

COURT OF APPEALS, STATE OF
COLORADO

Colorado State Judicial Building
Two East 14th Avenue
Denver, Colorado 80203

Larimer County District Court
Honorable Daniel J. Kaup, District Court Judge
Trial Court Case Number 06CR1962

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

v.

**FRANK MARZANO,
Defendant-Appellant.**

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Case No: 2008CA206

OPENING BRIEF

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Statement of Issues Presented for Review

1. The defense motion to suppress evidence from a warrantless search of the residence, without actual consent and with Frank Marzano's request that officers leave.

2. The trial court's order prohibiting the defense from calling patient witnesses unless they had designated Mr. Marzano as caregiver on a registry card, when the elements of the affirmative defense contain no such requirement, and resulting jury instructions.

3. The trial court's substantial bent of mind against Mr. Marzano, demonstrated by the record as a whole, as well as the trial court's order prohibiting defense counsel from mentioning the words "medical marijuana."

4. The denial of affirmative defenses of Ultimate User and Choice of Evils, denial of the Bill of Particulars, denial of motion for dismissal of Count II as void for vagueness, prohibiting the defense from challenging the element that this was not *cannabis sativa L.*, and denial of the motion for new trial based on the inconsistency of the verdicts.

Statement of the Case

This direct appeal from a jury trial presents issues of first impression regarding the Medical Marijuana provisions of the Colorado Constitution, Article XVIII § 14. This appeal arises from Frank Marzano's felony criminal convictions

for “Cultivation of Marijuana” and “Possession of Over Eight Ounces of Marijuana,” but acquittal on the charge of “Possession with Intent to Distribute Marijuana.” Mr. Marzano was a caregiver for numerous Medical Marijuana patients diagnosed by physicians as suffering from debilitating medical conditions. There was no evidence that any of Mr. Marzano’s actions related to marijuana were intended for anything other than medical use.

The Colorado Constitution, Article XVIII §14(2)(a), contains the elements of the affirmative defense of medical use of marijuana for either a patient or primary caregiver: (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. Mr. Marzano endorsed this defense for trial, as well as a separate exception in §14(2)(b) based on the possession of a registry card.

The trial court materially handicapped the defense by prohibiting it from calling patient witnesses to testify they received Medical Marijuana from Mr. Marzano, holding instead that for him to claim “caregiver” status requires that a patient have a State-issued Medical Marijuana Registry card expressly designating Mr. Marzano as caregiver. These requirements imposed by the trial court appear nowhere in Colorado’s Medical Marijuana laws, which do not even require the registry card, much less the explicit designation of caregiver on one. Even the

Colorado Attorney General stated in pretrial argument in this case that the affirmative defense does not require the existence of a Medical Marijuana Registry card or a caregiver designation on such card, and the Attorney General is bound by these representations.

Colorado voters' intent in enacting Article XVIII § 14 was to provide a safe, legal, confidential mechanism for suffering patients to comply with doctors' recommendations for medical marijuana. Mr. Marzano possessed dozens of registry cards on the date of alleged offense, offered to police at the outset. Mr. Marzano wished to call these patients as witnesses to support his affirmative defense, but the trial court violated Mr. Marzano's constitutional right to put on a defense in disallowing these witnesses.

The case also involves violations of Mr. Marzano's Fourth Amendment rights against warrantless search and seizure. The prosecution theory was that a letter written by a putative executor of the estate of the admitted "sham" owner of the property in New Jersey constituted consent to enter the property, in the face of Mr. Marzano's clear withholding of consent to enter or search.

The trial court departed from its neutral role and assumed the role of advocate, repeatedly making and "sustaining" *sua sponte* objections to defense questions and arguments. The trial court did not similarly assist the defense during trial. The trial court placed a gag order on the defense, but not on the prosecution,

preventing the defense from mentioning the two words “*Medical Marijuana*” even though these words appear on the State-issued “Medical Marijuana Registry” card, admitted as an exhibit, and even though the trial court itself used the words.

The cold transcript and record do not adequately capture the trial court’s demeanor directed against defense counsel, but the contents of the transcript still establish the trial court’s “substantial bent of mind” against the defense.

Statement of Facts

1. The Search

This case began with authorities allegedly searching for fugitive Randall Zandstra, supposedly traced to the property at 1621 Firerock Court in Loveland, Colorado. (Transcript of June 21, 2007 Motions Hearing at 27:23-25). The last time Zandstra had been seen at the property was February 2006. (Transcript of June 21, 2007 Hearing at 36:16-18). This was ten months before officers’ entry into the home. (Transcript of June 21, 2007 Hearing at 54:17-20).

Zandstra had allegedly placed ownership of the property in the name of Carol Dugasz, but U.S. Marshal West admitted that such transaction was a “sham.” (Transcript of June 21, 2007 Hearing at 37:10-12). The prosecution produced a hearsay letter purportedly from Anthony Dugasz of New Jersey, the putative “executor” of sham owner Carol Dugasz’s estate, without evidence of efforts to

verify that he was the executor of the estate, or to verify his supposed consent to enter. (Transcript of June 21, 2007 Hearing at 39:8-16; 58:3-5).

The letter consented to entry only for the purpose of arresting Zandstra. (Transcript of June 21, 2007 Hearing at 40:21-22). Officers broke in through a sliding glass door, searched the entire residence, including drawers and other small spaces where it would be impossible for Zandstra to hide, with officers and with a K-9 police dog unit, and did not locate Zandstra. (Transcript of June 21, 2007 Hearing at 52:12-18). Agent West testified that Mr. Marzano indicated there was medical marijuana present before the dog arrived. (Transcript of June 21, 2007 Hearing at 51:11-23; 79:2-5).

Although the reason for the alleged consent had been completed and Zandstra was not there, officers remained without consent from Mr. Marzano and in the face of his unequivocal request they leave. (Trial Court Record at 98-99.) At this point in the encounter before being questioned by authorities, Mr. Marzano was not free to leave and under arrest. (Transcript of June 21, 2007 Hearing at 70:19-25; 71:1-21). Mr. Marzano was never read his Miranda rights. (Transcript of June 21, 2007 Hearing at 72:2-7). U.S. Marshal West threatened Mr. Marzano “that he could possibly die in prison” if he did not cooperate. (Transcript of June 21, 2007 Hearing at 74:19-23). Agent West testified that neither he nor any other officer made any promises or threats in exchange for Mr. Marzano making

statements to police. (Transcript of June 21, 2007 Hearing at 89:25; 90:1-7).

Agent West later reversed that statement. (Transcript of June 21, 2007 Hearing at 91:15-22).

Larimer County Deputy Sheriff Al Eihausen confirmed that neither he nor any other officer ever had consent to enter or search from any physically-present occupant. (Transcript of June 21, 2007 Hearing at 101:21-25; 102:1; 113: 12-14). Mr. Marzano was ordered down the stairs at gunpoint, forced into a chair, arrested at approximately 11:00 a.m., but a judge did not sign the search warrant until 3:30 p.m., hours after the search. (Trial Court Record at 98-99.) Eihausen also testified that although he did not remember whether Mr. Marzano had asked him to leave, “it wouldn’t make any difference.” (Transcript of June 21, 2007 Hearing at 102:2-6). Eihausen confirmed that Mr. Marzano was never free to leave at any time during the encounter. (Transcript of June 21, 2007 Hearing at 104:20-25; 105:1-7; 115:6-11). Eihausen testified that the entire house was searched by police before any search warrant was issued. (Transcript of June 21, 2007 Hearing at 112:22-25; 113: 1). And the affidavit for search warrant, obviously written before the warrant issued, contains a description of five upstairs rooms.

Fort Collins Police Officer John Pierick authored the sworn affidavit for search warrant, but did not advise the judge what he admitted was “pertinent” information that the ownership of the property was a sham, and that the person

purporting to be the executor was not in fact the executor. (Transcript of June 21, 2007 Hearing at 125:1-6; 13-25). Officer Pierick testified that he omitted the information that this was medical marijuana because officers on the scene making the observations did not advise him of this. (Transcript of June 21, 2007 Hearing at 126:1-9). Officer Pierick confirmed that 41 pages of medical marijuana documentation were located in the home. (Transcript of June 21, 2007 Hearing at 130:6-25; 131:1-15; 136:18-25; Transcript of September 28, 2007 Hearing at 24:9-23). Officer Pierick decided that this was not a medical garden, never having met any of the patients whose documents were in the house, and having no medical training. (Transcript of June 21, 2007 Hearing at 139:21-25).

The trial court cut off further inquiry of Officer Pierick's credibility for omitting from his report and affidavit any reference to the 41 pages of medical documentation previously located in the warrantless search. (Transcript of June 21, 2007 Hearing at 143:10-25; 144:1-25; 145:1-16).

Officer Pierick admitted that had he known the "sham" ownership and the medical marijuana issues, these would "absolutely be material," and would have advised the judge evaluating the warrant. (Transcript of June 21, 2007 Hearing at 127:4-13). Officer Pierick also confirmed that information in the affidavit was obtained through the previous warrantless search of the residence, other than a

1995 misdemeanor arrest of Mr. Marzano in Minnesota. (Transcript of June 21, 2007 Hearing at 130:1-5).

The trial court denied Mr. Marzano's motion to suppress evidence seized in the warrantless search, holding that a person in New Jersey claiming to be the executor of the property's deceased sham owner could remotely consent in writing to a warrantless search of the property over the stated objections of the physically-present occupant. (Transcript of June 21, 2007 Hearing at 154-158). The trial court held that it was not misleading to omit from the affidavit any reference to medical marijuana, despite the fact that Mr. Marzano from the outset characterized this as a medical marijuana garden and turned over medical marijuana documentation for State-registered medical marijuana patients. (Transcript of June 21, 2007 Hearing at 158-159). The trial court held that although Mr. Marzano was not free to leave, Miranda advisements were unnecessary and his statements should not be suppressed. (Transcript of June 21, 2007 Hearing at 160-161).

The actual number of medical marijuana plants recovered in the search was a moving target throughout. At different points, the amount of plants is alleged to be "133 or 139" (Transcript of October 12, 2007 Hearing at 4:18); "approximately 100 plants" (Transcript of June 21, 2007 Hearing at 119:14); 100 plants (Transcript of June 21, 2007 Hearing at 138:18-19); 74 plants (Trial Transcript December 4, 2007 at 260:10-15); or 200 plants (Trial Transcript December 5, 2007 at 40:24-25).

2. Pretrial Actions Regarding Medical Marijuana

The trial court held a pretrial hearing on the Colorado Attorney General's motion, representing the Colorado Department of Public Health and Environment, to quash a prosecution subpoena for Medical Marijuana Registry information. The trial court believed that the medical marijuana registry card had to be renewed every year in order to present the affirmative defense. (Transcript of October 12, 2007 Hearing at 11:25; 12:1-7). The defense position was that the law permitted the Health Department to authenticate records that were no longer confidential, as patients had waived confidentiality by providing records to Mr. Marzano. (Transcript of October 12, 2007 Hearing at 14:1-9).

The Attorney General argued that the affirmative defense at Article XVIII § 14(2)(a) did not depend on the issuance or possession of a state registry card:

A card is solely a method of proof, and it is not necessary for the affirmative defense set forth in (a). It's only part of the exception to the criminal laws set forth in (b), and I think that's an important distinction. ... And nowhere in 2(a) is there any mention of a card. It's 2(b) where the card comes into effect."

(Transcript of October 12, 2007 Hearing at 18:10-22). Even the trial court mused later that whether Mr. Marzano was a caregiver could be established without reference to the registry card but by "quote, other evidence, cross-examination, various things as to whether and when somebody became a care provider." (Transcript of October 12, 2007 Hearing at 24:1-4).

The Attorney General explained the difference between the affirmative defense in §14(2)(a), which does not require the registry card, and the exception in §14(2)(b), which requires the possession of the card:

An exception has a different burden of proof, it has a different legal concept entirely from an affirmative defense. ***If the people, when enacting this constitutional provision, wanted the Court to be a part of the affirmative defense, it would have so stated. It wouldn't have said it separately, that it's an exception to the state's criminal laws.*** The verification by law enforcement doesn't necessarily have to relate to both (a) and (b). It can solely relate to (b). And on that ground, it is solely a matter of proof.

(Transcript of October 12, 2007 Hearing at 20:1-9) (emphasis added.) The defense echoed the Attorney General position that whether Mr. Marzano was designated caregiver on a card does not determine whether he functioned as a caregiver.

(Transcript of October 12, 2007 Hearing at 23:5-11; Transcript of November 28, 2007 Hearing at 6:2-11).

The Attorney General proposed that this issue be brought before the Colorado Court of Appeals, because numerous trial courts had considered this, and none of them had reached the result of the trial court here. (Transcript of October 12, 2007 Hearing at 28:17-25; 29:1-5). The trial court refused, instead giving the Department two days to comply or “you go to jail. ... which seems pretty straightforward, as far as your issue of contempt.” (Transcript of October 12, 2007 Hearing at 29:4-8). When the Attorney General requested a final contempt order, the trial court refused, stating “I guess I’ll see if you deliver things or not, because

I'm not quite through, Lisa.” (Transcript of October 12, 2007 Hearing at 29:14-16).

The defense had endorsed 35 patients who would have testified that on the date of offense, Frank Marzano served as their primary caregiver in providing medical marijuana. (Transcript of November 26, 2007 Hearing at 35:2-16). One week before trial, the trial court granted the prosecution motion preventing the defense from calling any of its five timely-endorsed expert witnesses. (Transcript of November 26, 2007 Hearing at 28:16-21).

The trial court then ruled that Mr. Marzano could not call any patient witnesses that had not explicitly designated him as caregiver on a registry card by the date of offense, thus lowering Mr. Marzano's patient witnesses from 35 patients to one patient. (Transcript of November 28, 2007 Hearing at 6-12; Transcript of November 26, 2007 Hearing at 32:18-25). The trial court recognized this was a “difficult one for the court in strictly construing the Constitution because the language is not specific and clear as to primary care providers and their duty to register.” (Transcript of November 26, 2007 Hearing at 33:21-25; 34:1; Transcript of November 28, 2007 Hearing at 7:24 (trial court “struggled” with this issue)).

The rationale for the trial court's pretrial ruling limiting patients was that patients would have an “abundant opportunity to abuse this limited exception” and “decide at the last minute that they are being provided marijuana by a particular

person.” (Transcript of November 28, 2007 Hearing at 9:22-25; 10:1-5). In this case 41 pages of medical marijuana documents had been found by police *at the initial search* and included in pages 75 through 116 of discovery, so these could not have been concocted *post hoc* for the trial. (Transcript of September 28, 2007 Hearing at 35:16-23). The trial court had earlier said “I’m not suggesting anything concocted after the fact,” (Transcript of September 28, 2007 Hearing at 35:24-25).

3. The Jury Trial

The prosecution began Opening Statement with an argument of law as to supposed limitations of plants, to which the defense objected, but the trial court permitted the prosecution to use its opening statement to discuss law rather than evidence. (Trial Transcript December 4, 2007 at 232:4-25). The prosecution’s opening statement argued that Mr. Marzano had “way too much, way too much” marijuana for the one patient the jury would know about. (Trial Transcript December 4, 2007 at 233-234). The defense attempted to obtain a modification of the court’s earlier ruling limiting the defense to one patient to address the prosecution’s legal arguments, but the trial court denied the motion, stating that the prosecution had opened the door “only as to one person” and allowed the prosecution’s arguments to stand and be reiterated throughout the trial. (Trial Transcript December 4, 2007 at 234:12-25).

On opening, the defense attempted to say that there would be no evidence that the marijuana was for any use other than medical, but the trial court would not permit the defense to directly respond to the prosecution case because it implied the existence of other patients that the trial court had prospectively excised from the case. (Trial Transcript December 4, 2007 at 239:6-25; 240:1-6). In preventing the defense from commenting on the lack of evidence, the trial court reversed the burden of proof because it required the defense to provide evidence of medical use rather than allow the defense to comment on the lack of evidence.

The trial court permitted as “background” the prosecution’s first witness, over defense objection, to testify as to the prejudicial fact that officers were there to execute a federal fugitive warrant. (Trial Transcript December 4, 2007 at 246:5-11). Officers also testified, over defense objections, that Zandstra had “quite a criminal history” and was “known to have knives and guns,” and did not stop this barrage of innuendo even when counsel objected. (Trial Transcript December 5, 2007 at 106:5-15). By contrast, the defense was not permitted to mention that officers conducted a warrantless search. (Trial Transcript December 4, 2007 at 237:21-25). The defense sought to bring this fact to the jury’s attention because the prosecution had used Mr. Marzano’s statements, and the fact that the police encounter was a complete surprise to Mr. Marzano influenced his statements. Over defense objection, officers testified about the size of this marijuana garden in

contrast to other unrelated marijuana gardens seen previously. (Trial Transcript December 5, 2007 at 110:6-25).

During the jury trial, the trial court admitted prosecution Exhibit #3, a police videotape of the home taken before seizure. The videotape depicts medical marijuana documentation hanging on a door. The trial court prohibited defense counsel from cross-examining as to the contents of the prosecution exhibit already admitted. (Trial Transcript December 5, 2007 at 32:12-25; 33:1-25; 39:14-23).

When defense counsel asked police officers if they had any knowledge of amounts or use of medical marijuana in this case with this defendant, the trial court did not permit such questions. (Trial Transcript December 5, 2007 at 146:2-8). Investigator Miller was permitted to testify, over defense objections and a motion for mistrial, that a single airline ticket found in the residence could show that Mr. Marzano was a “drug dealer” because drug dealers fly on airplanes, absent any evidence that Mr. Marzano had ever traveled with marijuana. (Trial Transcript December 5, 2007 at 196:12-25).

The court also interspersed a *sua sponte* objection to defense cross-examination regarding the advisory witness hearing previous testimony. (Trial Transcript December 6, 2007 at 188:15-24). The trial court made another *sua sponte* objection when defense counsel cross-examined as to the amounts of marijuana medically necessary, in direct response to the officer’s testimony that

there was “too much” marijuana. (Trial Transcript December 6, 2007 at 218:6-13). Another *sua sponte* objection occurred during the defense case when Mr. Marzano sought to introduce biographical information about defense witness Timothy Tipton. (Trial Transcript December 11, 2007 at 30:11-23). As to the one remaining patient, the trial court interspersed *sua sponte* objections to that patient discussing amounts of medical marijuana necessary for him, the core issue in the case. (Trial Transcript December 11, 2007 at 97:7-17; 116:13-25; 117:1-5).

The trial court initially sustained a defense hearsay objection to a handwritten letter found at the residence not written by Mr. Marzano. The trial court later changed its ruling and admitted the letter, which purported to be written instructions on how to grow medical marijuana. (Trial Transcript December 10, 2007 at 14:6-25; 15:1-15).

Officer John Pierick testified, over defense objection, regarding his opinion speculation of what the marijuana could be worth, including that Mr. Marzano could have made \$300,000 from marijuana growing every 90 days. (Trial Transcript December 6, 2007 at 234:21-23). Defense witness Timothy Tipton, who knew that Mr. Marzano made no money (and no cash was located in the home or the bank), was not permitted to testify about this. (Trial Transcript December 11, 2007 at 36:11-25; 37:1-6).

Officers testified at length, over defense objections, with opinions based on “training and experience” as to the relative size of this garden, but the defense was not permitted to question its witness Timothy Tipton about this, even though his experience regarding marijuana was extensive. (Trial Transcript December 11, 2007 at 43:4-25). Patient Larry Gray testified that Mr. Marzano was his caregiver, and that the most significant thing a caregiver does is provide him with medical marijuana. (Trial Transcript December 11, 2007 at 82:1-2).

Mr. Marzano took the stand, but the trial court would not permit him to testify about whether he grew, possessed, or used marijuana for non-medical purposes, the core of the prosecution case. (Trial Transcript December 11, 2007 at 161:6-23). The trial court also prohibited Mr. Marzano from testifying about People’s Exhibit 7, which depicts medical marijuana documentation posted on the door to one of the garden rooms. (Trial Transcript December 11, 2007 at 203:24-25; 204:1-13). When Mr. Marzano was asked what his intent was, the prosecutor needed to merely stand in silence to have her “objection” sustained *sua sponte* as to the essential element of intent. (Trial Transcript December 11, 2007 at 213:5-25).

The trial court said “medical marijuana” in the presence of jurors, before restricting the defense from using these words. (Trial Transcript December 4, 2007 at 15:10; 100:12-13 (correcting defense counsel); 104:16-17; 109:2; 110:17;

119:21; 119:22; 129:4; Trial Transcript December 6, 2007 at 228:8). The prosecutor said “medical marijuana” as well. (Trial Transcript December 4, 2007 at 81:19-20; 109:16-17; 113:14; 160:3-4; 231:25; 233:6). The trial court prohibited defense counsel from saying “medical marijuana.” (Trial Transcript December 5, 2007 at 213:11-25; 214:1-14) (“The reference to those two words together is not appropriate.”); (Trial Transcript December 6, 2007 at 12:17-24; 16:18-25; 17:1-8). The trial court stated in the jury’s presence that “I have ruled there is no medical marijuana.” (Trial Transcript December 10, 2007 at 84:4-6). And that the “Court has already ruled and advised the jury that there’s no particular thing called medical marijuana.” (Trial Transcript December 11, 2007 at 87:8-10).

The trial court gag order on the words “medical marijuana” continued through defense closing. (Trial Transcript December 12, 2007 at 50:11-21). Repeated objections to defense closing were either endorsed or unaddressed by the trial court. (Trial Transcript December 12, 2007 at 53:2; 58:23; 60:20; 66:4; 67:17-19; 70:11; 72:9-10; 73:11-12; 77:15-20; 78:22-23; 81:25; 83:2-8; 85:1-2; 89:17). The defense made a motion for mistrial based on this, which was denied. (Trial Transcript December 12, 2007 at 100-104).

After lengthy jury deliberation, Mr. Marzano was convicted of cultivation and possession, but acquitted of possession with intent to distribute. (Trial

Transcript December 12, 2007 at 134; Trial Court Record 195-199). He was sentenced to two years prison plus mandatory parole. (Trial Court Record at 259.)

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR IN DENYING FRANK MARZANO’S MOTION TO SUPPRESS EVIDENCE

A. Summary of Argument

Warrantless searches are presumptively unconstitutional, and there was no consent to overcome the warrant requirement. Mr. Marzano affirmatively expressed his refusal to consent, and his refusal trumps any purported consent from an absent executor in New Jersey, who was a “sham” executor and had no authority. The *post hoc* search warrant issued after the search compounds the constitutional violation and does not cure it, especially because the affidavit was misleading in that it omitted the material fact that this was medical marijuana.

B. Standard of Review

Appellate review of a trial court’s ruling on a motion to suppress evidence is a mixed issue of law and fact. People v. Pitts, 13 P.3d 1218, 1222-23 (Colo. 2000). The trial court’s findings of fact are aside if they are clearly erroneous or unsupported by the record. People v. Platt, 81 P.3d 1060, 1065 (Colo. 2004). The trial court’s legal conclusions are subject to *de novo* review. People v. Pitts, 13 P.3d at 1222.

C. Frank Marzano’s Affirmatively Expressed Withholding of Consent Trumps the Absent Sham Executor’s Purported Consent

Warrantless searches are presumptively unconstitutional. U.S. Const. Amend. IV; Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971); Hoffman v. People, 780 P.2d 471 (Colo. 1989). It is the prosecution’s burden to establish an exception to the warrant requirement. Mincey v. Arizona, 437 U.S. 385 (1978); McCall v. People, 623 P.2d 397 (Colo. 1981).

Frank Marzano was physically-present and repeatedly expressed that he was not consenting to a search and asked the officers to leave. (Trial Court Record at 98-99). Pursuant to Georgia v. Randolph, 547 U.S. 103 (2006), “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.” 547 U.S. at 106, 120, 122-123. Even if the sham executor Anthony Dugasz’s alleged remote “consent” were valid, Mr. Marzano’s refusal to permit a search renders the warrantless search invalid as to him. Anthony Dugasz, a “sham” owner (in the words of the U.S. Marshal), could not provide valid consent to a search from Hopatcong, New Jersey, especially in the face of the physically-present occupant’s withholding of consent. Once officers had determined at approximately 11:30 a.m. that Zandstra was not present, the police should have obtained a warrant. Instead, police

conducted a warrantless search without consent. The evidence should have been suppressed.

D. Omitting Medical Marijuana from the Affidavit Invalidates the Subsequent Seizure

In the post-search affidavit, the state misled the issuing magistrate or evinced a reckless disregard for the truth. The affidavit omitted the uncontested fact, expressed up front by Mr. Marzano himself and confirmed by a stack of documents, that this was a medical marijuana garden. If this fact were included in the affidavit, probable cause would have vanished. The trial court should have stricken the affidavit as misleading. Franks v. Delaware, 438 U.S. 154 (1978); People v. Winden, 689 P.2d 578, 582 (Colo. 1984). With the medical marijuana context added, the affidavit would be insufficient to support probable cause. People v. Leftwich, 869 P.2d 1260, 1270 (Colo. 1994).

Mr. Marzano 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, thus 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). Mr. Marzano 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 trial court should have considered facts and testimony outside the “four corners” of the affidavit. People v. Dailey, 639 P.2d at 1073.

It was error for the trial court to deny Mr. Marzano’s Motion to Suppress when a truthful affidavit would have established no illegal activity at the home, as medical marijuana is legal.

II. THE TRIAL COURT ERRED IN RESTRICTING THE MEDICAL MARIJUANA DEFENSE IN INSTRUCTIONS AND TESTIMONY

A. Summary of Argument

The trial court unconstitutionally limited Mr. Marzano’s right to put on a defense when it restricted him to calling only patient witnesses who had designated him as caregiver on their State-issued Medical Marijuana Registry cards, when Mr. Marzano in fact served at least 35 patients as caregiver. The jury instructions given also restricted the defense and influenced the result.

B. Standard of Review

All objections were preserved on the record. Plain error analysis applies to the review of jury instructions and to misconstruction of constitutional provisions. Griego v. People, 19 P.3d 1, 8 (Colo. 2001).

C. 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 provide it to patients for medical use. The Colorado Constitution, Article XVIII § 14(2)(a), 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 section¹, 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 possession of a Medical Marijuana Registry Identification Card, or a written designation of a

¹ 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.

caregiver. To claim the affirmative defense, a patient or care-giver need satisfy the above three elements and need not apply for, or receive, a State-issued medical marijuana registry card. The Colorado Attorney General took that same position before the trial court in this case, and it is still bound by it. (Transcript of October 12, 2007 Hearing at 18-24). As to prong (III) above, the amounts of medical marijuana that are permitted 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.

Article XVIII § 14(1) defines the 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.

Colorado voters’ purpose in creating the constitutional provision regarding medical marijuana is to provide those who suffer from debilitating medical conditions with medical marijuana recommended by a physician, and to protect from criminal prosecution caregivers like Frank Marzano.

D. The Trial Court’s Order Limiting Mr. Marzano’s Patients to Only Those Expressly Designating Him on a Registry Card was Unsupported by the Law and Denied His Constitutional Rights

In pre-trial orders relating to Mr. Marzano’s affirmative defense for the medical use of marijuana under Article XVIII § 14(2)(a), the trial court limited Mr. Marzano from calling patient witnesses who had not affirmatively designated Mr. Marzano as a caregiver on their registry cards on the date of offense. Mr. Marzano had timely designated a number of Medical Marijuana patients who he planned to call as witnesses whom he served as caregiver, as well as physicians who recommended medical marijuana to them. (Trial Court Record at 66-70; 91-94; 102-107; 128-129).

Confidentiality is a paramount aspect of Colorado’s Medical Marijuana law. See Colorado Constitution, Article XVIII §14(3) (creating confidential registry); §14(8)(d) (requiring legislature to enact penalties for violation of confidentiality); C.R.S. § 18-18-406.3 (establishing criminal offense for violating confidentiality of medical marijuana registry patient). This is why the framers structured the constitution so that the registry card is optional, and formulated the affirmative defense independent of 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), which has the only element being possession of the registry card.

Article XVIII § 14 of the Colorado Constitution is a clear and unambiguous provision. Even assuming, *arguendo*, there were any ambiguities, the trial court was required by the “Rule of Lenity” to construe any such ambiguities in favor of Mr. Marzano. 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 and construed ambiguities against Mr. Marzano; it added additional elements to the affirmative defense that do not exist in the affirmative defense, namely the requirement that Mr. Marzano be designated by a

patient on a registry card before that patient could testify Mr. Marzano acted as caregiver.

The trial court admitted that this statutory interpretation was “difficult” and that the trial court “struggled” to resolve what it viewed as ambiguities in Colorado’s Medical Marijuana law. (Transcript of November 26, 2007 Hearing at 33:21-25;34:1; Transcript of November 28, 2007 Hearing at 7:24). All three criminal charges in this case were based on a “knowingly” mental state on the part of Mr. Marzano. See C.R.S. § 18-18-406. Since the affirmative defense of medical marijuana was implicated by each charge, then Mr. Marzano, a non-lawyer, could not have “knowingly” committed a crime if even the trial court judge, an experienced attorney and jurist, had difficulty with the interpretation of Colorado’s Medical Marijuana law, and reasonable minds differ on the interpretation.

The trial court’s pretrial order meant that Mr. Marzano had no way to bring into evidence the 41 pages of Medical Marijuana registry cards he possessed on the date of offense. There is no other way for him to possess these cards than to be provided them by the patients. He had a strong medical marijuana defense, justifying the amounts of medical marijuana present, but the jury was not permitted to know this. The trial court’s rationale for its pretrial order assumed that caregiver defendants would be disingenuous and concoct the facts “at the last minute.”

(Transcript of November 28, 2007 Hearing at 9:22-25; 10:1-5). On the facts of this case, Mr. Marzano's patient list was confiscated by police in the initial raid, so there was no evidence, and ample evidence to the contrary, that he would concoct the defense *post hoc*.

The trial court's perspective regarding medical marijuana polluted the trial from start to finish. During *voir dire*, defense counsel attempted to question jurors about the subject of medical marijuana, but the trial court shut down counsel, preventing him from asking questions regarding patient access to medical marijuana. (Trial Transcript December 4, 2007 at 180:3-11).

E. Jury Instructions Rejected and Given Regarding Medical Marijuana Affirmative Defense and Exception Were Flawed and Not Based on Colorado Law Governing Medical Marijuana

The jury instructions the trial court gave regarding medical marijuana were flawed, as the instructions flowed from its clearly erroneous view of the affirmative defense. Defense tendered instruction #1 was a simple recitation of the affirmative defense that tracked the constitutional language. (Trial Court Record at 176.) This was erroneously rejected by the trial court, which instead substituted Instructions #23 and #24 that separated the medical marijuana defense into two instructions. (Trial Court Record at 226-227.) The trial court, over defense objection, also included Instruction #25, which was unnecessary, superfluous, and suggested to the jury that the medical marijuana defense may not apply. (Trial

Court Record at 228.) Instruction #26, again given over defense objection, misleadingly implied that the registry identification card and designation was required for the affirmative defense. (Trial Court Record at 229.)

Instruction #27, given over defense objection, was misleading. In stating that Mr. Marzano was designated as caregiver for only one patient, the trial court improperly highlighted one fact, and in doing so, misled the jury into thinking the designation was dispositive. Mr. Marzano was in fact acting as caregiver to at least 35 patients, most of whom had paperwork recovered in the initial search.

The defense tendered an instruction based upon the Medical Marijuana Exception contained at Article XVIII § 14(2)(b), a separate and distinct exception than the affirmative defense at (2)(a). (Trial Court Record at 180.) The Colorado Constitution, Article XVIII § 14(2)(b), provides for an exception from criminal prosecution for those persons who are in lawful possession of a State of Colorado-issued Medical Marijuana Registry Identification Card, as follows:

(b) Effective June 1, 1999, it shall be an exception from the state's criminal laws for any patient or primary care-giver in lawful possession of a registry identification card to engage or assist in the medical use of marijuana, except as otherwise provided in subsections (5) and (8) of this section.

The Colorado Constitution, Article XVIII § 14(1) defines “registry identification card” as follows:

(g) “Registry identification card” means that document, issued by the state health agency, which identifies a patient authorized to engage in the medical use of marijuana and such patient’s primary care-giver, if any has been designated.

Frank Marzano satisfied the elements of the exception on the date of offense because he possessed State of Colorado-issued Medical Marijuana Registry cards as a caregiver. An “exception” under Colorado criminal law is an immunity or threshold protection against criminal prosecution, and can justify pretrial dismissal of criminal charges, or it can be asserted at the jury trial phase, as here.

By way of analogy, Colorado law provides an exception for the use of deadly physical force against a home intruder, popularly known as the “Make My Day” law, C.R.S. § 18-1-704.5. A defendant can assert this defense both at motions and/or as an affirmative defense at trial. People v. McNeese, 892 P.2d 304, 305 fn. 5 (Colo. 1995); citing People v. Guenther, 740 P.2d 971, 981 (Colo. 1987). To claim the pretrial immunity afforded by the “Make My Day” defense, defendant must show the elements of the defense by a preponderance of the evidence. People v. McNeese, 892 P.2d at 308-309; People v. Phillips, 91 P.3d 476, 478 (Colo. App. 2004). The preponderance standard would not apply to the defendant to raise the exception at trial. The proper standard for the court to decide whether to instruct the jury on the exception is “scintilla of evidence.” People v. Saavedra-Rodriguez, 971 P.2d 223, 228 (Colo. 1998); People v. Lundy,

533 P.2d 920, 921 (Colo. 1975). People v. Dover, 790 P.2d 834, 836 (Colo. 1990); People v. Dillon, 655 P.2d 841, 845 (Colo. 1982).

California's appellate case law regarding medical marijuana contains helpful persuasive authority. In People v. Mower, 49 P.3d 1067 (Cal. 2002), a unanimous California Supreme Court considered the exception under California's Health and Safety Code § 11362.5, and concluded that:

in light of its language and purpose, section 11362.5(d) reasonably must be interpreted to grant a defendant a limited immunity from prosecution, which not only allows a defendant to raise his or her status as a qualified patient or primary caregiver as a defense at trial, but also permits a defendant to raise such status by moving to set aside an indictment or information prior to trial on the ground of the absence of reasonable or probable cause to believe that he or she is guilty.

People v. Mower, 49 P.3d 1067.

In State v. Hanson, 157 P.3d 438 (Wash. App. 2007), a defendant obtained his written documentation for medical marijuana after the police raid, and that established his status as a medical marijuana patient. "We find nothing in the statute that requires that the documentation be posted or that the qualifying patient obtain the documentation in advance," State v. Hanson, 157 P.3d at 440.

Here, Frank Marzano had his registry identification cards previous to the alleged offense, so he easily satisfied all of the elements of the exception. He was in lawful possession of state-issued medical marijuana registry cards, and

subsections (5) and (8) did not apply. The trial court committed plain error when it denied the defense tendered instruction #3 for the medical marijuana exception.

The trial court's errors regarding medical marijuana are of constitutional dimension, and violated Mr. Marzano's 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); In re Murchison, 349 U.S. 133, 1356 (1955).

The trial court's errors regarding medical marijuana violated Mr. Marzano's 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 trial court's errors regarding medical marijuana violated Mr. Marzano's 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 trial court should have allowed Mr. Marzano to call patients as witnesses who would have testified that Mr. Marzano was their caregiver. The trial court should have permitted Mr. Marzano to introduce evidence of the 41 pages of registry documentation at his residence on the date of the offense, and reflected in People's Exhibit 7, a photograph of the documentation tacked to a door. Such a departure from the constitution materially tainted this trial.

III. THE TOTALITY OF THE RECORD, THE TRIAL COURT’S GAG ORDER, NUMEROUS *SUA SPONTE* OBJECTIONS, AND OTHER COMMENTS AND RULINGS SLANTED AGAINST THE DEFENSE DEMONSTRATED THE TRIAL COURT’S SUBSTANTIAL BENT OF MIND AGAINST MR. MARZANO

A. Summary of Argument

The record should be reviewed as a whole to determine the trial court’s substantial bent of mind against the defendant. It was reversible error for the trial court to apply a gag order against defense counsel from mentioning the core concept in this case “medical marijuana.”

B. Standard of Review

The doctrine of cumulative error holds that numerous irregularities, when taken together, can deny a fair trial. Oaks v. People, 371 P.2 443 (Colo. 1962).

C. The Totality of the Record Shows the Trial Court’s Reversible Bent of Mind Against Mr. Marzano

At trial, as early as jury selection and all the way through to closing arguments, the trial court repeatedly assisted the prosecution and repeatedly interrupted and hampered the defense. This occurred when the trial court steered the prosecution away from an awkward *voir dire* analogy. (Trial Transcript December 4, 2007 at 77-78). During the defense opening statement, the trial court would not permit defense counsel to say that there is no evidence that any of the marijuana located in Mr. Marzano’s home was for non-medical use, the core factual issue in the case. (Trial Transcript December 4, 2007 at 239-240).

The trial court early on assumed a bent of mind against medical marijuana in general and Mr. Marzano in particular. The Statement of Facts section of this brief and the record as a whole, demonstrate the trial court's improper bent of mind, consisting of *sua sponte* objections raised by the Court on behalf of the prosecutor (and never the defense), rulings on objections, preventing the defense from confronting or introducing evidence on core issues of intent, and a gag order prohibiting counsel from saying "medical marijuana," accompanied by negative comments in the jury's presence. There are a few highlights that establish that this bent of mind reached the "substantial" level so as to afford Mr. Marzano a reversal and new trial in this case. For space considerations, the totality of the record is not repeated in this section and should be analyzed as a whole.

The trial court's bent of mind is evident as early as the motions hearing. When defense counsel cross-examined Agent West what he meant by telling Mr. Marzano during the interrogation that he could "die in prison," the trial court interjected that "I am surprised that you are putting your client in prison already." (Transcript of June 21, 2007 Hearing at 77:13-14). Larimer County Deputy Eihausen withheld his four-page written report until the day before the motions hearing, and it was not provided to the defense until after he testified. (Transcript of June 21, 2007 Hearing at 99:21-24; 101:10-12; 151). When counsel cross-examined as to why, the trial court interjected "Stop with the characterization.

And I mean it.” (Transcript of June 21, 2007 Hearing at 100:14-15). The trial court held this late delivery was not prejudicial to the defense and declined any sanctions. (Transcript of June 21, 2007 Hearing at 164:7-14).

One indicator of bent occurred on Day Three of the jury trial, when police officer Brian Koopman violated the trial court’s sequestration order and obtained a revealing preview of his impending cross-examination. When defense counsel brought this to the trial court’s attention, the trial court’s *chastised defense counsel* for not bringing this up sooner, called him “disingenuous,” and ascribed nefarious motives to defense counsel for not turning around to scan the courtroom. (Trial Transcript December 6, 2007 at 7:1-25; 8:1-2). The trial court never directed a comment against the prosecution for its failure to ensure that *its own witness* comply with the sequestration order. Then the court prohibited defense counsel from cross-examining Officer Koopman about his violation of the sequestration order and potentially tainted testimony. (Trial Transcript December 6, 2007 at 34:1-10). This misdirected ire provides an illuminating snapshot into the trial court’s bent of mind. The remainder of the record confirms it further.

A defendant who alleges a trial court is biased must show that the court had “a substantial bent of mind against him or her. Speculative statements and conclusions are insufficient to satisfy the burden of proof.” People v. James, 40 P.3d 36, 44 (Colo. App. 2001). “Numerous irregularities, each of which standing

alone is insignificant, may, when taken together, so affect the substantial rights of a defendant as to require reversal.” *Id.* at 45. If a trial court makes repeated statements establishing that it is irritated with, or intolerant of, the defendant or his counsel, the cumulative nature of these statements can indicate a “negative bent of mind” against a defendant, constituting judicial bias and denying the defendant a fair trial. *Id.*; *People v. Coria*, 937 P.2d 386, 391-92 (Colo. 1997). The trial court departed from its role as a neutral referee and tainted the result so as to deny Mr. Marzano a fair trial, and he is entitled to a new one.

IV. THE TRIAL COURT SHOULD NOT HAVE DENIED AFFIRMATIVE DEFENSES, SHOULD HAVE DISMISSED THE VAGUE POSSESSION WITH INTENT CHARGE, SHOULD HAVE ORDERED A BILL OF PARTICULARS, AND SHOULD HAVE PERMITTED CHALLENGE TO AN ELEMENT OF THE OFFENSES

A. Summary of Argument

Mr. Marzano satisfied the elements of the affirmative defenses of “Ultimate User” and “Choice of Evils” and should have at least waited for the evidence to consider whether they should go to the jury. The charge of possession with intent was unconstitutionally vague. The defense should have been permitted to challenge an element of the offenses, that the material was marijuana. The defense motion for a Bill of Particulars should have been granted because the prosecution theory was unclear. The motion for new trial should have been granted due to the inconsistency of the verdicts and for all of the other reasons briefed herein.

B. The Ultimate User and Choice of Evils Defenses Applied

The trial court denied the “Ultimate User” defense, and made this decision before hearing evidence. (Transcript of June 21, 2007 Hearing at 18:7-22; Trial Court Record at 61-63; 181). This defense tendered instruction should be given.

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) 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.

Mr. Marzano satisfies all of the above, and it was error for the trial court to deny his tendered jury instruction regarding this defense.

The trial court excluded the Choice of Evils defense, codified at C.R.S. § 18-1-702, before any evidence had been presented. (Transcript of November 26, 2007 Hearing at 43:19-25). The trial court also rejected the tendered instruction as to

this defense. (Trial Court Record at 177.) The trial court should have heard evidence, then determined whether the defense could go to the jury.

C. “Possession with Intent” Charge was Unconstitutionally Vague

The trial court denied Mr. Marzano’s motion to dismiss the “possession with intent” charge as void for vagueness. (Transcript of June 21, 2007 Hearing at 18:4-6; Trial Court Record 55-60). Although the jury acquitted as to this charge, its presence confused the issues. 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); 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, and the trial court should have dismissed this charge.

D. A Bill of Particulars was Warranted in this Case

The trial court denied the defense Motion for Bill of Particulars. (Transcript of June 21, 2007 Hearing at 16:22-23). That motion sought to have the prosecution set forth how Mr. Marzano was out of compliance with Colorado’s Medical Marijuana law. (Trial Court Record at 41-44.) Mr. Marzano requested specific, limited, and highly relevant information essential to enable him to prepare

a defense, procure witnesses, and avoid prejudicial surprise. Woertman v. People, 804 P.2d 188, 190 (Colo. 1991); People v. District Court, 603 P.2d 127.

Without the Bill of Particulars, Mr. Marzano was without sufficient knowledge of the charges to enable him to prepare a defense as required by due process. People v. Tucker, 631 P.2d 162 (Colo. 1981); People v. Fueston, 717 P.2d 978 (Colo. App. 1985), aff'd in part, rev'd in part on other grounds, 749 P.2d 952 (Colo. 1988); Erickson v. People, 951 P.2d 919 (Colo. 1998); People v. District Court, 603 P.2d 127 (Colo. 1979); People v. Dohachy, 586 P.2d 14 (Colo. 1978); Balltrip v. People, 401 P.2d 259 (Colo. 1965).

E. The Trial Court Erred and Abused its Discretion by Ignoring its Own Motions Filing Deadline When the Prosecution Sought Untimely to Add Another Criminal Charge

The trial court established and repeated a deadline for both parties to file motions by May 1, 2007. (Transcript of March 28, 2007 Hearing at 6:9-14; 11:14-17; Transcript of June 21, 2007 Hearing at 8:15-18). Then, the trial court abused its discretion by, over defense objection, considering and granting the untimely prosecution motion, filed after the deadline (Trial Court Record at 87), to amend the Information and add Count III, Possession of Eight Ounces or More of Marijuana, when the prosecution articulated no reason or new facts justifying the late filing. (Transcript of June 21, 2007 Hearing at 20:16-24.)

F. The Defense Should be Permitted to Challenge an Element of the Alleged Offenses that the Material was not Cannabis Sativa L.

It is an essential element of all criminal charges in this case that the material be proven as *cannabis sativa L.*, which is the statutory definition of marijuana. C.R.S. § 18-18-102(18); § 18-18-402. On the second day of trial, in a conference outside of the jury, the trial court opined on this subject that “if for some reason it isn’t *cannabis sativa L.*, then you [the prosecutor] have a problem.” (Trial Transcript December 5, 2007 at 72:5-7). But then the trial court reversed itself and disallowed Mr. Marzano from challenging this element of the offenses on the ground that the defense “didn’t raise” that it was contesting an element of the charges. (Trial Transcript December 6, 2007 at 6:7-14).

The trial court cited a 1975 case, People v. Holcomb, 532 P.2d 45 (Colo. 1975), that by judicial fiat concluded that two separate species, *cannabis sativa L.* and *cannabis indica*, were the same species. The defense presented a number of peer-reviewed scholarly scientific articles post-1975 that disputed this characterization (Trial Transcript December 6, 2007 at 8-11), and had established through the testimony of a number of the witnesses that the material found was in fact *cannabis indica*, but the trial court misleadingly instructed the jury that the two species were the same species. (Trial Court Record at 30.)

G. The Defense Theory Instruction Should Have Been Given

The defense tendered two versions of a proposed defense theory instruction. (Trial Court Record at 184-188). The trial court wrote its own defense theory

instruction which significantly limited the theory the defense sought to convey.
(Trial Court Record at 189; 237.)

H. The Defense Motion for Acquittal or New Trial Should Have Been Granted Due to the Irrationality of the Inconsistent Verdicts of Guilty and Not Guilty

The defense made motions for acquittal and new trial based on the inconsistency of the guilty verdicts on cultivation and possession but a “not guilty” verdict on possession with intent to distribute. (Trial Transcript December 12, 2007 at 135:13; Trial Court Record at 240-243.)

The Court erred in denying Mr. Marzano’s motion for directed verdict of acquittal following the inconsistent jury verdicts. At least two defense witnesses, including Mr. Marzano himself, admitted he possessed marijuana with intent to distribute, so for the jury to acquit reveals that the prosecution failed to prove the absence of the affirmative defense. The inconsistency of the jury’s verdict is further proof that the evidence failed to establish the essential elements of the offense and was insufficient to sustain a conviction. People v. McClure, 526 P.2d 1323 (Colo. 1974). The motions for acquittal and for new trial should have granted.

CONCLUSION

The warrantless entry and search into Mr. Marzano’s home violated the Fourth Amendment because police never had consent of the true owner of the

property, and had the affirmative refusal of a physically-present occupant. It was reversible error for the trial court to deny the defense motion to suppress evidence seized from the illegal warrantless search.

The trial court committed further error when it restricted Mr. Marzano's medical marijuana defense to only those patients who had a Medical Marijuana Registry card that designated Mr. Marzano, when the affirmative defense does not even require the card, much less the designation.

For these reasons and others, Mr. Marzano's criminal convictions in this case should be reversed and either vacated or the case remanded for a new trial.

Date: March 19, 2009

Respectfully submitted,

Robert J. Corry, Jr.

Certificate of Service

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

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Certification of Word Limit

Above designated counsel certifies that according to the word processing program used to write this Opening Brief, the brief contains 9,475 words, within the appropriate word limit.