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7
8 **IN THE [REDACTED] COURT**
9 **IN AND FOR THE STATE OF ARIZONA**

10 STATE OF ARIZONA,

11 Plaintiff,

12 vs.

13 [REDACTED]
14 Defendant

15 Case No. : [REDACTED]

16 MOTION TO SUPPRESS FOR LACK OF
17 PROBABLE CAUSE

18 (Honorable [REDACTED])

19 Defendant moves to suppress the State's evidence because there was no probable
20 cause to arrest Defendant. This motion is supported by the following memorandum of
21 Points and Authorities.

22 **I. FACTS AND ANTICIPATED TESTIMONY**

23 On [REDACTED], [REDACTED], [REDACTED] and her
24 husband [REDACTED] attended the [REDACTED]. They
25 arrived in separate cars. After the [REDACTED], [REDACTED] agreed that [REDACTED]
26 would go home, change clothes, and then return so they could go out to dinner. The
plan was that [REDACTED] would be driving that evening and since they live near the [REDACTED],
[REDACTED] would wait for [REDACTED] in their car.

1 A. Police Were Already On Scene Investigating Another Person (Not [REDACTED]
2 [REDACTED] For Suspicion Of DUI

3 Previous to this, the [REDACTED] Fire Department and [REDACTED] Police
4 Department had been dispatched to the [REDACTED]. They were investigating a possibly
5 intoxicated man who was slumped over the steering wheel in his car.

6 B. [REDACTED] Vehicle Was Incapable Of Moving Because It Was Blocked By A
7 Firetruck

8 Upon arriving at her car in the [REDACTED] parking lot, [REDACTED] noticed it was blocked
9 by a firetruck and incapable of moving.

10 C. [REDACTED] Decided To Wait For Dennis In Her Car, And Had No Intention Of
11 Driving

12 After making the request to the firefighter, [REDACTED] got into her vehicle. She
13 intended to wait in it until her husband returned. [REDACTED] started the car, turned the air
14 on, and got comfortable while waiting for her husband. The car always remained in
15 park.

16 D. [REDACTED] Request Prompted The Firefighter To Report Her

17 The firefighter told [REDACTED] Police Officer [REDACTED] that he smelled an
18 intoxicating beverage on Margie's breath. Officer [REDACTED] in turn told Officer [REDACTED]
19 who then decided to investigate [REDACTED]

20 Officer [REDACTED] asked [REDACTED] where she was going. [REDACTED] stated she was not
21 going anywhere, but was waiting for her husband to return.

22 E. [REDACTED] Ordered Two Glasses Of Wine, But Drank Less Than That

23 In response to Officer [REDACTED] questions [REDACTED] advised she had ordered two
24 glasses of wine, but had drank only one and a half glasses.

1 F. The Officer Arrested [REDACTED] With No Basis

2 Although [REDACTED] never exerted any actual physical control over her vehicle (as
3 defined below), Officer [REDACTED] asked her to submit to FSTs. She agreed, but due to
4 osteoporosis, [REDACTED] could not perform the one-leg stand. Nor did he administer a
5 Portable Breath Test. Nonetheless, he arrested her for DUI.

6
7 **II. ARGUMENT**

8 **A. The Court Should Suppress The State's Evidence Because There**
9 **Was No Probable Cause**

10 The Court should suppress all of the State's evidence because [REDACTED] was not in
11 actual physical control of her car.

12 According to the very recent opinion in *State v. Zaragoza*, 2CA-CR 2007-0017
13 (opinion issued July 23, 2008), mere presence in the driver's seat of a vehicle – even
14 with a key and even with the car running - does not mean a person is in actual physical
15 control. “[W]e believe the legislature intended to criminalize an impaired person’s
16 control of a vehicle when the circumstances of such control – as actually physically
17 exercised – demonstrate an ultimate purpose of placing the vehicle in motion or
18 directing an influence over a vehicle in motion.” *Id.* at page 9.

19
20 There is no evidence that [REDACTED] exercised actual physical control, as defined
21 above, over her car an automobile. [REDACTED] did not actually physically control a car,
22 i.e. she was not demonstrating a purpose of placing the vehicle in motion or directing
23 influence over a vehicle in motion per *Zaragoza*. The evidence is that she was merely
24 waiting in her car for her husband. Therefore, there was no crime and there could be no
25 probable cause to arrest her for exerting physical control over a vehicle while impaired.
26

1 **B. There Was No Evidence Of Improper Driving**

2 The officer had no probable cause to arrest [REDACTED] Because she was not
3 driving, she exhibited no erratic driving behavior. The only things the officer had were a
4 report from a fire fighter who claimed he smelled alcohol on her breath and a failed walk
5 and turn by a 71 year old woman with osteoporosis. Even if [REDACTED] had been exerting
6 actual physical control over her car, the smell of alcohol alone does not establish
7 probable cause for an arrest. Given that [REDACTED] was merely sitting in her car, the smell
8 of alcohol clearly does not establish probable cause.
9

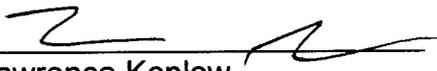
10 **C. [REDACTED]'s Actions Are Protected Under Arizona's "Safe Harbor" Law**

11 Under Potter v. A.D.O.T., 204 Ariz. 73, 59 P.3d 827 (App. 2002), probable cause
12 does not exist where, as here, Margie was using her car as a "safe harbor" or shelter
13 with no intent of driving. In some circumstances, the State can circumvent the "safe
14 harbor" law by showing that a defendant was driving while impaired prior to using his
15 vehicle as a "safe harbor." There is no evidence of that in [REDACTED]'s case.
16

17 **III. Conclusion**

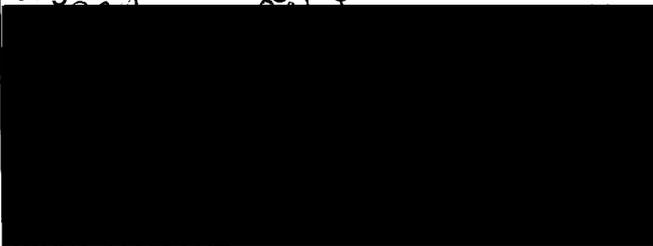
18 For the above reasons, Defendant requests that the Court suppress all of the
19 State's evidence.

20 RESPECTFULLY SUBMITTED this 23rd day of October, 2008.

21 
22 Lawrence Koplow
23 Attorney for Defendant
24
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1 Original of the foregoing faxed/filed

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(480) 512-2787

6 Copy mailed 23rd day of October, 2008, with:

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