

DISTRICT COURT  
BOULDER COUNTY, COLORADO  
1777 Sixth Street  
Boulder, CO 80306

---

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

v.

**SHERRI ANN VERSFELT,  
Defendant.**

---

Attorneys for Defendants:  
Robert J. Corry, Jr. #32705  
Lauren E. Davis #34510  
600 Seventeenth Street  
Suite 2800 South Tower  
Denver, Colorado 80202  
303-634-2244 telephone  
303-260-6401 facsimile  
[Robert.Corry@comcast.net](mailto:Robert.Corry@comcast.net)  
[www.RobCorry.com](http://www.RobCorry.com)

**COURT USE ONLY**

---

Case No. 08CR1299

Division 6

---

**OPPOSITION TO MOTION IN LIMINE RE: AFFIRMATIVE DEFENSES**

Defendant Sherri A. Versfelt, through undersigned counsel, hereby submits her opposition to the prosecution's "Motion in Limine re: Affirmative Defenses," requests that the motion be denied, and that she be permitted to exercise her constitutional right to raise defenses, on the following grounds:

**Factual Background**

1. When first encountered by drug task force officers on the date of alleged offense, Sherri Versfelt asserted the medical use of marijuana from the outset of the encounter. She presented a State of Colorado-issued Medical Marijuana Registry Card to police, and indicated she was serving as caregiver for the patient on the card. She further

indicated she could obtain a newer copy of the card directly from the patient, who also lives in Nederland. Police did not indicate they cared about the card. The Medical Marijuana Registry Card was provided in initial discovery.

2. Ms. Versfelt also suffers herself from a previously-diagnosed debilitating medical condition, and was advised by a physician that she might benefit from the medical use of marijuana. Contrary to the State's assertion, she has endorsed Dr. Kevin Dryden, M.D., who will testify as to his knowledge of her six-year medical history and discussions they had regarding the medical use of marijuana. Ms. Versfelt had a watermelon-sized tumor removed along with one of her ovaries when she was 14 years old. While Ms. Versfelt was being booked into jail to serve her 27-day pre-conviction incarceration, served because she could not post bond, she indicated to jail staff that she needed marijuana for medical use, but was denied.

3. Contrary to the prosecution's contention that "[t]he People's evidence will not raise the issue of medical marijuana," (Motion in Limine Re: Affirmative Defenses at page 2), Ms. Versfelt expects to elicit extensive evidence during the prosecution's case-in-chief through cross-examination of police witnesses regarding the issue of medical marijuana, documents located at the search, and Ms. Versfelt's statements and demeanor at the scene. Moreover, this Court has already ruled that although the medical marijuana exception does not merit pretrial dismissal, this issue can be presented to the jury.

#### **Standard of Review**

4. The legal standard for whether to permit Ms. Versfelt to raise an affirmative defense to the jury is whether there is a "scintilla" of evidence for the defense. Ms.

Versfelt has a fundamental constitutional right to present a defense. *Taylor v. Illinois*, 484 U.S. 400 (1988); *People v. Pronovost*, 773 P.2d 555 (Colo. 1989); accord *People v. Bell*, 809 P.2d 1026, 1029 (Colo. App. 1990); *U.S. Const.*, amends V, XIV; *Colo. Const.*, art. II. § 25.

5. Defenses supported by credible evidence should be presented to the jury. C.R.S. § 18-1-407; *Lybarger v. People*, 807 P.2d 570, 579 (Colo. 1991); *People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998). If even a scintilla of evidence, even if improbable or unreasonable, tends to substantiate Ms. Versfelt's theory, she is entitled to an appropriate instruction in accord with her theory. *People v. Cruz*, 903 P.2d 1198, 1199 (Colo. App. 1995) (reversible error to refuse request for affirmative defense instruction of consent where there was evidence consisting of inconsistencies in the victim's story and circumstantial evidence supported the issue of consent shortly before the alleged assault); *People v. Jones*, 677 P.2d 383, 385 (Colo. App. 1983).

6. The presentation of a defense instruction guarantees a defendant's due process right to present a defense at trial. *U.S. Const.*, amends. V, XIV; *Colo. Const.*, art. II, 25; see *Washington v. Texas*, 388 U.S. 14 (1967) (defendant has a constitutional right to present a defense).

7. The Colorado Constitution, Article XVIII § 14, governing the "medical use of marijuana by persons suffering from debilitating medical conditions," is a popularly-enacted provision in the State Constitution. When interpreting popularly-enacted constitutional amendments, courts "must determine what the voters believed the language of the amendment meant when they approved it, by giving the language the natural and

popular meaning usually understood by the voters.” ... Courts “must liberally construe [a constitutional] amendment to effectuate its true purpose.” *Grossman v. Dean*, 80 P.3d 952, 962 (Colo. App. 2003).

8. The purpose of Article XVIII § 14 is simply to alleviate suffering, and provide patients with a safe and legal supply of marijuana for medical use. The prosecution attempts to defeat the voters’ will with an excessively narrow technical reading of the amendment. “Courts should not engage in a narrow or technical reading of language contained in a constitutional amendment if such reading would defeat the intent of the voters. ... courts should consider the amendment as a whole and construe it in the light of the objective it seeks to achieve and the mischief it seeks to avoid.” *Grossman v. Dean*, 80 P.3d at 962; citing *Zaner v. City of Brighton*, 917 P.2d 280 (Colo. 1996); *Board of County Commissioners v. City and County of Broomfield*, 62 P.3d 1086 (Colo. App. 2002).

### **Medical Marijuana**

9. Ms. Versfelt easily meets the elements of both the affirmative defense and exception in the Colorado Constitution, Article XVIII § 14(2)(a) and (2)(b), respectively.

The exception provides 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.

10. The above terms are defined 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.

(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.

(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.

11. By contrast, it is easier for a defendant to satisfy the elements of the affirmative defense than the exception, as follows:

(2) (a) Except as otherwise provided in subsections (5), (6), and (8) of this section, 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). Thus, to claim the affirmative defense, a defendant need only satisfy the above three elements and not ever possess a State-

issued medical marijuana registry card. Logically, if the registry card is optional as to the affirmative defense, then the designation of a care-giver on that card is not required either. Ms. Versfelt easily meets the constitutional definition of caregiver at § 14(1)(f).

12. Here, both the exception and the affirmative defense apply, and have been timely endorsed for trial. The prosecution does not move to limit the jury's consideration of the exception, only the affirmative defense.

13. The prosecution alleges that Ms. Versfelt's own physician advice came too late. (Motion in Limine Re: Affirmative Defenses at page 2-3.) There is no requirement that the physician's advice be received before the date of offense. The elements require a "previous" diagnosis of a debilitating medical condition, but do not require "previous" physician's advice. See Colorado Constitution, Article XVIII § 14(2)(a). This is common sense. The medical use is justified by the previous debilitating medical condition. The voters intended to provide a defense against criminal prosecution for the "medical use of marijuana for persons suffering from debilitating medical conditions," period, which is the title of the provision.

14. In State v. Hanson, 157 P.3d 438 (Wash. App. 2007), the defendant obtained his written documentation for medical marijuana after the police raid, but the appellate court found that was sufficient to establish his status as a medical marijuana patient under Washington's medical marijuana law. "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.

15. The medical marijuana defense was previously considered by a different division of this Court in People v. Clendenin, Boulder District Court Case No. 06CR1758. That case was a medical marijuana case where, as here, defendant presented at least one Medical Marijuana Registry card to justify her properly-endorsed affirmative defense of medical use of marijuana, and the prosecution attempted to keep the issue of medical marijuana away from the jury. The trial court denied the prosecution request:

“The Court finds the registry certificates sufficient to establish the ‘scintilla of evidence’ necessary to raise the affirmative defense. Whether the Defendants are in fact care-givers to these certificate holders, whether these certificates are authentic, whether the certificate-holders have debilitating medical conditions, whether use of marijuana has been advised by their physicians, and whether their medical conditions require amounts greater than described in the Amendment are questions of fact for the trial.”

See Order of March 29, 2007, attached hereto.

16. The designation as caregiver is not required by the three elements of the affirmative defense. Ms. Versfelt thus easily satisfies the “scintilla” standard as to the Medical Marijuana defense and exception, and the jury should consider these.

### **Choice of Evils**

17. Ms. Versfelt satisfies the “scintilla” standard for the Choice of Evils defense as well, codified at C.R.S. § 18-1-702, the statutory codification of the common-law doctrine of “necessity.” She suffered from an exceedingly painful medical condition that could only be addressed by medical marijuana. The Choice of Evils defense invites a balancing between the harm sought to be avoided against the utility of antiquated laws prohibiting the cultivation of a plant. Employing this balance, and the Boulder District Attorney’s own stated view that marijuana ought to be legalized, (“Affirmative Defense

Key in Pot Case, *Law Week Colorado*, August 10, 2009), Ms. Versfelt should have this defense as to her own medical condition.

18. Ms. Versfelt also claims the Choice of Evils defense for Dr. Brooks Kelly, who was suffering from golfball-sized tumors on his body and gained relief from his excruciating pain with the medical marijuana produced by Ms. Versfelt.

### **Mistake of Fact or Law**

19. These two defenses, codified at C.R.S. § 18-1-504, should also be presented to the jury. Ms. Versfelt satisfies the elements of both; the Colorado Constitution Article XVIII § 14 explicitly permits the “acquisition, possession, manufacture, production, use, sale, distribution, dispensing, or transportation of marijuana” for medical use. Colorado Constitution, Article XVIII § 14(2)(d).

20. Reasonable minds can differ about the interpretation of this relatively-new constitutional provision. Ms. Versfelt indisputably asserted the medical use of marijuana from the outset of the police encounter. She believed she was following the law. The jury is entitled to evaluate her credibility on this issue.

### **Other Defenses and Exception**

21. Ms. Versfelt timely endorsed the affirmative defenses of possession of controlled substance pursuant to lawful order of a practitioner, C.R.S. § 18-18-302(3) and C.R.S § 18-18-102(36). The prosecution does not object to this defense nor to the timely-endorsed exception under the Colorado Constitution Article XVIII § 14(2)(b), so these should be permitted.

Wherefore, for the above reasons and those that will be shown at a hearing, the jury should be permitted to consider Ms. Versfelt's affirmative defenses, and for other relief proper in the premises.

Date: October 6, 2009

Respectfully submitted,



Robert J. Corry, Jr.

**Certificate of Service**

Above-designated counsel hereby certifies that on the above date a copy of the foregoing **OPPOSITION TO MOTION IN LIMINE RE: AFFIRMATIVE DEFENSES** was served via facsimile, electronic mail, U.S. Mail, or by hand, on the following:

Chris Estoll  
Deputy District Attorney  
1777 Sixth Street  
Boulder, CO 80302  
Fax: 303-441-4703  
[cestoll@co.boulder.co.us](mailto:cestoll@co.boulder.co.us)