion.

Zimmerman's own statements confirmed he no longer suspected a burglary or trespass. Even before arrival, he knew the men had been let into the apartment, testifying, "As we were en route, I believe dispatch notified, said that gentlemen had been let inside." IRP 7. As they entered the apartment, Zimmerman noted that they needed to escort the other person out. Ex. 1 at 17:14. When contacted, Davis was immediately willing to leave. Ex. 1 at 17:35. Shortly thereafter, Zimmerman explained to Davis his awareness that "they let you in." Ex. 1. Minutes later, the other officer explained, "No one's saying you're committing a crime." Ex. 1 at 19:40. After Davis' arrest, Zimmerman told other officers of Davis' outstanding

warrants and said, “As of right now, that’s all we got cuz mom let him in.”  
Ex. 1 at 26:05.

Zimmerman was not detaining Davis on suspicion of burglary or any other crime. 1RP 14-15; Ex. 1 at 19:40. He merely wanted to identify him. 1RP 14-15; CP 18.

This case is akin to Creed, 179 Wn. App. at 545. There, the officer initially suspected Creed of driving a stolen car. Id. at 537-38. However, after he pulled her over, he realized he had misread the license plate number. Id. at 538. Instead of telling her she was free to go, the officer kept her there while he ran the correct license plate number. Id. at 545. He never turned off the overhead lights of his patrol car and used his flashlight to look at the item she had tossed into the back seat. Id. The court determined the resulting evidence was properly excluded because the officer “lacked lawful authority to proceed with these actions once he realized that he lacked reasonable suspicion.” Id. at 545.

Once he learned Davis had been let in and was willing to leave, Zimmerman was justified in escorting him out of the apartment. But he was not justified in keeping Davis there in order to identify him and determine whether he had any outstanding warrants. See id. As in Creed, the resulting evidence should have been suppressed as the result of an unlawful seizure.

- c. Davis' conviction must be reversed because the evidence against him was obtained by exploiting an unlawful seizure.

Zimmerman's unlawful detention of Davis started a chain of events that led to Davis' arrest and the discovery of a controlled substance. The evidence obtained by dint of this unwarranted detention must be suppressed and Davis' conviction reversed.

When a person is unlawfully seized in violation of either the Fourth Amendment or Article I, Section 7 or both, the evidence obtained as a result of that seizure must be excluded. State v. Gantt, 163 Wn. App. 133, 144, 257 P.3d 682 (2011). Evidence is subject to the exclusionary rule "when derived through police misconduct." State v. Childress, 35 Wn. App. 314, 316, 666 P.2d 941 (1983).

The evidence against Davis must be suppressed under the exclusionary rule because it was derived from the illegal detention. See, e.g., Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) (fingerprints suppressed when obtained as result of unlawful detention). If Zimmerman had allowed Davis to leave, Davis would not have been further detained for providing a false name and would not have been arrested on the outstanding warrants. He would not have been booked into jail or strip searched. The evidence was obtained a direct result of the initial unlawful detention.

The narrow exception under Washington’s attenuation doctrine does not apply unless “an unforeseeable intervening act genuinely severs the causal connection between official misconduct and the discovery of evidence.” State v. Mayfield, 192 Wn.2d 871, 898, 434 P.3d 58 (2019). Merely showing that there were other contributing causes does not break the chain. Id. at 898. For example, Mayfield twice consented to a search after an unlawful detention. Id. at 899. The court held that these consents were not “independent acts of free will sufficient to establish a superseding cause,” even though Mayfield was told he could refuse consent. Id. The court concluded that giving consent during an unlawful seizure is entirely different from volunteering such consent. Id. at 900.

Here, no unforeseeable event occurred to break the chain of causation. Like Mayfield’s consent to search, Davis’ decision to provide a false name occurred during, and was the direct result of, an unlawful detention. It was not volunteered, not an act of independent free will. The frisk that led to Zimmerman learning Davis’ true identity was also a direct result of that unlawful detention. During the frisk, the officer discovered a wallet and asked Davis if his identification were inside. Ex. 1. Davis then admitted his true name and was arrested on outstanding warrants. Ex. 1.

Davis' arrest on the warrants led directly to his being booked into jail and strip searched.

Police were only able to arrest Davis on his warrants and execute a strip search by exploiting the unlawful detention. The evidence found during that search was the fruit of the poisonous tree and should have been suppressed. Gantt, 163 Wn. App. at 144. The conviction must be reversed because exclusion of that evidence would eliminate any basis for the conviction. Kinzy, 141 Wn.2d at 394-96.

2. THE OFFICER EXCEEDED THE SCOPE OF A LAWFUL TERRY FRISK WHEN HE PATTED DAVIS DOWN FOR WEAPONS WITHOUT REASON TO BELIEVE HE MIGHT BE ARMED OR DANGEROUS.

Even if Davis were not unlawfully detained at the time, the frisk for weapons was unlawful under Terry because police had no reason to believe Davis might be armed or dangerous. Additionally, Zimmerman exceeded the scope of a frisk by continuing to probe after finding a wallet, which was clearly not a weapon. The evidence against Davis should have been suppressed because it was obtained by exploiting this initial unlawful search. Reversal is required because the unlawful frisk is manifest constitutional error and counsel was ineffective in failing to make this argument to the trial court.

As discussed above, a warrantless search or seizure is unconstitutional unless it falls within one of the “jealously and carefully drawn exceptions” to the warrant requirement. State v. Garvin, 166 Wn.2d 242, 249-50, 207 P.3d 1266 (2009). One exception is that, during a valid Terry stop, an officer may frisk a suspect for weapons if he or she “reasonably believes her safety or that of others is endangered.” Garvin, 166 Wn.2d at 250.

“Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.” Terry, 392 U.S. at 24–25. A frisk for weapons is only permitted if the State can show “(1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes.” Garvin, 166 Wn.2d at 250 (citing Duncan, 146 Wn.2d 166). Here, none of these requirements were met. First, by the time of the search, Davis’ continued detention was unlawful, as discussed above. See section D.1, supra. Second, there was no reason to suspect he was armed or dangerous. Third, by continuing to probe after finding what was clearly a wallet, not a weapon, police exceeded any legitimate protective scope.

- a. The frisk was unlawful because the officer had no reason to believe Davis was armed or dangerous.

Zimmerman had no reason to suspect Davis was armed or dangerous. A police officer's authority to frisk a detainee for weapons is limited to those circumstances when "an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." Terry, 392 U.S. at 24. The question under Terry is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27. A reasonable belief must be based not on a mere "hunch" but on "specific reasonable inferences" that may be drawn from the facts in light of the officer's experience. Id. Before searching for weapons, an officer "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917 (1968) (emphasis added).

As with the detention question, underlying facts are reviewed for substantial evidence while conclusions about the justification for a frisk are reviewed de novo. Garvin, 166 Wn.2d at 249. Here, the facts established at the suppression hearing are insufficient to justify a search for weapons.

Zimmerman had no reason to believe Davis was armed or dangerous because he was not suspected of a violent offense and he cooperated with police. In State v. Xiong, 164 Wn.2d 506, 513-14, 191 P.3d 1278 (2008), the court held there was no justification for a frisk when the suspect cooperated with police, made no attempt to flee, and could not reach his pockets. Merely leaving the scene of a potential burglary is insufficient to justify a frisk, absent some sort of furtive or violent conduct. Williams, 102 Wn.2d at 740. “Generally, a suspicion of burglary by itself would not support an inference that a suspect was armed.” State v. Belieu, 112 Wn.2d 587, 604, 773 P.2d 46 (1989).<sup>5</sup>

The mere fact that a person is nervous or has lied about his or her name is insufficient to justify a frisk. State v. Setterstrom, 163 Wn.2d 621, 627, 183 P.3d 1075 (2008). In Setterstrom, the court held police did not have reasonable suspicion to frisk a person who appeared nervous and fidgety in police presence, was under the influence, and lied about his name. Id. at 627.

Merely holding a bottle of champagne is also insufficient under the circumstances to suggest that a person is armed or dangerous. This Court should reject Division One’s holding in State v. Bailey, 109 Wn. App. 1, 34

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<sup>5</sup> But see State v. Harvey, 41 Wn. App. 870, 875, 707 P.2d 146 (1985) (officer justified in making a protective search of a burglary suspect on the ground that it is well known that burglars often carry weapons).

P.3d 239 (2000), because that case is distinguishable and should be limited to its facts to avoid absurd results.

The two officers in Bailey were outnumbered by four suspects in a public place, the parking lot of a school. Id. at 3, 5. They detained Bailey on suspicion of a liquor violation because of the two liquor bottles located next to him. Id. at 4. They also frisked him for weapons and found a semiautomatic handgun. Id. at 3. Division One concluded the frisk was justified because 1) the officers were outnumbered and 2) the bottles were “handy to the suspects and could have been used as weapons.” Id. at 5.

The officers in this case were not outnumbered. There were two officers in the apartment with Davis and more outside taking custody of Jalhoon. Ex. 1. There were not multiple bottles and multiple suspects who could have accessed them to use as weapons. Thus, the rationale of Bailey should not extend to this case.

To extend Bailey's holding to other facts would lead to absurd results. Officers should not be permitted to search for weapons merely because a person is in proximity to an everyday item that could potentially be used as a weapon. Under this rationale, a person detained in a kitchen could always be searched for weapons, given the nearness of, not only bottles, but also knives and frying pans.

Here, police had nothing more than an already dispelled suspicion of trespass. There was no indication of furtive or violent movements by Davis. On the contrary, he was cooperative with police. 1RP 16. He put down the bottle when told to do so. Ex. 1. His lie regarding his first name is insufficient to support a reasonable belief that he was armed or dangerous. Setterstrom, 163 Wn.2d at 626. Even if Davis were not already unlawfully detained, police lacked any particular facts suggesting he was dangerous or armed, and the frisk was unlawful.

- b. By continuing to inquire about Davis' wallet, the officer exceeded the scope of a valid Terry frisk.

Additionally, even if the frisk had been lawful, the police exceeded the permissible scope. A Terry frisk or pat-down for weapons is limited to searching for the type of hard or sharp objects that may pose a threat to officer safety. State v. Russell, 180 Wn.2d 860, 870, 330 P.3d 151 (2014) The scope of the frisk is limited to identifying items of the “size and density” that might be a weapon. Id. “[O]nce it is ascertained that no weapon is involved, the government’s limited authority to invade the individual’s right to be free of police intrusion is spent.” Id. (quoting State v. Allen, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980)).

The facts of Allen are particularly relevant here. In Allen, police noticed a bulge that turned out to be a wallet. 93 Wn.2d at 171. The court

held there was no basis to rummage through the wallet. Id. at 172-73. As soon as police determined it was not a weapon, their authority to search ended. Id.

As in Allen, the wallet found when the police frisked Davis was not a potential weapon. As soon as the officer identified it as a wallet, his “limited authority” to invade Davis’ freedom was “spent.” Russell, 180 Wn.2d at 870. When the officer questioned Davis about whether his wallet contained his identification, he was not asking whether the wallet somehow contained something that might harm the officer. Ex. 1 at 23:41. He was investigating a crime, looking for evidence that Davis had provided a false statement. Ex. 1 at 22:18 (Zimmerman tells Davis he is being detained because he is not telling the truth).

A search for evidence of a crime requires both probable cause and a search warrant or a well-established exception to the warrant requirement. Allen, 93 Wn.2d at 173. Zimmerman had neither. Therefore, even if there were a basis to frisk Davis for weapons, the search and subsequent questioning about his wallet exceeded the permissible scope of that search, and the resulting evidence must nonetheless be suppressed. Id.

- c. The exclusionary rule requires suppression of the evidence obtained by exploiting the unlawful frisk.

Under the exclusionary rule, all evidence obtained by exploiting this unconstitutional frisk must be suppressed. Id. As discussed above, the narrow exception under Washington's attenuation doctrine does not apply because there was no "unforeseeable intervening act." Mayfield, 192 Wn.2d at 898. During the frisk, the officer discovered what felt like a wallet and asked Davis if his identification were in there. Ex. 1 at 23:41. At that point, Davis admitted his true name and was arrested on outstanding warrants. Id. Police only learned of the warrants by exploiting the unlawful frisk. Ex. 1. The warrants discovered via the frisk were the only basis to detain or arrest Davis. Ex. 1 at 26:05. Davis' arrest on the warrants led directly to the subsequent jail search. The evidence found during that search was the fruit of the poisonous tree and should have been suppressed. Allen, 93 Wn.2d at 173.

- d. This error is properly raised for the first time on appeal as manifest constitutional error and ineffective assistance of counsel.

Although counsel below argued suppression based on the illegal seizure, rather than the illegal search, this issue should, nonetheless, be addressed on appeal as manifest constitutional error under RAP 2.5. Alternatively, trial counsel was ineffective in failing to raise this issue below.

RAP 2.5 allows an issue to be raised for the first time on appeal when (1) it is an issue of constitutional dimension and (2) it is plausible the error had practical and identifiable consequences at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The facts necessary to adjudicate the issue must also be in the record. Id. The failure to raise a motion to suppress is manifest constitutional error when the record shows the motion would likely have been granted and prejudice would have resulted. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

These requirements are met in this case. First, the issue of an unlawful search in violation of constitutional privacy rights is constitutional in nature. Second, the result of the error was the admission of the controlled substance that was the critical evidence against appellant. Finally, the facts necessary to adjudicate it were presented at the suppression hearing because a closely related issue, the validity of the initial detention, was litigated.

Additionally, the interests of judicial economy also weigh in favor of addressing this issue in this direct appeal. Davis would otherwise have to file a personal restraint petition based on the same evidence that was presented at the suppression hearing.

As an alternative, this issue should be addressed because counsel was ineffective in failing to raise this argument during the two suppression hearings below. Ineffective assistance of counsel is a constitutional issue that

may be raised for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Counsel is constitutionally ineffective when counsel's performance was unreasonably deficient and the error prejudiced the client, giving rise to a reasonable probability that, absent the error, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). That standard is met here.

As the foregoing argument demonstrates, the frisk was unlawful in two respects: it was unwarranted by reasonable individualized suspicion of a weapon and it exceeded the scope of any search for a weapon. A reasonable attorney would have not failed to raise a meritorious argument that would lead to suppression of the only evidence against the client. This is not a case, as discussed in McFarland, where the warrantless arrest was merely questionable. 127 Wn.2d at 336 (discussing State v. Tarica, 59 Wn. App. 368, 798 P.2d 296 (1990)). The record demonstrates the absence of any reason to believe Davis presented a danger as well as the continuation of the search after it was clear the object was a wallet, not a weapon. Ex. 1. There was no strategic reason not to raise this argument. As the record demonstrates, counsel was already moving to suppress the evidence on several other constitutional grounds. CP 4-8, 25-32. There was, therefore, no possible tactical reason not to include argument that the frisk was unlawful.

Prejudice is also established under the Strickland standard. It is reasonably probable the trial court would have suppressed the evidence resulting from a frisk that was unwarranted by any reasonable suspicion and that exceeded the scope of a pat-down for weapons. Allen, 93 Wn.2d at 173. If that evidence had been suppressed, the trial would have resulted in an acquittal because the State could not prove possession of a controlled substance beyond a reasonable doubt. In addition to the unlawful detention, the unlawful frisk requires reversal of Davis' conviction. Kinzy, 141 Wn.2d at 394-96.

3. THE STRIP SEARCH VIOLATED ARTICLE I, SECTION 7 BECAUSE IT WAS NOT AUTHORIZED BY LAW.

Washington has set careful statutory limits on the use of strip searches of those detained in jail. The search of Davis in this case was unlawful because it violated those limits in several ways. First, the search exceeded the statutory definition of a strip search and was more akin to a body cavity search, prohibited by law without a warrant. Second, the search was not conducted in private, as required by the statute. Finally, Davis was not "arrested for" burglary or possession of a controlled substance as required by the statute for a strip search absent reasonable suspicion. Thus, the strip search was without the "authority of law" required under article I, section 7 and the evidence thereby obtained must be suppressed.

- a. Requiring Davis to spread his buttocks for inspection of his rectum exceeded the scope of a strip search.

The law permitting strip searches does not permit the invasive practice of requiring the person to pull apart his or her own buttocks to permit police to inspect a person's rectum. Nor does it permit the extraction of an item that is partially within the rectum. The law does not permit police to require a person to touch himself to spread apart the buttocks to peer at the entrance to the rectum or remove anything extruding therefrom. These acts exceed the statutory definition of a strip search.

A strip search is defined as "having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person." RCW 10.79.070(1). The law further provides that "Persons conducting a strip search shall not touch the person being searched except as reasonably necessary to effectuate the strip search of the person." RCW 10.79.100(1).

In a strip search, the statute allows officers to direct the person to remove or arrange clothing. RCW 10.79.070. It does not permit touching the person except as necessary to accomplish the strip search, i.e. the removal or arranging of clothing. RCW 10.79.100. Nothing in the definition of a strip search permits the touching of the person's buttocks to view the area

between them, regardless of whether that touch is accomplished by an officer or by ordering the person to do so. Nothing in the definition permits officers to contact the interior of the rectum by removing an object that is protruding from it.

The search here was more akin to a body cavity search as defined by the law. A body cavity search is defined as “the touching or probing of a person’s body cavity, whether or not there is actual penetration of the body cavity.” RCW 10.79.070(2). Requiring Davis to use his hands to spread apart his buttocks was more akin to a body cavity search because it requires touching the person. It was also more akin to a body cavity search because Keller pulled an object out of Davis’ rectum. By pulling it out, Keller necessarily contacted the interior of Davis’ rectum indirectly with the baggie as an instrument. The court thus erred in finding Keller did not probe or touch inside Davis’ rectum. CP 38 (Finding of Fact 23). Police exceeded the scope of a strip search and conducted a body cavity search in violation of the requirement that a body cavity search may only be conducted pursuant to a search warrant. RCW 10.79.080.

- b. The search violated the statute because it was not conducted in private.

Even if this were merely a strip search, the law requires that such a search be conducted in private. RCW 10.79.100. Police violated that

provision by requiring Davis to disrobe in a bathroom with the door open to the corridor where any officer walking by could view what was occurring.

A strip search must be conducted “at a location made private from the observation of persons not physically conducting the search.” RCW 10.79.100(3). “[N]o person may be present or observe during the search unless the person is necessary to conduct the search or to ensure the safety of those persons conducting the search.” RCW 10.79.100(4). These provisions were violated in this case.

Davis was searched in a bathroom with the door open to the hallway. CP 100-01. Keller’s declaration states “Mr. Davis was asked to enter a bathroom with the door remaining open so that his actions could be monitored by myself. CP 100. Corrections officers have access to the hallway. 2RP 17. The court found the door was open for security and liability purposes. CP 38 (Finding of Fact 18). But there was no evidence that the door needed to be open to the hallway so that others could view the search for safety purposes. The surveillance that Keller referenced was to be provided by Keller himself, not other officers passing by. CP 101. Thus, to the extent the court’s finding is interpreted as a finding that the open door was necessary for safety purposes, that finding is not supported by the record. Findings of fact are properly rejected on appeal as unsupported when the record lacks sufficient evidence to warrant a reasonable person in the

belief that the assertion is true. In re Welfare of M.R.H., 145 Wn. App. 10, 24, 188 P.3d 510 (2008). That is the case here.

The State argued the open door was necessary to prevent inmate lawsuits. 2RP 21. But the law does not provide an exception to prevent lawsuits. The law permits observation of others only to protect the safety of the person conducting the search. RCW 10.79.100(4). Even assuming this was a mere strip search, it was unlawful because it was not conducted in private.

c. The suspicionless strip search was unlawful because Davis was not under arrest for drug possession.

Davis was strip searched without any reason to believe that he, individually, might be bringing contraband into the jail. 2RP 28; CP 38. Despite the absence of reasonable suspicion relating to the individual, the law deems that reasonable suspicion automatically exists when the person “has been arrested for” a violent offense, an offense involving escape, burglary, or use of a deadly weapon, or an offense involving possession of a drug or controlled substance. RCW 10.79.130. Davis was arrested on outstanding warrants from the Department of Corrections pertaining to prior drug offenses. 1RP 14. The existence of a Department of Corrections warrant is not the equivalent of arrest for a drug offense. Therefore, the court erred in finding that no reasonable suspicion was required. 2RP 28; CP 38.

In general, the law requires at least reasonable suspicion before strip searching an arrestee. RCW 10.79.130. There must be reason to believe a strip search is necessary to discover weapons, evidence, or contraband concealed on the person's body. RCW 10.79.130(1). However, subsection (2) of the statute provides an exception, permitting suspicionless strip searches when the person is arrested for certain offenses.

RCW 10.79.130(2) provides:

For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:

- (a) A violent offense as defined in RCW 9.94A.030 or any successor statute;
- (b) An offense involving escape, burglary, or the use of a deadly weapon; or
- (c) An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.

This provision does not apply to Davis because he was arrested on a post-conviction warrant.

When interpreting a statute, courts “must ascertain and give effect to the Legislature’s intent.” Plemmons v. Pierce Cty., 134 Wn. App. 449, 456, 140 P.3d 601 (2006). Statutory construction is a question of law reviewed de novo. Id. For an unambiguous statute the Legislature’s intent is derived from the statute’s plain language. Id. When a statute is ambiguous, courts look to

principles of statutory construction, legislative history, and relevant case law to assist in interpretation. Id. A statute is ambiguous if it can reasonably be interpreted in more than one way. Id.

The statutory phrase “has been arrested for . . . an offense involving possession of a drug or controlled substance” is ambiguous. It could mean that a suspicionless strip search is justified any time the person to be held in custody has ever, at any time, been arrested for a drug offense. Or, it could mean that the person has been, at the time of the strip search, just been arrested on suspicion of having committed such an offense. The group of persons who have ever been convicted of drug possession is far larger than the group of persons who are, in the instant case, under arrest on suspicion of drug possession. This court should interpret the statute narrowly as per the legislature’s intent. RCW 10.79.060.

In enacting the strip search provisions of RCW 10.79, the legislature’s intent was to “restrict the practice of strip searching and body cavity searching persons booked into holding, detention, or local correctional facilities to those situations where such searches are necessary.” RCW 10.79.060. An expansive reading of the exceptions to the reasonable suspicion requirement is inconsistent with the intent to restrict strip searches to situations where they are necessary.

This narrow interpretation is also consistent with the only Washington case to apply the automatic strip search provision of RCW 10.79.130. In State v. Jones, 76 Wn. App. 592, 593-94, 887 P.2d 461 (1995), police sent two undercover informants to purchase cocaine from Jones. Jones was arrested approximately ten minutes later. Id. The court upheld the lawfulness of the strip search because Jones was arrested for possession of cocaine. Id. at 599. The court reasoned, “Here, Jones was arrested for an offense involving possession of cocaine which under RCW 10.79.130(2)(c), automatically means that a reasonable suspicion is deemed to be present. Thus, the search was properly conducted without a warrant.” Jones, 76 Wn. App. at 599.

By contrast, Davis was not arrested for an offense involving possession of a controlled substance. He was arrested on a “felony DOC warrant for possession of a controlled substance.” CP 89; 2RP 16 The trial court found this was a “Department of Corrections warrant based upon a conviction for Possession of a Controlled Substance.” CP 38 (Finding of Fact 15). These facts are in stark contrast to the arrest in Jones 10 minutes after he had sold cocaine.

- d. A warrantless strip search conducted in violation of the statute lacks the “authority of law” required by article I, section 7 of the Washington Constitution.

Article I, section 7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” As a general principle, “a search warrant or subpoena must be issued by a neutral magistrate to satisfy the authority of law requirement” under article I, section 7. State v. Miles, 160 Wn.2d 236, 247, 156 P.3d 864 (2007). In the absence of a warrant, the “authority of law” required by article I, section 7 may, in some circumstances, be “granted by a valid (i.e., constitutional) statute.” State v. Gunwall, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986); see also Blomstrom v. Tripp, 189 Wn.2d 379, 404, 402 P.3d 831 (2017).

The search in this case violated the state constitution because there was no warrant and the search did not comply with the statute. Id. Because the only evidence of a crime was obtained via this search, Davis’ conviction must be reversed for insufficient evidence and the charge dismissed with prejudice. Kinzy, 141 Wn.2d at 393-94 (no basis for conviction because motion to suppress should have been granted).

4. THE STRIP SEARCH STATUTE IS UNCONSTITUTIONAL TO THE EXTENT IT PERMITS SUSPICIONLESS STRIP SEARCHES.

To the extent that the blanket strip search provision of RCW 10.79.130(2) applies to Davis, that provision is unconstitutional under article I, section 7. “[W]arrantless strip searches must, at a minimum, be based on individualized, reasonable suspicion that the arrestee is concealing contraband.” State v. Audley, 77 Wn. App. 897, 908, 894 P.2d 1359 (1995) (quoting Giles v. Ackerman, 746 F.2d 614, 617 (9<sup>th</sup> Cir. 1984)).

No prior Washington case has addressed the constitutionality of subsection (2) of RCW 10.79.130 permitting automatic strip searches when a person is arrested for certain offenses. Davis asks this Court to hold that it violates article I, section 7 of the Washington constitution to permit automatic strip searches, without individualized suspicion, based solely on the underlying offense for which the person is arrested.

- a. Article I, section 7 requires a strip search be supported by at least reasonable, individualized suspicion.

“It is well established that article I, section 7 often provides broader protections than the Fourth Amendment.” Mayfield, 192 Wn.2d at 878. The Washington Supreme Court recently reaffirmed that “no Gunwall analysis is needed to justify an independent state law analysis of article I, section 7 in new contexts.” Id. Instead, the focus is on “whether the unique

characteristics of the state constitutional provision and its prior interpretations actually compel a particular result.” Id. at 879 (quoting State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007)). Courts examine the text of the constitutional provision, relevant prior case law, and the current implications of recognizing or not recognizing a privacy interest. Id. Examination of these factors demonstrates that, under article I, section 7, strip searches are impermissible without at least reasonable individual suspicion.

Washington’s constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, sec. 7. “Authority of law” under article I, section 7 means a warrant or a well-established exception to the warrant requirement. State v. Morgan, 193 Wn.2d 365, 369, 440 P.3d 136 (2019) (citing Ladson, 138 Wn.2d at 350). It is well established that this provision guarantees “uniquely heightened privacy protections.” Mayfield, 192 Wn.2d at 882.

In the context of strip searches, this Court has previously held that the protection of article I, section 7 is co-extensive with the Fourth Amendment. Audley, 77 Wn. App. at 899. However, given the more recent changes in Fourth Amendment jurisprudence, that aspect of Audley’s holding must be rejected.

Audley considered the constitutionality of subsection (1) of RCW 10.79.130, permitting warrantless strip searches based on reasonable suspicion. At the time, the weight of federal authority on the Fourth Amendment supported the proposition that reasonable suspicion was required. “Blanket policies permitting strip searches of all arrestees booked into detention facilities have uniformly been held unconstitutional by the federal circuit courts.” Audley, 77 Wn. App. at 907-08. Therefore, the court concluded “to comport with the Fourth Amendment, warrantless strip searches must, at a minimum, be based on individualized, reasonable suspicion that the arrestee is concealing contraband.” Id.

Federal Fourth Amendment jurisprudence has diverged from the principles elucidated in Audley. At the time, federal precedent held that blanket strip search policies were unconstitutional under the Fourth Amendment. Audley, 77 Wn. App. at 907-08; Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993) (citing, *inter alia*, Giles, 746 F.2d at 617).

Since then, however, the Ninth Circuit has upheld San Francisco’s policy requiring strip searches of all arrestees classified for housing in the general jail population as “facially reasonable under the Fourth Amendment, notwithstanding the lack of individualized reasonable suspicion.” Bull v. San Francisco, 595 F.3d 964, 982 (2010). The United States Supreme Court likewise upheld a strip search procedure applying to

“every detainee who will be admitted to the general population” as a “reasonable balance between inmate privacy and the needs of institutions.” Florence v. Board of Chosen Freeholders of City of Burlington, 566 U.S. 318, 322, 339-40, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012).

In addition to the changed federal landscape, analysis of the only two relevant Gunwall factors also leads to a different result now than at the time of Audley. Before applying the then-existing Fourth Amendment standard, the Audley court analyzed the fourth and sixth factors from Gunwall to determine whether our state’s constitution was more protective. Under the sixth Gunwall factor, the court concluded that national uniformity in jail strip searches is unnecessary and the issue is particularly local in character. Audley, 77 Wn. App. at 903-04. Both at the time of Audley and now, this sixth Gunwall factor weighs in favor of finding article I, section 7 more protective than the Fourth Amendment. Id.

Under the fourth Gunwall factor, previously established bodies of state law may bear on the distinctiveness of state constitutional rights. Gunwall, 106 Wn.2d at 61. At the time of Audley, there was “no preexisting state law entirely on point.” 77 Wn. App. at 904. The court looked instead to the decision in State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991), upholding the constitutionality of a statute permitting warrantless blood draws in cases of driving under the influence. The Curran court had relied

predominantly on federal cases to find this a reasonable intrusion. 77 Wn. App. at 904-05 (discussing Curran).

The state of affairs that existed at the time of Audley is no longer the case. Audley is now the pre-existing state law that did not then exist. For more than 25 years, Washington precedent has been that strip searches must be justified by reasonable, individualized suspicion. Audley, 77 Wn. App. at 907-08.

That proposition is consistent with other pre-existing Washington precedent holding that roadblocks are “highly intrusive,” pat-down searches are “highly intensive,” and urinalysis testing is “at least as invasive” as a roadblock or a pat-down. Blomstrom, 189 Wn.2d at 403-04 (citing City of Seattle v. Mesiani, 110 Wn.2d 454, 458, 755 P.2d 775 (1988); Jacobsen v. City of Seattle, 98 Wn.2d 668, 674, 658 P.2d 653 (1983)). Prior Washington precedent has rejected suspicionless searches in all of these circumstances. A strip search is more invasive than any of the above.

In cases where Washington has permitted warrantless searches outside the traditional, well-established warrant exceptions, at least reasonable suspicion has been required. For example, Curran pointed out the reasonableness of the belief that a blood test would provide evidence of driving under the influence under the circumstances. Curran, 116

Wn.2d at 184-85. Thus, prior Washington precedent in addition to Audley also supports a more protective interpretation of article I, section 7.

Pre-existing state law and matters of local concern, the Fourth and Sixth Gunwall factors, weigh in favor of finding article I, section 7 more protective than the Fourth Amendment in the context of strip searches. Specifically, that protection requires that such searches be predicated on reasonable suspicion that the arrestee is concealing contraband posing a threat to jail security. Audley, 77 Wn. App. at 908. To the extent it permits strip searches without reasonable suspicion, RCW 10.79.130(2) is unconstitutional under Audley and article I, section 7.

b. Police had no reason to suspect Davis of concealing contraband.

The strip search was unconstitutional in this case because police had no reason to suspect Davis of concealing contraband that could pose a threat to jail security. Absent reasonable suspicion, the strip search violated article I, section 7, and the evidence must be suppressed. Because the remaining evidence is insufficient to sustain a conviction, Davis' conviction must be reversed.

Reasonable suspicion to justify a strip search is the same as the "reasonable articulable suspicion" required to justify a Terry stop. State v. Harris, 66 Wn. App. 636, 643, 833 P.2d 402 (1992). This standard

requires a “substantial possibility” that the person is concealing contraband. Harris, 66 Wn. App. at 643. “Reasonable suspicion to conduct a strip search may be based on factors such as the nature of the offense for which a suspect is arrested and his or her conduct.” Audley, 77 Wn. App. at 897. The person’s prior criminal record and physically violent behavior may also be considered. RCW 10.79.140(2). For example, in Audley, the court found reasonable suspicion because the defendant was arrested for possession of a controlled substance with intent to deliver and the officer saw him reaching down the front of his pants to retrieve the suspected cocaine. 77 Wn. App. at 908 n. 11.

Here, no evidence was presented to justify any reasonable suspicion. Neither Keller nor Zimmerman observed Davis make any furtive or concealing movements. CP 100-01; Ex. 1; 1RP 4-16. There was no evidence that any controlled substance was involved in the potential trespass that Officer Zimmerman was investigating when he arrested Davis. 1RP 4-16; Ex. 1. Davis was arrested on an outstanding Department of Corrections warrant, presumably for violating a condition of his community custody. 2RP 16. No evidence was presented of what condition he had violated or whether it involved a controlled substance. Nor was there any evidence of how long ago the violation had occurred. When police suspect that a possessory drug offense has just occurred

immediately prior to arrest, that fact may amount to a reason to suspect the individual has contraband secreted on his person. But when the drug possession is a prior conviction, that inference is no longer reasonable.

The state relied on subsection (2)'s automatic strip search provision and on Davis' history of prior convictions for possession of a controlled substance. 2RP 20. The court similarly relied on the fact that "Mr. Davis has drug offenses" and "was arrested on the DOC warrant, which specifically goes to the drug offenses." 2RP 28. But a history of drug offenses does not, standing alone, create reasonable suspicion that Davis was concealing contraband on his person, requiring a strip search. See United States v. Powell, 666 F.3d 180, 188 (4th Cir. 2011) ( prior criminal record insufficient, standing alone, to support reasonable suspicion) (quoting United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011)); see also United States v. Hammond, 890 F.3d 901, 906 (10th Cir. 2018) ("Standing alone, a criminal record—let alone arrests or suspected gang affiliation—"is not sufficient to create reasonable suspicion of anything.").

Moreover, there was no evidence that Officer Keller researched Davis' criminal history and determined he had a reasonable suspicion of contraband. According to Keller's declaration, Davis was "processed pursuant to the intake policy of the Spokane County Jail." CP 100. Keller

made no mention that he knew any information regarding Davis except that he was “brought into the jail for booking on a felony warrant.” CP 100-01.

By the time they arrested Davis, police no longer suspected him even of trespass. 1RP 16. He had been let into the apartment and was happy to leave when asked. 1RP 16. He was arrested solely based on a DOC warrant arising out of a prior conviction for possession of a controlled substance and a prior burglary that the court agreed could not justify a strip search. 2RP 16, 28; Ex. 1. No witness or piece of evidence gave any reason to believe Davis was concealing contraband.

The court erred in denying Davis’ motion to suppress. To the extent the statute purports to permit automatic strip searches of those arrested on warrants pertaining to certain offenses without reasonable suspicion, the statute must be struck down as violating article I, section 7 of the Washington Constitution. The evidence obtained from the strip search must be suppressed under Washington’s exclusionary rule because it was obtained by exploiting an illegal search. Allen, 93 Wn.2d at 173. Absent this evidence, the remaining evidence is insufficient to sustain the conviction. Davis’ conviction for possession of a controlled substance must be reversed and dismissed with prejudice. Kinzy, 141 Wn.2d at 393-94.

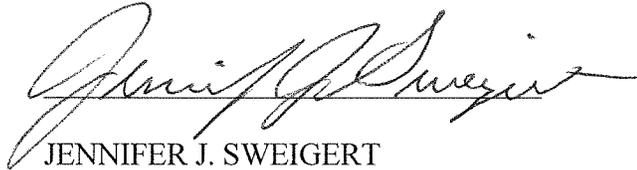
E. CONCLUSION

For the foregoing reasons, Davis asks this Court to reverse his conviction and dismiss the charges against him with prejudice.

DATED this 13<sup>th</sup> day of September, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", written over a horizontal line.

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