

COURT OF APPEALS,  
STATE OF COLORADO  
  
Ralph L. Carr Judicial Center  
2 East 14<sup>th</sup> Ave.  
Denver, CO 80203

Morgan District Court  
Honorable Charles M. Hobbs  
Case Number 11CR52

THE PEOPLE OF THE  
STATE OF COLORADO  
  
Plaintiff-Appellee  
  
v.  
  
Lorenzo Camacho  
  
Defendant-Appellant

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σ COURT USE ONLY σ

Case Number: 12CA237

**REPLY BRIEF**


<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Ralph L. Carr Judicial Center 2 East 14<sup>th</sup> Ave. Denver, CO 80203</p>	
<p>Morgan District Court Honorable Charles M. Hobbs Case Number 11CR52</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Plaintiff-Appellee</p> <p>v.</p> <p>Lorenzo Camacho</p> <p>Defendant-Appellant</p>	<p>σ COURT USE ONLY σ</p>
<p>Douglas K. Wilson, Colorado State Public Defender REBECCA R. FREYRE, #20010 1300 Broadway, Suite 300 Denver, CO 80203</p> <p><u><a href="mailto:PDApp.Service@coloradodefenders.us">PDApp.Service@coloradodefenders.us</a></u> (303) 764-1400 (Telephone)</p>	<p>Case Number: 12CA237</p>
<p style="text-align: center;"><b>CERTIFICATE OF COMPLIANCE</b></p>	

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).

It does not exceed 18 pages.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

  
Signature of attorney or party

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, Mr. Camacho submits the following Reply Brief.

### ARGUMENT

#### **1. THE PROSECUTION'S REPEATED VIOLATIONS OF CAMACHO'S PRE-ARREST AND POST-ADVISEMENT SILENCE AND ITS ARGUMENT OF THIS SILENCE AS EVIDENCE OF GUILT IN CLOSING DEPRIVED CAMACHO OF A FAIR TRIAL AND REQUIRES REVERSAL.**

In his Opening Brief, Camacho argued that the prosecutor's many questions to law enforcement witnesses concerning his failure to speak out and explain himself during the van's search violated his constitutional rights to remain silent and to a fair trial. While acknowledging that a defendant's post-arrest silence is irrelevant as substantive evidence of a defendant's guilt when the defendant does not testify, the State asserted that the prosecution's elicitation of Camacho's silence was "admitted to impeach defense counsel's theory of the case" that was implied by defense counsel's opening statement. (AB,p9-10) However, impeaching a theory of defense is not the same as impeaching a witness's credibility which constitutes actual evidence. The court properly instructed the jury that opening statements were *not* evidence and were intended only to help in understanding what the evidence would be. (10/11/11,p141)

The State cited *People v. Davis*, 312 P.2d 193, 196-97 (Colo. App. 2010) to argue that a defendant's post-arrest silence may be used to refute statements made by defense counsel in opening statement. (AB,p10) *Davis*, however, did not address post-arrest silence in this context, but rather, addressed the very narrow question of whether defense counsel's attacks during opening statements on a detective's interrogation methods and a witness's motives to change testimony "opened the door" and thereby allowed the prosecution to address these issues in its case-in-chief rather than in rebuttal. *Davis's* discussion of post-arrest silence concerned the prosecutor's ability to impeach a *testifying* defendant with his partial post-arrest silence and thus, is inapplicable here since Camacho never testified. *Id.* at 198-199.

The State relied on *People v. Quintana*, 996 P.2d 146 (Colo. App. 1998)(disapproved on other grounds by *People v. Harlan*, 8 P.3d 448,474 (Colo. 2000)) to assert that the use of post-arrest silence does not violate a defendant's constitutional rights and is not so lacking in probative value as to render it inadmissible for any purpose. (AB,p8) However, this case involved a single, brief reference to the defendant's silence as part of a chronological explanation of events, and the prosecution's attempt to use it as evidence of guilt in closing was prevented by defense counsel's objection and the court's admonishment to the prosecutor not to comment further on the defendant's silence. *Id.* at 150. In contrast, here, the

the arbitrary and vindictive use of the laws. *Rogers v. Tennessee*, 532 U.S. 451,460 (2001), citing *Lynce v. Mathis*, 519 U.S. 433, 439-440 (1997). Judicial *ex post facto* claims are analyzed under the Due Process Clause's principle of fair warning. *Id.* at 452; *People v. LaRosa*, 2013 CO 2, ¶44. In this context, a new rule of law is created when a decision overrules "clear past precedent" upon which the litigants may have relied, or resolves "an issue of first impression not clearly foreshadowed by prior precedent." *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 113 (Colo. 1992). The principle of "fair warning" is violated when the judicial decision's alteration of law is "unexpected and indefensible." *LaRosa*, 2013 CO at ¶44. The "key test in determining whether the due process clause precludes the retrospective application of a judicial decision in a criminal case is whether the decision was sufficiently foreseeable so that the defendant had fair warning that the interpretation would be given." *Id.* quoting *Aue v. Diesslin*, 798 P.2d 436, 441 (Colo. 1990). Thus, retrospective application of a new rule of law that was unforeseeable violates the Due Process Clause. *Id.*; *LaRosa, supra*; *see also, Bouie v. City of Columbia*, 378 U.S. 347 (1964)(striking down South Carolina Supreme Court's retrospective application of a trespass statute because the court's interpretation of that statute was completely unanticipated and thus, failed to give fair warning of the prohibition under which the defendant stood convicted); *Devine v. New Mexico Department of Corrections*, 866 F.2d 339 (10<sup>th</sup> Cir. 1989)(finding a due process

violation in retrospective application of a state supreme court decision because the decision was unforeseeable and retroactively enhanced punishment).

Here, the automatic reversal rule of *People v. Macrander*, 828 P.2d 234 (Colo. 1992) was regularly invoked by divisions of this Court and the Supreme Court to remedy wrongly-denied challenges for cause. Thus, defense counsel here knew and expected that preservation of wrongly denied challenges required only the exercise of all peremptory challenges. Conversely, defense counsel had no reason to believe and thus, had no “fair warning” that an outcome-determinative test would be applied on appeal and so had no reason to make a further factual record that might aid in such an analysis. As in *LaRosa*, the new judicial rule (remedy) announced in *Novotny*, was both unexpected and unforeseeable. The majority in *Novotny* conceded as much saying, “We are not unmindful that our holding today expressly overturns a bright-line rule initially imposed more than two decades ago...” *Novotny*, 2014 CO at ¶24. Accordingly, assuming this Court finds error in the court’s denial of the challenge for cause, this Court must reverse Camacho’s convictions, in accordance with *LaRosa*, the Due Process Clause and fundamental fairness.

**3. THE COURT ABUSED ITS DISCRETION IN DENYING CAMACHO'S MOTION TO CONTINUE THE TRIAL TO INVESTIGATE THE 404(b) EVIDENCE DISCOVERED TWO WEEKS BEFORE TRIAL THAT THE COURT RULED ADMISSIBLE IN REBUTTAL IF CAMACHO DENIED KNOWLEDGE OF THE DRUGS.**

In his Opening Brief, Camacho argued that the court abused its discretion in denying his motion to continue the trial after the prosecution disclosed and sought the admission of 404(b) and CI evidence two weeks before trial. In response, the State argued that defense counsel had sufficient time to investigate this new information and that counsel failed to act diligently. (AB,p23-24) First, the State incorrectly stated that the prosecution sought admission of this evidence for rebuttal purposes only. (AB,p21) However, it later acknowledged this was a limitation placed on it by the court as a pseudo-sanction for its late disclosure. (AB,p22) In fact, the court placed this limitation on the prosecution, and the record demonstrates the prosecution always sought admission of this evidence in its case-in-chief as demonstrated by its reference to the evidence in opening statements. (10/11/11,p150-151)

Additionally, the State provided no authority for its assertion that defense counsel did not act diligently. As set forth in the Opening Brief, the disclosures here did not occur within the parameters of Crim P. 16, and the initial disclosures to the prosecution were sketchy at best and provided no information from which defense



counsel could perform any investigation. It was not until one week before trial that counsel actually received names and could begin any meaningful investigation. When it became obvious that he had insufficient time to do so, he requested a continuance of the trial. Thus, the record contradicts the State's argument that defense counsel failed to act diligently or that counsel's continuance request was somehow intended to delay the proceedings. On the contrary, the FBI's unexplained, late disclosure of information within its possession for years to the prosecution was intended either to force a last-minute plea bargain, to alter the defense strategy or to force the defense to request a continuance. And, the State offers no argument about what defense counsel could have done differently or more expeditiously under the circumstances here. Accordingly, this Court should find the court abused its discretion in denying Camacho's motion for a continuance and reverse his convictions.

**4. THE COURT'S RULINGS IN ISSUE 3, *SUPRA*, IMPERMISSIBLY CHILLED CAMACHO'S CONSTITUTIONAL RIGHT TO TESTIFY IN HIS DEFENSE.**

In his Opening Brief, Camacho argued that the court's rulings on the 404(b) evidence and its denial of his continuance request to further investigate this new evidence impermissibly chilled his constitutional right to testify. In the Standard of Review, the State asserted this issue was not preserved. (AB,p25) Contrary to this assertion, the record demonstrates that defense counsel specifically told the court that

its ruling on these issues altered his strategies to present the co-defendant's and Camacho's testimonies and that the rulings deprived Camacho of his constitutional right to present a defense. (10/12/11,p18) Thus, this issue is preserved and should be reviewed for constitutional harmless error.

**5. THE COURT PLAINLY ERRED IN ALLOWING CUTLER TO TESTIFY THAT FAST FOOD TRASH, WATER AND OIL BOTTLES, NO LUGGAGE AND AN EMPTY CAR SEAT SHOWED THE DRIVER/PASSENGER WERE IN A HURRY TO GET SOMEPLACE AND EVIDENCED POSSIBLE DRUG-RUNNING ACTIVITY WITHOUT PROPER QUALIFICATION AS AN EXPERT UNDER CRE 702.**

Camacho argued in his Opening Brief that Cutler's opinions were based on specialized knowledge and only admissible under CRE 702. In response, the State argued no specialized knowledge was required to conclude that the presence of trash in the van was a ruse to deflect suspicion of drug activity. (AB,p36) Common sense and reasonableness contradict the State's arguments. The vast majority of people who drive around with fast food trash and empty water/pop bottles, particularly those with children, are not trying to evade the detection of drug activity. It is far more plausible that people with trash in their vehicle simply either do not mind the presence of trash or do not have the time to clean regularly. Without some specialized knowledge that these items are indicative of concealment of drug activities, a reasonable juror would have no reason to believe they were significant. Accordingly, and for the reasons set forth the in the Opening Brief, this Court should reverse Camacho's convictions.

CONCLUSION

Based on the fact and authorities set forth above, as well as those presented in the Opening Brief, Mr. Camacho respectfully requests that this Court reverse his convictions and with respect to Issue 5, vacate his conviction for possession.

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CERTIFICATE OF SERVICE

I certify that, on June 12, 2014, a copy of this Reply Brief of Defendant-Appellant was electronically served through ICCES on Jay C. Fisher of the Attorney General's office.