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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
El Paso County District Court Honorable Marla Prudek Case Number 13CR430	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Rebecca Marie Kelley Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson Colorado State Public Defender JOSEPH P. HOUGH, #34384 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 14CA15

OPENING BRIEF OF DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

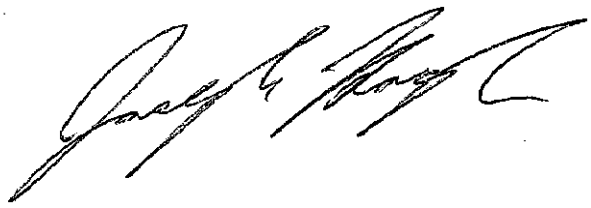
This brief complies with C.A.R. 28(g) because:

It contains 4,380 words.

This brief complies with C.A.R. 28(k) because:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.___), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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II. Whether the prosecution failed to prove, beyond a reasonable doubt, the defendant committed the crime of introduction of contraband.

STATEMENT OF THE CASE & FACTS

Rebecca Kelley, the defendant, was charged with possession of methamphetamine (two grams or less) and drug paraphernalia as well as the introduction of contraband into a detention facility, the "El Paso County Criminal Justice Center" (herein referred to as the CJC).(CF,p20-21) After pleading not guilty and trying her case to a jury, Kelley was convicted as charged and subsequently sentenced to two years of supervised probation.(R.Tr.(9/18/13),p115;(11/18/13),p5)

At trial, Officer Michelle Nethercot testified that after responding to a call of a possible robbery in progress, at a medical marijuana dispensary, she was met by Rebecca Kelley (in the dispensary's parking lot) who explained that she and her passenger (Chris Dieter) as well as another man (in a separate vehicle parked on the street) were in the area retrieving the belongings of Kelley's friend and Dieter's girlfriend (Mandy) who was currently incarcerated but lived in a nearby

apartment.(R.Tr.(9/17/13),p21-28) According to Officer Nethercot, while Kelley was fully cooperative and communicative, Dieter, by contrast, attempted to evade detection and conceal himself (in Kelley's truck) before fleeing the scene on foot when asked for his identification.(R.Tr.(9/17/13),p29-32) Though Nethercot immediately gave chase, she was unable to catch up to and apprehend Dieter—though he was eventually located and arrested, by other officers, a few blocks away.(R.Tr.(9/17/13),p29-32)

When Nethercot returned to the parking lot, she placed Kelley in the backseat of her police cruiser, confiscated the defendant's belongings on her person and proceeded to search the defendant's vehicle.(R.Tr.(9/17/13),p29-34) Nethercot located a number of syringes in the truck's center console as well as a purse containing a smaller black and white zippered bag with less than a gram of methamphetamine inside.(R.Tr.(9/17/13),p34-48) Upon further interrogation, by Nethercot, Kelley admitted ownership of the purse but denied any knowledge of the narcotics or drug paraphernalia and insisted that Dieter (a self-confessed "career criminal" who conceded to police that he knew he was "going back to prison") must have planted those items.(R.Tr.(9/17/13),p34-48,140-42)

Shortly thereafter, Nethercot transported Kelley to the police substation where she was ordered to disrobe and turn over all of her personal

items.(R.Tr.(9/17/13),p49-60) Nethercot then placed Kelley's belongings (including most of the defendant's clothing and her socks) inside a plastic bag and secured it in a police locker.(R.Tr.(9/17/13),p54-95) Later that evening, another officer (Edward Lindahl) transported Kelley and her effects to the CJC where yet another officer (Loralee Herrera) received the defendant's bagged clothing and upon closer inspection, discovered a small metal case, inside one of Kelley's socks, containing an additional 1.83 grams of methamphetamine.(R.Tr.(9/17/13),p168-75,185-86)

SUMMARY OF THE ARGUMENT

First, the trial court reversibly erred in failing to grant the defendant's motion to suppress the methamphetamine, drug paraphernalia and her own incriminating statements because that evidence was "come at by exploitation of" the defendant's unlawful detention and arrest (based on less than reasonable suspicion or probable cause to believe that she had committed any crime) as well as her involuntary consent to search her vehicle.

Second, the prosecution failed to prove, beyond a reasonable doubt, that the defendant committed the crime of introduction of contraband into a detention facility (CJC) because once her clothing and other belongings (including the sock containing the methamphetamine) were confiscated, and bagged and locked away

at the police substation, the defendant lost possession and control of the contraband and did not later introduce it into the CJC.

ARGUMENT

I. The trial court reversibly erred in failing to grant the defendant's motion to suppress the evidence against her.

Concerning the applicable standard of review, the denial of a motion to suppress presents a mixed question of law and fact—meaning, appellate courts will defer to the trial court's findings of fact, if supported by the record, but review a trial court's conclusions of law *de novo*. *People v. Adkins*, 113 P.3d 788, 790 (Colo. 2005). Furthermore, where the error is one of constitutional dimension, reversal is required unless the court is convinced that the error was harmless beyond a reasonable doubt. *See Bartley v. People*, 817 P.2d 1029, 1034 (Colo. 1991).

The constitutional harmless error test is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *People v. Welsh*, 58 P.3d 1065, 1072 (Colo. App. 2002) (citing *Bernal v. People*, 44 P.3d 184 (Colo. 2002)). Put another way, if the record shows that the defendant could have been prejudiced, the error cannot be considered harmless beyond a reasonable doubt. *People v. Perry*, 68 P.3d 472, 476 (Colo. App. 2002).

Prior to trial, the defense filed a motion to suppress alleging that Kelley was illegally detained and due to that detention, officers unlawfully gathered physical "evidence, statements and observations."(CF,p10) Specifically, argued the defense, there was no "specific and articulable basis" for stopping and detaining Kelley, and the "scope and character" of her detention was neither reasonable nor related to any suspected crime.(CF,p10-11) Furthermore, not only was the defendant's consent to search her vehicle (leading to the discovery of the methamphetamine and drug paraphernalia) not voluntarily and knowingly given, but the defendant made incriminating statements while being interrogated in custody and without first being advised of her *Miranda* rights.(CF,p10-11)

At a subsequent hearing on the matter, the prosecution called Officer Michelle Nethercot (discussed above) who testified that sometime near 6:00 p.m., she was "contacted by the owner or one of the employees of the medical marijuana establishment who told [her] that he was afraid they were going to be robbed…because the vehicles were sitting in their parking lot"—one (the defendant's Toyota truck) was actually in the parking lot while the other (Chevrolet Blazer) was "on the street in front of the east side door" of the business.(R.Tr.(5/2/13),p6-8,p35,57) Upon her arrival, Nethercot "pulled up to the

parking lot and kind of blocked the entrance" and after leaving her patrol vehicle, was approached by Kelley, who was also outside of her truck.(R.Tr.(5/2/13),p8)

According to Nethercot, the defendant was "extremely nervous," but after some initial questioning, Kelley explained (in a "rapid" manner) that there was another person in the vehicle (Blazer) on the street, and that they were "trying to get some belongings for a friend who had been arrested the day before" and "had permission to be in the parking lot" to retrieve the friend's Cadillac that was parked there.(9-11,38) Upon approaching the Blazer, the man inside indicated that he was "waiting for a friend" and presented his driver's license to Nethercot who then re-approached Kelley in order to retrieve her license as well.(R.Tr.(5/2/13),p12-13)

Shortly thereafter, Nethercot "noticed there was another person in the Toyota" who was "sinking down in his seat…refusing to look at [her], and acting as if he didn't want [her] to see him."(R.Tr.(5/2/13),p13) When the officer asked for the man's name (later determined to be Chris Dieter), he "jumped out of the vehicle and ran away."(R.Tr.(5/2/13),p14) Nethercot "began running after him" while her cover officer watched Kelley.(R.Tr.(5/2/13),p14) Because it was "snowing pretty heavily," Nethercot was unable to catch up to Dieter, so she returned to Kelley, "put her in the back of the cruiser" before confiscating her

phone and other "belongings" and then proceeding to interrogate her.(R.Tr.(5/2/13),p15-17,44-46)

Without informing Kelley that she could refuse, Nethercot then requested permission to enter the defendant's vehicle (ostensibly to search for "any identification for the male"), and Kelley agreed.(R.Tr.(5/2/13),p17,47) While searching the interior passenger portion of the truck, Nethercot "found a purse, and looked inside" to discover a smaller black and white zippered bag containing various items of drug paraphernalia and a small amount of methamphetamine.(R.Tr.(5/2/13),p18-24) Thereafter, without even mentioning the defendant's *Miranda* rights, Nethercot proceeded to interrogate Kelley about the ownership of the purse and when the defendant admitted it was hers, Nethercot informed the defendant that she was under arrest for possession of narcotics.(R.Tr.(5/2/13),p23-28,49) After booking Kelley at the police substation, the defendant was eventually transported to CJC where more methamphetamine was discovered inside a metal case within one of her socks.(R.Tr.(5/2/13),p23-28,50-53,64-71)

At the conclusion of the testimony, defense counsel argued (pursuant to numerous Colorado cases including *People v. Padgett*, 932 P.2d. 810 (Colo. 1997) and *People v. Rodriguez*, 945 P.2d 1351 (Colo. 1997)) that Officer Nethercot had

neither reasonable suspicion nor probable cause to detain and arrest Kelley, prior to the discovery of the methamphetamine and drug paraphernalia in the defendant's purse and sock.(R.Tr.(5/2/13),p73-77) Furthermore, not only was Kelley's consent to search her vehicle invalid, as it was extracted as a product of the unlawful detention and arrest, but Nethercot also failed to advise the defendant, pursuant to § 16-3-310, C.R.S. (2012), that she had the right to refuse such a request to search.(R.Tr.(5/2/13),p77-78,82-83)

After taking the matter under advisement, the court subsequently issued an oral ruling and determined that Nethercot possessed "reasonable suspicion to validly detain Ms. Kelley at the point in time given the circumstances with the other individual fleeing that Ms. Kelley was detained, but it was a reasonable detention."(R.Tr.(5/9/13),p7) Furthermore, according to the court, though Nethercot failed to comply with the statute, nevertheless, "the consent to search was voluntary, because the totality of the circumstances seemed to be that this whole – the tone of the whole encounter was one or more of confusion than it was of coercion or intimidation, or any overbearing attitude on the police."(R.Tr.(5/9/13),p8)

Turning now to the law governing the issue at hand, the Fourth Amendment to the United States Constitution guarantees the right to be secure

against unreasonable searches and seizures. U.S. Const. amends. IV, XIV; *See* Colo. Const. art. II, § 7. To effectuate these protections, "specific, articulable, and objective facts" or "reasonable suspicion" must exist before police may detain or initiate a "seizure of a particular individual." *People v. Schreyer*, 640 P.2d 1147, 1149 (Colo. 1982); *see People v. Johnson*, 865 P.2d 836 (Colo. 1994) (A police officer, lacking probable cause to arrest, may stop a person whom the officer reasonably suspects is committing, has committed, or is about to commit a crime.).

Concerning an officer's authority to arrest, a "warrantless arrest must be supported by probable cause, i.e., a 'court must determine whether the facts available to a reasonable cautious officer at the moment of arrest would warrant his belief that an offense has been or is being committed' by the person to be arrested." *Schreyer, supra* at 1150 (quoting *People v. Navran*, 483 P.2d 228 (Colo. 1971)). Furthermore, the burden of proof is on the State to prove that the officer possessed sufficient probable cause to execute a warrantless arrest, and if that "arrest is not supported by probable cause, then evidence obtained incident to that arrest must be suppressed." *People v. King*, 16 P.3d 807, 813-4 (Colo. 2001).

Clearly here, Nethercot's initial questioning of Kelley was a reasonable consensual encounter based on a report of suspicious activity at or near the medical marijuana dispensary. *See People v. Trujillo*, 773 P.2d 1086, 1089 (Colo. 1989)

(consensual encounters involve "no restraint of liberty of the citizen"). However, as defense counsel argued below, what began as a legitimate consensual encounter quickly escalated into an arrest, after Chris Dieter fled the scene but prior to Nethercot's search of Kelley's vehicle.

Again, not only did Nethercot admit to blocking in Kelley's vehicle so that she could not leave the parking lot, but she also ordered a fellow officer to remain with the defendant (as she pursued Dieter) before returning to Kelley, "put[ting] her in the back of the cruiser," confiscating her phone and other "belongings" and then requesting to search her vehicle. *See People v. Whitaker*, 32 P.3d 511, 514 (Colo. App. 2000) (Fourth Amendment implicated when a "reasonable person would not feel that he or she was free to leave or disregard the officer's request for information."). Thus, under the totality of the circumstances, Kelley was undoubtedly and unlawfully arrested by Nethercot, without probable cause to believe that the defendant had committed or was about to commit any crime. *See People v. McCoy*, 870 P.2d 1231, 1235 (Colo. 1994) ("probable cause to arrest requires that at the time an arrest is made the police have probable cause to believe a crime has been or is being committed and probable cause to believe the person to be arrested has committed or is committing the crime").

However, even assuming, *arguendo*, that this Court agrees with the trial court's conclusion that, prior to Nethercot's search of the vehicle, Kelley had not been arrested but was merely being detained, again, "[b]efore making an investigatory stop, an officer must have an articulable and specific basis in fact for suspecting that the individual is committing, has committed, or is about to commit a crime." *Padgett, supra* at 814. In determining if such a detention is valid, a "court must take into account the facts and circumstances known to the officer at the time of the intrusion." *Id*. at 815.

As discussed above, Nethercot testified that she was dispatched to the dispensary on a report of a possible burglary. Upon arrival, however, there was no evidence that any burglary had occurred or was imminent but rather, Kelley explained that she was attempting to retrieve a friend's belongings, including a vehicle (Cadillac) that was parked in the dispensary's parking lot. Shortly after Nethercot approached Kelley's vehicle, Chris Dieter (not the defendant) fled the scene and was apprehended at a later time. In response to Dieter's evasion, Nethercot ordered Kelley into the confines of her police cruiser, confiscated her belongings and then requested to search the defendant's vehicle.

Thus, prior to Kelley's detention (or arrest), neither Nethercot nor any other officer present at the scene (or otherwise) had any reason to believe that the

defendant, herself, had committed any crime—burglary or otherwise. And though Nethercot might have had some "unarticulated hunch that a criminal act [had] occurred" or was about to occur, this vague suspicion was certainly not enough to justify detaining or arresting the defendant. *People v. Greer*, 860 P.2d 528, 530-31 (Colo. 1993); *see also People v. Rahming*, 795 P.2d 1338, 1341 (Colo. 1990) (in order to detain an individual, officers must have more than an inchoate or unparticularized suspicion). Furthermore, while Nethercot also mentioned, during the suppression hearing, something to the effect of a number of dispensaries being burglarized recently, she never testified that this particular dispensary or neighborhood had been subjected to any criminal activity of late, and even if it had, our Supreme Court has previously observed that a "history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality." *People v. Rahming*, 795 P.2d 1338, 1343 (Colo. 1990) (internal quotations and citations omitted).

Concerning, specifically, Nethercot's request and Kelley's consent to search her vehicle, in *People v. Rodriguez*, 945 P.2d 1351, 1364 (Colo. 1997), our Supreme Court held:

> When illegal police action precedes a defendant's consent to search, the defendant's later consent may

> dissipate the taint of the police illegality. On the other hand, the police legality may fatally taint the consent. In deciding whether a defendant's consent was sufficiently an act of free will to purge the primary taint of the unlawful invasion, no single factor is dispositive. A reviewing court must consider the temporal proximity of the arrest and the [consent], the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct.
>
> We hold that evidence obtained by a purported consent that follows improper conduct by police must meet a two-fold test: (1) was the consent obtained through exploitation of the prior illegality; and (2) was the consent voluntary? Evidence obtained by a purported consent is admissible only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality. Even if a defendant's consent is voluntary, then the evidence will not be admissible unless the consent represents an act of free will [sufficient] to purge the primary taint of police illegality. Conversely, the fact that the consent and the illegality are attenuated does not preclude the possibility that the evidence will be inadmissible on the grounds that the consent was not voluntary. The prosecution bears the burden of proving both attenuation and voluntariness when seeking the admission of evidence discovered during a consent search.

(internal quotations and citations omitted) (emphasis original).

Here, just as in *Rodriguez*, "the proximity of the arrest [or unlawful detention] and the consent was immediate" (as Nethercot first ordered Kelley into the back of her patrol car before confiscating her personal property and then requesting to search her vehicle), and there was "[n]o intervening circumstances

between the illegal arrest and the consent." *Id*. Furthermore, the "impropriety of the arrest [or detention] was obvious" and clearly "investigatory" in nature—as there was absolutely no reasonable suspicion, much less probable cause, to believe Kelley had committed any crime and, by her own admission, Nethercot sought information and evidence concerning the identity of Chris Dieter. *Id*. Moreover, and importantly, Nethercot failed, in any conceivable respect, to comply with § 16-3-310, C.R.S. (2012) which mandates that officers *must* advise a suspect that she has a right to refuse any request to search her vehicle.

Thus, Kelley's consent to search "was not sufficiently attenuated from [her] illegal arrest [or unlawful detention], but instead was tainted by the police illegality and therefore [was] ineffective." *Id*. at 1365. Accordingly, because the methamphetamine (both in Kelley's vehicle and sock) and drug paraphernalia was "come at by exploitation of" the defendant's unlawful detention or arrest as well as her involuntary consent to search, the evidence should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 484, 488 (1963) (articulation of "fruit of the poisonous tree doctrine"); *People v. Jansen*, 713 P.2d 907, 911 (Colo. 1986) (State must demonstrate the constitutional validity of warrantless searches and seizures, which are presumptively unconstitutional).

Finally, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), statements by the accused, made during custodial interrogation, are inadmissible unless the prosecution establishes that the individual was fully advised of her constitutional rights and effectively waived those rights. Only two requirements must be met before the *Miranda* advisement need be given: the person making the statement must be in "custody" and the statement must be the product of police interrogation. *See People v. Breidenbach*, 875 P.2d 879, 885 (Colo. 1994). Interrogation includes "any words or actions on the part of the police…that the police should know are reasonably likely to elicit an incriminating response from the suspect." *People v. Rivas*, 13 P.3d 315, 319 (Colo. 2000) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). An officer's words can constitute interrogation even if the officer did not subjectively intend to elicit an incriminating response. *Breidenbach*, *supra* at 887.

An interrogation is considered "custodial" when a reasonable person in the suspect's position would consider herself deprived of freedom of action in any significant way, regardless of whether a formal arrest has been made. *See Miranda*, *supra* at 444; *People v. O'Hearn*, 971 P.2d 1168, 1175-76 (Colo. 1997). Among the factors a court may consider in determining whether a person is in custody are the time, place, and purpose of the encounter, the persons present during the

questioning, the words and tone of voice used by the officer, the general mood of the interrogation, and whether the defendant is restrained in any way or given any instruction. *See People v. Matheny*, 46 P.3d 453, 465-66 (Colo. 2002).

As previously discussed, there can be no real dispute that Kelley was, at a minimum, detained (as the trial court here found) or "in custody" for *Miranda* purposes once Officer Nethercot ordered her to the confinement of the back of a police cruiser before confiscating the defendant's personal belongings, including her cellular telephone. *See, e.g.*, *People v. Cleburn*, 782 P.2d 784, 786 (Colo. 1989) (interrogation was custodial where police officer exerted "subtle coercive influence over the defendant"). Additionally, because Nethercot's questioning of Kelley (particularly regarding the ownership of the purse) was likely to, and did in fact, elicit an incriminating response from the defendant (that the purse containing the methamphetamine and paraphernalia belonged to her), it clearly amounted to an interrogation. *See Breidenbach*, *supra* at 887.

Thus, by failing to grant the defendant's motion to suppress in its entirety, including as to Kelley's incriminating statements (unaccompanied by an explanation and waiver of the defendant's *Miranda* rights), the trial court undoubtedly erred and violated Kelley's constitutional rights. Furthermore, the error cannot be regarded as harmless beyond a reasonable doubt, or otherwise, as

there is a substantial probability that the defendant's case was severely prejudiced, not only by the erroneous admission of the physical evidence (methamphetamine and paraphernalia in the vehicle and sock) but by Kelley's own incriminating statements to Nethercot as well. Therefore, this Court should reverse the defendant's convictions and remand the case for dismissal or, depending on this Court's findings as to the proper remedy, a new trial. *See Wong Sun, supra.*

II. The prosecution failed to prove, beyond a reasonable doubt, that the defendant committed the crime of introduction of contraband.

Appellate courts review the record *de novo* to determine whether the evidence was sufficient to sustain a conviction. *Dempsey v. People*, 117 P.3d 800 (Colo. 2005). Evidence is considered sufficient when "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" and insufficient when "reasonable jurors must necessarily have a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291-92 (Colo. 2010). And even though the evidence is to be viewed in the light most favorable to the prosecution, it must nevertheless be *substantial and sufficient* enough to allow a reasonable person to conclude that the defendant is guilty beyond a reasonable doubt. *See Kogan v. People*, 756 P.2d 945 (Colo. 1988).

As previously noted, in addition to possession of methamphetamine and drug paraphernalia, Kelley was also charged with and convicted of introducing

contraband in the first degree: "On or about January 29, 2013, Rebecca Marie Kelley unlawfully, feloniously, and knowingly introduced or attempted to introduce a controlled substance, namely: Methemphetamine, into El Paso County Criminal Justice Center, a detention facility; in violation of section 18-8-203(1)(a), C.R.S.".(CF,p21)

Again, concerning this particular allegation, Nethercot testified that before Kelley was transported to the CJC (where the introduction of contraband was charged to have occurred), she ordered the defendant to disrobe and turn over her clothing, including the sock where methamphetamine was eventually discovered.(R.Tr.(9/17/13),p54-60) Nethercot then placed Kelley's clothing inside a plastic bag and secured the bag in a police station locker.(R.Tr.(9/17/13),p54-60)

Hours later, Officer Edward Lindahl placed this plastic bag (containing the defendant's clothing, socks and other personal belongings) inside the trunk of his police cruiser and transported the bag and Kelley (in the back seat of the patrol vehicle) to the CJC.(R.Tr.(9/17/13),p168-72) Once there, Kelley was taken to a holding or detention cell while the bag of her belongings was brought (by Lindahl) to an inspection area.(R.Tr.(9/17/13),p168-75) Sometime thereafter, Officer Loralee Herrera received the plastic bag (containing Kelley's clothing and socks)

and while searching through the items, discovered a small metal case containing methamphetamine inside one of the defendant's socks.(R.Tr.(9/17/13),p185-86)

Thus, there can be no legitimate dispute here that, based entirely on the prosecution's evidence, once Nethercot took Kelley's clothing and other effects (including the sock containing the methamphetamine) from the defendant at the police substation, bagged them up and then placed them inside a secure police locker, Kelley no longer possessed or exercised any control over those items and therefore, could not have possibly "introduced or attempted to introduce a controlled substance" into the CJC. But even if this Court reasons, somehow, that by perhaps being aware of the presence of methamphetamine in her sock, Kelley continued to possess and control the narcotic in some fashion, the defendant nevertheless did not engage in any knowing or affirmative act of introduction or attempted introduction. Rather, the evidence clearly showed that Officer Lindahl (albeit unknowingly) was the person who introduced the sock containing the methamphetamine into the CJC.

It is axiomatic that the Due Process Clauses of the United States and Colorado Constitutions require the State to prove every factual element necessary to constitute the crime charged beyond a reasonable doubt prior to the imposition of a conviction or punishment. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979);

People v. Hardin, 607 P.2d 1291, 1294 (Colo. 1980). Sufficient evidence is that which is necessary to convince a jury of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson, supra* at 316. This standard gives concrete substance to the presumption of innocence by requiring the factfinder to reach "a subjective state of near certitude of guilt" before convicting the accused. *Id*. at 315.

Thus, even in the light most favorable to the prosecution and based entirely on the evidence it presented, Kelley's guilt for introducing contraband into CJC was far from both "substantial and sufficient" and, in fact, was nonexistent. *See Kogan, supra* at 950; *People v. Gonzales*, 666 P.2d 123 (Colo. 1983). Though it is arguable that Kelley may have been aware that the methamphetamine was hidden inside one of her socks, she not only lost possession and control of that sock (after Nethercot confiscated her clothing and other personal items) but most importantly, she did not (by the statute's own unambiguous terms) "introduce" the methamphetamine inside the sock (as Lindahl did) into the CJC. Therefore, Kelley's conviction for introducing contraband must be reversed, vacated and remanded for dismissal below. *See People v. Sprouse*, 962 P.2d 300, 304 (Colo. App. 1997) (a conviction based on insufficient evidence of the crucial elements of an office constitutes a denial of due process and is, therefore, constitutionally

infirm.); *People v. Miralda*, 981 P.2d 676, 680 (Colo. App. 1999) (if every element of a particular offense is not proven, beyond a reasonable doubt, state and federal double jeopardy principles prohibit the defendant from being retried on that count).

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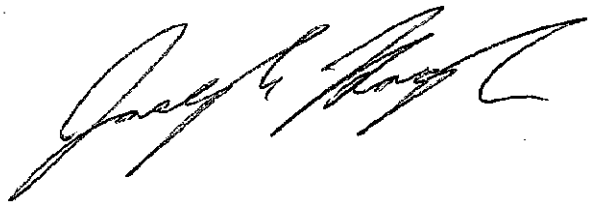

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CERTIFICATE OF SERVICE

I certify that, on February 4, 2015, a copy of this Opening Brief of Defendant-Appellant was electronically served through ICCES on Catherine P. Adkisson of the Attorney General's office through their AG Criminal Appeals account.