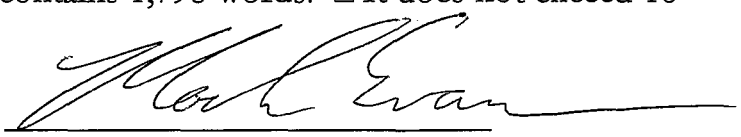
COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Weld County District Court Honorable Marcelo A. Kopcow, Judge	
Case Number 09CR814	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. VALERIE L. EHRLICK Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender MARK EVANS, #40156 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 09CA2769
REPLY BRIEF OF DEFENDANT-APPELLANT	

COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Weld County District Court Honorable Marcelo A. Kopcow, Judge Case Number 09CR814	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. VALERIE L. EHRLICK Defendant-Appellant	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender MARK EVANS, #40156 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 09CA2769

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that: The reply brief complies with C.A.R. 28(g). Choose one: ☒ It contains 1,798 words. ☐ It does not exceed 18 pages.



In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. The district court erroneously determined that Ms. Ehrlick's presence in a warehouse district late at night, without any other indicia of criminal activity, amounted to "reasonable suspicion" justifying police initiation of an investigatory stop.

Ms. Ehrlick was "seized" for purposes of the Fourth Amendment at the moment Deputy Tanner activated his patrol car's overhead lights. *People v. Jackson*, 39 P.3d 1174, 1185 (Colo. 2002) (abrogated on different grounds by *Brendlin v. California*, 551 U.S. 249 (2007)) ("Our precedent recognizes that the flashing lights and overhead sirens used to effect a "full-blown" traffic stop are a display of authority and control indicative of an investigatory stop."). Although the Attorney General urges this Court to determine that initial contact was consensual, the district court's finding that "this was an investigatory stop" should not be disturbed. (09/03/09, p.39)

The Answer relies on *People v. Paynter*, 955 P.2d 68 (Colo. 1998), to support its consent argument. (Answer, pp.9-10) In that case, the Colorado Supreme Court found a police encounter was consensual where the officer approached a parked car whose lights were off, and did not exhibit a "display of authority or control by activating the siren or any patrol car overhead lights." *Paynter*, 955 P.2d at 73. Here,

however, Ms. Ehrlick was driving when Deputy Tanner decided to pull up behind her. (09/03/09, pp.6-7) Although the record is unclear whether her vehicle was moving at the moment the deputy activated his lights, it is undisputed that the vehicle's brake lights were on. (09/03/09, pp.10-11) Unlike the *Paynter* defendant, Ms. Ehrlick was not parked when an officer approached, and her continued progress was halted by police intervention.

Also in contrast to *Paynter*, Deputy Tanner pulled in close to Ms. Ehrlick and then activated all of his overhead lights, thus presenting a show of authority demonstrating to a reasonable person that he or she was not free to leave. *See Paynter*, 955 P.2d at 71-73. (09/03/09, pp.10-11) Deputy Tanner's actions were thus more intrusive than a police officer merely approaching an individual on the street and asking for identification. *Cf. Paynter*, 955 P.2d at 73-74. Instead, Ms. Ehrlick's detention was more akin to a traditional traffic stop, which is a seizure for purposes of the Fourth Amendment. *See Brendlin*, 551 U.S. at 255 ("The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver even though the purpose of the stop is limited and the resulting detention quite brief." (quotations omitted)).

Because Ms. Ehrlick demonstrated that she was seized, and it was undisputed that Deputy Tanner proceeded without a warrant, the burden was on the State to

demonstrate the encounter's legality. *See Outlaw v. People*, 17 P.3d 150, 155 (Colo. 2001). Attempting to do so, the Answer relies on this Court's analysis in *People v. Rushdoony*, 97 P.3d 338 (Colo. App. 2004). (Answer, pp.11-12) Its attempt to analogize this case to *Rushdoony*, however, merely highlights the factual differences between the two situations. The *Rushdoony* defendant was observed digging in a dumpster late at night in the immediate geographic and temporal proximity to a string of prior burglaries. 97 P.3d at 343 (emphasizing the area "was not simply one known generally as a high crime area; rather, within the previous two weeks, burglaries had occurred at businesses directly in front of, and directly on one side of, the business behind which the deputy encountered defendant and his companion."). Additionally, when that defendant saw police — but *before* he was seized — he "pulled away from the dumpster" and began moving toward his car. *Id.*

In contrast to *Rushdoony*, Deputy Tanner had no knowledge of any prior thefts occurring at the warehouse complex into which he followed Ms. Ehrlick. (09/03/09, p.25) He did not observe her attempting to escape his observation, and in fact testified that he did not see any criminal activity prior to activating his lights. (09/03/09, p.21) Consequently, the only common fact between this case and *Rushdoony* is that a law enforcement officer observed someone outside late at night.

Being outside at night is not, however, enough to justify the warrantless seizure of a Colorado citizen. Our courts have long struggled to balance society's need for order against individuals' right to freedom from restraint. In doing so they have made clear that neither late-night travels nor presence in a high-crime area is sufficient to justify warrantless police detention. *See People v. Pagett*, 932 P.2d 810, 815-16 (Colo. 1997) (regarding time of day); *People v. Greer*, 860 P.2d 528, 531-32 (Colo. 1993) (regarding high crime areas). The Attorney General has not and cannot meaningfully distinguish that precedent.

Although the district court's recitation of the law and facts was substantially correct, its ultimate analysis depended upon precisely the type of inarticulable hunch that cannot support an investigatory stop. *See Greer*, 860 P.2d at 530-31. The court reasoned:

> And so the officer is doing his job. He's suspicious that this activity is unusual, given the totality of the circumstances. And arguably, if something did happen, and he didn't respond to that suspicious activity, I imagine the officer could have easily been criticized by members of the community why he didn't take any action, because the activity was so suspicious.
>
> (09/03/09, p.42)

Even if Deputy Tanner was "suspicious that this activity [was] unusual[,]" that generalized suspicion simply was not enough to justify seizing Ms. Ehrlick. Further, basing an evaluation of reasonable suspicion on the opinion of unspecified "members

of the community" undermines one of the fundamental goals of the Fourth Amendment. The Bill of Rights was ratified in part to protect unpopular minorities — who by nature of their unpopularity are inherently suspicious — from the oppressive whims of the majority. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) ("The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together."); *Feldman v. United States*, 322 U.S. 487, 501 (1944) (Black, J., dissenting) (citing 1 Annals of Cong. 437 (1789)) ("From their distrust were derived the first ten amendments, designed as a whole to 'limit and qualify the powers of Government', to define 'cases in which the Government ought not to act, or to act only in a particular mode', and to protect unpopular minorities from oppressive majorities."), *overruled in part by Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964).

The district court erred by finding Ms. Ehrlick was properly seized, and therefore erred by failing to suppress evidence derived from that seizure. *See People v. Jorlantin*, 196 P.3d 258, 261 (Colo. 2008) (evidence collected during and after a traffic stop, including the observations of the officer, will be suppressed if the stop of the driver was not supported by a reasonable suspicion of criminal activity); *Outlaw*, 17 P.3d at 159 (trial court must suppress evidence derived from investigatory stop not

of the community" undermines one of the fundamental goals of the Fourth Amendment. The Bill of Rights was ratified in part to protect unpopular minorities — who by nature of their unpopularity are inherently suspicious — from the oppressive whims of the majority. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) ("The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together."); *Feldman v. United States*, 322 U.S. 487, 501 (1944) (Black, J., dissenting) (citing 1 Annals of Cong. 437 (1789)) ("From their distrust were derived the first ten amendments, designed as a whole to 'limit and qualify the powers of Government', to define 'cases in which the Government ought not to act, or to act only in a particular mode', and to protect unpopular minorities from oppressive majorities."), *overruled in part by Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964).

The district court erred by finding that Ms. Ehrlick was properly seized, and therefore erred by failing to suppress evidence derived from that seizure. *See People v. Jorlantin*, 196 P.3d 258, 261 (Colo. 2008) (evidence collected during and after a traffic stop, including the observations of the officer, will be suppressed if the stop of the driver was not supported by a reasonable suspicion of criminal activity); *Outlaw*, 17 P.3d at 159 (trial court must suppress evidence derived from investigatory stop not

based on reasonable suspicion). Because Ms. Ehrlick's convictions were based on evidence derived from an illegal seizure, those convictions cannot stand.

II. The district court erred by denying Ms. Ehrlick's motion for a mistrial after one juror expressed his opinion regarding the merits of the case to four other jurors before the close of evidence.

The Attorney General argues that *People v. Flockhart*, __ P.3d __, 2009 WL 4981910 (Colo. App. No. 07CA312, Dec. 24, 2009) (*cert. granted*, Feb. 22, 2011), is inapplicable because the error in that case — instructing the jury that it was allowed to predeliberate — did not occur here. (Answer, p.20) The reason the *Flockhart* court found error was not, however, because of the instruction itself; it was because the instruction had the effect of allowing predeliberation. 2009 WL 4981910 at *3-*5. *Flockhart* applies because it found constitutional error in telling a jury that it *could do* exactly what the jury here *actually did.*

The record is undisputed that predeliberation occurred. Hence, reversal is required unless the State can prove beyond a reasonable doubt that predeliberation did not contribute to the verdict obtained. *See id.* at *3-*5; *Huff v. State*, 519 S.E.2d 263, 268 (Ga. Ct. App. 1999). Attempting to do so, the Answer cites cases discussing passive yet arguably improper conduct by jurors, such as sleeping or seeking employment from one of the parties. (Answer, pp.19-20) *See Smith v. Phillips*, 455 U.S. 209, 212, 217 (1982); *People v. King*, 121 P.3d 234, 241-42 (Colo. App. 2005).

Here, in contrast, the district court uncovered active misconduct directly related to how jurors approached the merits of this case and the court's instructions.

The Attorney General also cites *People v. Manzanares*, 942 P.2d 1235, 1239 (Colo. App. 1996), in which a division of this Court found that alleged juror misconduct was not prejudicial because: "Nothing in the record indicates the dismissed juror expressed an opinion on the substance of the case, the evidence, or any prospective witness, or made any comment that would create enmity toward or bias against defendant." (Answer, p.21) Here, however, the dismissed juror *did* express an opinion on the substance of the case and the evidence. He told other jurors that the case was "cut and dry" or "a slam dunk[,]" and questioned why a jury was even necessary. (09/21/09, pp.147-48, 152, 158) As a division of this Court has acknowledged, once a juror has expressed such an opinion to his fellow jurors, "the die may well have been cast." *Flockhart*, 2009 WL 4981910 at *4 (quoting *State v. Washington*, 438 A.2d 1144, 1148 (Conn. 1980)). Under the circumstances here, Juror 4's comments to other jurors cannot be considered harmless.

The Opening Brief's articulation of the applicable standard of review cites *People v. Santana*, 240 P.3d 302, 309 (Colo. App. 2009), for the proposition: "Where a trial court denies a motion for mistrial after an error of constitutional dimension, this Court applies the constitutional harmless error standard of review." (Opening, p.16)

Although *Santana* has been overturned, the Colorado Supreme Court did not reach that portion of the case. *See People v. Santana*, __ P.3d __, __, 2011 WL 2529509 at *10 (Colo. No. 09SC808, June 27, 2011). The standard of review thus remains accurate.

For the reasons explained in the Opening Brief and above, the State did not meet its burden of proving beyond a reasonable doubt that the jury's predeliberation did not contribute to Ms. Ehrlick's convictions. This Court must thus reverse those convictions and remand this case for a new trial.

CONCLUSION

For the reasons explained in the Opening Brief and above, Ms. Ehrlick respectfully requests this Court reverse her convictions for possession of a controlled substance and possession of paraphernalia.

DOUGLAS K. WILSON
Colorado State Public Defender

MARK EVANS, #40156
Deputy State Public Defender
Attorneys for VALERIE L. EHRLICK
1290 Broadway, Suite 900
Denver, Colorado 80203
303-764-1400

CERTIFICATE OF SERVICE

I certify that, on July 27, 2011, a copy of this Reply Brief of Defendant-Appellant was served on Elizabeth Rohrbough of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us: