COURT OF APPEALS, STATE OF COLORADO 2 East Fourteenth Avenue, Suite 300 Denver, CO 80203 El Paso County District Court The Honorable Kirk Stewart Samelson, Chief Judge Trial Court case # 04CR6238 20 E Vermijo Ave Colorado Springs CO 80903 **Defendant-Appellant: Calvin Karl Cheeks** **vs.** **Plaintiff-Appelle: The People of the State of Colorado.** Attorney Don Soulliere 1325 S Colorado Boulevard Suite 503 Denver, CO 80222 Telephone: (303) 320-8576 Fax: (303) 320-8578 Atty. Reg. #27872	FILED IN THE COURT OF APPEALS STATE OF COLORADO 2009 JAN 16 P 4:09 CHRISTOPHER T RYAN CLERK COURT OF APPEALS **COURT USE ONLY** Case Number: 08CA7

DEFENDANT'S OPENING BRIEF

INTRODUCTION

The Defendant-Appellant, Calvin Karl Cheeks, will hereafter be referred to as "the defendant" or by name. The Plaintiff-Appelle, The People of the State of Colorado, will be referred to as "the prosecution" or "the state." Citations to the trial record will be by page and line number (p. ___, l. ___). Citations to pretrial motion hearings will be by date, page and line number (d. ___, p. ___, l. ___). Citations to documents filed in the trial court and made part of the appendix will be to its page number in the appendix (ap. ___).

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ISSUES PRESENTED

Whether the search warrant authorizing the search of 3040 S Academy was constitutionally invalid for its failure to specify with sufficient particularity, the place to be searched, and for its over-breadth, where the defendant's residence was only a single unit, designated 3044 S Academy Boulevard, in a larger, multi-unit commercial building, designated 3040 S Academy Boulevard, and where police fail to adequately investigate the location of the place to be searched.

Whether the manner of the search of the defendant's residence violated his constitutional right to be free from unreasonable searches and seizures where police, armed with a search warrant to search 3040 S Academy Boulevard, discover, upon arrival and prior to entry, that the entire multi-unit building is designated 3040 S Academy Boulevard, and knowing that, proceed with the entry and search of the residence whereupon they

discover that the defendant's residence is designated 3044 S Academy Boulevard but do not exit the premises and suspend the search until an amended warrant could be obtained.

Whether evidence recovered from the defendant's residence was properly admitted at trial pursuant to the doctrine of inevitable discovery, where the prosecution presented no evidence establishing that there was a reasonable probability that the tainted evidence would have been discovered, in the absence of the police misconduct, and that the police were pursuing an independent line of investigation, leading to the evidence, at the time the illegality occurred.

Whether admission of the evidence recovered from the search of the defendant's residence, at trial, was constitutional harmless error beyond a reasonable doubt.

STATEMENT OF THE CASE

On January 3, 2005, the defendant was charged by felony complaint and information with Aggravated Robbery, a violation of §§ 18-4-302(1)(b) and 18-4-302(1)(c), C.R.S., and Crime of Violence, a violation of § 18-1.3-406(2)(a)(I)(A), C.R.S., and Theft, a violation of § 18-4-401(1),(2)(c), C.R.S., and Menacing, a violation of § 18-3-206(1)(a),(b), C.R.S., and

Conspiracy to Commit Aggravated Robbery, Theft and Menacing, a violation of §§§§ 18-4-302(1)(b), 18-4-401, 18-3-206, and 18-2-201, C.R.S..

The case was set for trial and motions hearing after the defendant entered a plea of not guilty to all charges. The defendant filed a Motion to Suppress Evidence, on October 18, 2006, arguing that the search warrant authorizing the search of the premises known as 3040 S Academy Blvd (hereinafter "3040") was constitutionally invalid as it failed to identify with particularity, the area to be searched. Further, the motion argued that the execution of the search warrant proceeded in an illegal manner as police conducted the search prior to obtaining an amended search warrant, knowing that the search warrant, as issued, was overly broad and should have specified 3044 S Academy Blvd (hereinafter "3044") rather than 3040 as the area to be searched.

The motion was heard on January 8, 2007 and denied by the court. The court held that the search warrant was valid for 3040, basing its holding on either one of two alternatives: first, "the whole building was 3040 … In which case, there is not even a problem with the fact that they were at 3044 inside of the building. Or, alternatively, if '3044' was a valid address, then [the prosecution] is correct on [its] argument for inevitable discovery because there was a valid search warrant that was executed at what

everybody thought was '3040'..." (d. 1-8-07, p. 43, l. 1-16) *and see* (ap. 3) (minute order of 1-8-07). At trial the defendant was convicted of all charges. This appeal followed.

STATEMENT OF TRIAL FACTS

Kimberly Sebring, a teller at the bank, testified that on December 1, 2004, two offenders entered the bank and said, "everybody down now." (p. 150, l. 5). One remained near the front door, armed with a weapon, while the other entered Sebring's teller station ordering her to "get up." (p. 152, l. 17-24). The offender directed Sebring to, "open up the drawer and put it all in the bag." (p. 153, l. 5-8). She gave him all the money in her top drawer which included some "bait money" and a bank dye pack, placing it into his green duffle bag. (p. 153, l. 5-22; p. 154, l. 7-11). Sebring testified that, the offender as approximately 6'1'' to 6'2'', wearing a ski mask that covered his entire face and under which was a black mesh. (p. 160, l. 20; p. 161, l. 25). That he had a weapon with a sling under his right arm. (p. 163, l. 16-20). And, that he sounded "African-American." (p. 165, l. 18-20). Sebring could not identify Cheeks as one of the robbers. (p. 211, l. 6-9). Sebring could see a bit of the offender's neck and brown skin. (p. 162, l. 1-5). She believes she saw flesh tone on his neck while in the vault. (p. 204, l. 18-25).

Yvonne Boggs, a branch manager at Compass Bank, was not present at the robbery. Boggs provided law enforcement with a list of prerecorded bait bill serial numbers that were in Sebring's teller station. (p. 228, l. 12-15). Boggs determined about $7,000.00 was taken during the robbery. (p. 230, l. 13-25).

Michelle Acosta, a bank employee saw two men coming in with ski masks, heard one say, "Everybody get down." (p. 237, l. 10-20; p. 238, l.12-18). The offender at the door had a gun, about 10 inches long. The other offender, according to Acosta, looked like he had something in his jacket, something that he was holding up under the jacket, but did not actually see a gun. Acosta thought their voices sounded black. (p. 244, l. 5-21). Though believing the offenders were black, Acosta acknowledged she could not be sure, and initially, told police she could not say what race they were. (p. 249, l. 7–25).

Francisco Grijalva was working hanging Christmas lights on December 1, 2004. (p. 273, l. 10-11). The company van he was using near the bank was a white Ford Econoline van. (p. 275, l. 1-8). He saw a person walking from the parking lot, wearing a ski mask. (p. 277, l. 1, 2, 15, 16). He could not tell if it was a man or a woman. (p. 278, l. 1-4). As he drove, he could see something sticking out from underneath the shirt on the right

side of the person, about three inches long, but could not tell if it was a gun. It may have been a shot gun. (p. 279, l. 2-21). Grijalva can not identify the person. (p. 280, l. 9 – p. 281, l. 9). On cross, Grijalva testified that the van he was driving that day was similar to the van depicted in Defense exhibits A and B, and the same as the van depicted in People's exhibit 51. (p. 283, l. 10 – p. 285, l. 14).

At trial, Detective Anderson testified that he received a call from Gaming Investigator Martinez on December 3, 2004 regarding the recovery of dye stained money, smelling of mace, from slot machines at Womack's casino. (p. 319, l. 23 – p. 320, l. 7). Anderson faxed the list of bait bill serial numbers to Martinez. (p. 322, l. 8-23). Most of the recovered money came from Womack's casino. (p. 337, l. 7-11). Chagnon arrested the defendant on December 21, 2004. Cheeks was interviewed, and gave "3040" as the location where he spent the majority of his time. (p. 346, l. 18 – p. 347, l. 2).

A search warrant was executed at "what we believed was ['3040']." (p. 347, l. 3-6). Inside, police recovered a plastic tub containing a red stain. (p. 350, l. 16 – p. 351, l. 9). A loaded pistol grip shot gun was recovered. (p. 353, l. 3-5). A black trash bag containing a loaded, automatic SKS assault rifle was recovered. (p. 355, l. 24 – p. 356, l. 11). The butt of the

SKS rifle had been cut off and a sling had been fashioned to the butt of the rifle. This modification was of special interest to Anderson. (p. 356, l. 15-20). Three magazines with live rounds were recovered. (p. 358, l. 3-4). Anderson testified that a bank photo shows that,

> "a weapon is actually partially concealed underneath the jacket with the top half being alongside the individual's torso." (p. 358, l. 14 – p. 359, l. 20).

And that,

> "It appears the individual in the photograph the jacket has opened up or pulled back across the shoulders, and you can see some sort of strap going diagonally from left shoulder to right."

That is, the strap ran from the left shoulder, diagonally across the chest, and below the right armpit. (p. 362, l. 11-17). A buckle appears to break up the uniform appearance of the strap. (p. 362, l. 18-24). Anderson demonstrated how the strap fit over his left shoulder, revealing a buckle on the strap visible on his chest. (p. 364, l. 3 – p. 365, l. 3). In that position, the barrel of the weapon pointed down terminating at about his knee. (p. 365, l. 7-9). A .9mm Ruger box and a pawn ticket for a .22 caliber hand gun was recovered. (p. 366, l. 8-21; p. 367, l. 17-23).

David Dixon testified he sells dye packs to banks. (p. 428, l. 17-20). Compass Bank purchased his dye packs. (p. 433, l. 10-13). Dye packs contain a receiver and once it leaves the bank, and no longer receives a

signal from a transmitter mounted above the bank doors, it activates, causing red dye and c.s. gas to disperse, generating heat for a short time, up to 500 degrees. (p. 434-445). The dye has limited application, for instance, it is used in taillights, and sky diving. (p. 463, l. 25 – p. 464, l. 10).

Gary George testified that he is Womack's manager of security and surveillance. (p. 470, l. 1-3). All of the slot machines are covered by surveillance cameras. (p. 471, l. 12-17). Money is removed in numbered canisters from slot machines, placed on a cart, and taken down stairs to the "count room." The machine number is on the canister. (p. 473, l. 16-22). Each canister is counted, then the money is strapped and sent to the cage. (p. 473, l. 23 – p. 474, l. 4). Cameras are focused on the count square in the count room. (p. 476, l. 1-10). Gaming officers asked George to do a tape review, to figure out which machines the money came from. (p. 480, l. 6 – 15). George explained the tape review tracking process. In the count room, the procedure is video taped. Tainted money or rejected bills are placed in a separate canister. (p. 480, l. 16 – p. 481, l. 4). Randy Gardner, a member of the count team, would place rejected money into a particular reject container. (p. 480, l. 16 – p. 481, l. 12). The video tape was reviewed, and Randy Gardner identified occasions where he placed rejected bills into the reject container, then back tracked to see which number canister the rejected

bill came from. (p. 481, l. 5-12). The number on the canister matches to a particular slot machine. (p. 482, l. 16 – p. 483, l. 8). George and Gardner were able to determine that rejected bills came out of a particular machine, or the machines to either side of that particular machine. (p. 486-88, 490-491, 509). A map was made showing which machines they thought the tainted money came from, indicating which tapes to review. (p. 491, l. 5-14). Other employees were to review the tapes between the November 30, 2004 drop and the December 3, 2004 drop, for the machines "that possibly the bills came out of." The goal was to identify the person who played all of these machines. (p. 493, 19-21; p. 495, l. 19 – p. 496, l. 20).

On cross, George agreed, there was no way to tell when the tainted bills had been played other than sometime between drops on November 30th and December 3rd. (p. 506, l. 2 – p. 507, l. 4). Further, George agreed he could only be 33% sure that the tainted bills came out of a particular machine because each could only, at best, be traced back to one of three possible machines. (p. 510, l. 6 – p. 512, l. 17).

Randy Gardner testified, there are times when 2or 3 validators will be combined together at one time. (p. 527, l. 8-19).

Ron Gagnon testified, he works in the video surveillance room. (p. 583, l. 1-10). That Gardner and George made a map of 10 to 12 highlighted

machines. (p. 586, l. 1-22). Gagnon pulled the tapes for review, days and days of tapes, to find the common denominator. (p. 586, l. 23 - p.587, l. 25). It took two and a half to three weeks to review all the tapes and take notes as to who played them, and after that, Gagnon testifies that he

> "had one common denominator that played every one of those machines that those bills came from." (p. 587, l. 22-25).

Gagnon testified, he spent "thousands of hours" viewing tape, explaining, "You can't take your eye off the screen for one second, you might miss something." (p. 588, l. 9-18). Gagnon said he was "walking into it blind," without any description or suspect in mind. (p. 588, l. 22 – p. 589, l. 3). He focused only on the highlighted machines, not the adjacent machines. (p. 597, l. 18 – p. 598, l. 3). On cross, Gagnon agrees, "By the time the money is actually pulled out, the camera is no longer on the bill validator it came out of." (p. 625, l. 5-8). And agrees, "That's why we can't narrow it down to nine, the best we can do is one to either side." (p. 625, l. 9-12). And, agrees the dyed money could have come out of a total of 27 machines. (p. 625, l. 13-19). Gagnon could not recall whether he had been told, before starting his surveillance, that the bank robbery suspects were two black males. (p. 631, l. 12-19). Gagnon acknowledged, that information may have filtered to him. (p. 632, l. 10-14).

Gaming Investigator Tim Martinez testified, he received a list of bait bill serial numbers on December 3, 2004, and located three of the bills. (p. 650, l. 8-10; p. 652, l. 4-9; p. 654, l. 13-19). On December 3, Martinez told Penny Estrada, a casino employee in the cage, that the robbery suspects were two black males. (p. 658, l. 4-18). Martinez testified that on December 4, Ron Gagnon said he had already tied a suspect, named Calvin, to two machines. (p. 668, l. 9-12). That on December 8, 2004, Detective Anderson asked Martinez to obtain player tracking information pertaining to Calvin Cheeks from all casinos in Cripple Creek, and collected that information. (p. 671, l. 24 – p. 672, l. 5). At Womack's, on December 6, 2004, Martinez saw Cheeks playing in the casino over the surveillance video with Gary George. (p. 672, l. 25 – p. 673, l. 5). They saw him playing a particular machine, then with the assistance of Kevin Blevins, a slot technician, took that machine out of commission and removed the validator, opened it noting the slight smell of mace and found a ten dollar bill with a burned edge. (p. 673, l. 8-25). Next, Martinez was able to determine that the $10.00 bill was played in that machine at 17:17. (p. 675, l. 7-22). The surveillance tape for that machine revealed that Calvin Cheeks was playing that machine at the relevant time. (p. 675, l. 23 – p. 676, l. 22). That day, Martinez noticed that Cheeks was playing four machines in a bank of machines, so Martinez

inspected the validators in those machines finding dye stained bills in three of the four machines. (p. 677-686). That money, however, had only small portions of stain in the corners. (p. 705, l. 11-20). It was not sent to CBI for analysis. (p. 788, l. 18 – p. 790, l. 9).

FBI agent Hunt testified, he assisted in the execution of a search warrant at the defendant's address. (p. 726, l. 5-11). That the area searched was part of a large building, in front is the Ace Pawn and Loan. On the back, there are several doors. (p. 729, l. 22 – p. 730, l. 21). Once they entered and saw how large it was, he called for the assistance of several additional FBI agents. (p. 731, l. 7-10). Inside, items were recovered including a pair of black gloves, inside of which, were a pair of blue rubber gloves. (p. 731, l. 23-25). Black or dark grey pieces of women's stockings were recovered from 3044. They were made of stretchy material that had been cut. (p. 733, l. 15-17, 25; p. 734, l. 1-5). Four rounds of .25 caliber ammunition for a pistol was recovered. (p. 738, l. 1-25). Loaded 30 round SKS magazines were recovered. (p. 741, l. 16-25; p. 742, l. 18-20). A past due notice from Plasco Storage Rental unit number 41 at 2303 West Bott Avenue was recovered. (p. 739, l. 5-9). Hunt indicated that address was significant as a search warrant was executed there also. (p. 739, l. 12 – p. 740, l. 2). Items recovered from the search of the storage unit included a

container of .22 caliber rounds, a magazine for an SKS rifle, containing 10 rounds. (p. 741, l. 1-13). Hunt assisted Chagnon with the interviewing process at the bank on the day of the robbery. Sebring did not say that she saw the offender's skin color and that it was black. (p. 746, l. 13-16). She said a mask covered the offender's face completely, but saw black mesh where the eye and mouth holes were and, that prevented her from seeing flesh tone in the suspects face. (p. 745, l. 3-8). It did not appear that a woman was residing at Cheeks' residence. (p. 751, l. 14-25). The SKS rifle had been modified, a sling had been fashioned to allow the rifle to be carried under the shoulder. (p. 753, l. 7-19).

Detective Chagnon testified, he sent two ten dollar bills to CBI to determine the nature of the dye stain. (p. 763, l. 18 – p. 764, l. 11). He participated in the search of the defendant's residence and recovered nine photographs each showing the defendant as the winner of a slot machine jackpot at Womack's with dates ranging from January 14, 2004 through October 19, 2004. (p. 770, l. 12 – p. 773, l. 12). A Womack's mailer card addressed to defendant at 3044 S Academy Blvd was recovered. (p. 774, l. 1-20). Four Womack's players club cards in the name of Calvin Cheeks were recovered. (p. 774, l. 21 – p. 775, l. 8). Two pieces of wood, believed to be cut from the stock of the SKS rifle, were recovered. (p. 776, l. 13-21).

The wood was the same color and style as the stock of the SKS rifle. (p. 776, l. 12-24). On December 1, Sebring did not say that she saw the flesh of the offender's neck or any thing remotely close to that. (p. 779, l. 22 – p. 780, l. 4).

Officer Drennan testified, he participated in the search of the defendant's storage unit located at 2303 Bott Ave., Unit #41 and recovered a green plastic pail containing ammunition. (p. 798, l. 24 – p. 799, l. 11). That he also recovered a box of 12 gauge shotgun rounds, .22 caliber rounds, .9 mm handgun ammo, .12 gauge shell casings, gun cleaning equipment, 27 loose .22 caliber rounds, and a 12 round magazine. (p. 799, l. 17 – p. 801, l. 18).

Detective Eric Anderson testified, he interviewed the defendant on December 21, 2004. The defendant did not admit involvement in the robbery. (p. 815, l. 25 – p. 816, l. 4).

Tim McKibben, CBI forensic chemist, testified, red dye used in dye packs is Methylamino Anthraquinone. (p. 831, l. 16-19). He tested two ten dollar bills with red stain. The results were consistent with bank dye. (p. 839). A rectangular tub containing red dye tested positive for 1-Methylamino Anthraquinone. (p. 839, l. 2 – p. 841, l. 17; p. 843, l. 4 – p. 846, l. 6).

Statement of Facts: Defendant's Motion to Suppress Evidence

On December 21, 2004, the defendant was arrested on an arrested warrant. The defendant revealed that he resided at 3040 in Colorado Springs, Colorado. (d. 1-8-07, p. 15, l. 15-16; p. 16, l. 11-12). Detective Anderson provided the 3040 address to Detective Chagnon who obtained a search warrant for 3040. (d. 1-8-07, p. 17, l. 9-12). Officers and Detectives went to the defendant's building to execute the warrant. (d. 1-8-07, p. 31-32). Chagnon testified, "we were told that by the management company at the pawn shop, who runs the management for the building, that the entire building's address was '3040'." (d. 1-8-07, p. 33, l. 13-16). There is a glass door on the West side of the building with the numbers "3040" over the door. (ap. 9) (application and affidavit for 2nd search warrant). This is not the entrance to the defendant's property. His entrance is through a wooden door on the South side. (d. 1-8-07, p. 26, l. 1-4, 15-20; p. 27, l. 12-18). On cross, it became clear that Chagnon spoke with building management *prior* to executing the first search warrant, and was advised that the entire building was 3040. (d. 1-8-07, p. 36, l. 1-22). Chagnon testified that management "actually pointed out which door was [defendant's]." (d. 1-8-07, p. 36, l. 11-13). At that point, Chagnon realized the search needed to be narrower than the entire property designated "3040." (d. 1-8-07, p. 36, l. 14-22). Chagnon

received this information from management *before* the SWAT team entered the space leased by the defendant. (d. 1-8-07, p. 36, l. 9-13). Chagnon understood the defendant's area did not extend to all of 3040, but was limited to a space within 3040. (d. 1-8-07, p. 37, l. 8-14).

A mailbox posted outside the door to the defendant's area had the numbers "3040" scratched into it in three different places. (ap. 12) (second affidavit). 3040 sits on the corner of Hancock and Academy. (d. 1-8-07, p. 25, l. 5-12). The front faces East and is occupied by a pawn shop. The North side contains businesses with separately numbered entrances. (d. 1-8-07, p. 25, l. 13-25). Police did not enter two separate locations, they entered a wooden door on the South side, what they thought was 3040, but once inside, they found they were in 3044. (d. 1-8-07, p. 26, l. 3-5, 15-25; p. 27, l. 1-18).

According to Anderson, at some point during the search, investigating officers realized that "3040", was not the correct address. (d. 1-8-07, p. 17, l. 20-25; p. 18, l. 1-7). According to Anderson,

> "once inside, after we had been inside for a period of time, there were two different situations that came to our attention that showed us that there was a difference between what I learned from Mr. Cheeks and where we were at, neither one of which were clearly visible from the outside of the building." (d. 1-8-07, p. 18, l. 16-21).

Chagnon's initial affidavit, however, indicates that Cheeks,

"gave his primary residence address as 3040 South Academy Boulevard. He stated that he has a living area inside the building normally used for commercial purposes and has his other vehicles stored there." (ap. 6).

Anderson could not recall whether the search was stopped upon realizing that 3040 was too broad, and that 3044 was the specific area that needed to be searched. Anderson recalled, Detective Chagnon left to obtain an amended search warrant. (d. 1-8-07, p. 18, l. 23-25; p. 19, l. 1-8). Anderson could not recall whether he or any other detective directed officers to stop the search, exit the building, and secure the area until an amended search warrant was obtained. (d. 1-8-07, p. 19, l. 11-25). Anderson realized the search needed to be narrowed to 3044 when a mailer from Womack's, addressed to Cheeks at 3044 was found by detectives just inside the door *and* when officers noticed address numbers "3044" on the glass above the door they entered, visible, only from inside 3044, as the outer glass was covered. *See* (ap. 12, 13, 15) *and* (d. 1-8-07, p. 20, l. 22-25; p. 21, l. 1-2). Anderson does not know how long it was, after entry, that these items were discovered. (d. 1-8-07, p. 20, l. 12-20). During the search, Anderson, became aware of a private security camera at the door they entered, and approximately 30 minutes after the entry, the camera was disabled by an officer. (d. 1-8-07, p. 22, l. 3-18). The defense offered a video tape from the

security camera at the door through which entry was made. The court accepted, without objection, the defense offer of proof that,

> "It shows about a thirty-minute period of time when SWAT initially goes in at 2:15 ... that about thirty minutes later, there was police officers that are still inside of that particular area; nothing has been cordoned off out of the front door." (d. 1-8-07, p. 23, l. 4-25, p. 24, l. 1-3).

Chagnon's initial affidavit identified the place to search as "3040." No other descriptive details describing the place to be searched, or providing directions to the premises were contained in the initial affidavit. *See* (ap. 4-7). The "application" page of the first search warrant, not made part of the trial court record as it could not be located by either party, apparently contained only the address of 3040, and like its supporting affidavit, lacked any further description of the place to be searched. (d. 1-8-07, p. 39, l. 16-20; p. 40, l. 4-22). The prosecution indicated that the property to be searched was identified in the first search warrant, only as 3040. No additional descriptive details, with respect to the first search warrant, were offered by the prosecution at the hearing. (d. 1-8-07, p. 41, l. 5-25; p. 42, l. 1-21). The first affidavit notes that Martinez obtained a booking photo for Cheeks and the address on that record "later matched to the home address given by Calvin Cheeks to Womack's Casino in his application for a player's card." (ap. 5). Chagnon does not specify in either affidavit, what address number is on the booking card, nor does he indicate what number

Cheeks provided to Womack's on his "player's card" application. *See* (ap. 4-7; 9-13). The first affidavit states Chagnon, "had a patrol officer respond to ["3040"] and he positively identified the location and stated that there is property stored inside." (ap. 6).

In the second affidavit, Chagnon adds text not included in the first affidavit. The additional text begins by describing vehicles registered to Cheeks and located at his residence, then provides:

> "On 12-21-2004 an application for a Search Warrant was presented to the Honorable Judge Sletta for the address of 3040 South Academy Boulevard, Colorado Springs, Colorado the residence of Calvin Cheeks. The application was approved, Clerk 04-883, and was executed on 12-21-2004 at 2:15 p.m. As Detectives began a search the numbers 3044 was observed over the front door of the residence which is a sub-divided building, the numbers 3044. These numbers can not be seen from outside and a mailbox posted outside the door has the number "3040" scratched into it in 3 different places.
>
> Detectives had previously spoken with the building management who stated that the whole building is 3040 South Academy and they indicated exactly which sub-divided space is leased by Calvin Cheeks. This is the door that was entered pursuant to the issued Search Warrant. Detectives also found a piece of mail just inside the front door with the address 3044 South Academy Boulevard, Colorado Springs, Colorado." (ap. 12-13).

The return inventory, listing items recovered from "3044", labeled "Attachment C," includes "one Womack's mailer addressed to Calvin Cheeks at 3044 S Academy Bl." (ap. 15).

SUMMARY OF ARGUMENTS

The trial court erred in holding that the warrant to search 3040 was valid. Defendant resided in a single unit, 3044, within a larger, multi-unit commercial building, designated 3040. The wrong address warrant was not sufficiently particular to guide officers to the place to be searched without a substantial probability that another place might be mistakenly searched. Law enforcement relied on independent outside information to guide them to the correct premises to be searched. The multi-unit nature of the building is apparent from the exterior. Under these circumstances, the warrant as issued was too broad, and the risk of mistake, particularly where multi-unit property is involved, was too high. When only a street address is used to describe the place to be searched, the correct address must be used. People v. Avery, 173 Colo. 315, 478 P.2d 310 (1970). Police could not rely in good faith on the warrant, as issued, because they failed to reasonably investigate the location of the premises before making their application. Thus, the warrant is invalid.

The manner of the search violated the defendant's right to be free from unreasonable search. Detectives entered knowing the warrant was too broad; further, the violation grew when, after entry, police discover they have a wrong address warrant, and did not retreat and secure the residence,

until a valid warrant was obtained. Police can not rely in good faith on a warrant they know or should know to be defective when conducting a search. Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013 (1987). No exceptions to the warrant requirement apply. Thus, the search was invalid.

Inevitable discovery does not apply because the prosecution failed to make any showing that a separate line of investigation was underway at the time of the illegality, and that it would have inevitably led to the tainted evidence.

The error was not harmless beyond a reasonable doubt because the prosecutions case for robbery was based almost entirely on the illegally seized evidence.

Standard of Review

The reviewing court will consider the "interrelationship between the evidentiary facts of record, the findings of the trial court, and the applicable legal standards in review of the lower court's conclusion of law." People v. Syrie, 101 P.3d 219, 221-22 (Colo. 2004). "A trial court entering a suppression order engages in fact-finding and application of legal standards. Id., at 222. Generally, the reviewing court will defer to the trial court's findings of fact "when there exists sufficient evidence in the record to support them." People v. Arias, 159 P.3d 134, 137 (Colo. 2007). "The legal conclusions of the trial court are subject to de novo review and reversal if the court applied an erroneous legal standard or came to a conclusion of constitutional law that is inconsistent with or unsupported by the factual findings." Syrie, 101 P.3d 219, 221-22 (Colo. 2004). The legal conclusions of the trial court are considered under the totality of the circumstances. Id.

The defendant filed a Motion to Suppress Evidence arguing that the search warrant authorizing the search of the premises known as 3040 was constitutionally invalid as it failed to identify with sufficient particularity, the area to be searched. (ap. 1-2). Further, the motion argued that the execution of the search warrant proceeded in an illegal manner and violated the defendant's right to be free from unreasonable searches and seizures. (ap. 1, ¶ 2) ("the search occurred prior to the amended application being approved") *and see* (d. 11-13-06, p. 3, l. 5 – p. 6, l. 25) (defense clarifies that the motion attacks the manner of the search in that police failed to follow the correct procedure upon discovery of the defect in the search warrant). After a hearing, the trial court denied the motion and ruled that the warrant was valid, and that if it was not valid, then inevitable discovery applies, and the evidence is admissible. (d. 1-8-07, p. 43, l. 1-16).

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE WHERE THE SEARCH WARRANT CONTAINED THE WRONG ADDRESS, AND DID NOT PROVIDE SUFFICIENT PARTICULARITY TO GUIDE LAW ENFORCEMENT TO THE PLACE TO BE SEARCHED WITHOUT AN UNREASONABLE RISK THAT THE WRONG PLACE MIGHT BE MISTAKENLY SEARCHED.

The search warrant for 3040 is invalid in that it contains the wrong address, lacks the required particularity, and is overly broad where the

defendant's residence was only a single unit, designated 3044, in a larger, multi-unit building, designated 3040. Crim. P. 41(c)(1)(I) provides in part,

"A search warrant shall issue only on affidavit .... Such affidavit shall relate facts sufficient to: Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched..."

Crim. P. 41(d)(1)(I) provides in part,

"If the judge is satisfied that grounds for the application exist, ... he shall issue a search warrant, which shall: Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched..."

These provisions are related to the constitutional requirement that search warrants describe the place to be searched with particularity. *See* People v. Ragulsky, 184 Colo. 86, 518 P.2d 286 (1974).

The United States Constitution, Amendment IV, provides that,

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and ***particularly describing the place to be searched***, and the persons or things to be seized."

Similarly, the Colorado Constitution, Article II, Section 7, provides that,

"The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without ***describing the place to be searched, or the person or thing to be seized, as near as may be***, nor without probable cause, supported by oath or affirmation reduced to writing." (***emphasis added***).

In Steele v. United States, 267 U.S. 498, 45 S.Ct. 414 (1925), the U.S. Supreme Court ruled that the description is adequate if the officer

executing the warrant can, with reasonable effort, ascertain and identify the place intended to be searched. Id., at 503, 416. Further, "not only must the officer executing the warrant be able to reasonably ascertain the place to be searched, but there must also be no reasonable probability that another place might be mistakenly searched." People v. Del Alamo, 624 P.2d 1304, 1306 (Colo. 1981)

In People v. Royce, 173 Colo. 254, 257, 477 P.2d 380, 381(1970), the Supreme Court of Colorado reversed the trial courts denial of Royce's motion to suppress evidence because the search warrant failed to satisfy the particularity requirement with regard to the description of the place to be searched. The warrant in Royce had the correct number but the wrong street name. The mistake occurred when the officer used the yellow pages to look up the street name for the Normandy Apartments, and used the listed street name in the warrant. Id., at 256, 381. *After* completing the search of the defendant's apartment, the officer discovered that the defendant's correct address was different than the address used in the warrant. Id. The Colorado Supreme Court ruled that,

> "[t]he 'wrong address' search warrant here involved fails completely to comply with the requirements of the Colorado and United States Constitutions." Id., at 257, 381.

The Court noted that,

"if the police officer executes a search warrant at a place not described in the warrant, the search and seizure is without any semblance of validity. A search of a place other than as is described in a search warrant is, in effect, a search without a warrant." Id., at 257, 381-382.

Further, the court made it clear that,

"[t]o describe the place to be searched with particularity as is required, certainly means that if the place has an established street address, and this is the only method of description utilized, the correct address, and only the correct address, will suffice. In our view, this is a self-evident constitutional requirement in those cases where search warrants utilize street numbers and street names as a means of describing the place to be searched." Id., at 257-258, 382.

In Avery, 173 Colo. 315, 478 P.2d 310, the description of the place to be searched was given as a single address applicable to the entire multi-unit premises, as in the present case. In sustaining the trial court's suppression order, the Supreme Court of Colorado ruled that,

"[W]hen authority is desired to search a ... particular room or rooms within a multiple-occupancy structure, the warrant must sufficiently describe the ... subunit to be searched, either by number or other designation, or by the name of the tenant or occupant; and where ... the warrant merely describes the entire multiple-occupancy structure by street address only, without reference to the particular dwelling unit or units sought to be searched, it is constitutionally insufficient and the evidence seized pursuant to such a warrant will be suppressed upon proper motion." Id., at 319, 312.

The Avery court noted that, "certain overriding considerations have evolved which may control and guide the magistrate in issuing the warrant, depending upon the nature and character of the place to be searched. A basic

consideration is that general or blanket searches are forbidden, such being the very evil sought to be protected against ..." Id., at 318, 311-312.

In the present case, no description beyond the incorrect address of 3040 was provided in the affidavit for the first warrant. (ap. 4-6). The prosecutor did not suggest at the suppression hearing, that the application page of the first warrant contained any additional descriptive language, beyond what was provided in the affidavit. *See* (d. 1-8-07, p. 41, l. 5-25; p. 42, l. 1-21).

Though Chagnon indicated in his first affidavit that a patrol officer confirmed the address, the officer apparently did not accompany Chagnon and the others, to the defendant's residence to execute the warrant as, according to Chagnon, officers were directed by building management to Cheeks' residence. (d. 1-8-07, p. 36, l. 1-13) *and* (ap. 6). Alternatively, the more likely scenario may be that the confirming officer was present but unable to locate the correct entrance to the Cheeks' residence.

According to Anderson, the numbers "3040," were scratched into the mailbox adjacent to the door to Cheek's residence, and were not visible until viewed up close. (ap. 12) (d. 1-8-07, p. 18, l. 16-21; p. 24, l. 16-22). Neither the fact that the numbers were scratched into the mailbox, nor the fact that such mailbox was located next to Cheeks' entrance, appeared in

Chagnon's first affidavit. (ap. 4-8). Such specific facts, if provided, may have added the constitutionally required particularity needed to sustain this search warrant.

Instead, in the first affidavit Chagnon indicates that, "a patrol officer responded to that address and he positively identified the location and stated that there is property stored inside." (ap. 6). The multi-unit nature of the building was apparent from the exterior. (d. 1-8-07, p. 25, l. 5 – p. 26, l. 14). The officer confirming the address and noticing property inside, was probably looking through the ***glass door, designated "3040" on the West side*** of the building as described by Chagnon in his second application for a search warrant; and not, the ***wooden door on the South sid***e of the building, belonging to Cheeks, as described in testimony by Anderson. *Compare* (ap. 9) to (d. 1-8-07, p. 26, l. 3-5, 15 – p. 27, l. 18).

From the hearing, in light of the totality of the evidence, it is apparent that the warrant, authorizing the search of 3040, without more, was insufficient to guide officers to the place to be searched without the assistance of independent knowledge provided by building management who, according to Chagnon, "actually pointed out which door was [the defendant's]." (d. 1-8-07, p. 36, l. 11-13).

Also, in light of what little investigation was done to secure a description of the place to be searched, particularly where the multi-unit nature of the building was apparent, it can not be said that police relied in good faith on the warrant as issued. (d. 1-8-07, p. 35, l. 5-25). Though Chagnon stated in his first affidavit that Martinez obtained a booking photo and the address on that record "later matched to the home address given by Calvin Cheeks to Womack's Casino in his application for a players' card," this statement appears to be false as the Womack's mailer recovered from the Cheeks' residence was addressed to Cheeks at 3044, his specific address within the greater area designated 3040. *Compare* (ap. 5) to (ap. 15).

The wrong address warrant, on its face and on its supporting affidavit, was insufficient to guide police to the intended place to be searched and posed a substantial probability that the wrong unit may have been searched, as according to Chagnon, "the whole building is supposedly numbered 3040 S Academy." (d. 1-8-07, p. 32, l. 19-20). Further, by comparing the description and location of 3040 as provided in the second application ("glass door on the west side"), to Anderson's testimony describing Cheeks' entrance and its location ("wooden door" on "the South side"), it becomes crystal clear that the risk that the wrong place ("glass door on the west side")

could have been mistakenly searched was very great. *Compare* (ap. 9) to (d. 1-8-07, p. 26, l. 3-5, 15 – p. 27, l. 18).

Thus, this court should hold that the wrong address warrant failed to describe the place to be searched with sufficient particularity in violation of the Colorado and United States constitutions.

II. THE MANNER OF THE SEARCH VIOLATED CHEEKS' RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WHERE POLICE, ARMED WITH A SEARCH WARRANT TO SEARCH 3040, DISCOVER, UPON ARRIVAL AND PRIOR TO ENTRY, THAT THE ENTIRE MULTI-UNIT BUILDING IS DESIGNATED 3040, YET, PROCEED WITH THE ENTRY AND SEARCH OF THE RESIDENCE WHEREUPON THEY DISCOVER THAT THE DEFENDANT'S RESIDENCE IS DESIGNATED 3044 BUT DO NOT EXIT THE PREMISES AND SUSPEND THE SEARCH UNTIL AND AMENDED WARRANT COULD BE OBTAINED.

The police did not act in good faith reliance on a warrant authorizing the search of 3040 when they entered the residence knowing the entire multi-unit building was designated 3040. Further, once inside, police failed to act in good faith reliance on the warrant, as issued, when they discovered that the defendant's actual address was 3044, and failed to suspend the search until an amended warrant could be attained. The United States Supreme Court has held that, when evaluating the constitutional reasonableness of police officers' actions in executing a search warrant, "we must judge the constitutionality of their conduct in light of the information

available to them at the time they acted." Maryland v. Garrison, 480 U.S. 79, 85 107 S.Ct. 1013, 1017.

In Maryland v Garrison, a police officer obtained a search warrant for a third floor apartment believing, in good faith, after taking several investigatory steps leading the officer to reasonably conclude that there was only one apartment on the third floor. Upon execution of the warrant, police realized that the warrant was overly broad as they discovered two apartments on the third floor. When they arrived on the third floor and entered into a locked vestibule, they encountered two open doors and commenced their search of what they believed to be a single apartment, but soon realized that they were actually searching two separate apartments. First, the U.S. Supreme Court found that the original warrant, though in retrospect turned out to be overly broad, was still valid when issued because police reasonably believed that there was only one apartment on the third floor at the time the warrant was issued. Police made a reasonable investigation before obtaining the warrant by verifying information obtained from a reliable informant, by conducting an exterior examination of the three story building, and by conducting an inquiry of the utility company. Id., at 80, 86, 1015, 1017. Further, the manner in which the search was conducted did not offend the U.S. Constitution because the officer's failure to realize the over-breadth of

the warrant was objectively understandable and reasonable. Id. at 88, 1018. It should be noted that police in Maryland v Garrison immediately discontinued the search when they became aware of the fact that there were actually two separate apartments on the third floor and that the warrant was too broad. Id, at 81, 1015.

Police conduct in the present case stands in sharp contrast to the conduct of police in Maryland v. Garrison. First, the overly broad warrant in Maryland v. Garrison was deemed to be valid when issued because police made a reasonable investigation into the place to be searched by conferring with a reliable informant, observing the exterior of the building, and by conferring with the utility company to determine how many apartments were on the third floor. Id., at 80, 86, 1015, 1017. In the present case, however, police merely relied on true but incomplete information obtained from the defendant regarding the address of the entire building in which he maintained his residence. (d. 1-8-07, p. 17, l. 9-15; p. 33, l. 13-16). In the present case, police did not contact the utility company, review known casino records, or conduct a DMV records check to obtain a correct address. (d. 1-08-07, p. 35, l. 5-25). If Chagnon would have merely reviewed the casino player's club records before applying for a search warrant they would have found Cheeks' address to be listed as 3044. See (ap. 15) (showing that

a recovered Womack's mailer was addressed to defendant at 3044). Note also that on December 8, 2004, Anderson asked Martinez to obtain player tracking information pertaining to Calvin Cheeks from all casinos in Cripple Creek, and that Martinez collected that information. (p. 671, l. 24 – p. 672, l. 5).

Secondly, in Maryland v. Garrison, police immediately discontinued their search upon realizing that the third floor contained two apartments and that the warrant was too broad. Id., at 81, 1015. In the present case, however, Chagnon knew that the warrant was too broad before the entry, and acknowledged that the information provided by building management, prior to entry, "specified a more narrow search area than the entire 3040." (d. 1-8-07, p. 32, l. 17-20; p. 36, l. 1-22; p. 37, l. 8-14). Knowing the warrant was too broad, police entered anyway, guided by building management who pointed out the Cheeks' entrance. (d. 1-8-07, p. 36, l. 1-22). Upon entry, police realize they have a wrong address warrant when they found a Womack's mailer addressed to Cheeks at 3044, *and* observe the numbers "3044" on the glass above the entrance. (ap. 12-13, 14, 15) (second affidavit reads, "As Detectives began a search the numbers 3040 was observed over the front door … also found a piece of mail just inside the front door with address 3044 S Academy", and the property inventory return

list shows that the only mail recovered was from Womack's) *and see* (d. 1-8-07, p. 20, l. 22-25; p. 21, l. 1-2). At that point, the search continued. At the hearing, the prosecutor indicated that, "the search, to the best of my understanding, was not stopped for them to get an amended warrant," when police discovered "that the portion that Mr. Cheeks had leased was specified at 3044." (d. 1-8-07, p. 9, l. 8-16).

When Detective Anderson was asked what happened when officers realized that 3040 was not the right address, he responded, "I could not tell you." (d. 1-8-07, p.17, l. 20 - p. 18, l. 14). When asked again, "what happened upon your realization that 3040 was too broad, and that 3044 was specifically the area that the detective needed to search?" Anderson responded, "... two years ago, I don't recall." (d. 1-8-07, p. 18, l. 23 – p. 19, l. 2). Further, Anderson could not recall whether he or any other detective said, "Okay, guys, stop the search, let's all go outside, officers so and so, you stand by the front door, and make sure that nobody enters." (d. 1-8-07, p. 19, l. 11-15). The search apparently continued unabated as, FBI agent Hunt testified at trial, that once they entered and saw how large it was, he called for the assistance of several additional agents. (p. 731, l. 7-10).

Anderson agreed that the search began at 2:15. (d. 1-8-07, p. 20, l. 7-11). The court accepted the defendant's offer of proof, without objection,

that a private surveillance video tape shows officers entering at 2:15, and after about thirty minutes, police officers have not exited from inside and nothing has been cordoned off. (d. 1-8-07, p. 23, l. 4 – p. 24, l. 3).

Police entry, knowing the warrant was too broad, followed by their failure to suspend the search after they discover that they had a wrong address warrant, constitutes a flagrant disregard for the defendant's right to be free from unreasonable searches and seizures under the U.S. and Colorado Constitutions. In Maryland v. Garrison the Supreme Court noted that, "if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of [the building], they would have been obligated to exclude respondent's apartment from the scope of the requested warrant." Id., at 85, 1017.

Evidence has been properly suppressed in other cases where police proceeded with a search knowing that their search warrant contained the wrong address. For instance, in State v. Henderson, 66 Ohio App.3d 447, 585 N.E.2d 539 (1990), the appellate court upheld the trial court's suppression order where police obtained a warrant to search apartment numbers 1 and 3, but realized upon arrival that apartment number 3 was the wrong apartment and that number 4 was the correct apartment to be searched. Police proceeded with the search of apartment number 4, knowing

that the search warrant contained the wrong number without first obtaining an amended warrant. The appellate court in Henderson, distinguished the Henderson facts from those of Maryland v. Garrison noting that, "in this case, unlike in Maryland v. Garrison, the police were not relying in good faith upon a defective warrant—they knew that the warrant was defective and elected to conduct a search knowing that it would be outside the scope of the warrant they obtained." Id., at 451, 541. Suppression of evidence is not warranted, however, when police notice that the warrant contains the wrong address and immediately seek an amended warrant *before* executing the search. *See* State v. Workman, 272 S.C. 146, 249 S.E.2d 779 (1978); *see also* People v. Woods, 211 Mich.App. 314, 535 N.W.2d 259 (Mich.App. 1995)(search upheld where police contact magistrate to correct an address error in the search warrant immediately upon arrival at the scene and discovery of the error).

According to the second search warrant affidavit, it appears that the discovery of the wrong address, occurred at the beginning of the search, essentially upon the initial entry. Chagnon's second affidavit states, "As detectives ***began a search*** the numbers '3044' was observed over the front door of the residence which is a sub-divided building, ... Detectives also

found a piece of mail ***just inside the front door*** with the address 3044." (ap. 12-13).

"While it may be presumed that an officer was acting in good faith if he was acting pursuant to a warrant ... exclusion is still called for whenever the officer 'lacks reasonable grounds for believing that the warrant was properly issued.'" People v Gall, 30 P.3d 145 (Colo. 2001) citing United States v. Leon, 468 U.S.897, 923, 104 S.Ct. 3405, 3405 (1984).

Thus, this court should find that the police did not rely in good faith on the warrant authorizing the search of "3040" when they entered the premises knowing that the warrant as issued was overbroad, and further, that it was constitutionally unreasonable to continue the search knowing that the correct address, 3044 S Academy, was not stated in the warrant. Thus, this court should find that the manner of the search violated the defendant's right to be free of unreasonable search and seizure, and enter an Order directing the trial court to grant the defendant's motion to suppress evidence.

III. THE DOCTRINE OF INEVITABLE DISCOVERY SHOULD NOT PRECLUDE THE EXCLUSION OF EVIDENCE RECOVERED FROM THE DEFENDANT'S HOME, AND STORAGE UNIT, BECAUSE THE PROSECUTION FAILED TO SHOW THAT A SEPARATE AND INDEPENDENT LAWFUL LINE OF INVESTIGATION WAS UNDERWAY, AND DESTINE TO LEAD TO THE TAINTED EVIDENCE, AT THE TIME OF THE INITIAL ILLEGALITY.

Generally, the inevitable discovery exception to the exclusionary rule allows evidence initially discovered in an unconstitutional manner to be received, but only if the prosecution can establish that the information ultimately or inevitably would have been discovered by lawful means." People v. Diaz, 53 P.3d 1171, 1176 (Colo. 2002). The Diaz court held that, "the ability to subsequently obtain a lawful search warrant, after an illegal search has occurred, does not satisfy inevitable discovery requirements. Id. In Diaz, the police obtained non-testimonial identification evidence from the defendant without the defendant's consent, without a warrant and without the existence of any exigent circumstance. The prosecution, in Diaz, argued that inevitable discovery applied because they could legally obtain the hair and blood samples from the defendant at any time under Crim. P. 41.1 or Crim. P. 16(II)(a). The supreme court of Colorado, however, found that "[t]he prosecution's ability to obtain identity evidence under these rules while the criminal case is pending does not satisfy the requirements of the inevitable discovery exception." Id. To satisfy the elements of the inevitable discovery doctrine, "[t]he prosecutor must establish that there was a reasonable probability that the evidence would have been discovered in the absence of police misconduct, and that the police were pursuing an independent investigation at the time the illegality occurred." Id. Diaz makes it clear that,

for the state to prevail under the inevitable discovery doctrine, they must show that a separate and independent lawful course of investigation was underway, and destine to lead to the tainted evidence, at the time of the initial illegality. Id. ("the police must have been pursuing *another* lawful means of discovery at the time the illegality occurred"). In reversing the trial court's denial of Diaz's motion to suppress evidence, the Diaz court held that, "the prosecution has not shown that an independent police investigation was being conducted, or that the police would have inevitably discovered the evidence through such an investigation despite their misconduct." Id. Inevitable discovery did not apply in Diaz because the voluntary examination of the victim's body and the interrogation of the defendant were deemed to be a single line of investigation.

In the present case, the record is completely devoid of any evidence or suggestion that detectives were pursuing any other line of investigation destine to lead to the evidence recovered from the defendant's residence at the time of the initial illegality. At hearing, in support of its inevitable discovery theory, the prosecution cited People v. Diaz, 53 P.3d. 1171 (Colo. 2002), for the proposition that "the doctrine of inevitable discovery ... states that when police officers execute a search warrant that is valid at the beginning, any illegality that is subsequent to that can be corrected with the

amended warrant." (d. 1-8-07, p. 9, l. 24 – p. 10, l. 4). In Diaz the search was illegal from its inception, and on review, the fact that a valid warrant could be obtained after the illegality occurred did not establish grounds for the application of the inevitable discovery doctrine, Id., at 1176. The fact that police sought an amended warrant, after the illegality occurred does not satisfy the requirements for independent discovery. Thus, the trial court erred when it found that the inevitable discovery doctrine applies to preclude the exclusion of the evidence recovered from the defendant's residence and the fruits thereof.

IV. ADMISSION OF THE TAINTED EVIDENCE WAS NOT HARMLESS ERROR BEYOND A REASONABLE DOUBT, IT WAS AN ERROR OF CONSTITUTIONAL PROPORTIONS.

If the error is of constitutional dimension, the "constitutional harmless error" standard applies. Under this standard, the People would have the burden of showing beyond a reasonable doubt that the error did not contribute to the verdict. People v. Krutsinger, 121 P.3d 318, 321 (Colo. 2005). "To find constitutional harmless error, a court must be confident beyond a reasonable doubt that the guilty verdict actually rendered in this case was surely unattributable to the error." To apply a harmless error analysis, an appellate court should examine a number of factors, including the importance of the evidence to the prosecutions case, the cumulative

nature of the evidence, the presence or absence of corroborating or contradictory evidence on the material points of the evidence, and the overall strength of the prosecution's case." People v. Bass, 155 P.3d 547, 551 (Colo.App. 2006). Constitutional errors subject to harmless error analysis include the admission of evidence obtained in violation of the Fourth Amendment. People v. Boykins, 140 P.3d 87, 94 (Colo.App. 2005).

Crucial evidence recovered from the defendant's residence included the modified SKS rifle, the bank dye stained tub, the pieces of darkly colored nylon stocking, the pawn ticket that led to the search of the defendant's storage unit yielding a bucket of ammunition and a magazine capable of being used in the SKS was all highly corroborating. (p. 913, l. 12 – p. 916, l. 25). Detective Anderson's in court demonstration of how the position of the buckle on the SKS strap, when used to carry the weapon, matched what appeared as a buckle on a strap seen across the offender's chest in the bank photo. (p. 364, l. 3 – p. 365, l. 3). The barrel sticking out of the offender's clothing, as described by several witnesses, also matched the position of the barrel on the SKS when the strap was used to carry the weapon. (p. 279, l. 2-21; p. 358, l. 14 – p. 359, l. 20; p. 364, l. 3 – p. 365, l. 9; p. 915, l. 15 – p. 916, l. 10). The dye stained tub is also strongly

corroborative of the defendant's involvement in the robbery. (p. 913, l. 15-18).

The cutoff nylon stockings match with the mesh layer observed by witnesses through the eye and mouth holes of the ski masks used in the robbery. (p. 915, l. 1-4). The numerous jackpot photos and large quantity of ammunition was also corroborative. (p. 770, l. 12 – p. 773, l. 12). Thus, the introduction of tainted evidence cannot be considered harmless error beyond a reasonable doubt, as the evidence clearly contributed to the defendant's conviction.

CONCLUSION

For all the foregoing reasons, the defendant requests an Order vacating his conviction, and reversing the trial court's ruling on the defendant's motion to suppress evidence, and directing the trial court to enter an Order granting the motion to suppress evidence on remand for a new trial.

Respectfully Submitted,

Dated: 1/16/2009

Don Soulliere, Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2009, a true and accurate copy of the foregoing Defendant's Opening Brief was deposited in the United States mail properly addressed with prepaid postage:

John W. Suthers, Attorney General
State of Colorado, Dept. of Law
1525 Sherman St., 7th Floor
Denver, CO 80203

Calvin Cheeks
139114
FCF 8
P.O. Box 999
Canon City, CO 81215-0999

Dated: 1/16/2009

Don Soulliere, Attorney

CERTIFICATE OF WORD COUNT

I, Don Soulliere, hereby certify on this 16th day of January, 2009, that there are 9,805 words from Issues Presented through the Conclusion of the foregoing Opening Brief.

Dated: 1/16/2009

Don Soulliere, Attorney

APPENDIX

ORIGINAL

NM

EL PASO COUNTY DISTRICT COURT
270 S. Tejon
Colorado Springs, CO 80903

FILED IN THE DISTRICT AND COUNTY COURTS OF EL PASO COUNTY, COLORADO

OCT 18 2006

M.V. PERRY
CLERK OF COURT

Plaintiff: **The People of the State of Colorado**

vs.

Defendant: **Calvin Cheeks**

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Case No.: 04CR6238
Div.: 14 Ctrm:

MOTION TO SUPPRESS STATEMENTS AND EVIDENCE UNDER COLORADO RULES OF CRIMINAL PROCEDURE 41 (e) and (g)

COMES NOW, Defendant, Calvin Cheeks, by and through his attorney, Mark S. Hanchey, and for his Motion to Suppress Statements and Evidence Under C.R.C.P. 41(e) and (g) states the following:

1. On December 21, 2004, law enforcement officers from major crimes unit of Colorado Springs Police Department searched the premises known as 3040 South Academy Boulevard, Colorado Springs, Colorado and seized property. This building is a multi commercial use building within a shopping complex. A small portion of this building was occupied by Calvin Cheeks and the application for the search warrant did not identify with any particularity the area to be searched.

2. It is the understanding of the defense that at some point the authorities realized that the actual address which should have been searched was 3040 South Academy rather than the 3044 South Academy address which is listed in the original application for the search warrant. They submitted an amended application. However, the search occurred prior to the amended application being approved.

3. Based upon these facts, the defense argues that the search was constitutionally invalid based on the fact that it did not list with particularity the correct address to be searched.

to Division

RESPECTFULLY SUBMITTED this 18 day of October, 2006.

Mark S. Hanchey
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing was mailed this 18 day of October, 2006, postage prepaid, addressed as follows:

District Attorney
105 E. Vermijo
Colorado Springs, CO 80903

Kim Brown

FILE DATE	EVENT/FILING/PROCEEDING
1/08/2007	**Minute Order (print)**

JUDGE: KSS CLERK: REPORTER:
SAMELSON/KAL/STOA/DDA HARWOOD HTMN 01/08/07
DPWC-ADC HANCHEY; COMES ON MOTN TO SUPPRESS; DDA INFORMS CRT THAT FILE SHOULD HAVE MOTN TO SUPPR SEARCH WARR PREV FILED ON 05/25/05 BY PREV ATD GASPER W/ AMND SEARCH WARR ATTACHED; INITIAL SEARCH BASED ON INCORRECT ADDRESS ON SEARCH WARR, CORRECT ADDR CONTAINED W/IN THE WRONG ONE; ONCE ERROR REALIZED, DETECTIVES CANNOT SAY W/ CERTAINTY THAT SEARCH WAS CEASED; DDA CITES PEOPLE V DIAZ, DOCTRINE OF INEVITABLE DISCOVERY-IF SEARCH VALID AT BEGINNING, ILLEGALITY CAN BE CORRECTED W/ AMND WARR; DDA RQST CRT DISMISS MOTN W/OUT HEARING EVID; ADC NO DISPUTE OF FACTS; ADC CITES ROYSE 477 P2ND 380, SEARCH SHOULD NOT HAVE BEEN CONTINUED ONCE ERROR REALIZED; ADC ARGUES DIAZ REQS INDEPENDENT MEANS OF DISCOVERY; CRT WANTS TO HEAR EVID; PEOPLE CALL DET ANDERSON; ADC RQST CRT TAKE JUDICIAL NOTC OF PC AFFID; ADC OFFERS SURVEILLANCE TAPE; DDA NO OBJ LIMITED PURPOSE OF HEARING; CRT ACCPTS ADC'S OFFER OF PROOF; PEOPLE CALL DET CHAGNON; CRT DENIES MOTN TO SUPPRESS AS 3040 WAS ONLY ADDR ON OUTSIDE BLDG, HAD VALID WARR; IF 3044 WAS VALID ADDR, DOCTRINE OF INEVITABILITY APPLIES;
IF PARTIES HAS DISAGREEMENT OVER MOTN IN LIMINE, MAY PUT ON DOCKET, DEFT'S PRES WILL NOT BE REQ;
PTRD 04/09/07, 900A; JTRL 04/17/07, 900A; BONC
/KAL /KAL

ATTACHMENT 'A'

In support of a request for the issuance of a search warrant your affiant, Donald J Chagnon 81D, a Police Officer for the Colorado Springs Police Department and so employed for over eighteen years and now currently assigned to the Major Crimes Robbery Unit, state under oath that I have personal knowledge of the following facts:

On 12-01-2004 at about 12:10 p.m. two unknown males did enter the Compass Bank, 2805 Dublin Boulevard, within the City of Colorado Springs, County of El Paso and State of Colorado. The males were armed with what witnesses and victims described as handguns. One of the males was later observed in surveillance photographs carrying what appears to be a long rifle on a sling over his right shoulder.

The males loudly announced a robbery and ordered to everyone in the bank, "Everyone get down!" Inside the lobby with their mothers were two small children ages 4 and 5. The male carrying the long rifle went behind the closed teller area and ordered the victim teller, "Open it up! Open them all up! Give me everything! Put it in the bag!"

The victim teller stated that this male presented what she described as a green in color army style duffle bag which he held open for her to put the money in. The teller stated that the first items that she placed in the bag were her dye pack and bait bills. She stated that she then put the remaining money that she had into the bag on top of that.

She stated that the male wanted to get into other cash drawers and the vault area but could not because they were locked and the people with the keys were not present at the time. The teller stated that the male then went back into the lobby area where he and the second male left the bank. The males took a total of $7039 in US currency.

The teller described the male that came behind the counter as a Black male, 6'1" to 6'2" tall and weighing about 220 to 230 pounds. She added that he was wearing a burgundy knit watch cap with some type of black mesh over the eyes and mouth. She stated that he was also wearing a red/black/white plaid flannel or wool shirt and slightly faded jeans. She stated that she did not see the second suspect well enough to describe him. Other victims inside the bank vaguely described him as a male, about 5'10" tall and about 180 to 190 pounds. I asked the teller and other victims inside the bank what they believed would happen if they did not comply with the two males. All indicated that they believed they would be harmed or killed.

After robbing the bank the two unidentified suspects fled the area to the south across the parking lot, behind the strip mall area and through the back yard of the residence directly behind the Overtime Sports Bar to Lange Drive. According to two separate witnesses, a white in color van was seen leaving the area immediately after the robbery had occurred. All information pertaining to this initial investigation is documented in Colorado Springs Police Department Police case report number 04-43639.

On Friday 12-03-2004, Detective Eric Anderson received a phone message from Colorado State Department of Gaming Investigator Tim Martinez. During that phone conversation, Investigator Martinez informed Detective Anderson that workers from Womack's Casino in Cripple Creek, Colorado contacted Investigator Martinez to inform him that they received numerous US Currency bills of various denominations which were either dye stained with red ink, burned or smelled of some sort of tear gas.

Your affiant would note that when a dye pack from a bank explodes the pack will emit a red colored dye, red smoke which contains a chemical irritant gas, a form of tear gas and the pack will burn at approximately 500

degrees. During this conversation with Investigator Martinez, Detective Eric Anderson told Martinez that he would fax a copy of the bait bill list from the bank so that Investigator Martinez could check the serial numbers of recovered money against the list to see if the money matched the money taken from the bank.

On 12-03-2004 after having checked the recovered bills against the bait bill list, Investigator Martinez contacted Detective Eric Anderson and told him that he, Investigator Martinez, found that three of the bills recovered from Womack's were in fact listed on the bait bill list provided by Detective Eric Anderson. Investigator Martinez stated that he recovered two fifty dollar bills and one twenty dollar bill. The bait bills are noted as one fifty dollar bill, 1996 series, bearing serial number AK02603550A, one fifty dollar bill, 1996 series bearing serial number AE66109149A, and one twenty dollar bill, 2001 series, bearing serial number CL88405281C. The rest of the money recovered from Cripple Creek was either dye stained, burned or smelled of tear gas. The total amount recovered from Cripple Creek as a whole was $3,100.00 US Currency. Your affiant would note that of the $3,100.00 dollars recovered from Cripple Creek, $2,960.00 dollars of that money was actually recovered from the Legends Casino which is a part of the Womack's casino.

During review of the video surveillance conducted by Ronald Gagnon of Womack's Security, a possible suspect was identified. This male matched the general physical characteristics as provided by your affiant and Detective Anderson to Investigator Martinez and Womack's security personnel. That male was positively observed playing slot machines in the immediate area where the recovered red dye stained money had originally been played. His play can be tracked to 8 of 13 machines where red dye stained money was found.

On 12-04-2004 Surveillance operator Ron Gagnon from Womack's Casino was checking surveillance video of 12-02-2004 and noticed that a Womack's Casino employee identified as Roger Steggal talking with the then unknown suspect, Calvin Cheeks. Gagnon talked with Steggal later on in the evening and asked him who he had been talking to. Gagnon reported that Steggal told him that he was talking to "Calvin".

Investigator Martinez obtained a copy of Colorado Springs Police Department booking photograph for Calvin Karl Cheeks, Date of Birth 02-04-1962. This is the only Calvin Cheeks listing in Colorado Springs Police Department criminal records. The residence address on that record later matched to the home address given by Calvin Cheeks to Womack's Casino in his application for a player's card.

Investigator Martinez went to the Womack's promotions department and spoke with Amy Hayes. Investigator Martinez asked Hayes if she knew a person named "Calvin", and Hayes stated that yes she knew a Calvin Cheeks. Hayes further reported that Calvin Cheeks is the only person with the first name Calvin who currently has a Players club card with Womack's Casino. Investigator Martinez showed Hayes a still photograph of Cheeks and asked if she knew the person in the photo. Hayes said she was pretty sure the person in the photograph was Calvin Cheeks.

On 12-09-2004, Investigator Martinez was conducting further follow up when he talked to another Womack's Casino employee identified as Gary D. Kring. Kring stated he has known Calvin Cheeks for a number of years. After obtaining some initial information, Investigator Martinez showed Kring a photograph of Cheeks with all identifying information covered up. Upon viewing the photograph Kring told Investigator Martinez that the person in the photo was Calvin. Investigator Martinez asked, "Calvin who?" Kring replied, "Calvin Cheeks."

Calvin Cheeks was noted to have returned to Cripple Creek on 12-06-2004. During his visit on that day, his play patterns and movement within the casino were watched. Calvin Cheeks was observed playing machines

which were later taken out of service and inspected. Additional red dye stained money was removed from the machines, which was later determined that only Cheeks could have put into the machine.

Gagnon has stated that he has done extensive work on tracking Cheeks to the dyed money. He later told Investigator Martinez that he would be available for court to testify about how he came to the conclusion that Calvin Cheeks is the only person who could have put the dyed money in the machines on 12-06-2004. Gagnon added that he has ruled out any other people placing the red dyes money in the slot machines on that day.

Follow-up conducted by Detective Anderson has identified several vehicles registered to Calvin Cheeks. These vehicles include a 1996 white in color Isuzu NPR tilt-cab panel van, a 1979 blue in color Jaguar XJ6 and a 1986 white in color Ford Econoline E250 cargo van. This last vehicle is similar to the vehicle observed in the area where the suspects of the bank robbery were last seen.

On 12-13-2004, your affiant presented to the Honorable Judge Manzanares an application for a Court Order to Produce Records. This order was approved and served upon Sprint Communication for telephone records relating to a cellular phone number that Mr. Cheeks had also given as his own number. A response to the Court Order was received on 12-20-2004 and a call was found placing the telephone in the area of the bank robbery about 2¾ hours after the robbery. Several calls to and from a number 719-635-7362 were also found. A reverse listing on this phone number shows to an E.R. Taylor at 948 East Rio Grande Street, Colorado Springs, Colorado.

On 12-21-2004 pursuant to an Arrest Warrant issued by the Honorable Judge Sletta on 12-20-2004, your affiant and other officers arrested Calvin Cheeks as he arrived for a scheduled court appearance at the El Paso County Court, 20 East Vermijo. At the time of his arrest Cheeks had arrived in his 1996 white in color Isuzu NPR tilt-cab panel van. That vehicle was impounded for the purpose of obtaining a search warrant.

During an interview with Cheeks, after he stated that he understood his rights and agreed to waive those rights, gave his primary residence address as 3040 South Academy Boulevard. He stated that he has a living area inside the building normally used for commercial purposes and has his other vehicles stored there.

Your affiant had a Patrol Officer respond to that address and he positively identified the location and stated that there is property stored inside. The other vehicles belonging to Cheeks were also found parked outside that address.

Your affiant, Detective Donald Chagnon would respectfully request that probable cause be found that on 12-01-2004 at 2805 Dublin Boulevard, within the City of Colorado Springs, County of El Paso and State of Colorado and Aggravated Robbery occurred in violation of 18-04-302, Colorado Revised Statutes as amended. Your affiant would also ask that probable cause be found that the subject Calvin Karl Cheeks was involved in that Aggravated Robbery and was in possession of money taken in that robbery.

Your affiant would also request that probable cause be found that the address 3040 South Academy Boulevard, Colorado Springs, Colorado and fully identified in the application for this search warrant is the current residence of Calvin Cheeks. Your affiant would thus respectfully request the authorization of a search of vehicle described for items as identified in Attachment 'B'

Applicant: _____ Detective Donald Chagnon

Law enforcement agency: Colorado Springs Police Department

Position: Detective

Sworn and subscribed before me this 21 day of December, 2004

Judge: _____
SLETTA

ATTACHMENT 'B'

04-884

The following person(s), property or thing(s) will be searched for and if found seized:

GENERAL INFO

- General photographs of the residence
- Indicia of residency
- Identification which would identify any occupants of the residence

GUNS INVOLVED

- Any and all firearms
- Any and all ammo
- Any documentation showing the ownership of a firearm
- Any and all sales records showing the purchase of a firearm
- Any projectiles
- Any and all spent shell casings
- Any item commonly used to carry and transport a firearm (i.e. holster & gun carrying case, magazines, cleaning kits)

WRITTEN MATERIAL

- Any letters, notes, tapes, pictures, or other written material depicting any association with this investigation
- Any audio or videotapes depicting any association with this investigation.

CLOTHING

- Burgundy or black in color ski masks.
- Long sleeve red/black/white plaid shirt
- Tactical vests or body armor

MISCELLANEOUS

- Any dye stained or burned US Currency
- Any US Currency listed on Bait bill list provided by victim bank.
- Any and all sales receipts showing purchases of items similar to or that could be described as military style duffle bags.
- Any military style duffle bags
- Any objects or clothing stained with red dye

04-885

(DISTRICT) (COUNTY) COURT, EL PASO COUNTY, STATE OF COLORADO

CRIMINAL ACTION NUMBER _____ Agency Case Number: 04-43639

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

The undersigned, a peace officer as defined in 18-1-901 (3) (1), C.R.S. 1973 as amended, being first duly sworn on oath moves the Court to issue a Warrant to search those person(s) and/or premises known as:

3044 South Academy Boulevard, Colorado Springs, Colorado; a multi-commercial use building within the shopping complex on the southwest corner of the Intersection of Academy Boulevard and Hancock Expressway. 3040 South Academy Boulevard is a two level building with light grey stucco exterior and a glass door on the west side with the numbers '3040' over the door. Also a 1986 white Ford Econoline E250 VIN 1FTEE24N3GHA87316 and a 1979 blue Jaguar XJ6 VIN JAVLN49C100839.

The undersigned states that there exists probable cause to believe that the following person, property or thing(s) to be searched for, and if found, seized will be found on the aforementioned person(s) and or premises and are described as follows:

See Attachment 'B'

The grounds for the seizure of said person(s), property or thing(s) are that probable cause exists to believe that it: ☒ Is stolen or embezzled, or ☒ Is designed or intended for use as a means of committing a criminal offense, or ☒ Is or has been used as a means of committing a criminal offense, or ☒ Is illegal to possess, or ☒ would be material evidence in a subsequent criminal prosecution, or ☒ Is a person, property or thing the seizure of which is expressly required, authorized, or permitted by a statute of the State of Colorado, or ☒ Is kept, stored, transported, sold, dispensed, or possessed in violation of the statute of the State of Colorado under circumstances involving a serious threat to the public safety, or order, or to the public health, (Mark 'X' according to the fact);

The facts submitted in support of this application are set for in the accompanying attachment designated as Attachment "A" which is attached hereto and made a part hereof.

Applicant: _____ Detective Donald Chagnon

Law enforcement agency: Colorado Springs Police Department

Position: Detective

Sworn and subscribed before me this 21 day of December, 2004

Judge: _____

SUSTAIN

04004CR06238

1074

ATTACHMENT 'A'

04-885

In support of a request for the issuance of a search warrant your affiant, Donald J Chagnon 81D, a Police Officer for the Colorado Springs Police Department and so employed for over eighteen years and now currently assigned to the Major Crimes Robbery Unit, state under oath that I have personal knowledge of the following facts:

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The males loudly announced a robbery and ordered to everyone in the bank, "Everyone get down!" Inside the lobby with their mothers were two small children ages 4 and 5. The male carrying the long rifle went behind the closed teller area and ordered the victim teller, "Open it up! Open them all up! Give me everything! Put it in the bag!"

The victim teller stated that this male presented what she described as a green in color army style duffle bag which he held open for her to put the money in. The teller stated that the first items that she placed in the bag were her dye pack and bait bills. She stated that she then put the remaining money that she had into the bag on top of that.

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The teller described the male that came behind the counter as a Black male, 6'1" to 6'2" tall and weighing about 220 to 230 pounds. She added that he was wearing a burgundy knit watch cap with some type of black mesh over the eyes and mouth. She stated that he was also wearing a red/black/white plaid flannel or wool shirt and slightly faded jeans. She stated that she did not see the second suspect well enough to describe him. Other victims inside the bank vaguely described him as a male, about 5'10" tall and about 180 to 190 pounds. I asked the teller and other victims inside the bank what they believed would happen if they did not comply with the two males. All indicated that they believed they would be harmed or killed.

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Your affiant would note that when a dye pack from a bank explodes the pack will emit a red colored dye, red smoke which contains a chemical irritant gas, a form of tear gas and the pack will burn at approximately 500

degrees. During this conversation with Investigator Martinez, Detective Eric Anderson told Martinez that he would fax a copy of the bait bill list from the bank so that Investigator Martinez could check the serial numbers of recovered money against the list to see if the money matched the money taken from the bank.

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Investigator Martinez went to the Womack's promotions department and spoke with Amy Hayes. Investigator Martinez asked Hayes if she knew a person named "Calvin", and Hayes stated that yes she knew a Calvin Che ks. Hayes further reported that Calvin Cheeks is the only person with the first name Calvin who currently has a Players club card with Womack's Casino. Investigator Martinez showed Hayes a still photograph of Cheeks and asked if she knew the person in the photo. Hayes said she was pretty sure the person in the photograph was Calvin Cheeks.

On 12-09-2004, Investigator Martinez was conducting further follow up when he talked to another Womack's Casino employee identified as Gary D. Kring. Kring stated he has known Calvin Cheeks for a number of years. After obtaining some initial information, Investigator Martinez showed Kring a photograph of Cheeks with all identifying information covered up. Upon viewing the photograph Kring told Investigator Martinez that the person in the photo was Calvin. Investigator Martinez asked, "Calvin who?" Kring replied, "Calvin Cheeks."

Calvin Cheeks was noted to have returned to Cripple Creek on 12-06-2004. During his visit on that day, his play patterns and movement within the casino were watched. Calvin Cheeks was observed playing machines

which were later taken out of service and inspected. Additional red dye stained money was removed from the machines, which was later determined that only Cheeks could have put into the machine.

Gagnon has stated that he has done extensive work on tracking Cheeks to the dyed money. He later told Investigator Martinez that he would be available for court to testify about how he came to the conclusion that Calvin Cheeks is the only person who could have put the dyed money in the machines on 12-06-2004. Gagnon added that he has ruled out any other people placing the red dyes money in the slot machines on that day.

Follow-up conducted by Detective Anderson has identified several vehicles registered to Calvin Cheeks. These vehicles include a 1996 white in color Isuzu NPR tilt-cab panel van, a 1979 blue in color Jaguar XJ6 and a 1986 white in color Ford Econoline E250 cargo van. This last vehicle is similar to the vehicle observed in the area where the suspects of the bank robbery were last seen.

On 12-13-2004, your affiant presented to the Honorable Judge Manzanares an application for a Court Order to Produce Records. This order was approved and served upon Sprint Communication for telephone records relating to a cellular phone number that Mr. Cheeks had also given as his own number. A response to the Court Order was received on 12-20-2004 and a call was found placing the telephone in the area of the bank robbery about 2¾ hours after the robbery. Several calls to and from a number 719-635-7362 were also found. A reverse listing on this phone number shows to an E.R. Taylor at 948 East Rio Grande Street, Colorado Springs, Colorado.

On 12-21-2004 pursuant to an Arrest Warrant issued by the Honorable Judge Sletta on 12-20-2004, your affiant and other officers arrested Calvin Cheeks as he arrived for a scheduled court appearance at the El Paso County Court, 20 East Vermijo. At the time of his arrest Cheeks had arrived in his 1996 white in color Isuzu NPR tilt-cab panel van. That vehicle was impounded for the purpose of obtaining a search warrant.

During an interview with Cheeks, after he stated that he understood his rights and agreed to waive those rights, gave his primary residence address as 3040 South Academy Boulevard. He stated that he has a living area inside the building normally used for commercial purposes and has his other vehicles stored there.

Your affiant had a Patrol Officer respond to that address and he positively identified the location and stated that there is property stored inside. The other vehicles belonging to Cheeks were also found parked outside that address. These vehicles specifically the 1986 white in color Ford Econoline E250 bearing no license plat but VIN 1FTEE24N3GHA87316 attached; and a 1979 blue in color Jaguar XJ6 bearing Colorado license plate KAD4975 and VIN JAVLN49C100839 attached.

On 12-21-2004 an application for a Search Warrant was presented to the Honorable Judge Sletta for the address of 3040 South Academy Boulevard, Colorado Springs, Colorado the residence of Calvin Cheeks. The application was approved, Clerk 04-883, and was executed on 12-21-2004 at 2:15 p.m. As Detectives began a search the numbers 3044 was observed over the front door of the residence which is a sub-divided building, the numbers 3044. These numbers can not be seen from outside and a mailbox posted outside the door has the number 3040 scratched into it in 3 different places.

Detectives had previously spoken with the building management who stated that the whole building is 3040 South Academy and they indicated exactly which sub-divided space is leased by Calvin Cheeks. This is the

door that was entered pursuant to the issued Search Warrant. Detectives also found a piece of mail just inside the front door with the address 3044 South Academy Boulevard, Colorado Springs, Colorado

Your affiant, Detective Donald Chagnon would respectfully request that probable cause be found that on 12-01-2004 at 2805 Dublin Boulevard, within the City of Colorado Springs, County of El Paso and State of Colorado and Aggravated Robbery occurred in violation of 18-04-302, Colorado Revised Statutes as amended. Your affiant would also ask that probable cause be found that the subject Calvin Karl Cheeks was involved in that Aggravated Robbery and was in possession of money taken in that robbery.

Your affiant would also request that probable cause be found that the address 3044 South Academy Boulevard, Colorado Springs, Colorado and fully identified in the application for this search warrant, as amended is the current residence of Calvin Cheeks. Your affiant would thus respectfully request the authorization of a search of that business, vehicles identified in this affidavit and parked on the property, as well as the physical property for items as identified in Attachment 'B'.

Applicant: _____ Detective Donald Chagnon

Law enforcement agency: Colorado Springs Police Department

Position: Detective

Sworn and subscribed before me this 21 day of December, 2004

Judge: _____

SLETT

ATTACHMENT 'C'

On 12-21-2004 pursuant to Search Warrant authorized by the Honorable Judge Sletta, the following items were seized as evidence during the execution of the Search Warrant at 3044 South Academy Boulevard.

- SKS assault rifle 7.62x39mm with modified pistol grip stock & sling, found inside black plastic garbage bag loaded with a full magazine attached. Also found with 2 spare fully loaded magazines. **ALL ITEMS MADE SAFE** – SN# 9455064
- Maverick 12 gauge shotgun found fully loaded with six rounds. **WEAPON MADE SAFE** – SN# 16389B
- Marksman repeater bb air .177 cal with no serial number. **WEAPON MADE SAFE**
- Two pieces of wood - originally the complete stock of the SKS rifle (above), cut from the original stock to make modified pistol grip.
- Two Colorado license plates 778BMR, 335ILW.
- One Colorado license plate 574cnp.
- One vehicle registration for 1979 Jaguar Colorado license KAD4975 VIN JAVLN49C100839.
- One customer survey card from Colorado Springs Credit Union with handwritten surveillance notes from Mon Nov 10, 2:00 p.m.
- One Ace Loans pawn ticket indicating a night scope was pawned by Calvin Cheeks at Ace Loans on 12-16-2004.
- One key ring containing 3 keys marked 'Do Not Duplicate'.
- One envelope containing a past due notice for a storage unit located at 2303 W Bott Av.
- Two hardback books, one titled 'The Cops Are Robbers' & one titled 'Evidence and Its Legal Aspects'.
- One VHS video tape titled, 'Art of Crime'.
- One plastic tub containing suspected red dye.
- One plastic hockey mask.
- One key ring containing multiple keys.
- The left five (5) twenty dollar bills and the left half of one (1) one hundred dollar bill.
- One Ruger handgun box for a P89 9mm handgun, missing the handgun but containing a pawn slip for an Intratec .22 caliber pistol.
- One pair of black knit gloves w/ blue rubber gloves inside them.
- Four pairs of women's stockings made into headwear/skullcaps.
- One pair of wrap around style sunglasses.
- One used book of checks #2003 through 2325 in the name of Olympic Floors.
- Box containing photos and paperwork for gambling winnings.

- Three (3) Womack's gold club cards #92192 & one (1) Premier Club card from the Double Eagle casino in the name Calvin Cheeks.
- One (1) silver colored security officer's badge.
- Four (4) .25 caliber bullets.
- Two (2) 9mm bullets.
- One SKS cleaning kit.
- One Womack's mailer addressed to Calvin Cheeks at 3044 S Academy Bl.
- One (1) brown knit stocking cap.
- One (1) black leather trench coat w/ a skull cap in the pocket.
- One (1) pair black jeans

(Person who helped to conduct the search and seizure) - Detective Donald Chagnon