COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Weld District Court Honorable James F. Hartmann Case Number 08CR1659	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. MATTHEW VINCENT MARTINEZ Defendant-Appellant	▲ COURT USE ONLY ▲
Douglas K. Wilson, Colorado State Public Defender ANNE T. AMICARELLA, #40834 1290 Broadway, Suite 900 Denver, Colorado 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 09CA1179
OPENING BRIEF OF DEFENDANT-APPELLANT	

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CERTIFICATE OF COMPLIANCE

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The brief complies with C.A.R. 28(g).

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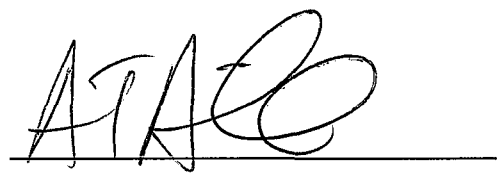

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II. Did the prosecutor's statements in closing that three people knew "what happened" but that the jury only heard from two of them and that Martinez's intent could not be known because he did not testify violate Martinez's constitutional right against self-incrimination?

STATEMENT OF THE CASE

On September 22, 2008, Martinez was charged with, among other things, attempt to influence a public servant, a class four felony in violation of §18-8-306, C.R.S.; criminal impersonation, a class six felony in violation of §18-5-113(1)(e), C.R.S.; possession of marijuana – one ounce or less, a class two petty offense in violation of §18-18-406(1), C.R.S.; and possession of drug paraphernalia, a class two petty offense in violation of §18-18-428(1), C.R.S., for events occurring in Evans, Colorado on September 14, 2008. (File, pp 11-16).

Subsequently, the state amended the information to include, among other things, assault in the second degree, a class four felony in violation of §18-3-203(1)(f), C.R.S. (File, p 21)

Martinez moved to suppress all evidence of a search by police that occurred at Martinez's residence on September 14, 2008. (File, pp 53-54) The court denied the motion.. (1-22-09, pp 3-40)

Martinez pled not guilty and tried his case to a jury. On March 31, 2008, Martinez was convicted of criminal impersonation, possession of marijuana – one ounce or less, possession of drug paraphernalia, and the lesser non-included offenses of obstructing a peace officer (a class two misdemeanor in violation of §18-8-104(1)(a), C.R.S.) and resisting arrest (a class two misdemeanor in violation of §18-8-103, C.R.S.). Martinez was acquitted of assault in the second degree. (3-31-09, p 134; File, pp 123-128) The jury hung on the attempt to influence a public servant charge.[1] (3-30-09, pp 133, 135-139

Martinez timely filed an appeal. (Flat file)

STATEMENT OF THE FACTS

On September 14, 2008, Officer Dan Ranous, of the Evans Police Department, was dispatched to an apartment complex in Evans, Colorado for a loud music

[1] The state indicated it would move to dismiss the hung charge at another Martinez court date on a different matter set for April 20, 2009. (3-31-09, p 141) An earlier added charge of possession of a schedule II controlled substance – less than one gram – second offense, a class four felony in violation of §18-18-405(1)(2.3)(a)(1), C.R.S. was dismissed by the court pursuant to Martinez's motion at the end of the state's case-in-chief. (File, pp 31-32; 3-30-09, p 4; 3-31-09, pp 25-32)

complaint. (3-30-09, p 176) When Ranous arrived at the complex, he could hear the music, coming from a particular apartment, from a distance. (3-30-09, p 177) However, the music was then turned down to a level where Ranous "couldn't hear it outside" and, subsequently, a person, whom Ranous knew to be a man named Angel Medina (from another complex), left the apartment. (3-30-09, pp 177, 212, 214)

Ranous, in uniform, walked towards the front door of the apartment which was open. (3-30-09, p 177) As he did so, Ranous believed that he smelled the odor of burning marijuana, and he saw a haze of smoke in the apartment. (3-30-09, p 177; 1-22-09, p 6))

Martinez was sitting alone at a table inside and, according to Ranous, appeared to be putting down a metallic object that had been at his lips. (3-30-09, pp 177; 1-22-09, p 7) Ranous suspected that Martinez was smoking marijuana in what he believed from his training and experience was a pipe used for that purpose. (1-22-09, pp 7-8; 3-30-09, pp 177-79, 183) He contacted another officer "to come over to where I was to provide me with backup and assistance."

Ranous did not indicate at either the suppression hearing or at the trial the exact timing of the request for assistance, and the record does not indicate that Martinez had been made aware of this request before he got up on his own initiative and went to the door. (3-30-09, pp 179-81, 215; 1-22-09, p 7) Ranous's testimony at

the suppression hearing sometimes conflicted with his testimony at the trial. For instance, at the suppression hearing, Ranous stated that when Martinez came to the doorway, "I told him why I was there." (1-22-09, p 7) (Ranous did not elaborate on what he was referring to.) At the trial, Ranous did not testify that he said any such thing when Martinez came to the doorway. (3-30-09, p 180)

At the door, the two men engaged in a conversation in a "normal tone of voice." (3-30-09, p 180) At some point in the conversation, Ranous asked Martinez for his name and date of birth. (3-30-09, p 180) Martinez gave the name of "Antonio Diaz" and a date of birth of October 26, 1987. (3-30-09, p 180)

A few minutes later, Officer McDaniel arrived to assist Ranous. (3-30-09, pp 181-82, 239, 241-42) Again, Ranous's testimony at the suppression hearing conflicted with his trial testimony. At the suppression hearing, Ranous testified that he had told Martinez "there was another officer on his way and the investigation would be continuing at that point." (1-22-09, p 18) At the trial, Ranous testified that, once the other officer arrived, he then told Martinez the police would be entering the apartment. (3-30-09, pp 183, 242)

Martinez was later charged by the state with two felonies associated with these facts: attempt to influence a public servant (§18-8-206, C.R.S.) and criminal impersonation (§18-5-113(1)(e)). (File, pp 11-16)

Martinez told the men they were not entering the apartment, and he began to shut the door while putting his hand on Ranous's shoulder. (3-30-09, pp 183, 242) A struggle ensued between Martinez and the two officers after the officers forced their way into the apartment, and the three men careened from one wall of the apartment living room to the other while police attempted to secure Martinez's arms which he was holding in to his body and move Martinez's legs out from under him. (3-30-09, pp 183-87, 188-95, 216-19, 243-47) During the struggle – "ten seconds of chaos" in which it was unclear who was directing the momentum – Martinez was commanded to stop resisting and told that he was under arrest. (Id.) Martinez continued to struggle with the two officers. (Id.) Martinez was threatened with tasing if he did not succumb, and then he was tased by Ranous two times.[2] (3-30-09, pp 188-95, 220-22) During the struggle, Ranous hurt his shoulder when hitting the walls of the apartment, and he subsequently sought continuing medical treatment for a "severe contusion to the front of his shoulder" that included bruising of the bone. (3-30-09, pp 207-11; 3-31-09, pp 4-15)

Once Martinez was handcuffed, and while McDaniel conducted a "security sweep" of the apartment, Martinez indicated he had information about other criminal

[2] Ranous testified that he felt that Martinez was not receiving the full effect of the first tase and so he "introduced" the taser itself to Martinez's body. (3-30-09, pp 190-92)

activity in the area that he wanted to discuss with police. (3-30-09, pp 195-97, 251-53) While McDaniel also talked to people who had gathered outside of the apartment who apparently heard the struggle (and whom Ranous implied were residents of the complex who were typically "hostile to law enforcement"), Ranous continued to "tend to" Martinez. (Id.) When the officers stood Martinez up to take him to a police car, his legs buckled and he began to have breathing difficulties. (3-30-09, pp 198, 267) Martinez requested an ambulance. (3-30-09, pp 199, 267) However, he immediately became unconscious and was unresponsive to verbal or physical stimulus. (Id.) Martinez, still unconscious when picked up by the ambulance and when he arrived at the hospital, spent the next two to three days in the hospital. (3-30-09, pp 199-201, 225)

Martinez was later charged by the state with assault in the second degree (§18-3-203(1)(f)). (File, p 21)

Once Martinez was gone, police found at the table where Martinez had been sitting, among other things, old food, beer cans, two small pipes (one silver, one larger that was glass), and a baggy with a green leafy substance in it. (3-30-09, pp 201-02) The green leafy substance tested positive for marijuana, and was determined to weigh

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McDaniel testified regarding one tase that he also felt had gone through the right side of his own body (3-30-09, pp 249-50)

.26 ounces. (3-30-01, pp 202, 292-309; Exhibit 1) The residue of one of the pipes also tested positive for marijuana. (3-30-09, pp 292-309)

SUMMARY OF THE ARGUMENT

The police entry into and search of the home where Martinez was an overnight guest was unlawful and therefore all evidence seized from the search should have been suppressed. The district court found that exigent circumstances existed to effect a warrantless entry for the limited purpose of seizing a small pipe which police believed had smoldering marijuana in it. However, the possible criminal offenses associated with the pipe and the marijuana smoldering in it were non-jailable petty offenses that do not justify a warrantless entry into a home.

During closing the prosecutor called attention to the fact that Martinez did not testify and thus violated Martinez's constitutional right against self-incrimination. The prosecution told the jury at the beginning of his closing that three people knew what had happened and that they had heard from two of them. In addition, the prosecutor drew attention to the fact that Martinez's state of mind was unknown because he did not testify.

ARGUMENT

I. The police entry into and search of the home where Martinez was an overnight guest was unlawful and therefore all evidence seized from the search should have been suppressed.

A. Standard of Review

Martinez preserved this error for review when he filed a Motion to Suppress Fruit of Illicit Search[3] on January 13, 2009 requesting that "all observations of law enforcement agents, all statements attributed to Mr. Martinez, and all evidence seized following the initial illegal entry into Mr. Martinez's home must be suppressed as fruits of an illegal search and seizure in violation of the Fourth and Fourteenth Amendment to the Constitution of the United States, and Article II §7 of the Constitution of the State of Colorado." (File, pp 53-54)

"When ruling on a motion to suppress, a trial court must engage both in fact-finding...and law application which involves the application of the controlling legal standard to the facts established by the evidence." *People v. Pate*, 71 P.3d 1005, 1010 (Colo. 2003) (citations omitted). "The trial court's findings of historical facts are entitled to deference and will not be overturned if supported by competent evidence in the record," and the trial court's legal conclusions are reviewed *de novo* "because the legal effect of undisputed controlling facts is a question of law." *Id.* *Id.* (citations omitted). When the trial court has made an incorrect legal conclusion, either because the conclusion is inconsistent with the facts or because an erroneous legal standard

[3] The motion initially lists July 9, 2008 as the date of the search but then correctly lists September 14, 2008. (File, p 53)

has been applied, a reviewing court may correct it. *People v. Quezada*, 731 P.2d 730, 732-33 (Colo. 1987) (citations omitted).

B. Applicable Facts

A reviewing court must look only to the facts introduced into evidence at a suppression hearing when determining whether the trial court correctly ruled on a suppression issue. *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007).

Facts testified to at the suppression hearing on January 22, 2009 were as follows:

On September 14, 2008, Ranous was dispatched to a loud music complaint at an apartment. (p5,6) When he arrived at the apartment complex of eight units, Ranous heard the music coming from a particular apartment. (p6) The music was then turned down and Ranous saw a person later identified as Angel Medina exit the apartment. (p6)

Ranous approached the apartment where the front door was open with no screen door. (p6) Through prior experience, Ranous knew that a man named Williams lived in the apartment, although he did not know if anyone else lived there or was an overnight guest. (p14) He saw Martinez sitting at a lone table, approximately 10 to 12 feet away, in the living room of the apartment. (pp7, 12) According to Ranous, Martinez "had a silver metallic object in his hand that appeared

to be coming away from his mouth" that was "later identified as a marijuana pipe." (p7) Ranous testified that there was "a light smoky haze in the room (although he did not indicate this particular fact in his report) and a heavy odor of burning marijuana (although he did not indicate in his report where the odor was emanating from)." (pp7, 13) Ranous believed, based on his training, that the metallic object was a marijuana pipe. (p7) Ranous then contacted another officer (Sgt. McDaniel) to come to the complex to provide assistance. (p7)

When Martinez saw Ranous at the door to the apartment, Martinez "stood up from the table...and walked to the doorway and talked to me." (p7) Ranous testified no more specifically about what he told Martinez than "I told him why I was there" and that he then "made light conversation with [Martinez] about where he was from." (p8)

When asked if he lived in the apartment, Martinez told Ranous he had moved in the day before[4]. (p9) Ranous had no other knowledge at that time of who (other than Williams) lived in the apartment. (pp9, 14) When asked by the state if there was "anyone else in the apartment," Ranous replied "No, there was not." (pp 9, 10)

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[4] The court found that Martinez was an overnight guest with an expectation of privacy in the residence and therefore that he had standing to challenge the search. (p34) This legal conclusion was correct under applicable law. *See Minnesota v. Olson, infra* (overnight guest has reasonable expectation of privacy).

When McDaniel arrived, Ranous told Martinez[5] "that we were going to come in and talk about the marijuana." (p10) He testified on cross-examination that he told Martinez "there was another officer on his way and the investigation would be continuing at that point," although it was established that his report said "Once Sergeant McDaniel arrived, I told Matt Martinez I was going into the apartment." (p18) Ranous testified that his "intent was to secure the smoldering marijuana that was on the table." (pp10, 36) Martinez told Ranous "[y]ou are not coming in." (p10) Martinez then put out his left arm and met Ranous's shoulder and started to close the door. (pp10, 14) Ranous blocked the door with his foot, and then he and McDaniel "took the defendant into custody." (pp10, 14-15)

Once inside, Ranous observed on the table in the living room a silver pipe, a glass pipe, a bag with a "leafy green substance" that later tested presumptive positive for marijuana, and a small bag that contained a "white powder residue" that later tested presumptive positive for methamphetamine." (p10)

The district court's factual findings and legal conclusions were as follows:

The court began by denying Martinez's motion to suppress and stated that, based upon the facts, the state had established "that there were in fact exigent circumstances that would allow the officers to go in for a very limited purpose."

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[5] Ranous did not indicate that Martinez did anything other than remain at the

(p34) The court's factual findings were the same as above except that it emphasized that Ranous stood outside of the apartment while Martinez remained inside and, with respect to what Ranous told Martinez at the door in the latter part of their conversation, that "the officer told the defendant that once backup arrived, he was going to come into the apartment." (pp34-36) In terms of any encounter at the door, the court indicated that Martinez "said no, the officer would not be coming into the apartment. The defendant tried to shut the door. The officer placed his foot as a barrier to having the door being shut." (Id.)

The court based its denial of the motion on the supreme court precedent of *Mendez, infra*, in particular drawing a parallel between *Mendez* and the case at hand. (pp 36-38) The court articulated that Martinez's actions in this case of "trying to exclude the officers by shutting the door, coupled with the fact that the officer smelled burning marijuana and saw the smoke and saw what a reasonably trained officer would believe to be a marijuana pipe in the defendant's hand that he sat on down on a table" were akin to the facts of *Mendez* where exigency was present. (pp38-39) The court explained that had the basis for the police officer's decision been to secure baggies that he had seen on the table, it would view the situation "much differently"

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doorway during the entire contact.

because "the defendant's person could have been secured until a warrant was obtained." (p39)

The district court then specifically found that the "purpose of going into the home was to secure that pipe, which was seen in close proximity to the defendant's mouth, there's a smell of burning marijuana, there's smoke in the air. And to secure whatever is in that pipe, the officer needs to act with expediency and to go in to secure that, which is what the officer said." (p39)

Once inside the residence, "in plain view," in close proximity to the "pipe" on the table was the baggy with green leafy material and the baggy with white residue. Thus, according to the court, the "officer at that time was in a place that he had the right to be" where "the scope of the entry was to secure the pipe" and, therefore, the "plain view exception to the Fourth Amendment" gave the officer the right to seize those items without first obtaining a warrant. (pp 39-40)

C. Law and Analysis

The United States and Colorado constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Colo. Const. art. II, §7. Physical entry of a home is "the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (*citing United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

The principal protection against governmental intrusion into a home is the requirement of a warrant based on probable cause to search or arrest. *People v. Lewis*, 975 P.2d 160, 166 (Colo. 1999) (citations omitted)); *see also Hoffman v. People*, 780 P.2d 471, 474 (Colo. 1989) (establishment of probable cause merely permits officers to obtain a warrant to search premises and seize property)). "The right of officers to thrust themselves into a home is...a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10 (1948).

When a search (or arrest or seizure) has occurred without benefit of a warrant when such is constitutionally required, the prosecution must prove that (1) there was probable cause to search, and (2) circumstances existed to justify the warrantless entry. *People v. Miller*, 773 P.2d 1053, 1057 (Colo. 1989) (*citing People v. Jensen*, 713 P.2d 907, 911 (Colo. 1986)).[6]

Assuming *arguendo* that probable cause is established, a warrantless search and seizure is still considered presumptively unreasonable unless justified by one of the recognized exceptions to the Warrant Clause of the Fourth Amendment. *People v. Pate*, 71 P.3d at 1010 (*citing People v. Hebert*, 46 P.3d 473, 478 (Colo. 2002)). It is the prosecution's burden to prove one of these exceptions. *Id.* (*citing People v. Amato*, 193

Colo. 57, 60, 562 P.2d 422, 423 (1977)). "To determine whether the prosecution has met its burden, courts must examine the totality of the circumstances as they would have appeared to a 'prudent and trained police officer' at the time the decision to conduct a warrantless entry was made." *People v. Pate*, 71 P.3d at 1010 (quoting *People v. Hebert*, 46 P.3d at 480; *People v. Grazier*, 992 P.2d 1149, 1154 (Colo. 2000)). "[E]xceptions to the warrant requirement are 'few in number and carefully delineated,'" and "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.'" *Welsh v. Wisconsin*, 466 U.S. at 750 (*quoting United States v. United States District Court*, 407 U.S. at 318; all other citations omitted)).

One exception justifying a warrantless search exists when "exigent circumstances exist that necessitate immediate police action." *People v. Kluhsman*, 980 P.2d 529, 534 (Colo. 1999) (citation omitted). Three situations are recognized as those which pose exigent circumstances justifying a warrantless search: (1) police engaged in "hot pursuit" of a fleeing suspect, (2) risk of immediate destruction of evidence, and (3) a colorable claim of emergency threatening the life or safety of another. *Id.* (citations omitted). The scope of the intrusion is strictly circumscribed by the exigency justifying it. *Id.* (citations omitted). Doubt as to whether police have

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[6] The district court did not specifically address probable cause and it should have

concluded that warrantless search was justified must be resolved in favor of the defendant. *People v. Miller*, 773 P.2d at 1057 (*citing People v. Jansen*, 713 P.2d at 912).

Exigent circumstances may exist where evidence is in the process of being destroyed. *Mendez v. People*, 986 P.2d at 282 (smell of burning marijuana indicates that evidence is being destroyed). However, the United States Supreme Court has stressed that another factor that must be considered as part of the totality of the circumstances in determining exigency is the gravity of the alleged criminal offense. *Welsh v. Wisconsin*, 466 U.S. at 753 ("an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense").

In *Welsh*, the Court noted that a warrantless entry into "the sanctity of the home" was at issue (in order to effect an arrest) and then emphasized that the offense of concern was "a minor offense." *Welsh v. Wisconsin*, 466 U.S. at 750. Specifically, a witness told officers that the defendant was driving erratically, swerved into a field and then got out of car to walk and was, therefore, either "very inebriated or very sick" -- officers subsequently located the defendant via auto registration, proceeded to defendant's home, gained entry where they found him asleep and arrested him for a noncriminal traffic offense. *Id.* at 742-43. Accordingly, the Court reasoned, "[w]hen the government's interest is only to arrest for a minor offense, [the] presumption of

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before addressing exigency. *See Mendez v. People*, 986 P.2d 275, 280-81 (Colo. 1999)

unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate." *Id.*

The Court went on to note that this "is not a novel idea," highlighting the opinion of Justice Jackson in *McDonald v. United States*, 335 U.S. 451 (1948) explaining that "a finding of exigent circumstances to justify a warrantless home entry should be severely restricted when only a minor offense has been committed." *Id.* (subsequently *quoting McDonald v. United States*, 335 U.S. at 459-460 " 'It is to me a shocking proposition that private homes...may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it.' "). This is not to say that exigency is created "simply because there is probable cause to believe that a serious crime has been committed." *Welsh v. Wisconsin*, 466 U.S. at 753.

Later, in *Illinois v. McArthur*, 531 U.S. 326, 336 (2001), the Supreme Court, in the context of *Welsh*, drew a distinction between jailable and non-jailable offenses. Specifically, in justifying the detention of a defendant from entering his home while police obtained a warrant, the Supreme Court held that the defendant's suspected crimes were "jailable" - that is, the offenses were punishable by a possible jail sentence. *Id.*

Colorado's supreme court gave great importance to the gravity of the offense analysis of *Welsh* in *Mendez*. However, because in *Mendez* officers had no idea as to what amount of marijuana was at issue when they were standing in front of the closed door to the defendant's motel room, the court found that officers could not infer whether a misdemeanor or felony charge was at stake. *Mendez v. People*, 986 P.2d at 283. Accordingly, the potential gravity of the offense was greater than that in *Welsh*. *Id.*

In the recent case of *People v. Wehmas*, No. 09SC1002, slip op. at 12 (Colo. November 22, 2010), the Colorado Supreme Court endorsed the *McArthur* reasoning and concluded that because a first-time DUI offense is still a possibly jailable offense, it may be sufficiently grave to validate a warrantless home entry. Thus, by the same reasoning, when jail is not a possibility for a particular offense, it does not validate a warrantless home entry under the auspices of exigency.

In addition, when evaluating gravity of the offense in cases involving marijuana, the expanding legality of marijuana use should be considered. The legal use of marijuana is now recognized in Colorado's constitution. *See* Colo. Const. art. XVIII, Sec. 14, subsec. (2)(b). The Blue Book distributed for the 2000 election, when the medical marijuana amendment was passed, states that "[p]atients...are allowed to legally acquire, possess, use, grow, and transport marijuana and marijuana

paraphernalia." Colorado Legislative Council, Research Publ. No. 475-76, *An Analysis of 2000 Ballot Proposals* 1 (2000). The prevalence of legal use has been discussed in Colorado's major newspapers. *See, e.g.,* John Ingold, *Medical-marijuana sales tax nets $2.2 million for Colorado this year,* Denver Post (November 23, 2010) at http://www.denverpost.com/news/marijuana/ci_16688199?source=pkg (Colorado patient registry at approximately 115,000 people, Denver marijuana-related sales tax receipts from dispensaries at $265,000 per month).

In Martinez's case, the district court made clear that it based its decision on the limited purpose of police securing the silver pipe that Martinez had been holding and that held marijuana that was allegedly smoldering. (1-22-09, pp 34, 38-39) Under relevant Colorado statutes, neither a felony or misdemeanor charge was a possibility given the amount of marijuana that can fit in a pipe of the description given by Ranous. (1-22-09, p 7) Thus, the court's justification for the warrantless entry into a private home was to stop the destruction of evidence (via burning in the pipe) for which two possible petty offenses were at stake, the penalty for either of which (either possession of the pipe or the amount of marijuana in it) is a $100 fine. *See* §18-18-406(1), C.R.S. (possession of one ounce or less of marijuana is petty offense) and §18-18-428(1) (possession of drug paraphernalia). Accordingly, neither offense merited a warrantless entry. *Welsh, supra*; *Illinois, supra*; *Mendez, supra*, *Wehmas, supra.*

Thus, because exigent circumstances were not established, Martinez respectfully requests that this Court vacate his convictions and order a new trial at which the evidence obtained from the unlawful search and seizure of the apartment is suppressed. *Mendez, supra*; *Pate, supra*; *Wehmas, supra*; *Welsh, supra;* U.S. Const. amend. IV; Colo. Const. art. II, §7.

II. The prosecution violated Mr. Martinez's right against self-incrimination by discussing Mr. Martinez's failure to testify during closing argument.

A. Standard of Review

Martinez did not object to the prosecutor's statements regarding defendant's election not to testify, and accordingly, although the right not to testify is of constitutional magnitude, the prosecutor's statements are reviewed for plain error. *People v. Cevallos-Acosta*, 140 P.3d 116, 122 (Colo. App. 2005); *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005) (constitutional harmless error analysis reserved for cases in which defendant has preserved error). When a prosecutor's improper comments "so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction," plain error has occurred. *People v. Cevallos-Acosta*, 140 P.3d at 122. Where a prosecutor comments on the defendant's failure to testify, the prosecutor violates the defendant's constitutional right against self-

incrimination. U.S. const. amend. V, XIV; Colo. Const. art. II, §25; *Griffin v. California*, 380 U.S. 609 (1965).

B. Applicable Facts

The first statement from the prosecution in its closing argument was "Ladies and gentlemen, three people know what happened that day, three people know what happened inside that apartment, and you've heard from two of them. The defendant doesn't have to testify, it's his right." (3-31-09, p 85)

The prosecution then argued that it had proved the elements of each of the charged crimes by proceeding through the elements one-by-one. The mens rea focus by the prosecution for both the crime of criminal impersonation and attempt to influence a public servant was on Martinez's alleged understanding that he believed Ranous would give him a citation for the burning marijuana.

Specifically, when going through the elements of attempt to influence a public servant, the prosecution declared "Well, [Martinez] gave a fake name." (3-31-09, p 92) Then, specifically referencing the marijuana petty offense, the prosecution indicated that Ranous "saw a crime being committed" and then suggested that Ranous said to Martinez "What's your name? I've got a crime that's just been committed

here. What's your name?" [7] (Id.) The prosecution then told the jury, still in the same context of the marijuana, that Ranous said "Well, when I walked into that apartment, I was walking in to collect that evidence, detain the defendant, and I would have issued a citation to Antonio Diaz." (Id.) Finally, when talking about the intent element, the prosecution argued "Now obviously we don't know his specific intent because he never testified, and he doesn't have to, but you can tell his specific intent by all the circumstantial evidence." (3-31-09, p 93)

Similarly, when discussing the elements of the crime of criminal impersonation and the element of intent to unlawfully gain a benefit, the prosecution suggested that Martinez "gave that fake name, he gave that date of birth, to change the officer's opinion, to change the officer's decision so that a ticket wouldn't be issued to him, so that he wouldn't get in trouble. There's no other reason for him to do that, because he got caught red-handed smoking marijuana." (3-31-09, p 95)

In its closing, defense counsel reminded the jurors that they were not permitted to consider the fact that Martinez did not testify. (3-31-09, p 110)

In rebuttal, the prosecution referred to the fact that defense counsel suggested in closing argument that the police had never interviewed any of the crowd that had

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[7] As indicated in the Statement of Facts, *supra*, Ranous did not testify at trial that he told Martinez that a crime was being committed either immediately before or immediately after asking him his name.

gathered outside of Martinez's apartment when they heard the forceful encounter between Martinez and the two police to see if any of those persons knew what happened. (3-31-09, p 112) Here again, the prosecution, after stating "Well, they could interview everyone for blocks and no one's going to know anything" emphasized "There's three people that knew what happened. Three people." (Id.) This time there was no added reminder that Martinez need not testify.

The jury received the standard jury instruction (No. 12 here) indicating that a defendant is not compelled to testify and the fact that he does not should not prejudice him. (File, p 101)

C. Law and Analysis

It is well-established by the Colorado Supreme Court that the prosecution may not refer to a defendant's exercise of his Fifth Amendment right against self-incrimination. *People v. Key*, 185 Colo. 72, 75, 522 P.2d 719, 721-22 (1974) (citations omitted); *see also* U.S. Const. amend. V, XIV; Colo. Const. art. II, §25; *Griffin v. California*, 380 U.S. 609 (1965) (Fifth Amendment forbids comment by prosecution on accused's silence). A defendant cannot be penalized for exercising a constitutional privilege. *People v. Ortega*, 198 Colo. 179, 182, 597 P.2d 1034, 1036 (1979) (defendant did not contemporaneously object but plain error found because defendant talked after arrest but did not advance theory that he used at trial and prosecution

emphasized in opening and closing defendant's failure to talk about theory when first interviewed). "The clear weight of authority favors a reversal in such a situation where the prosecution has thus utilized the defendant's silence as a means of creating an inference of guilt." *Hines v. People*, 179 Colo. 4, 7, 497 P.2d 1258, 1260 (1972).

To determine whether a prosecutor's comment on defendant's silence constitutes reversible error, the court should consider whether the remarks were used to create an inference of guilt, and whether the prosecution argued that the defendant's silence constituted an implied admission of guilt. *People v. Hall*, 107 P.3d 1073, 1078 (Colo. App. 2004) (citations omitted).

Even assertion by the prosecution that its evidence is uncontroverted because the jury has not heard from the defendant also warrants reversal when such an assertion infers guilt or suggests that defendant has impliedly admitted his guilt by remaining silent. *Montoya v. People*, 169 Colo. 428, 457 P.2d 397 (1969). In *Montoya*, the defendant elected not to testify and the case turned on knowledge of defendant's state of mind because the defendant asserted that he was too intoxicated to form the intent to commit the charged crime of larceny of a motor vehicle. *Id.* at 429-30, 397-98. In this regard, the prosecutor stated in closing "The defendant did not testify. He doesn't have to, he has a constitutional right not to testify. However, you are asked to determine what went on in his mind[.] [O]nly that person can actually tell you[.]

[(F]rom the person who really knows, we heard nothing." *Id.* at 430, 398. The supreme court held that such statements "[lead] inescapably to the conclusion" that they were prejudicial and in violation of defendant's right not to testify, and thereby denied the defendant a right to a fair trial. *Id. Compare Martinez v. People*, 162 Colo. 195, 425 P.2d 299 (1967) (prosecutor's assertion in closing that evidence was uncontradicted, which was literally true since defendant did not call witnesses[8], was general comment conveying to jury that evidence was sufficient to justify guilty verdict and did not draw attention to fact that defendant had not testified)

In Martinez's case, there is no question that the prosecutor directly referred to Martinez's election not to testify. (3-31-09, pp 85, 93, 95, 112) The fact that the prosecutor followed the references on some occasions with informing the jury that Martinez had a right not to testify, as the prosecution also did in *Montoya*, does not somehow undo the damaging reference. Indeed, the prosecutor here used words very similar to the words responsible for the reversal in *Montoya* suggesting that specific intent could not really be known (except by other circumstantial evidence) because only the defendant would know what was going on in his mind. (3-31-09, p 93, 95)

[8] Martinez did call a witness on his behalf, an Evans police officer who took photos of Martinez while he was unconscious at the hospital just after the arrest. ((3-31-09, pp 45-50)

Similarly, as in *Ortega*, the evidence in Martinez's case, particularly with respect to mens rea, was circumstantial. The prosecution said as much, and it tried repeatedly to suggest that Martinez knew that he was caught "red-handed" in a crime and therefore knew he would be cited by Ranous for the marijuana. (3-31-09, p 95) Even when the prosecution told the jury that the circumstantial evidence in the case was enough to support a guilty verdict, it still managed to also highlight to the jury that Martinez did not testify. (3-31-09, p 95)

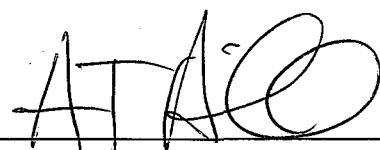
Under either of the factors of consideration outlined in *Hall*, the prosecution prejudiced Martinez as to all mens rea elements of the crimes he was charged with that it created reversible error. Clearly an inference of guilt was created by the remarks because the prosecution was suggesting that Martinez never contradicted the testimony of the officers present that day. Likewise, the prosecution was suggesting that Martinez's failure to testify and contradict the officers or what the state believed was convincing circumstantial evidence was an implied admission of his guilt. Martinez was convicted of, among other things, criminal impersonation, a crime for which the prosecution had to prove Martinez's intent to gain an unlawful benefit. Therefore, the comments about Martinez's failure to testify necessarily affected the jury's decision and prejudiced Martinez.

Accordingly, because the prosecution referenced Martinez's constitutional right against self-incrimination, and when it did so, it prejudiced Martinez to the degree that it did, reversible error occurred. Thus, Martinez respectfully requests that this Court reverse his convictions and remand his case for a new trial on those charges. *Hall, supra*; *Ortega, supra*; *Montoya, supra*; *Key, supra*; *Griffin, supra*; U.S. Const. amend. V, XIV; Colo. Const. art. II, §25.

CONCLUSION

For the reasons and authorities in Argument I, Martinez respectfully requests that this Court vacate his convictions and remand his case for a new trial at which the evidence obtained from the unlawful search and seizure of the apartment is suppressed. For the reasons and authorities in Argument II, Martinez respectfully requests that this Court reverse his convictions and remand his case for a new trial.

DOUGLAS K. WILSON
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on December 28, 2010, a copy of this Opening Brief of Defendant-Appellant was served on Catherine P. Adkisson of the Attorney General's Office by emailing a copy to AGAppellate@state.co.us.