

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	
<p>Boulder County District Court Honorable D.D. Mallard, Judge Case No. 06CR1758.</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>Plaintiff-Appellee,</p> <p>v.</p> <p>STACY CLENDENIN,</p> <p>Defendant-Appellant.</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No.: 08CA624</p>
<p>JOHN W. SUTHERS, Attorney General JOHN T. LEE, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5168 Registration Number: 38141 *Counsel of Record</p>	
<p>PEOPLE'S ANSWER BRIEF</p>	

STATEMENT OF THE CASE AND FACTS

I. Proceedings Below

On October 10, 2006, the People charged the defendant, Stacy Clendenin, with cultivation of marijuana, possession with intent to distribute marijuana, possession of marijuana concentrate, possession of marijuana-eight ounces or more, and possession of drug paraphernalia (v. 1, pp. 9-11). Following a jury trial, the jury found the defendant guilty as charged (v. 1, p. 137). On February 8, 2008, the trial court sentenced the defendant to one year of unsupervised probation and forty-eight hours of community service (v. 1, p. 140).

II. Statement of the Facts

As the defendant did not include any transcripts on appeal, the following facts are based on the probable cause arrest affidavit and the trial court's minute orders.

Detective Shultz received a tip from a named informant that there was "come and go" traffic at the defendant's residence (v. 1, p. 63). The detective obtained utility and assessor records for the defendant's house and for several nearby houses of comparable size (v. 1, p. 63). In comparing the utility reports he discovered that between June and September of 2006, the power usage at the defendant's house was four times greater than the other houses except for one

month when it was three times higher (v. 1, p. 63). The usage was also two to three times higher than that used by the previous resident (v. 1, p. 63). As a result, the detective took trash from the garbage can in front of the defendant's house, and inside, he found three marijuana stalks (v. 1, p. 63).

The detective obtained a search warrant (v. 1, p. 3). When he exercised the warrant on October 4, 2006, the defendant opened the door and identified herself (v. 1, p. 3). Smelling a strong scent of marijuana, the detective advised the defendant of the warrant (v. 1, p. 3). She escorted the detective to the basement where she had two "grow rooms" (v. 1, p. 3). The defendant told the detective she grew four kinds of marijuana and did so for "medical purposes, because she has migraine headaches" (v. 1, p. 3). During the search, the detective found 44 marijuana plants (v. 1, p. 64), \$572.00 in the defendant's bedroom (v. 1, p. 4), and 67 medium sized zip lock jewelers bags (v. 1, p. 4).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in finding that the affidavit provided probable cause for the search of the defendant's house. The affidavit provided a fair probability that evidence of marijuana cultivation would be found in the defendant's house.

The trial court correctly prevented the defendant from presenting an affirmative primary caregiver defense. The amendment expressly limits the defense to primary caregivers, and simply providing marijuana for medical use does not constitute “significant responsibility for managing the well-being of a patient.”

The defendant was not entitled to present an affirmative defense of “ultimate user.” The defense requires that possession be in accordance with a prescription and that the person intended to consume the controlled substance. As the evidence in this case did not raise these issues, the evidence did not support the instruction.

The possession of a controlled substance statute readily satisfies the relatively modest requirements of the void-for-vagueness doctrine as well.

ARGUMENT

I. The trial court correctly found that the affidavit supported the search warrant.

The defendant argues that the search warrant lacked probable cause. However, the record and applicable law support the trial court’s order denying the defendant’s motion to suppress.

A. Standard of review

In reviewing suppression issues, this Court “give[s] deference to the trial court’s findings of historical fact and will not overturn them if supported by competent evidence in the record.” People v. Pitts, 13 P.3d 1218, 1221 (Colo. 2000). A magistrate’s probable cause determination is given great deference and is not reviewed de novo. People v. Leftwich, 869 P.2d 1260, 1266 (Colo. 1994). The duty of a court reviewing the sufficiency of an affidavit on a motion to suppress is simply to ensure that the issuing judge had a “substantial basis” for concluding that probable cause existed. People v. Pate, 878 P.2d 685, 690 (Colo. 1994) (citing Illinois v. Gates, 462 U.S. 213 (1983)).

B. Factual Background

Prior to trial, the defense filed its “Motion to Suppress Evidence and Statements” (v. 1, p. 37). The defendant argued that the affidavit for the search warrant lacked probable cause (v. 1, p. 39). The trial court held a hearing on the defendant’s motion, and Detective Shultz explained that he “received a tip from a named citizen information regarding ‘come and go traffic’ at the defendant’s residence.” (v. 1, p. 63). The detective obtained utility and assessor records for that addresses and several nearby houses, and found that the power usage for the defendant’s address between June and September of 2006 was four times greater

than the other houses, except for one month, when it was three times higher (v. 1, p. 63). He took trash from the garbage in front of the house, and found three marijuana stalks in the trash (v. 1, p. 63). Based on this evidence, the detective obtained a search warrant (v. 1, p. 64).

Following a pretrial hearing, the trial court denied the defendant's motion to suppress holding that there was probable cause to support the warrant given the marijuana stalks found in the garbage and the utility bill information that established the defendant's home used significantly more power than that used by comparable neighborhood homes (v. 1, p. 70). The trial court also held that the evidence would be admissible under the good faith exception (v. 1, p. 70).

C. Law and Analysis

Both the United States and Colorado constitutions provide that a search warrant may only be issued upon a showing of probable cause, supported by oath or affirmation, particularly describing the place to be searched and the things to be seized. U.S. Const. amend. IV; Colo. Const. art. II, § 7. Search warrants do not require, as a foundation, an affidavit that establishes guilt beyond a reasonable doubt. People v. Atley, 727 P.2d 376, 377 (Colo. 1986). To be valid, a search need only be based on probable cause. See e.g. People v. Altman, 960 P.2d 1164, 1167 (Colo. 1998). Probable cause for a search exists when the affidavit in support

of the warrant alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or other evidence of criminal activity is located at the place to be searched. Henderson v. People, 879 P.2d 383, 391 (Colo. 1994).

Whether an affidavit satisfies the constitutional standard of probable cause is evaluated on the basis of the totality-of-the-circumstances. People v. Turcotte-Schaeffer, 843 P.2d 658, 660 (Colo. 1993). Specifically, “Probable cause depends upon probabilities and not certainties, and upon knowledge grounded in the practical considerations of every day life on which reasonable and prudent persons act.” People v. Fortune, 930 P.2d 1341, 1346 (Colo. 1997). In making the probable cause determination, the reviewing court must restrict itself to the four corners of the affidavit. Atley, 727 P.2d at 377. The affidavit must be interpreted “in a common sense and realistic fashion” and courts should not impose “technical requirements of elaborate specificity.” Banks v. People, 678 P.2d 1035, 1039 (Colo. App. 1983) (citing United States v. Ventresca, 380 U.S. 102, 108 (1965)).

The defendant contends that the affidavit did not provide probable cause to believe marijuana cultivation was occurring in her residence, and as a result, the warrant to search the residence was impermissible under the Fourth Amendment. Particularly, the defendant argues that the warrant lacked probable cause because “the affidavit failed to mention that the informant had never provided reliable

information previously,” and though the affidavit provided that the officer found marijuana stalks in the trashcan, the affidavit did not explain that the trashcan was “accessible to any random individual present in the neighborhood” (Opening Brief, pp. 9-10).

Here, the affidavit set forth a fair probability that the cultivation of marijuana would be found in the defendant’s residence. Indeed, contrary to the defendant’s assertions, the trial court did not rely on the identified informants report of “come and go” traffic in determining that the affidavit had probable cause. Rather, as the trial court found, “probable cause was developed by the officer” (v. 1, p. 70). Indeed, as the officer listed in the affidavit, four marijuana stalks were found in the trash outside of the defendant’s residence. Additionally, the detective obtained records concerning the power usage of the defendant’s house and discovered that it used three to four times the amount of power of comparable houses in the area. Based on the totality of circumstances, the affidavit established a fair probability that marijuana cultivation would be found in the defendant’s residence. See U.S. v. Colonna, 360 F.3d 1169, 1175 (10th Cir. 2004) (rejecting the defendant’s argument that evidence of drugs found in the trash outside his home did not provide probable cause to search his home); see generally People v. Kazmierski, 25 P.3d 1207 (Colo. 2001) (affidavit had merely to establish

a reasonable basis for believing that evidence of the crime would be located in the place to be searched); People v. Pate, 878 P.2d 685, 690 (Colo. 1994) (doubts must be resolved in favor of a magistrate’s determination of probable cause).

Still, the defendant argues that the affidavit lacked probable cause because it omitted the possibility that “another person, unrelated to and unknown to the occupants, could have placed [the marijuana stalks] in a generally-accessible garbage can” (Opening Brief, p. 10). Accordingly, she argues that “the state misled the issuing magistrate or evinced a reckless disregard for the truth” and “the trial court should have stricken all false or misleading statements from the affidavit” (Opening Brief, p. 10). However, “There is no requirement that a warrant affidavit fully describe all steps taken, all information obtained, and all statements made by witnesses during the course of an investigation.” People v. Kerse, 181 P.3d 1167, 1172 (Colo. 1992). Instead, “an affiant’s duty of disclosure extends only to material or relevant adverse facts.” Id. quoting People v. Sundermeyer, 769 P.2d 499, 501 (Colo. 1989). “In sum, although information omitted from the affidavit may be adverse and relevant, its omission does not rise to the level of misrepresentation if it does not cast doubt on the existence of probable cause.” Id.

In the present case, contrary to the defendant's assertion, the detective's statement regarding the marijuana stalks found in the trashcan was not misleading. The affidavit only provided that the detective "took trash from the garbage can in front of the house" (v. 1, p. 63). The affidavit did not affirmatively indicate or suggest that the detective had any other reason to believe that the trash may belong to the defendant other than the fact that it was found outside of the defendant's house. Accordingly, the statement did not rise to the level of a misrepresentation. In any event, the fact that the affidavit did not explicitly provide that the trash was accessible to the public and it was therefore possible that someone else may have put the marijuana stalks in the trash does not "cast doubt" on the existence of probable cause to invalidate the search warrant. See Kerse, 181 P.3d at 1172. Therefore, the defendant's argument fails. See U.S. v. Gary, 528 F.3d 324, 327-28 (4th Cir. 2008) (rejecting the defendant's argument that a warrant lacked probable cause because though it was possible that the unmarked trash can outside the defendant's house where the officer found evidence of drug use may possibly have belonged to someone else, "that possibility is too slight to defeat probable cause"); Colonna, 360 F.3d at 1175; Cf. United States v. Sparks, 291 F.3d 683, 689-690 (10th Cir. 2002) (where it was reasonable to conclude that defendant was involved in the distribution of methamphetamine, it was reasonable to believe there

was a fair probability that additional evidence of crime would be found in defendant's nearby residence), (citing United States v. Whitner, 219 F.3d 289, 297-99 (3rd Cir. 2000)).

D. Even assuming arguendo that the warrant was not supported by probable cause, the error is harmless because the good-faith exception applies.

Even assuming that the affidavit lacked probable cause, the good faith exception would apply to allow the admission of the fruits of the ensuing search. Section 16-3-308 C.R.S., (2008), creates a presumption that an officer was acting in good faith if he was acting pursuant to a warrant. People v. Miller, 75 P.3d 1108, 1113 (Colo. 2003). This Court has confirmed that, "Where officers executing a warrant reasonably and in good faith believe that they are executing a legitimate warrant, the evidence obtained may be admissible, even if the warrant is found to be defective." People v. Bachofer, 85 P.3d 615, 618 (Colo. App. 2003).

There are four circumstances in which an officer's reliance on a warrant would not be objectively reasonable: (1) where the issuing magistrate or judge was misled by a knowing or recklessly made falsehood; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the warrant is so facially deficient that the officers cannot reasonably determine the particular place

to be searched or things to be seized; and (4) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Miller, 75 P.3d at 1114.

“The first notion to be remembered in considering the good faith principle is the presumption created in Leon that when an officer relies upon a warrant, the officer is acting in good faith.” United States v. McKnelly, 6 F.3d 1447, 1454 (10th Cir. 1993) (citing United States v. Leon, 468 U.S. 897 (1994)). “This presumption, though not absolute, must carry some weight.” McKnelly, 6 F.3d at 1454 (citing United States v. Cardall, 773 F.2d 1128, 1133 (10th Cir.1985)).

The defendant argues that the affidavit here was a “bare bones” affidavit. When an affidavit in support of a warrant is so deficient that it cannot reasonably support a difference of opinions about its sufficiency, then it is referred to as a “bare bones affidavit.” People v. Randolph, 4 P.3d 477, 482 (Colo. 2000). Such an affidavit contains “wholly conclusory statements devoid of facts from which a magistrate can independently determine probable cause.” Id. at 481(citations omitted). Here, the affidavit was not “bare bones” and the good faith exception would apply.

Indeed, rather than making “wholly conclusory statements devoid of facts,” the affidavit sets forth a substantial and detailed factual basis for the conclusion

that defendant was cultivating marijuana. In substance, the affidavit related: that the officer received a report from an identified informant of “come and go” traffic; the officer found marijuana stalks in the trash outside of the defendant’s house; and in comparing the defendant’s utility bill with that of comparable houses in the area, the officer discovered that the defendant’s power usage was three or four times that of comparable houses in the area. As the affidavit had ample factual support for the judge to conclude that there was probable cause, the officer who executed the search warrant appropriately relied in good faith upon the decision of the judge. See People v. Altman, 960 P.2d 1164, 1172 (Colo. 1998); United States v. Wright, 791 F.2d 133, 135 (10th Cir.1986) (when the affidavit relied upon by the magistrate who issued the warrant is not devoid of factual support, officers who execute the search warrant are “entitled to rely in good faith upon the decision of that magistrate.”).

II. The plain language of the amendment demonstrates that the primary caregiver defense is available only to those who have “significant responsibility” for managing the well-being of patients with debilitating medical conditions.

The defendant contends that the trial court erred in preventing her from presenting a primary caregiver affirmative defense. This argument rests on the

mistaken premise that she was a primary caregiver. As the record and applicable law supports the trial court's judgment, it should be affirmed.

A. Factual Background

In 1999, Colorado amended its constitution to include provisions for medical marijuana usage. Colo. Const. art. XVIII, § 14 (West 2008). The amendment also sets forth the establishment of an affirmative defense to the possession and cultivation of medical marijuana for primary caregivers:

[A] patient or primary care-giver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana will be deemed to have established an affirmative defense to such allegation where:

(I) The patient was previously diagnosed by a physician as having a debilitating medical condition;

(II) The patient was advised by his or her physician, in the context of a bona fide physician-patient relationship, that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and

(III) The patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section.

Colo. Const. art. XVIII, § 14(2)(a).

Prior to trial, the People field a motion in limine asking for a hearing to determine whether the defendant should be allowed to assert an affirmative defense at trial (v. 1, pp. 49-50). Although the People argued that in order to claim the primary caregiver affirmative defense the “defendant must have been issued a registry identification card” (v. 1, p. 49), the trial court found that the defense does not require the possession of a card or designation on such a card (v. 1, p. 79).

However, following a hearing, the trial court found that “as a matter of law, the plain language of the amendment does no[t] allow a grower of marijuana who has no personal contact with patients to be a ‘caregiver’ under the amendment” (v. 1, p. 136).

B. Standard of Review

“Whether additional written jury instructions must be given which properly state the law and fairly and adequately cover issues presented is a matter committed to the sound discretion of the trial court. The trial court’s exercise of discretion will not constitute reversible error absent manifest prejudice or a clear showing of abuse of discretion.” People v. Renfro, 117 P.3d 43, 48 (Colo. App. 2004). However, whether sufficient evidence supported a defendant’s tendered affirmative defense instruction or theory of the case instruction is reviewed de

novo. See, e.g., People v. Garcia, 113 P.3d 775, 783-84 (Colo. 2005); People v. Hill, 934 P.2d 821, 826 (Colo. 1997).

The defendant preserved her objection below (v. 1, p. 136).

B. Law and Analysis

As with statutes, the starting point for interpreting a constitutional amendment is the language of the amendment itself. See Grossman v. Dean, 80 P.3d 952 (Colo. App. 2003). Like the district court observed, the language of the amendment is “plain” (v. 1, p. 136). The amendment defines a “primary caregiver” as a person “other than the patient and the patient’s physician, who is eighteen years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition.” Therefore, as a matter of law, a primary caregiver is not one “with no personal contact with patients” (v. 1, p. 135).

Consistent with the determination of the trial court, appellate courts in other states with analogous affirmative defenses for primary caregivers have rejected the defendant’s argument. In State v. Mullins, 116 P.3d 441 (Wash. App. 2005), the defendant argued that the trial court erred in precluding him from presenting a primary caregiver affirmative defense. Id. at 444. Under Washington’s Medical Use of Marijuana Act, a primary caregiver must be “18 years of age or older,

responsible for the housing, health, or care of the patient, and designated in writing by the patient to perform the duties of a primary caregiver.” Id. Applying that definition, the court rejected the defendant’s claim that he fell under the definition of a primary caregiver because he supplied the medical marijuana used by the patient. Id. at 445. In so doing, the Court stated that though the defendant “arguably was providing a basic service in so far as he supplied [the patient] with the drugs necessary to treat his medical condition,” he “was responsible for only one aspect of [the patient’s] care,” and thus he was not a primary caregiver. Id. at 446.

In People v. Mentch, 195 P.3d 1061 (Ca. 2008), the California Supreme Court delineated the same limitation in determining the application of the “primary caregiver” defense. There, a primary caregiver is defined as “the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.” Id. at 283; § 11358, Cal (2008). As a factual matter, in comparing the different states to have adopted similar acts, the court concluded that Colorado, like California, had adopted the approach “of limiting the caregiver exception by using a higher standard for the nature of the relationship and responsibility assumed.” 195 P.3d 168, n. 8. Having determined that “a primary caregiver must establish he or she

satisfied the responsibility clause based on evidence independent of the administration of medical marijuana,” Id. at 1068, the court held that the affirmative defense does not apply “where the provision of marijuana is itself the substance of the relationship.” Id. at 1070.

The same result must follow here. As the district court observed, the language of the amendment explicitly and unambiguously defines a “primary caregiver” as a person that “has significant responsibility for managing the well-being of a patient who has a debilitating medical condition.” This Court has repeatedly noted that “significant” means “deserving to be considered; important; notable.” See Z.J. Gifts D-2, L.L.C. v. City of Aurora, 93 P.3d 633, 639-40 (Colo. App. 2004); Denver Pub. Co. v. City of Aurora, 896 P.2d 306, n. 11 (Colo. 1995); City of Colorado Springs v. Board of County Com’rs of County of Eagle, 895 P.2d 1105, 1114 (Colo. App. 1994). Viewed in the proper light, the language of the amendment is straightforward. The amendment demarcates a primary caregiver as one that has significant responsibility. Because the amendment intended the affirmative defense to apply to those only with “significant” responsibility, it necessarily follows that it did not intend to apply to persons with “some” responsibility.

The defendant suggests that it is the “the provision of medical marijuana, itself, that constitutes the ‘significant responsibility’” (Opening Brief, p. 17). Specifically, she contends that she should have been allowed to present evidence of people who received her marijuana through a cooperative and of “whom she had never met” (Opening Brief, p. 17). Nothing in the text supports the defendant’s proposition. The phrase the amendment uses—significant responsibility for managing the well-being of a patient—requires a relationship beyond providing marijuana.

Indeed, the acts of possession, production, use and transportation of marijuana are included in the Amendment’s definition of “medical use.” Colo. Const. art. XVIII, § 14 (III)(b). Accordingly, had the amendment intended to include a primary caregiver as someone who only had significant responsibility managing the “medical use” of a patient with a debilitating medical condition, it would have done so. Cf. People v. Drennon, 860 P.2d 589, 591 (Colo. App. 1993) (holding that statute’s provision providing criminal immunity to those who use force against an intruder who makes an “unlawful entry” into a dwelling does not extend to those who use force against a person who remains unlawfully in a dwelling); People v. McNeese, 865 P.2d 881, 884 (Colo. App. 1993) (finding that

if the General Assembly intended to distinguish between *an* unlawful entry and *an* uninvited entry, it would have so done).

Moreover, “It is an elementary rule of statutory construction that statutory words are generally to be construed according to their commonly understood meaning unless they have acquired a technical or particular meaning by legislative definition or judicial construction.” People v. Becker, 759 P.2d 26, 31 (Colo. 1988) (citing Binkley v. People, 716 P.2d 1111, 1113 (Colo. 1986)). The term “manager” is defined as “a person charged with the control or direction of an institution, business, or the like.” Webster’s Encyclopedic Unabridged Dictionary of the English Language 870 (1989). Accordingly, as the trial court correctly found, “managing” requires some form of supervision and contact. Cf. U.S. v. Chambers, 985 F.2d 1263, 1268 (4th Cir. 1993) (concluding that the term “manager” connotes responsibility greater than other participants and requires some level of supervision); State v. Afanador, 631 A.2d 946 (N.J. 1993) (holding that use of term “manager” in kingpin statute “connote some degree of control over another person's actions); Hall v. Progress Pig, Inc., 610 N.W.2d 420, 428 (Neb. 2000) (relying on Webster’s in holding that “manage” means “take charge or care of”). Therefore, as a matter of law, a defendant with no personal contact with a

patient is not “*managing* the well-being” of that patient. See Mentch, 195 P.3d at 1083; Mullins, 116 P.3d at 446.

Indeed, holding that a primary caregiver includes someone who just possesses or cultivates marijuana would also “rest the primary caregiver defense on an entirely circular footing.” Mentch, at 284. Under the amendment, a primary caregiver is a predicate for being allowed under state law to possess or cultivate marijuana. Yet under the defendant’s interpretation, anybody who provides marijuana qualifies as a primary caregiver. Under that construction, there would be no need for a separate definition of a primary caregiver, because the affirmative defense would apply to anyone engaging in the provision of medical marijuana. Such an interpretation would lead to absurd results and, is contrary to our rules of statutory construction. See AviComm, Inc. v. Colorado Pub. Utils. Comm’n, 955 P.2d 1023, 1031 (Colo. 1998) (“[A] statutory interpretation that defeats the legislative intent leads to an absurd result will not be followed”).

As the language of the statute is clear, the rule of lenity would not apply as the defendant contends (Opening Brief, p. 19). “The rule of lenity provides that courts must ‘resolve ambiguities in a penal code in the defendant’s favor.’” People v. Leske, 957 P.2d 1030, 1042 (Colo. 1998) quoting People v. Lowe, 660 P.2d 1261, 1267 (Colo. 1983). The existence of a statutory ambiguity is insufficient by

itself to justify application of the rule of lenity. See Caron v. United States, 524 U.S. 308, 316 (1998) (“the rule of lenity is not invoked by a grammatical possibility”); United States v. Graham, 169 F.3d 787, 790 (3rd Cir. 1999) (“the rule of lenity does not apply simply because a statute requires interpretation”).

To be sure, the rule of lenity “is a doctrine of last resort, to be used only after the traditional means of interpreting authoritative text have failed to dispel any ambiguities.” Mahn v. Gunter, 978 F.2d 599, 601 (10th Cir. 1992); see Terry v. People, 977 P.2d 145, 151 (Colo. 1999) (“giving statutory words their full meaning in the context in which they are used does not violate the rule of lenity”). The rule of lenity does not consist of “an overriding consideration of being lenient to wrongdoers,” N.O.W. v. Scheidler, 510 U.S. 249, 262 (1994) quoting United States v. Turkette, 452 U.S. 576 (1981); see also People v. Jones, 990 P.2d 1098, 1103 (Colo. App. 1999) (“the rule of lenity does not stand for the proposition that a court must show ‘leniency.’”), and should not be used to “engraft an illogical requirement” to the text of an unambiguous statute, Salinas v. United States, 522 U.S. 52, 66 (1997); “to beget” ambiguity, United States v. Turkette, 452 U.S. 576, 588 n.10 (1981); or “to defeat the evident intention of the legislature.” People v. Wiedemer, 852 P.2d 424, 431 (Colo. 1993); see also People v. Swain, 959 P.2d 426, 431 (Colo. 1998).

Rather, the rule of lenity only applies when, “after reviewing everything from which aid can be derived,” a court can “no more than guess at what [the legislature] intended.” Muscarello v. United States, 524 U.S. 125, 138 (1998). Courts properly apply the rule of lenity “only to resolve an unyielding ambiguity in statutory language,” Schubert v. People, 698 P.2d 788, 794 n.12 (Colo. 1985) (emphasis added); where there is a “grievous ambiguity or uncertainty in the language and structure of the statute;” Chapman v. United States, 500 U.S. 453, 463 (1991); or when “a reasonable doubt persists about a statute’s intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.” Moskal v. United States, 498 U.S. 103, 108 (1990).

As no such ambiguity exists in the amendment, the rule of lenity does not apply. The defendant’s argument fails.

III. The defendant was not entitled to an “end user” affirmative defense.

The defendant argues that her convictions must be reversed because the court rejected her affirmative defense instruction on end user. However, evidence that the defendant intended to consume some of the marijuana she cultivated did not establish an affirmative defense within the meaning of § 18-18-302, C.R.S. (2008). Therefore, the trial court’s judgment should be affirmed.

A. Standard of Review

The standard of review in argument II is incorporated herein. The defendant preserved her objection below (v. 1, p. 136).

B. Law and Analysis

Whether a particular defense is an affirmative defense has significance for determining what jury instructions, if any, must be given concerning the burden of proof regarding the matter raised as a defense. People v. Huckleberry, 768 P.2d 1235, 1238 (Colo. 1989). A defendant who introduces some credible evidence of an affirmative defense is entitled to an instruction informing the jury that the prosecution “has the burden of proving the guilt of the defendant . . . beyond a reasonable doubt as to the affirmative defense, as well as to all the elements of the crime charged.” § 18-1-407, C.R.S. (2008)

§ 18-18-302 provides that:

The following persons need not register and may lawfully possess controlled substances under this article:

(a) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if the agent or employee is acting in the usual course of business or employment;

(b) A common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled

substance is in the usual course of business or employment;

(c) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner.

In the instant case, as the trial court correctly found, the exception “applies to an end user in possession of a controlled substance ‘pursuant to a lawful order of practitioner’” (v. 1, p. 136). As relevant here, § 18-18-102(23)(a) defines order as “a prescription order which is any order . . . authorizing the dispensing of drugs.” The trial court ruled that the issue of a prescription was “not relevant to the case of hand” (v. 1, p. 136). Therefore, as no evidence supported the instruction, the trial court correctly refused to tender it. See People v. Lucas, 992 P.2d 619, 625 (Colo. App 1999) (finding that when defendant failed to present evidence sufficient to meet at least one element of affirmative defense, he was not entitled to the instruction).

To the extent the defendant may argue that the evidence at trial raised such an issue, the defendant bears the burden of providing reviewing courts with adequate appellate records that set forth the factual underpinnings of their appellate claims. See People v. Rodriguez, 914 P.2d 230, 260 (Colo. 1996); People v.

Velarde, 616 P.2d 104, 105 (Colo. 1980); Till v. People, 581 P.2d 299, 300 (1978).

In the absence of an adequate record, this court must presume that the trial court's actions were correct. Till, 581 P.2d at 300; see also People v. Quintero, 196 Colo. 434, 586 P.2d 48, 49 (1978) (matters which do not intelligibly appear of record cannot be reviewed by an appellate court); Mingo v. People, 171 Colo. 474, 468 P.2d 849, 852 (1970) (appellate review is limited to matters contained in the appellate record).

In any event, it appears that the evidence was undisputed that the defendant possessed marijuana in which she did not intend to be the “end user.” Rather, as the defendant continues to urge, “she cultivated marijuana with the intent of supplying it solely to patients” (Opening Brief, p. 6). Accordingly, as it appears there was no evidence presented that the defendant intended to consume all of the marijuana found, she was not an “end user,” and the trial court correctly refused to tender her instruction.

IV. The possession statute satisfies the relatively modest requirements of the void-for-vagueness doctrine.

The defendant argues that the language of the “intent to distribute” is constitutionally deficient because it fails to state “how much” of the controlled

substance is necessary to permit the inference that the possessor had an intent to distribute. Her claim should be rejected.

A. Factual Background

Prior to trial, the defendant filed a motion to dismiss the possession with intent to distribute charge because the statute was unconstitutionally vague (v. 1, pp. 26-31). Citing U.S. v. King, 485 F.2d 353 (10th Cir. 1973), the trial court held that the statute was not unconstitutional (v. 1, p. 70).

B. Standard of Review

Statutes are presumed to be constitutional. People v. McCullough, 6 P.3d 774, 779 (Colo. 2000); People v. Hickman, 988 P.2d 628, 634 (Colo. 1999). The party challenging the validity of a statute carries the burden of proving unconstitutionality beyond a reasonable doubt. Hickman, 988 P.2d at 634 (citing People v. Janousek, 871 P.2d 1189, 1195 (Colo. 1994)). If a challenged statute is capable of different constructions, one of which comports with constitutional standards, the courts must adopt that construction that accords with constitutional norms. People v. Lowrie, 761 P.2d 778, 782 (Colo. 1988). In other words, “a statute is facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a permissible manner.” People v. Montour,

157 P.3d 489, 499 (Colo. 2007) citing Woldt v. People, 64 P.3d 256, 266 (Colo. 2003).

C. Law and Analysis

A law is void for vagueness where its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Vague laws offend due process because they fail to give fair notice of the conduct prohibited, and do not supply adequate standards for those who apply them in order to prevent arbitrary and discriminatory enforcement. People v. Baer, 973 P.2d 1225, 1233 (Colo. 1999); People v. Perea, 74 P.3d 326, 332 (Colo. App. 2002); Hickman, 988 P.2d at 643. At the same time, simply because a law requires a person to conform his conduct to an imprecise but comprehensible normative standard is not unconstitutionally vague. Id. That is because due process does not require mathematical exactitude, and generality is not the equivalent of vagueness. Grayned, 408 U.S. at 110; Perea, 74 P.3d at 332. Statutory standards frequently contain broad terms to ensure their applicability to varied circumstances. Id. at 332.

The defendant bears the burden of establishing unconstitutional vagueness beyond a reasonable doubt. People v. Shell, 148 P.3d 162, 172 (Colo. 2006). A court should uphold a facial challenge only when the enactment is

incomprehensible in all its applications. Id. If a statute survives a facial challenge, a litigant may succeed on a vagueness claim only by demonstrating that it is impermissibly vague as applied to him. People v. Harte, 131 P.3d 1180, 1183 (Colo. App. 2005).

A statute is vague as applied if it does not, with sufficient clarity, prohibit the conduct against which it is to be enforced. People v. McIntier, 134 P.3d 467, 475 (Colo. App. 2005). A defendant may test a law for vagueness as applied only with respect to his or her particular conduct. People v. Couillard, 131 P.3d 1146, 1151 (Colo. App. 2005). If the statute is not vague as applied to the defendant, it will be enforced even though it may be vague as applied to the conduct of others.

Id. In assessing a vagueness challenge, the court should give the words and phrases of a statute their generally-accepted meanings, and it has a duty to interpret the statute, whenever possible, so as to avoid a construction that would render it void for vagueness. Janousek, 871 P.2d at 1196.

Here, the statute readily satisfies the relatively modest requirements of the void-for-vagueness doctrine. The statute specifically explained the type of conduct it prohibits:

[I]t is unlawful for any person knowingly to manufacture, dispense, sell, distribute, or possess with

intent to manufacture, dispense, sell, or distribute,
mari[j]uana . . .

§ 18-18-406(8)(b)(I), C.R.S. (2008).

Indeed, the statute provides clear guidance that it is unlawful to possess any controlled substance with an intent to distribute. The phrase “intent to distribute” is not a term that a person of ordinary intelligence could not understand. The issue of what quantity permits the factfinder to find that the possessor intended to distribute is “evidentiary in nature and necessarily depends upon all the facts and circumstances of the case at hand.” King, 485 F.2d at 357; see generally People v. Riley, 708 P.2d 1359, 1363 (Colo. 1985) (“we have recognized that, insofar as the provisions of the Colorado statute parallel those of the federal counterparts, judicial authorities construing the federal counterparts are highly persuasive”). Therefore, the statute is not unconstitutionally vague.

CONCLUSION

For the foregoing reasons and authorities, the order and judgment of the trial court should be affirmed.

JOHN W. SUTHERS
Attorney General

JOHN T. LEE, 38141*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

AG ALPHA:
AG File:
COPY.DOC

DATT QFUY
Q:\AP\APLEEJT\BRIEFS 09-10\CLENDENIN BRIEF LSS

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this ____ day of 2009 addressed as follows:

Robert J. Corry, Jr.
600 Seventeenth Street
Suite 2800 South Tower
Denver, CO 80202

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. The trial court correctly found that the affidavit supported the search warrant	3
A. Standard of review	4
B. Factual Background.....	4
C. Law and Analysis	5
D. Even assuming arguendo that the warrant was not supported by probable cause, the error is harmless because the good-faith exception applies.....	10
II. The plain language of the Amendment demonstrates that the primary caregiver defense is available only to those who have “significant responsibility” for managing the well-being of patients with debilitating medical conditions	12
A. Factual Background.....	13
B. Law and Analysis	15
III. The defendant was not entitled to an “end user” affirmative defense	22
A. Standard of Review	23
B. Law and Analysis	23
IV. The possession statute satisfies the relatively modest requirements of the void-for-vagueness doctrine	25
A. Factual Background.....	26
B. Standard of Review	26
C. Law and Analysis	27

TABLE OF CONTENTS

	PAGE
CONCLUSION.....	29

TABLE OF AUTHORITIES

PAGE

CASES

AviComm, Inc. v. Colorado Pub. Utils. Comm'n, 955 P.2d 1023 (Colo. 1998)	20
Banks v. People, 678 P.2d 1035 (Colo. App. 1983)	6
Binkley v. People, 716 P.2d 1111 (Colo. 1986)	19
Caron v. United States, 524 U.S. 308 (1998)	20
Chapman v. United States, 500 U.S. 453 (1991)	22
City of Colorado Springs v. Board of County Com'rs of County of Eagle, 895 P.2d 1105 (Colo. App. 1994)	17
Denver Pub. Co. v. City of Aurora, 896 P.2d 306 (Colo. 1995)	17
Grayned v. City of Rockford, 408 U.S. 104 (1972)	27
Grossman v. Dean, 80 P.3d 952 (Colo. App. 2003)	15
Hall v. Progress Pig, Inc., 610 N.W.2d 420 (Neb. 2000)	19
Henderson v. People, 879 P.2d 383 (Colo. 1994)	6
Illinois v. Gates, 462 U.S. 213 (1983)	4
Mahn v. Gunter, 978 F.2d 599 (10th Cir. 1992)	21
Mingo v. People, 171 Colo. 474, 468 P.2d 849 (1970)	25
Moskal v. United States, 498 U.S. 103 (1990)	22
Muscarello v. United States, 524 U.S. 125 (1998)	21
N.O.W. v. Scheidler, 510 U.S. 249 (1994)	21
People v. Altman, 960 P.2d 1164 (Colo. 1998)	5, 12
People v. Atley, 727 P.2d 376 (Colo. 1986)	5, 6
People v. Bachofer, 85 P.3d 615 (Colo. App. 2003)	10
People v. Baer, 973 P.2d 1225 (Colo. 1999)	27
People v. Becker, 759 P.2d 26 (Colo. 1988)	19
People v. Couillard, 131 P.3d 1146 (Colo. App. 2005)	28

TABLE OF AUTHORITIES

	PAGE
People v. Drennon, 860 P.2d 589 (Colo. App. 1993).....	18
People v. Fortune, 930 P.2d 1341 (Colo. 1997)	6
People v. Garcia, 113 P.3d 775 (Colo. 2005)	14
People v. Harte, 131 P.3d 1180 (Colo. App. 2005)	28
People v. Hickman, 988 P.2d 628 (Colo. 1999)	26, 27
People v. Hill, 934 P.2d 821 (Colo. 1997).....	14
People v. Huckleberry, 768 P.2d 1235 (Colo. 1989).....	22
People v. Janousek, 871 P.2d 1189 (Colo. 1994)	26, 27
People v. Jones, 990 P.2d 1098 (Colo. App. 1999)	21
People v. Kazmierski, 25 P.3d 1207 (Colo. 2001)	8
People v. Kerse, 181 P.3d 1167 (Colo. 1992).....	8, 9
People v. Leftwich, 869 P.2d 1260 (Colo. 1994)	4
People v. Lowe, 660 P.2d 1261 (Colo. 1983).....	20
People v. Lowrie, 761 P.2d 778 (Colo. 1988)	26
People v. Lucas, 992 P.2d 619 (Colo. App 1999)	23
People v. McCullough, 6 P.3d 774 (Colo. 2000).....	26
People v. McIntier, 134 P.3d 467 (Colo. App. 2005).....	28
People v. McNeese, 865 P.2d 881 (Colo. App. 1993).....	18
People v. Mentch, 195 P.3d 1061 (Ca. 2008)	16, 17, 19
People v. Miller, 75 P.3d 1108 (Colo. 2003).....	10, 11
People v. Montour, 157 P.3d 489 (Colo. 2007).....	26
People v. Pate, 878 P.2d 685 (Colo. 1994)	4, 8
People v. Perea, 74 P.3d 326 (Colo. App. 2002)	27
People v. Pitts, 13 P.3d 1218 (Colo. 2000).....	4
People v. Quintero, 196 Colo. 434, 586 P.2d 48 (1978).....	24
People v. Randolph, 4 P.3d 477 (Colo. 2000)	11

TABLE OF AUTHORITIES

	PAGE
People v. Renfro, 117 P.3d 43 (Colo. App. 2004).....	14
People v. Riley, 708 P.2d 1359 (Colo. 1985)	29
People v. Rodriguez, 914 P.2d 230 (Colo. 1996)	24
People v. Shell, 148 P.3d 162 (Colo. 2006).....	27
People v. Sundermeyer, 769 P.2d 499 (Colo. 1989)	8
People v. Turcotte-Schaeffer, 843 P.2d 658 (Colo. 1993).....	6
People v. Velarde, 616 P.2d 104 (Colo. 1980)	24
People v. Wiedemer, 852 P.2d 424 (Colo. 1993)	21
Salinas v. United States, 522 U.S. 52 (1997).....	21
Schubert v. People, 698 P.2d 788 (Colo. 1985).....	22
State v. Afanador, 631 A.2d 946 (N.J. 1993).....	19
State v. Mullins, 116 P.3d 441 (Wash. App. 2005)	15, 19
Terry v. People, 977 P.2d 145 (Colo. 1999)	21
Till v. People, 581 P.2d 299 (1978).....	24
U.S. v. Chambers, 985 F.2d 1263 (4th Cir. 1993).....	19
U.S. v. Colonna, 360 F.3d 1169 (10th Cir. 2004).....	7, 9
U.S. v. Gary, 528 F.3d 324 (4th Cir. 2008)	9
U.S. v. King, 485 F.2d 353 (10th Cir. 1973)	26, 29
United States v. Cardall, 773 F.2d 1128 (10th Cir.1985)	11
United States v. Graham, 169 F.3d 787 (3rd Cir. 1999).....	20
United States v. Leon, 468 U.S. 897 (1994)	11
United States v. McKnelly, 6 F.3d 1447 (10th Cir. 1993).....	11
United States v. Sparks, 291 F.3d 683 (10th Cir. 2002)	9
United States v. Turkette, 452 U.S. 576 (1981).....	21
United States v. Ventresca, 380 U.S. 102 (1965)	6
United States v. Whitner, 219 F.3d 289 (3rd Cir. 2000).....	10

TABLE OF AUTHORITIES

PAGE

United States v. Wright, 791 F.2d 133 (10th Cir.1986)	12
Woldt v. People. 64 P.3d 256 (Colo. 2003).....	26
Z.J. Gifts D-2, L.L.C. v. City of Aurora, 93 P.3d 633 (Colo. App. 2004)	17

CONSTITUTIONS

Colo. Const. art. XVIII § 14	13
Colo. Const. art. XVIII, § 14 (III)(b)	17
U.S. Const. amend. IV	6

STATUTES

§ 16-3-308 C.R.S., (2008).....	10
§ 18-1-407, C.R.S. (2008).....	22
§ 18-18-102(23)(a), C.R.S. (2008).....	23
§ 18-18-302, C.R.S. (2008).....	22, 23
§ 18-18-406(8)(b)(I), C.R.S. (2008)	28

OTHER AUTHORITIES

Webster's Encyclopedic Unabridged Dictionary of the English Language 870 (1989).....	18
-----------------------------------------------------------------------------------------	----