

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

**REPLY BRIEF**

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## ARGUMENT

### **I. MARIJUANA STALKS IN PUBLIC GARBAGE AND HIGH POWER USAGE ARE NOT SUFFICIENT PROBABLE CAUSE FOR THE ISSUANCE OF A WARRANT**

The State's Answer Brief correctly identifies the legal requirement of probable cause and also correctly identifies the two sole factual bases for the issuance of the search warrant, namely (1) marijuana stalks found in a garbage can, and (2) high power usage in Ms. Clendenin's home. (State Answer Brief at 5-10.)

However, under the Fourth Amendment to the United States Constitution, these two facts, standing alone, cannot constitute probable cause in a system based on the ancient premise that a "[wo]man's home is [her] castle."<sup>1</sup> In analyzing whether the facts articulated in an affidavit for a search warrant, the trial court and this Court have the benefit of hindsight, but courts must not cast aside common sense and logic.

Ms. Clendenin's and her numerous roommates' allegedly high power usage, standing alone, means nothing. Cf. People v. Altman, 960 P.2d 1164, 1172 (Colo. 1998) (establishing that "purchase of equipment commonly

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<sup>1</sup> "This saying is as old as the basic concepts of English common law." William and Mary Morris, Morris Dictionary of Word and Phrase Origins (HarperCollins, New York, 1977, 1988). Sir Edward Coke, Will and Doom (1692) ("For a man's house is his castle, et domus sua cuique tutissimum refugium" ("One's home is the safest refuge for all")).

associated with indoor marijuana cultivation at the height of the outdoor growing season, the high electrical usage, the potentially suspicious use of a rental car, and the defendant's previous brushes with the law all created a reasonable inference of marijuana cultivation.”); People v. Dunkin, 888 P.2d 305, 309 (Colo. App. 1994); cert. denied, Dunkin v. People, 1995 Colo. LEXIS 1014 (Colo. 1995); cert. denied, Smith v. Colorado, 515 U.S. 1105 (1995) (“heavy curtains as precluding observation of the operation from outside the residence, the periodic occupation of the residence as indicating control of the plant growth, ... a 4-month growth cycle of planting and harvesting marijuana as fitting a pattern seen in the monthly bills for the residence”).

Here, all of the numerous factors in the Altman and Dunkin marijuana cultivation cases are absent, save the high power usage. People v. Altman, 960 P.2d at 1172; People v. Dunkin, 888 P.2d at 309. There was no evidence of the purchase or possession of marijuana cultivation equipment, no suspicious use of rental car, no sporadic occupation of the residence, no 4-month cycle in electric bills, no heavy curtains, and no previous brushes with the law, as Ms. Clendenin and her roommates had sparkling clean criminal records. Importantly, when Altman and Dunkin were decided in 1998 and 1994 respectively, cultivation of medical marijuana was not yet

legal in Colorado, so these cases are highly distinguishable on this ground as well.

There are thousands of perfectly legal actions or conditions that can explain high usage of power in a home in expensive Boulder County, Colorado, such as multiple young people trying to save money by sharing a small space and using disproportionately more power, lack of insulation, extra showers, hot tub, numerous inefficient appliances, flat screen TVs, tendency to leave lights on for safety purposes, open windows or doors, computer usage, an indoor organic vegetable garden, and so forth. High power usage alone does not indicate illegal activity.

In fact, criminal marijuana cultivators commonly hack into the main power lines and steal their power, precisely to avoid detection by the power company or police, and also to avoid paying high power bills. Thus, high power usage that can be traced to the home is indication of lack of criminal behavior or intent.

Obviously indoor cultivation of plants is not illegal, as many people prefer to control their own food intake rather than introduce harmful pesticides or products with unknown origin. See People v. Altman, 960 P.2d at 1175-1176 (Martinez, J., dissenting) (“Firstly, neither the purchase nor the use of hydroponic growing equipment is illegal. The equipment is used for

the indoor cultivation of plants, including vegetables and other legal plants. That the equipment may also be used to further illegal ends does not transform it into contraband or an ‘inherently suspicious’ item. Moreover, the abnormally high electrical use indicated nothing more than that Altman was perhaps using hydroponic equipment to grow something in the house. [footnote omitted] These indications alone cannot support probable cause to believe that Altman was engaged in illegal activity.”)

As noted, since 2000, even indoor cultivation of *marijuana* is not necessarily illegal in Colorado, given that cultivation of medical marijuana is protected by the Colorado Constitution, Article XVIII § 14. The affidavit for search warrant intentionally ignores this possibility, rendering it further misleading.

As for the marijuana stalks in the garbage, it is uncontested that the garbage can in question was completely unprotected and accessible to any passerby, including in this case police, who searched it without a warrant and certainly would not have violated any trespass law in doing so. See California v. Greenwood, 486 U.S. 35 (1988); People v. Hillman, 834 P.2d 1271 (Colo. 1992) (no reasonable expectation of privacy in garbage cans placed adjacent to sidewalk).

Once again, courts must not cast aside common sense. For the same reasons that Ms. Clendenin had no expectation of privacy in a garbage can under Hillman, the evidence obtained from that garbage can is worthless in establishing probable cause. What is sauce for the goose is sauce for the gander. It is common practice for illegal (non-medical) marijuana growers to deposit marijuana stalks in trash *other than their own* to hide their illicit conduct. Thus, marijuana stalks found in a publicly-accessible trash can are *less likely* to have been placed there by the property owner than by an unknown third party.

However, in 2006 when the search in this case occurred, the cultivation of medical marijuana had been legal in Colorado for six years. So even if the stalks in question did emanate from Ms. Clendenin's home, even these stalks were not necessarily probable cause of any illegal activity without knowledge of and access to privileged and confidential medical information of the occupants, or their protected status as medical marijuana patients. See C.R.S. § 18-18-406.3 (disclosure of patient's status on medical marijuana registry a misdemeanor crime).

Thus, there are numerous perfectly legal reasons for each of the two data points used by officers to obtain the warrant. None of these plausible legal reasons was set forth and excluded in the affidavit. It should not have

been signed and it does not set forth probable cause of illegal activity occurring in the home.

For the same reasons, an officer relying on a signed warrant based on these two data points alone is not entitled to “good faith” deference, particularly because an officer also possesses, or should possess, common sense, knowledge of the legality of medical marijuana under the Colorado Constitution he swore to uphold, coupled with the real-world understanding that there are 1000 legal explanations for high power usage, plus the “street knowledge” that illicit marijuana cultivators do not usually throw away their stalks in their own trash. Thus, an officer who actually works in the field would or should know that home-based illicit marijuana cultivators are more likely to deposit their marijuana-related trash in another trash can than they are in their own trash can, so reliance on this warrant was not “objectively reasonable” or the result of “a reasonable judgmental error” under C.R.S. § 16-3-308 and People v. Miller, 75 P.3d 1108, 1113 (Colo. 2003).

Given that high power usage and marijuana stalks in the trash are the only basis for the warrant, the warrant is invalid and unsupported by probable cause, and no reasonable officer could have relied on these two data points to justify probable cause. The evidence should have been suppressed, and the case dismissed. Only this Court can exercise the

gatekeeping function of the judicial branch as a deterrent to unconstitutional infringements on our privacy.

**II. A MEDICAL MARIJUANA CAREGIVER CAN HAVE “SIGNIFICANT RESPONSIBILITY” FOR MANAGING THE WELL-BEING OF A PATIENT WITHOUT THE FORMALITY OF MEETING THE PATIENT FACE-TO-FACE AND MS. CLENDENIN MUST BE PERMITTED TO PUT ON HER DEFENSE**

With regard to the Medical Marijuana defense, the State has an even more difficult road to tread than with regard to the suppression issues. The State argues that Ms. Clendenin can properly be prevented from calling witnesses and putting forth a defense. The State argues for an unfair playing field skewed towards the prosecution, denying Ms. Clendenin her rights to due process, a fair trial, presumption of innocence, and right to put on a defense. (See Opening Brief at 20-21).

The State does not address in its brief Ms. Clendenin’s commonsense and apt analogy between medical marijuana caregivers and pharmacies, which supply even harder narcotics to thousands of Colorado patients every day without face-to-face meetings between patients and those in the production chain. These prescription narcotics (pills, liquids, powders, lotions, etc.) are manufactured, produced, and formulated either on- or off-site, in some cases even outside of Colorado or the United States, by multiple people at many levels of a complex production chain, most of

whom other than the cashier never meet or have any contact whatsoever with the patients who receive these prescribed narcotics under physicians' orders.

The State contends that “as a matter of law” (State Answer Brief at 15, 19), the Colorado Constitution’s definition of caregiver somehow also contains the requirement of a face-to-face meeting between patient and caregiver. This is not established as a matter of law; there are no reported appellate cases in Colorado construing the Colorado Constitution, Article XVIII § 14. And there is no such requirement in the actual text of the constitutional provision, passed by the voters as Amendment 20, a compassionate provision designed and intended to give relief to the sick and dying, not as a mechanism for State prosecutors to construct semantic obstacles between patients and the all-too-rare medicine doctors have ordered them to take.

The constitution exists to protect the people against the powers of the State to imprison and destroy, not as an additional weapon in the State’s already-formidable arsenal of built-in advantages. See Colorado Constitution, Article II § 1 (“All political power is vested in and derived from the people.”) Constitutions and statutory provisions, where ambiguous, must be construed in favor of the criminally accused, not the

State. Courts should err on the side of those people whose liberty is at stake, not on the side of that entity which seeks to take liberty away. In this case, the trial court failed to follow the simple language of the constitution and added additional requirements not in the constitution, all to the detriment of Ms. Clendenin.

The State attempts to construct analogies from two other medical marijuana states, California and Washington. (State Brief at 15-17.) Neither of these states has enacted state constitutional provisions related to medical marijuana; these states enshrined such protections in mere statutes.

California's medical marijuana statute, Health & Safety Code § 11362.5(e), differs significantly from Colorado's broader constitutional protection relating to its definition of caregiver. California defines caregiver 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." Cal. Health & Safety Code § 11362.5(e).

Washington's newer statute, RCW § 69.51A.010, defines a "designated provider" as

- (1) "Designated provider" means a person who: (a) Is eighteen years of age or older; (b) Has been designated in writing by a patient to serve as a designated provider under this chapter; (c)

Is prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as designated provider; and (d) Is the designated provider to only one patient at any one time.

Washington amended its medical marijuana statute in 2007, eliminating the statutory definition of “caregiver” and eliminating the requirement that a caregiver provide for the “housing, health, or care” of the patient, cited in State v. Mullins, 116 P.3d 441, 444-445 (Wash. App. 2005) (State Brief at 15-16). See “Compassionate Use Act,” Washington Senate Bill 6032; 2007 chapter 371 § 1.<sup>2</sup>

Colorado’s simpler definition of caregiver, befitting a constitution as opposed to a more specific statute, is simply “a person, other than the patient and 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

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<sup>2</sup> “The legislature intends to clarify the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment, qualifying patients may fully participate in the medical use of marijuana, **and designated providers may assist patients in the manner provided by this act without fear of state criminal prosecution.** This act is also intended to provide clarification to law enforcement and to all participants in the judicial system.” (emphasis added)

debilitating medical condition.” Colorado Constitution, Article XVIII § 14(1)(f).

The differences between California and Washington law on the one hand, from Colorado law on the other hand, regarding the definition of caregiver are legion, and this court should decline the Colorado Attorney General’s invitation to make Colorado more like California as regards medical marijuana.

First, California says “*the*” individual, Colorado says “*a*” person, meaning in California there can be one caregiver, Washington expressly limits it to one, but in Colorado, there can be more than one.

Second, California and Washington require a “designation” of the caregiver, Colorado law does not require a designation, and in fact expressly makes designation of one optional. See Colorado Constitution, Article XVIII § 14(3)(f) (“To maintain an effective registry identification card, a patient must annually submit, ... the name and address of the patient’s primary caregiver, *if any is designated at such time.*”) (emphasis added).

And as the trial court in this case correctly found, and the Attorney General has already conceded in another medical marijuana-related appeal pending in this Court (People v. Marzano, Colorado Court of Appeals Case No.

08CA206), the registry card and express designation of caregiver are not dispositive of whether the affirmative defense applies.

Third, California requires a caregiver to “consistently” assume responsibility for a patient, while Colorado does not require any consistency, one occasion is sufficient.

Fourth, California requires the caregiver to assume responsibility for the “housing, health, or safety” of the patient, while Colorado only requires a “significant responsibility for managing the well-being” of the patient. The concept of “well-being” is not further defined, and to counsel’s knowledge, has not been defined in a reported Colorado case. Merriam-Webster’s Dictionary (2009) ([www.merriam-webster.com/dictionary](http://www.merriam-webster.com/dictionary)) defines the noun “well-being” as “the state of being happy, healthy, *or* prosperous.” (emphasis added).

The State offers a crabbed and narrow dictionary definition of “manager.” (State Brief at 19.) The 2009 version of Webster’s Dictionary (twenty years newer than the Attorney General’s 1989 version (see State Brief at 19)) defines “manager” as:

one that manages: as **a**: a person who conducts business or household affairs **b**: a person whose work or profession is management **c** (1): a person who directs a team or athlete (2): a

student who in scholastic or collegiate sports supervises  
equipment and records under the direction of a coach

This is a more accurate definition of a manager than the 1989 version. A manager can be many things, such as the manager of a franchise, or one who supervises equipment, or conducts household affairs. Under this definition, the “manager” of the corner franchise pharmacy need not personally meet and greet every patient who comes in the door to fill a doctor’s prescription in order to be a manager.

More relevant here is the dictionary definition of the actual word in the Colorado Constitution, “manage,” a verb which is defined even more broadly:

*Transitive verb*1: to handle or direct with a degree of skill: as **a:** to make and keep compliant <can't *manage* their child> **b:** to treat with care : **HUSBAND** <*managed* his resources carefully> **c:** to exercise executive, administrative, and supervisory direction of <*manage* a business> <*manage* a bond issue> <*manage* a baseball team> 2: to work upon or try to alter for a purpose <*manage* the press> <*manage* stress>3: to succeed in accomplishing : **CONTRIVE** <*managed* to escape from prison>4: to direct the professional career of <an agency that *manages*

entertainers>*intransitive verb* 1 **a:** to direct or carry on business or affairs ; *also* : to direct a baseball team **b:** to admit of being carried on 2: to achieve one's purpose

**synonyms** see CONDUCT

Merriam-Webster's Dictionary (2009). It is clear that Ms. Clendenin satisfies most of these meanings of the word "manage."

Fifth, Colorado's definition of caregiver, unlike California's, expressly *excludes* the prospect of a physician serving as caregiver, which belies the State's argument here that serving as a caregiver is akin to being a nurse or doctor.

Cultivating medical marijuana supplied to a patient on one or more occasions, with or without meeting the patient, fits any reasonable definition of "managing the well-being" of a patient. These patients -- had they been permitted by the trial court to testify -- would all have testified that the medical marijuana Ms. Clendenin supplied them made them happy, healthy, or prosperous. They would have all testified that the medical marijuana, itself, was "significant" to "managing" their "well-being." They would have all testified that obtaining a good quality, safe, dependable source of medical marijuana, such as Ms. Clendenin's, is difficult at best and impossible for

some. But Ms. Clendenin never got the chance to call them to testify. She was deprived her defense.

This Court is thus faced with an easy question: who gets to say what is “significant” for a patient’s well-being, the patient or someone else? The patients should be able to testify what is significant for them. The patients were not permitted to so testify in this case, which was reversible error.

This Court should decline the State’s invitation to follow the California court’s reasoning in People v. Mentch, 195 P.3d 1061 (Cal. 2008), primarily for the reasons above, that Colorado’s medical marijuana provision is distinguishable from California’s in the areas upon which Mentch relies, and certainly should ignore State v. Mullins, 116 P.3d 441 (Wash. App. 2005) since the Washington Legislature superseded it in 2007.

The State argues that under Ms. Clendenin’s interpretation, “anybody who provides marijuana qualifies as a primary caregiver.” (State Brief at 20). Ms. Clendenin does not make that argument. The limitation on who is a caregiver is whether that person intends to produce or supply marijuana for medical use or non-medical use. Medical use is legal; non-medical use is not. That is not an “absurd” result as the State contends. (State Brief at 20.) Most narcotics are legal for medical use but illegal for recreational use.

The constitution defines “medical use” (Colorado Constitution Article XVIII § 14(1)(b), and that is the use for which Ms. Clendenin intended to cultivate, or at least sought to put forth a defense along these lines. She must be permitted a fair playing field, she must be allowed to call witnesses on her behalf and offer a defense, and let the jury decide whether that defense applies.

Ms. Clendenin agrees with the State that this court need not necessarily apply the Rule of Lenity, but for opposite reasons and not because Ms. Clendenin, a law-abiding citizen who grew a plant peacefully in her home with the intent to help people sick like herself, is a “wrongdoer.” (See State Brief at 21.) Ms. Clendenin argues that the constitution is clear and unambiguous in its definitions of “medical use” and of “caregiver.” However, if there is ambiguity and reasonable minds may differ, then under the Rule of Lenity the accused wins as regards constitutional or statutory interpretation, especially in light of the element of intent that must be proven beyond a reasonable doubt in this any every criminal prosecution.

### **III. THE TRIAL COURT SHOULD HAVE INSTRUCTED AS TO THE END USER DEFENSE AND SHOULD HAVE DISMISSED THE VAGUE POSSESSION WITH INTENT CHARGE**

The State argues that there was no “order ... authorizing the dispensing of drugs” pursuant to C.R.S. § 18-18-102(23)(a) (State Brief at

24), yet it is uncontested that there were numerous patients who would have testified that they possessed an order from a practicing physician for precisely that. The jury should have been permitted to assess the end user defense codified at C.R.S. §§ 18-18-302 and 18-18-102(36).

The State fails to explain how a person can reasonably understand or avoid a felony charge of “possession with intent to distribute” by possessing any amount of marijuana. The State fails to identify any objective guidelines of what the charge means. (State Brief at 26-29.) Citizens are entitled to understand the laws under which we live, and the charge meets all of the requirements of void for vagueness and it should have been dismissed.

### **Conclusion**

Stacy Clendenin’s home was searched illegally, and she was denied her constitutional right to put on a defense and call witnesses. This case should be reversed on either or both of these grounds.

Date: June 15, 2009

Respectfully submitted,

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Robert J. Corry, Jr.

### **Certificate of Service**

Above designated counsel certifies that on the above date a true copy of the above **REPLY BRIEF** was served by delivery through the U.S. Mail on the following:

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### **Certification of Compliance with Word Limit**

Above designated counsel certifies that according to the word processing program used to write this Reply Brief, the brief contains 3883 words, within the appropriate word limit of 5700 as provided by C.A.R. 28.