

COURT OF APPEALS, STATE OF  
COLORADO

Colorado State Judicial Building  
Two East 14<sup>th</sup> Avenue  
Denver, Colorado 80203

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Boulder County District Court  
Honorable D.D. Mallard, District Court Judge  
Trial Court Case Number 06CR1758

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**THE PEOPLE OF THE STATE OF  
COLORADO,  
Plaintiff-Appellee,**

v.

**STACY CLENDENIN,  
Defendant-Appellant.**

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Case No: 2008CA624

**OPENING BRIEF**

**Table of Contents**

	<u>Page</u>
<u>TABLE OF CONTENTS</u> .....	ii
<u>TABLE OF AUTHORITIES</u> .....	iv
<u>STATEMENT OF ISSUES PRESENTED FOR REVIEW</u> .....	1
<u>STATEMENT OF THE CASE</u> .....	2
<u>STATEMENT OF FACTS</u> .....	4
<u>ARGUMENT</u> .....	9
I. <u>THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING STACY CLENDENIN’S MOTION TO SUPPRESS EVIDENCE</u> .....	9
A. <u>Summary of Argument</u> .....	9
B. <u>The Affidavit Misleadingly Speculates that Marijuana Cultivation is Occurring in the Home</u> .....	9
C. <u>The Affidavit was Required to Disclose the Fact that the Informer Had Never Provided Reliable Information Previously and the Trial Court Abused its Discretion in Not Granting the Motion to Suppress</u> .....	12
II. <u>THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING PRETRIAL ORDERS REGARDING STACY CLENDENIN’S MEDICAL MARIJUANA CAREGIVER DEFENSE BY PERMITTING HER TO CALL AS WITNESSES ONLY VALID MEDICAL MARIJUANA PATIENTS WITH WHOM SHE HAD PERSONAL CONTACT</u> .....	13
A. <u>Summary of Argument</u> .....	13
B. <u>The Colorado Constitution Article XVIII § 14 Sets Forth a Mechanism Through Which Patients Suffering from</u>	

	<u>Debilitating Medical Conditions can Obtain Medical Marijuana from Caregivers</u> .....	14
C.	<u>The Trial Court’s Order Limiting Ms. Clendenin’s Patients to Only Those with Personal Contact with Her was Unsupported by the Law and Denied Her Constitutional Rights</u> .....	18
III.	<u>THE TRIAL COURT SHOULD NOT HAVE DENIED MS. CLENDENIN’S AFFIRMATIVE DEFENSE OF END USER AND SHOULD HAVE DISMISSED THE POSSESSION WITH INTENT CHARGE AS VOID FOR VAGUENESS</u> .....	22
A.	<u>Summary of Argument</u> .....	22
B.	<u>The End User Defense Applied Here and the Jury Should Have Been So Instructed</u> .....	22
C.	<u>The “Possession with Intent” Charge was Unconstitutionally Vague and the Trial Court Erred in Not Dismissing this Charge</u> .	23
	<u>CONCLUSION</u> .....	27

Appendix

Colorado Constitution, Article XVIII § 14 Medical Use of Marijuana

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>I. Constitutional Provisions</b>	
United States Constitution, Amendment V .....	20-21
United States Constitution, Amendment VI .....	20-21
United States Constitution, Amendment XIV .....	20-21
Colorado Constitution, Article II § 16 .....	21
Colorado Constitution, Article II § 25 .....	20-21
Colorado Constitution, Article XVIII, § 14.....	passim
<b>II. Cases</b>	
<u>Connally v. General Construction Co.</u> , 269 U.S. 385 (1926).....	23-24
<u>Lisenba v. California</u> , 314 U.S. 219 (1941).....	20
<u>In re Murchison</u> , 349 U.S. 133, 1356 (1955).....	21
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 294 (1973).....	21
<u>Estelle v. Williams</u> , 425 U.S. 510 (1976).....	21
<u>Franks v. Delaware</u> , 438 U.S. 154 (1978) .....	11
<u>People v. Winden</u> , 689 P.2d 578 (Colo. 1984).....	11
<u>People v. Leftwich</u> , 869 P.2d 1260 (Colo. 1994) .....	11
<u>People v. Kazmierski</u> , 25 P.3d 1207 (Colo. 2001) .....	11, 13
<u>People v. Dailey</u> , 639 P.2d 1068 (Colo. 1982).....	11

<u>People v. Young</u> , 785 P.2d 1306 (Colo. 1990).....	11
<u>People v. Thomas</u> , 543 P.2d 1249 (Colo. 1975).....	12
<u>People v. Peschong</u> , 506 P.2d 1232 (Colo. 1973) .....	12
<u>People v. Randolph</u> , 4 P.3d 477, 482-83 (Colo. 2000).....	13
<u>Pigford v. People</u> , 593 P.2d 354 (Colo. 1979).....	20
<u>People v. Cornelison</u> , 559 P.2d 1102 (Colo. 1977).....	20
<u>People v. Allen</u> , 657 P.2d 447 (Colo. 1983).....	24
<u>People v. Castro</u> , 657 P.2d 932, 939 (Colo. 1983) .....	24, 27

### **III. Statutes**

C.R.S. § 18-1-402 .....	21
C.R.S § 18-18-102(36).....	22
C.R.S. § 18-18-302(3).....	22
C.R.S. § 18-18-406(8)(a) .....	5
C.R.S. § 18-18-406(8)(b).....	5, 24-26
C.R.S. § 18-18-406(4)(b)(I).....	5
C.R.S. § 18-18-428(1).....	5

## Statement of Issues Presented for Review

1. The trial court's denial of Stacy Clendenin's motion to suppress evidence from a search with a warrant unsupported by any evidence of illegal activity committed by anyone residing at the defendant's home, where the only evidence the trial court employed to justify the warrant was supposedly elevated electric usage and alleged marijuana stalks found on one occasion in garbage cans close to the home and accessible to the general public.

2. The trial court's grant of the government's motion *in limine* limiting the testimony of patients provided Medical Marijuana by Ms. Clendenin to only those patients who had personal contact with Ms. Clendenin, even though there is no such requirement contained in the Constitution, which only requires a primary caregiver to be "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."

3. The trial court's grant of a protective order preventing Ms. Clendenin from subpoenaing a state custodian of records to authenticate non-confidential portions of official Medical Marijuana registry cards already in Ms. Clendenin's possession.

4. The trial court's denial of Ms. Clendenin's motion to dismiss the "possession with intent to distribute" count as unconstitutionally vague.

5. The trial court's denial of Ms. Clendenin's motion to dismiss pursuant to the statutory "end user" defense, and the trial court's refusal to offer Ms. Clendenin's tendered jury instruction on this same defense.

### **Statement of the Case**

Marijuana cultivation, production, distribution, use, and possession are legal in Colorado (and thirteen other states) for medical purposes. This is a recent and significant development, and the legal culture (as well as the culture as a whole) is still adjusting to this modification of 70+ years of total Prohibition, which itself is an aberration from the majority of U.S. history as well as thousands of years of human civilizations worldwide, wherein use of the naturally-occurring marijuana plant was completely unimpeded and ignored by those in power.

This direct appeal presents issues of first impression regarding the Medical Marijuana provisions of the Colorado Constitution, Article XVIII § 14, added to the State Constitution by Colorado voters in 2000. This appeal arises from felony criminal convictions after a jury trial of Stacy Clendenin, who cultivated, possessed, and distributed Medical Marijuana for numerous patients who had been diagnosed by physicians as suffering from

debilitating medical conditions and who were in possession of State of Colorado-issued Medical Marijuana Registry cards and/or recommendations by physicians for the medical use of marijuana.

The Colorado Constitution, Article XVIII §14(2)(a), provides that the affirmative defense of medical use of marijuana for either a patient or primary caregiver is satisfied if three requirements are met: (1) a previous diagnosis of a debilitating medical condition; (2) a physician's recommendation for medical marijuana; (3) and possession of medical marijuana in amounts medically necessary to address the debilitating medical condition.

In this case, the trial court issued a pretrial order prohibiting the defense from calling patient witnesses who would have testified that they received Medical Marijuana from Ms. Clendenin, holding instead that to claim "primary caregiver" status requires that a patient have personal contact with Ms. Clendenin. These requirements imposed by the trial court appear nowhere in the constitutional provision or laws related to Medical Marijuana in Colorado.

Colorado voters' intent in enacting the Medical Marijuana provisions of the Colorado Constitution was to provide a safe, legal mechanism by which patients diagnosed with debilitating medical conditions could receive

Medical Marijuana if a physician recommended it. An analogy is a pharmacist who dispenses medicine manufactured by a drug company: there is no need for the individuals who produce the medicine at a drug company far away to personally meet the patients who ultimately use the medicine. Any contrary rule unreasonably restricts a beneficial, life-saving medicine from those who need it to survive but who are incapable of producing it on their own, and unreasonably punishes those like Ms. Clendenin who generously help suffering people.

### **Statement of Facts**

In October 2006, an informer told Longmont Police that Stacy Clendenin's home had "come and go" traffic, and that the occupants had lived there for "only" 6-8 months. (Trial Court Record at 063.) Although "come and go" traffic and living in a place for less than a year are not yet crimes in Colorado, police nevertheless decided to conduct surveillance on Ms. Clendenin's home. They found the occupants therein had no criminal records, and observed no "come and go" traffic. (Trial Court Record at 064.) Police did find allegedly high power usage without any knowledge of, or corroborative check on, home insulation, number of appliances, age and condition of appliances, air conditioning, number of roommates living there, cooking habits, showering habits, or any other perfectly legal behavior that

might cause one residence to use more electrical power than another residence. (Trial Court Record at 040.)

On one occasion, police also conducted a “solid waste inspection” of a trash bucket in the area, and located three alleged marijuana “stalks,” but did not specify that the “solid waste inspection” was of a trash bucket accessible to the general public, and that anybody could have placed the alleged marijuana there because the police did not observe any occupant of the home ever interacting with the trash bucket in question. (Trial Court Record at 040, 063-064.) The informant had not supplied any previously accurate information to the police, and the affidavit for search warrant failed to disclose that this informant had never provided any previously accurate information to police. (Trial Court Record at 041.)

On October 6, 2006, police obtained a search warrant and searched Ms. Clendenin’s home at 6:49 A.M., finding an indoor garden with five mature medical marijuana plants, 44 total plants, and associated materials in the basement. (Trial Court Record at 064, 069.)

Ms. Clendenin was then charged by Criminal Complaint with Cultivation of Marijuana, C.R.S. § 18-18-406(8)(a) (F-4); Possession with Intent to Distribute Marijuana, C.R.S. § 18-18-406(8)(b) (F-4); Possession of Marijuana Concentrate, C.R.S. § 18-18-406(4)(b)(I) (F-5); Possession of

Marijuana – Eight Ounces or More, C.R.S. § 18-18-406(4)(b)(I) (F-5); and Possession of Drug Paraphernalia, C.R.S. § 18-18-428(1) (PO-2). (Trial Court Record at 009-012.)

Ms. Clendenin moved to suppress all evidence obtained in the search, alleging that there was no probable cause of illegal activity by anyone living in the residence to justify the issuance of the search warrant, and that the affidavit in support thereof was misleading and inaccurate. (Trial Court Record at 037-044.)

After hearing, the trial court denied Ms. Clendenin’s motion to suppress, while agreeing that “come and go” traffic is not probable cause, and finding that although “the detective did not find certain evidence commonly associated with a cultivation operation,” (Trial Court Record at 070), that based on the “totality of circumstances,” the above facts in conjunction with the utility billing information and the marijuana stalks found in publicly-accessible garbage, established probable cause. (Trial Court Record at 070.)

The affirmative defense concerning Medical Marijuana caregivers as well as patients recognizes the common reality that most patients suffering from debilitating conditions will be unable or unwilling to grow or otherwise manufacture their own medical marijuana, and so will need to obtain their

medicine from a caregiver. (Trial Court Record at 111.) Although Ms. Clendenin was a medical marijuana patient herself, she was also a “caregiver” because her medicine was used by other patients as well, as permitted by Article XVIII § 14.

In issuing pre-trial orders relating to Ms. Clendenin’s properly-endorsed affirmative defense for the medical use of marijuana under Article XVIII § 14(2)(a), the trial court found that Colorado’s constitutional provision “does not allow a grower of marijuana who has no personal contact with patients to be a ‘caregiver’ under the amendment.” (Trial Court Record at 135-136.) This ruling significantly hampered Ms. Clendenin’s defense, which would have been that she cultivated marijuana with the intent of supplying it solely to patients with debilitating medical conditions who had been previously diagnosed with debilitating medical conditions and recommended by physicians to use medical marijuana, whether she had personally met those patients or not. There was no evidence that any of the marijuana cultivated, possessed, or distributed by Ms. Clendenin was for any purpose other than medical.

Instead, the universe of patient witnesses Ms. Clendenin was able to call at her jury trial was significantly reduced by this brief pretrial ruling. Numerous suffering patients who would have testified they used Ms.

Clendenin's medical marijuana were shut out of the courtroom, and the jury did not see the full picture.

Ms. Clendenin had timely and validly served a *subpoena duces tecum* on the Colorado Department of Health Custodian of Records for the purpose of having the Custodian of Records authenticate and confirm Medical Marijuana Registry certificates issued pursuant to the Colorado Constitution, Article XVIII § 14, documents that were already in the possession of Ms. Clendenin, without disclosing any confidential patient information whatsoever, such as name, address, or social security number. (Trial Court Record at 109-110.)

The State Department of Public Health and Environment, represented by the Colorado Attorney General, filed a Motion to Quash Subpoena Duces Tecum and, in the Alternative, Motion for Protective Order, which the trial court granted without notification on the defense or affording the defense an opportunity to respond. (Trial Court Record at 81-84; 109-110.)

The State's motion alleged that the law prohibited release of "confidential" patient information. Each Medical Marijuana registry card has a unique number assigned to the card by the State, and these numbers themselves are not confidential and lead to no confidential patient information. The custodian of records could have identified each patient by

the card number. Ms. Clendenin suggested that the patient's confidential information be redacted from the registry cards that will be provided to the jury as exhibits, so that only the dates of issuance and unique card numbers are visible. (Trial Court Record at 112.) As a result, at the jury trial, the defense was unable to have the State witness authenticate the various Medical Marijuana registry cards in Ms. Clendenin's possession.

The trial court denied the defense request to instruct the jury as to the statutory "end user" defense, holding that defense requires a prescription although the term does not appear in the statute. The trial court also denied the defense request to instruct the jury as to the affirmative defense of Choice of Evils. (Trial Court Record at 135-136.) The jury asked 47 questions in writing during the three-day trial and 4.5 hour deliberation, and found Ms. Clendenin guilty on all counts. (Trial Court Record at 135-136; Jury Questions.)

Ms. Clendenin was sentenced to unsupervised probation, but this law-abiding citizen who still has a heart for helping suffering people, is now a felon for life, unless this Court acts.

## **ARGUMENT**

### **I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING STACY CLENDENIN'S MOTION TO SUPPRESS EVIDENCE**

**A. Summary of Argument**

The affidavit for search warrant is misleading as it speculates marijuana cultivation is occurring in the residence with no evidence of marijuana cultivation, save for (1) allegedly high power bills which were not calculated with any reference to the numerous things such as the number or type of appliances, air conditioning, heaters, or number of residents therein; or (2) alleged marijuana stalks in a trash can to which anyone had unfettered access. The trial court abused its discretion in denying the motion to suppress on this lack of probable cause in the affidavit and because the affidavit failed to mention that the informer had never provided reliable information previously.

**B. The Affidavit Misleadingly Speculates that Marijuana Cultivation is Occurring in the Home**

The affidavit for search warrant was misleading in a number of material ways, and it was an abuse of discretion for the trial court to deny the Motion to Suppress. The affidavit discusses a “solid waste inspection” which turned up alleged marijuana “stalks,” without specifying where the solid waste was located. (Trial Court Record at 040.) The affidavit fails to point out that, as elicited on cross-examination at the motions hearing (Trial Court Record at 064), the trash can in question was outside of Ms. Clendenin’s home, accessible to any random individual present in the

neighborhood, and that police officers never saw any resident of the home accessing the trash can. Even police officers had unfettered access to the trash can as did all members of the public, because the police conducted that search of the trash without a warrant. Thus the affidavit fails to establish any linkage between any solid waste found outside of the property and the occupants therein. The affidavit fails to exclude the distinct possibility that another person, unrelated to and unknown to the occupants, could have placed solid waste in a generally-accessible garbage can. The affidavit misleadingly concludes that based on the officer's speculation, indoor hydroponic cultivation could have been occurring. Indoor cultivation of plants, foods, fruits, and vegetables, a common activity, is perfectly legal. (Trial Court Record at 040.)

The state misled the issuing magistrate or evinced a reckless disregard for the truth. The speculation that marijuana cultivation was occurring was pure speculation, no fact established that any illegal activity was occurring on the property. If all of the irrelevant innuendo regarding perfectly legal acts is stricken from the application, all probable cause to search is eliminated. The trial court should have stricken all false or misleading statements from the affidavit. Franks v. Delaware, 438 U.S. 154 (1978); People v. Winden, 689 P.2d 578, 582 (Colo. 1984). Without these false

statements or the informant's conclusory statements, the affidavit is only "bare bones," and insufficient to support probable cause. People v. Leftwich, 869 P.2d 1260, 1270 (Colo. 1994) (affidavit "bare bones" because it contains only unsupported conclusions not based on reliable information).

Ms. Clendenin properly alleged in good faith that a deliberate falsehood or reckless disregard occurred, supplied statements of supporting facts, demonstrated that impeachment is of the affiant, and established that upon deletion of false or misleading innuendo, probable cause vanishes. Franks v. Delaware, 438 U.S. 154 (1978); People v. Kazmierski, 25 P.3d 1207, 1210; People v. Dailey, 639 P.2d 1068, 1075 (Colo. 1982). Ms. Clendenin thus satisfied the three elements of a veracity hearing: (1) whether the affidavit contains false statements; (2) whether the false statements must be excised; and (3) if the statements are excised, whether the remaining statements establish probable cause. People v. Young, 785 P.2d 1306, 1308 (Colo. 1990), citing People v. Dailey, 639 P.2d at 1075. In this evaluation, the Court may consider facts and testimony outside the "four corners" of the affidavit. People v. Dailey, 639 P.2d at 1073.

Thus, it was an abuse of discretion for the trial court to deny Ms. Clendenin's Motion to Suppress when the affidavit pointed to absolutely no illegal activity being suspected of the residents in the home.

C. **The Affidavit was Required to Disclose the Fact that the Informer Had Never Provided Reliable Information Previously and the Trial Court Abused its Discretion in Not Granting the Motion to Suppress**

A further defect of the affidavit is that it misleadingly omitted the required statement that the informer in question had never previously provided accurate information to police. There is nothing in the affidavit or addendum that establishes the reliability of the informant, or how many times, if any, he or she has supplied information that proved to be reliable in the past. (Trial Court Record at 041.) Again, on cross-examination in the motions hearing, the officer admitted “that the named informant had not previously given his department information.” (Trial Court Record at 064; ¶ 5.) This is required to be disclosed in the affidavit. People v. Thomas, 543 P.2d 1249 (Colo. 1975). In People v. Peschong, 506 P.2d 1232 (Colo. 1973), the Colorado Supreme Court analyzed a defective affidavit and reasoned: “The affidavit could have indicated – which it fails to do – the nature of the information previously given by the informant, whether it related to drugs, thefts, or other matters. It could have indicated whether the previous information led to arrests or convictions, or otherwise proved to be true.”

Here, Ms. Clendenin established that the informant was clearly interested in the result of this case, because he or she summoned police for the mere fact of a flatbed truck driving up and entering a residence and staying for a short period of time, and thus clearly had a vendetta against the occupants of the property, for whatever reason. (Trial Court Record at 041.) The police should not exist to vindicate irrational vendettas held by a nosy neighbor. The Colorado Supreme Court requires that a “not disinterested informer,” such as this informant’s, conclusory statements be corroborated by independent evidence. People v. Kazmierski, 25 P.3d 1207, 1210 (Colo. 2001) (evidence suppressed; trial court ruling on motion to suppress must strike false or misleading information from affidavit and then determine whether remaining statements establish probable cause); People v. Randolph, 4 P.3d 477, 482-83 (Colo. 2000) (evidence suppressed because informant’s statements were conclusory with no independent corroboration).

Here, the not disinterested informer’s statements were not corroborated by any evidence of illegal activity committed by occupants of the residence. For this reason, the evidence should have been suppressed and the trial court abused its discretion in failing to do so.

## **II. THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING PRETRIAL ORDERS REGARDING STACY CLENDENIN’S MEDICAL MARIJUANA CAREGIVER**

**DEFENSE BY PERMITTING HER TO CALL AS WITNESSES  
ONLY VALID MEDICAL MARIJUANA PATIENTS WITH  
WHOM SHE HAD PERSONAL CONTACT**

**A. Summary of Argument**

The trial court unconstitutionally limited Ms. Clendenin's right to put on a defense when it restricted the universe of patients to only those with whom she had personal contact. No pharmacy that deals in controlled substances would have such a limitation, belied by common sense and the plain language of the Constitution. The trial court also unconstitutionally limited Ms. Clendenin's defense when it prevented her from eliciting testimony authenticating government-issued medical marijuana registry cards. These were material errors that affected the result in the case.

**B. The Colorado Constitution Article XVIII § 14 Sets Forth a Mechanism Through Which Patients Suffering from Debilitating Medical Conditions can Obtain Medical Marijuana from Caregivers**

In 2000, Colorado voters legalized marijuana for medical use, and created a constitutional provision protecting from criminal prosecution those who supply this medicine to patients for medical use. The Supreme Law of the State of Colorado, the Colorado Constitution, Article XVIII § 14, provides an affirmative defense for the medical use of marijuana as follows:

(2) (a) Except as otherwise provided in subsections (5), (6), and (8) of this section<sup>1</sup>, 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.

Colorado Constitution, Article XVIII § 14(2)(a) (emphasis added).

The elements of this affirmative defense thus do not require, and have nothing to do with, possession of a Medical Marijuana Registry Identification Card, or a written designation of a caregiver. Therefore, to claim the affirmative defense, a patient or primary care-giver need satisfy the above three elements and need not apply for, or receive, a State-issued medical marijuana registry card.

The trial court correctly ordered in this case that the registry card was not required for Ms. Clendenin or others to assert their status as medical

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<sup>1</sup> Subsections (5) (use of medical marijuana in way that endangers general public or in plain view); (6) (use of medical marijuana by persons under eighteen years of age only with recommendation of two physicians and consent and involvement of parent); and (8) (breach of confidentiality or forged card) did not apply in this case.

marijuana patients or caregivers. In a handwritten order, the trial court rejected the prosecution motion to further limit the medical defense to only those with registry cards explicitly designating Ms. Clendenin: “Whether defendant is an actual caregiver of a medical marijuana user is a question of fact for the jury. Failure to register the defendant as caregiver is evidence that is relevant to that issue, but is not determinative of the issue.” (Trial Court Record at 125.)

As to prong (III) above, the amounts of medical marijuana that are permitted under this section are as follows:

(4) (a) A patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition. A patient’s medical use of marijuana, within the following limits, is lawful:

(I) No more than two ounces of a usable form of marijuana; and

(II) No more than six marijuana plants, with three or fewer being mature, flowering plants that are producing a usable form of marijuana.

(b) For quantities of marijuana in excess of these amounts, a patient or his or her primary care-giver may raise as an affirmative defense to charges of violation of state law that such greater amounts were medically necessary to address the patient’s debilitating medical condition.

The Colorado Constitution, Article XVIII § 14(1) defines the operative terms above as follows:

(b) “Medical use” means the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient’s debilitating medical condition, which may be authorized only after a diagnosis of the patient’s debilitating medical condition by a physician or physicians, as provided by this section.

(d) “Patient” means a person who has a debilitating medical condition.

(e) “Physician” means a doctor of medicine who maintains, in good standing, a license to practice medicine issued by the state of Colorado.

(f) “Primary care-giver” means 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.

The constitutional definition of “primary care-giver” does not require the possession or issuance of a registry card or a designation on such card. Stacy Clendenin satisfied the definition of “primary care-giver” as to numerous patients, some of whom she met personally, and more of whom she had never met, yet the medical marijuana she supplied them reached their possession through a cooperative. It was the provision of medical marijuana, itself, that constitutes the “significant responsibility” required to be a caregiver. From the patients’ perspective, having a reliable source of medical marijuana was significant.

All of these patients met the above definition of patient in that they had debilitating medical conditions. There is no restriction as to the number of caregivers that a patient may have, and due to uneven supply created in part by criminal prosecutions of caregivers such as the instant case, it is common practice for Colorado medical marijuana patients to receive their medical marijuana from numerous sources and caregivers. (Trial Court Record at 111.)

Colorado voters' purpose in creating the constitutional provision regarding medical use of marijuana is to supply patients who are suffering and dying from debilitating medical conditions with medical marijuana recommended by a physician, and to protect from criminal prosecution those people, like Stacy Clendenin, who serve as caregivers for these patients and supply them their medicine.

C. **The Trial Court's Order Limiting Ms. Clendenin's Patients to Only Those with Personal Contact with Her was Unsupported by the Law and Denied Her Constitutional Rights**

In pre-trial orders relating to Ms. Clendenin's affirmative defense for the medical use of marijuana under Article XVIII § 14(2)(a), the trial court found that Colorado's constitutional provision "does not allow a grower of marijuana who has no personal contact with patients to be a 'caregiver'

under the amendment,” (Trial Court Record at 135-136), and consequently limited Ms. Clendenin from calling patient witnesses who had received her medical marijuana, and who she possessed registry cards of, but who had not had personal contact with her.

A commonsense reading of the constitutional provision does not support the trial court’s order limiting patient testimony to only those patients who Ms. Clendenin had met personally. Caregivers can be compared to pharmacies, places where people obtain their medications prescribed by physicians. Nobody would seriously argue that the patient must have personal contact with every employee at the drug company who manufactured the pills that the patient picks up at the pharmacy. There are numerous people in the manufacturing chain of prescription medications, just as there are numerous people in the medical marijuana production chain.

Due to Prohibition-era laws and the ongoing prosecution thereof, there is a climate of fear in the Medical Marijuana community about disclosing to the government or anyone else, status as medical marijuana patients or caregivers. Many patients choose to remain anonymous even to the extent that they do not wish the person who cultivates their medicine to know their identities.

This is why the framers structured the constitution so that application and possession of the registry card is optional, and formulated the affirmative defense separate from any requirement for the registry card. Instead, the framers created a separate exception for patients or caregivers in possession of the registry card, creating two levels of protection for patients and caregivers, the affirmative defense in Section 14(2)(a) and the more powerful exception in Section 14(2)(b).

Article XVIII § 14 of the Colorado Constitution is a clear and unambiguous provision, and the elements of the affirmative defense therein are clear. Even if there were any ambiguities in this legal provision (and Ms. Clendenin does not concede any), courts are required by the “Rule of Lenity” to construe any such ambiguities in favor of the defendant. Colorado criminal statutory provisions are to be strictly construed in favor of the accused. Pigford v. People, 593 P.2d 354 (Colo. 1979); People v. Cornelison, 559 P.2d 1102 (Colo. 1977). The trial court departed from the required strict construction; it added additional elements to the affirmative defense that do not exist in the affirmative defense, namely the requirement that Ms. Clendenin have personal contact with a patient before that patient could testify Ms. Clendenin served as caregiver.

The trial court's grant of the protective order meant that Ms. Clendenin had no way to bring into evidence the numerous registry cards that she possessed. There is no other way for her to possess these cards than to be provided them by the patients. She had a strong medical marijuana defense, easily justifying the amounts she had, but the jury was not permitted to know this and the prosecution ultimately succeeded in its misleading theory that she had too much medical marijuana for the limited medical needs known to the jury.

Preventing Mr. Clendenin from calling patients or authenticating registry cards to support her affirmative defense violated her right to due process and a fair trial. U.S. Const. Amend. V, VI, XIV; Colo. Const. Art. II, § 25; Lisenba v. California, 314 U.S. 219, 236 (1941) (“As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.”); In re Murchison, 349 U.S. 133, 1356 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”).

Preventing Ms. Clendenin from calling patients or authenticating registry cards to support her affirmative defense violated her right to the

presumption of innocence. U.S. Const. Amend. V, XIV; Colo. Const. Art. II, § 25; C.R.S. § 18-1-402; Estelle v. Williams, 425 U.S. 510 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. . . . To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process.”).

Preventing Ms. Clendenin from calling patients or authenticating registry cards to support her affirmative defense violated her right to present a defense. U.S. Const. Amend. V, VI, XIV; Colo. Const. Art. II, §§ 16, 25; Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.”).

**III. THE TRIAL COURT SHOULD NOT HAVE DENIED MS. CLENDENIN’S AFFIRMATIVE DEFENSE OF END USER AND SHOULD HAVE DISMISSED THE POSSESSION WITH INTENT CHARGE AS VOID FOR VAGUENESS**

**A. Summary of Argument**

Ms. Clendenin satisfied the statutory defense of end user and the charge of possession with intent was unconstitutionally vague and should have been dismissed.

**B. The End User Defense Applied Here and the Jury Should Have Been So Instructed**

The trial court denied the defense request to instruct the jury as to the statutory “end user” defense, holding that defense requires a prescription although the term does not appear in the statute. (Trial Court Record at 135-136.)

C.R.S § 18-18-102(36) defines “Ultimate user” as “an individual who lawfully possesses a controlled substance for the individual’s own use or for the use of a member of the individual’s household or for administering to an animal owned by the individual or by a member of the individual’s household.” C.R.S. § 18-18-302(3) further 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.

Ms. Clendenin fits all of the categories above, and it was error for the trial court to deny her tendered jury instruction regarding this defense codified in Colorado statute, in the same article as all of the criminal charges in this case.

C. **The “Possession with Intent” Charge was Unconstitutionally Vague and the Trial Court Erred in Not Dismissing this Charge**

The trial court denied Ms. Clendenin’s motion to dismiss the “possession with intent” charge as void for vagueness. (Trial Court Record at 070.)

The government had no actual evidence that Ms. Clendenin distributed, or intended to distribute, marijuana. The charge is based principally upon the fact that a home where Ms. Clendenin and others were living had a quantity of marijuana inside. (Trial Court Record at 027.)

Citizens are entitled to be governed by laws that can be understood, where a citizen can conduct himself appropriately. Citizens should not be arbitrarily and irrationally treated differently in the application of unpredictable laws. A criminal statute violates the constitutional prohibition against vagueness if it “forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application.” Connally v. General Construction Co., 269 U.S. 385 (1926); People v. Allen, 657 P.2d 447, 449 (Colo. 1983). Criminal statutes must use sufficiently clear language to inform those subject to them of the standards of conduct imposed and to give fair warning of the forbidden acts. Id.

A statute satisfies the standards required by due process only if the statutory terms “are sufficiently clear to persons of ordinary intelligence to afford a practical guide for law-abiding behavior and are capable of application in an even-handed manner by those responsible for enforcing the law.” People v. Castro, 657 P.2d 932, 939 (Colo. 1983) (citations omitted).

The “possession with intent” portion of section 18-18-406(8)(b)(I) does not satisfy this standard, neither facially nor as applied in this case.

Section 18-18-406 states:

(8)(b)(I) Except as is otherwise provided in subsection (7) of this section and except as authorized by part 3 of article 22 of title 12, C.R.S., or by part 2 or 3 of this article, it is unlawful for any person knowingly to manufacture, dispense, sell, distribute, or *possess with intent to manufacture, dispense, sell, or distribute marihuana* or marihuana concentrate; or attempt, induce, attempt to induce, or conspire with one or more other persons, to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute marihuana or marihuana concentrate.

C.R.S. § 18-18-406(8)(b)(I) (emphasis added). The principal problem with the above statute, on its face, is its complete lack of standards or guidance for what constitutes “possession with intent.” It leaves the decision regarding whom to charge with “possession with intent” completely to the

discretion of the government without providing guidance to citizens, police, prosecutors, or courts.

Because the statute lacks any objective precision as to what constitutes “intent to distribute,” some people get charged with possession with intent to distribute, while others in similar circumstances get charged with simple possession, while some others in the same circumstances get charged with nothing, and there is no rational basis for the distinction. Facially, the statute permits charging “possession with intent” for any quantity of marijuana, or for any action, or lack thereof.

The law must do better than that, and indeed it has, in conjunction with other drug laws. The legislature easily could insert objective guidelines into the statute. The legislature has placed objective guidelines into other portions of the narcotics laws. Examples include C.R.S. § 18-18-405(3)(a)(I); § 18-18-405(3)(a)(II); and § 18-18-405(3)(a)(III) regarding different offenses for controlled substances based on quantity.

In addition, the legislature could include objective standards regarding packaging, or paraphernalia, or objective actions or conditions demonstrating intent to distribute. Under the current § 406(8)(b)(I), a charge of “intent to distribute” could result from a miniscule amount of a controlled

substance, a charging decision subject only to the whim of the State, and not based on any objective fact or predictor.

As the statute reads today, citizens must guess as to the meaning of “possession with intent.” Fact-finders must make their decision based on subjective testimony of police officers as to whether an individual had intent to distribute. And the statute gives police and prosecutors no rational standard for deciding whom to charge with intent to distribute.

As a result, a citizen who merely possesses marijuana -- *any quantity* - with the actual intent to consume it himself, could be charged with “possession with intent to distribute,” based solely on the police officer’s subjective opinion that the citizen intended to distribute the marijuana. No reasonable person can know how to avoid a felony charge of “possession with intent” as opposed to less serious charges of straight possession, which can be petty offenses or misdemeanors depending on quantity. C.R.S. § 18-18-406.

Under this statute, charging decisions will and do vary from police officer to police officer, from district attorney to district attorney, from jurisdiction to jurisdiction, and even from co-defendant to co-defendant. The broad language of the statute gives far too much discretion to the police and prosecution, and makes it impossible to have the law applied in “an

even-handed manner by those responsible for enforcing the law.” People v. Castro, 657 P.2d 932, 939 (Colo. 1983) (citations omitted).

This charge is on its face and as applied to Ms. Clendenin’s case, void for vagueness and the trial court should have so ruled and dismissed this charge.

### **Conclusion**

The trial court abused its discretion in denying Ms. Clendenin’s motion to suppress, as there was no evidence of criminal activity by occupants of the home to support issuance of a search warrant.

The trial court should abused its discretion in restricting Ms. Clendenin’s right to call witnesses to support her defense that she was a caregiver of Medical Marijuana under Article XVIII § 14 to only those patients with whom she had personal contact, as there is no requirement of this in the constitution. And the trial court abused its discretion in preventing Ms. Clendenin from subpoenaing a government custodian of records to authenticate Medical Marijuana registry cards already in Ms. Clendenin’s possession.

For these reasons, Ms. Clendenin’s criminal convictions in this case should be reversed and either vacated or remanded, as appropriate.

Date: January 16, 2009

Respectfully submitted,

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Robert J. Corry, Jr.

**Certificate of Service**

Above designated counsel certifies that on January 16, 2009, a true copy of the above **OPENING BRIEF** was served by delivery through the U.S. Mail on the following:

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