WORD COUNT CERTIFICATION: 8,779



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| COURT OF APPEALS, STATE OF COLORADO<br>2 East 14th Avenue,<br>Denver, Colorado 80203<br><br>Appeal from the District Court for La Plata County Case Number 10CR518, 10CR71<br>Honorable Jeffrey Raymond Wilson<br><br>**APPELLANT:**<br><br>CHARLES EDWARD TROGDON<br><br>**APPELLEE**:<br><br>THE STATE OF COLORADO<br><br>Attorney for Defendant-Appellant:<br>**David C. Japha, Reg. No. 14434**<br>**THE LAW OFFICES OF DAVID C. JAPHA, P.C.**<br>**950 S. Cherry Street, Ste. 912**<br>**Denver, CO 80246**<br>Phone Number: **(303) 964-9500**<br>Fax Number: **1- (866) 260-7454**<br>**E-mail: DJapha4064@aol.com** | ▲ COURT USE ONLY ▲<br><br>CASE NUMBER: 12CA2045 |

**CORRECTED AMENDED OPENING BRIEF**

MARCH 25, 2014

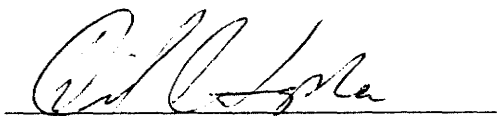
Oral Argument Requested

## CERTIFICATE OF COMPLIANCE

I hereby certify that this 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:

1. The brief complies with C.A.R. 28(g). It contains 8,779 words.

2. The brief complies with C.A.R. 28(k). It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.



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## STATEMENT OF THE ISSUES

I. Whether the trial court erred in denying the Defendant's Motion to Suppress Evidence.

II. Whether there was sufficient evidence upon which the jury could find Mr. Trogdon guilty of the sixteen counts of conviction.

## STATEMENT OF THE CASE

Charles Trogdon was arrested on October 28, 2010 for burglary of the house of customers of his extermination business – Monte and Marsha Miller. After media accounts of the arrest, numbers of then-present and former customers contacted law enforcement authorities in Archuleta and LaPlata Counties on the assumption that thing stolen or missing from them had been taken by Mr. Trogdon. Mr. Trogdon was arrested and made bail numerous times and he was subject to nine (9) search warrants.

Numerous charges were filed against Mr. Trogdon for burglary, trespass, theft and attempted theft. He filed a motion to suppress evidence seized after execution of all the search warrants, which motion was denied. In January, 2012, Mr. Trogdon went to trial on 32 counts, for 15 alleged victims. Four counts were dismissed, Mr. Trogdon was acquitted of 11 counts by the jury and found guilty on 16 counts. He

was sentenced on August 15, 2012 to a total of 21 years in the department of corrections. (Rec. Vol. II, p. 574).

Mr. Trogdon appeals his convictions arguing the trial court erred in denying his motion to suppress evidence and that the evidence that was presented against him was insufficient to convict him.

**STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW**[1]

Charles Trogdon was a professional pest exterminator who lived and owned his own business in La Plata county. He worked many years in LaPlata and Archuleta Counties. On October 27, 2010, Mr. Trogdon's life would forever be transformed. In an effort to contact Ms. Marsha Miller at her home, Mr. Trogdon sought paper and pencil from her bedroom dresser to write her a note. Ms. Miller was hiding in her bedroom closet. She stealthily observed Mr. Trogdon, whom she had suspected of theft based on unsubstantiated rumors from Ms. Terry Sower, her friend and a former customer of Mr. Trogdon. Ms. Miller confronted Mr. Trogdon upon his opening her dresser drawer and asked what he was doing there. He answered, but the answer did

1. Specific citations to the relevant facts in the record are also made in the body of the arguments.

not satisfy Ms. Miller. Yet, she did not ask him to leave her house and continued talking to him, and, in fact, let him give a treat to the Miller's dog, Maggie. [Tr. 01/13/12, pp. 1227-1230]. Thereafter, Ms. Miller called the LaPlata County Sheriff and reported what she saw - namely that Mr. Trogdon was going through her dresser drawer. She assumed he was looking for cash, because in the past she had kept it there. Though she did not insist that Mr. Trogdon leave, she did call authorities. [*Id.*]

Mr. Trogdon was charged with one count of second degree burglary in LaPlata County after the officers heard Ms. Miller's story. They also began a full-scale investigation in both LaPlata and Archuleta Counties. [Tr. 1/10/12; pp. 343-346]. Ms. Miller told Officer Webb and Investigator Patterson that she saw Mr. Trogdon rifling through her bedroom night stand where she and her husband used to keep large amounts of cash. Notably, Ms. Miller did not see Mr. Trogdon take anything, but as noted, confronted him about what he was doing there. [Tr. 01/10/12, testimony of Matt Webb, pp. 326-327; *Id*].

After Ms. Miller's accusations and the report were made public, many other people came forward both in LaPlata and Archuleta Counties. In total, nine search warrants were executed on Mr. Trogdon's property. [Tr., 05/09/11, 9:17-22; 13:1, 15-24; Record, Envelope #4, containing all 9 Affidavits and Search Warrants,

Defendant's Motions Hearing Exhibits 1-9].

The November 30, 2010 affidavit sought authority to seize a gold serpentine style bracelet; another gold bracelet; 98 Mauser 65.06; A Winchester rifle moder #70 364 .308 caliber; two silver goblets; a white gold ring with a red ruby in the middle; a new Henry Big Boy lever action rifle, serial number BB08669; two earing studs described as yellow gold with a two caret diamond on each, valued at $10,000.00; cash over $1,000.00; two rope style gold necklaces; 12-18 inches long; and old watch with about 300 small diamonds; computers; safes and business records for Professional Exterminator (the name of Mr. Trogdon's company). *See* Defendant's Exhibit 1 from Motions Hearing 09/07/11.

According to the Sworn Return and Inventory for Search Warrant [*id*], what officers recovered after the November 30, 2010 search was: The Henry Big Boy Rifle; $10,000.00 cash; Sig sauer pistol model #SP2022 .40 cal, S#SP0121445; Walther pistol moder #P22 S# L212823; Browning 22 pistol S# 655PV01750; Mossberg 12 Gauge Model #590 S#K422878; Norinco rifle 7.65 by 39 S# 3147335; colt pistol Model 90 lightweight S# GT01897; Smith and Wesson revolver stainless steel .44 magnum model #629 S# BRB9755; Ruger .22 Cal. Msark 2 Target pistol S#213-40889; Mauser Modelo Argention 1891 rifle S# S8440. A simple comparison

between what was sought and what was seized (based on the sworn affidavit of Officer Patterson) shows that only the Henry Big Boy and the cash were on the search warrant. According to Officer Patterson, there was a considerable amount of jewelry (about 50 pieces) recovered and this was photographed. In addition to what was noted on the inventory there were a number of more firearms and fifty pieces of assorted jewelry. [ Tr., 09/07/11, 62:2-6, 30:18-22].

When law enforcement officers encountered the guns, some of which were in cases or scabbards, they opened the casings to see whether it housed a weapon they were searching for. [Tr., 09/07/11, 63:11-14]. In addition to determining whether the guns matched the rifles described in the warrant, law enforcement officers also moved the guns to record their serial numbers. [Tr., 09/07/11, 57:3-12, 86:3-11]. When law enforcement officers encountered the Defendant's jewelry, they laid it out on a bed to be photographed. [Tr., 09/07/11, 29:1-7].

Following this search, Investigator Patterson began checking the serial numbers of the guns through the national databases to see if any were stolen. When a few returned stolen, he returned to the residence, seized the guns and arrested Mr. Trogdon for yet a second time. He was first arrested on October 28, 2010. [Tr., 09/07/11, 87:22-25, 88:1].

As more items were checked, and were found to be stolen based on their serial numbers, in some cases, or pictures shown to prospective victims in other cases, more victims came forward. As a result, eight more search warrants were issued seeking to search Mr. Trogdon's home. [Envelope 4, Defendant's Exhibits 2-9, 09/07/11]. Many of the affidavits were based on the same information and the warrants sought much of the same property. Based on the recovered evidence, Mr. Trogdon was charged in multiple cases that were ultimately consolidated into the LaPlata case, number 10CR518.

On July 25, 2011, Mr. Trogdon's attorneys filed a motion to suppress the fruits of the November 30, 2010 search from evidence. [Vol. 1, pp. 164-186]. An evidentiary hearing was held on September 7, 2011, and the trial court issued a written ruling denying the motion on September 21, 2011. [Vol. 1, pp. 225-232].

Mr. Trogdon's trial began on January 9, 2012. The jury returned their verdicts on January 18, 2012. At trial, the Prosecution showed the jury 33 different stolen items, guns, tools, bows an a ring. The people who believe that Mr. Trogdon stole those items from them testified at trial. The fifteen victims testifying regarding the 32 counts accusing Mr. Trogdon of burglary, trepassing, attempt theft and theft are set forth in Jury Instruction No. 2,[ Rec. Vol. II, pp. 396-397]. As noted above, Mr.

Trogdon was convicted of 16 of those counts. [Rec. Vol. II, pp. 567-575].

Beginning with Ms. Miller and through to Pam Lynd, the entirety of the prosecution's case was built upon either the finding of property that was labeled as stolen in Mr. Trogdon's house years after it had either been reported or suspected stolen, or based on assumptions and inferences drawn from those assumptions.

The prosecution's theory of the case was that Mr. Trogdon used his position as a trusted exterminator to go into people's homes unannounced and steal from them a little at a time. [Rec. 01/10/10, p. 298, lines 16-22; p. 313, lines 11-16]. It was Mr. Trogdon's theory that the people were building a case based upon drawing inferences from faulty assumptions. [Rec. 01/10/10, p. 314].

The jury returned its verdicts of guilty and not-guilty on January 18, 2012 [Rec. 01/18/12; pp. 1463-1468; Vol. III, pp. 480-483]. Specifically, Mr. Trogdon was convicted of second degree burglary from Monte and Marsha Miller, Count 1, though there is no property associated with this in so far as Ms. Miller said she did not see him steal anything [Rec. 01/13/10, pp. 1341-1342]. Mr. Trogdon was convicted or Count 3, misdemeanor theft, from Thomas Jones for the Henry Big Boy that was found at his property on November 30, 2010. Based on the Ruger .22 Caliber that was seized, but not listed in the November 30, 2010 warrant, Mr. Trogdon was

convicted of count 7, misdemeanor theft from Mr. John T. Llewellyn. Mr. Trogdon was convicted in count 9, of misdemeanor theft for stealing from Janice Roberts, a .38 caliber Rossi. This was found at a later search.

Mr. Trogdon was also convicted of Count 11, criminal attempt to commit theft based on testimony from Vernon and Terry Sower. Like in the case of the Millers, no property was actually taken and could not be linked to Mr. Trogdon.

For weapons taken from Mr. William Neder, Mr. Trogdon was convicted of Counts 14, 15 and 18. Mr. Trogdon was convicted also in Count 19 for stealing a safe, 8 firearms, ammunition magazines, currency and flashlights, from Mr. Neder. All of these items were taken in 2007 or 2008. Mr. Neder was not able testify with certainty about when they were taken. But, it was some years before the search in November, 2010. [Rec. 01/12/12, pp. 1063-1070].

Mr. Trogdon was convicted in Count 17, for theft of two shotguns, bow, bags and climbing gear from Todd Shelton. These items were also recovered after the original search on November 30, 2010. From Paul Day, Mr. Trogdon was convicted in County 21 of first degree criminal trespass. It is instructive to note that on two other counts involving Mr. Day, Mr. Trogdon was acquitted – theft of $30,000.00 cash and second degree burglary. [Rec. 01/18/12, pp. 1466-1467].

Mr. Trogdon was convicted of stealing tools from Arthur Combs in Count 26, resulting in a conviction of a class 2 misdemeanor. From Ms. Elaine Hyde, Mr. Trogdon was convicted of Counts 27 and 28 of a class 3 felony for second degree burglary and a class 4 felony for theft for stealing a diamond ring, a gold necklace and a gold coin. Ms. Hyde was not able to identify the ring from a picture, according to the detective who showed her the picture. [Rec. 01/13/12, pp. 1274-1276; *see also,* Rec. 01/12/12, pp. 1025 and 1034]. Ms. Hyde reported the thefts in December, 2009 and testified that Mr. Trogdon always made appointments to come do work. There was no testimony that he was in her house unlawfully. [Rec. 01/12/12, pp. 1025-1034].

Mr. Trogdon was convicted of Count 30, theft from Bill Dawson of a Norinco Ak-47, resulting in a class 1 misdemeanor. Finally, Mr. Trogdon was convicted of Count 32, a class 4 felony for the theft of a Ltd Edition Marlinn Rifle from Pam Lynd.

It is Mr. Trogdon's contention that the property for which he was convicted should have been suppressed and not allowed into evidence. Further, the testimony from the victims and law enforcement together with evidence introduced was insufficient to convict Mr. Trogdon of the crimes of conviction because all of it required inferences that needed to be drawn from other inferences. For these reasons,

Mr. Trogdon requests his convictions to be reversed.

## ARGUMENT

### I. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, WHICH ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

**ISSUE RAISED AND RULED UPON:** The issue presented was raised by the Defendant's suppression motion filed July 26, 2011 (Vol. I, p. 164-186), and denied on by District Judge Wilson in his written order on September 21, 2011 (Vol. I, pp. 225-232). The trial court heard testimony at a hearing on motions on September 7, 2011. Rec., Tr. September 7, 2011, *passim*.

**STANDARD OF REVIEW:** A ruling on a motion to suppress requires the trial court to make findings of historical fact and apply controlling legal standards to the established facts. *People v. Pate,* 71 P.3d 1005, 1010 (Colo.2003). "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." *Id.* However, the appellate court analyzes de novo the trial court's application of legal standards to those facts as a question of law. *People v. Kazmierski,* 25 P.3d 1207, 1210 (Colo.2001), *all cited in People v. Nelson*, 296 P.3d 177, 182 (Colo. App. 2012). *See also*, *People v. Burola*, 848 P.2d 958, 964-965 (Colo. 1993)

**SUMMARY OF THE ARGUMENT:** Law enforcement officers conducted a search of Mr. Trogdon's home on November 30, 2010. However, the warrant sought out specific property. Officers found and seized many items that were not in that warrant. In an effort to clean up the warrantless searches of Mr. Trogdon's home and to provide warrants for property already seized, officers came back with new warrants on eight more occasions. Mr. Trogdon argues that it was improper to try to correct the warrantless search and that any of the items seized after November 30, 2010 should have been suppressed. Further, the items of import have been identified in the fact section above and the admission of those items was not harmless beyond a reasonable doubt.

Mr. Trogdon argues that the plain view and inevitable discovery exceptions do not apply in this case. Further, in it ruling, the trial court then made findings of fact and conclusions of law that were incorrect and not supported by the record as to law enforcement possessing probable cause for the search. The trial court also found exigent circumstances existed but applied the incorrect legal standard and made no findings of fact that would support the correct legal standard. The warrantless search was not valid, and the fruits cannot besaved by an exception to the exclusionary rule.

The evidentiary fruit resulting from the warrantless search of the Mr.

Trogdon's home was obtained in violation of the Mr. Trogdon's rights under the Fourth Amendment to the Constitution of the United States and Article II, Section 7 of the Colorado Constitution, and therefore should have been suppressed from evidence at trial.

**DISCUSSION**

A. The Plain View Exception to the Warrant Requirement Does Not Justify the Warrantless Search

As the trial court noted in the Order Regarding Motions, the Defendant's suppression motion did not challenge the legality of the November 30, 2010 warrant that authorized the first search of his home. Vol. I, p.226. Rather, the Defendant argued that law enforcement officers illegally exceeded the authority granted by the November 30, 2010 search warrant, and in so doing, discovered the evidence which led to his arrest, subsequent searches of his home, and ultimately this case. Vol. I, p.1667.

In addition, the trial court should have suppressed the money. It was described in the Affidavit for Search Warrant and in the Search Warrant as "large amounts of cash (over $1000.00)," Rec. Envelope 4, Nov 30 2010, Exhibit 1 in Motions hearing held on 7 Sept 2011. On the Return and Inventory for Search Warrant (*Id.*),

$10,000.00 cash is reported having been recovered. The identification of the cash was not specific as to denominations of the bills and other indicia of reliability. The Millers (Conviction Count 1) never described with particularity the denominations of the bills they kept.

Mr. Trogdon's counsel argued this in their written Motion to Suppress, Vol. I, p. 169, ¶¶ 17 - 19. The trial court did not specifically address the cash in his written order issued on September 21, 2011 and there does not seem to be any request for reconsideration of that order or objection to the introduction of the mention of the cash at trial. At no time during her testimony at trial was Ms. Miller asked to identify any of the cash that was recovered. A review of her testimony both at the preliminary hearing (Tr. May 19, 2011, pp. 8-36) and at trial (Tr.01/13/12, pp. 1213-1244), makes this clear.

In addition, Deputy Sheriff Dan Patterson testified that though $10,000.00 in cash was recovered at Mr. Trogdon's property during the search on November 30, 2011, there was no way that he could know whether it was connected with the Millers or any other alleged victim. *See,* Tr. Jan 10, 2012, pp. 365 (l. 25) -366 (ll. 1-6). And, note, too, Investigator Patterson testified that they were search for "tens of thousands of dollars worth of cash." Tr. Jan 10, 2012, p. 366, lines 8-9. The Millers had

reported losing $4,400.00 on or about October 27, 2010 and about $1,400.00 on two prior occasions, though Mr. Trogdon was never charged with these alleged thefts.

At the evidential hearing on the motion to suppress, Investigator Patterson also testified that there was no identifying information regarding either the cash missing from the Millers or from another alleged victim, Paul Day. Mr. Day claimed to have had $30,000.00 cash stolen from his house. *See,* Tr., Motions Hrg. 09/07/11, pp. 71-72. *See also,* the Affidavit for Search Warrant, Defendant's Ex. 1, to Motions Hearing. Note that search warrant 10 SW 89, Defendant's Exhibit 1 to the Hearing on Motions, included information from Archuleta cases as well. Rec. Tr., 9/7/2011, p. 37, lines 12-17.

"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." U.S. Const. amend. IV, *see also* Colo. Const. art. II, § 7. The Fourth Amendment and Article II §7's particularity requirements serve to "prevent general searches." *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016, 94 L.Ed.2d 72 (1987). "The requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id*. The particularity requirements also

demand sufficient descriptions such that they "enable the executing officer to reasonably ascertain and identify the things authorized to be seized." *People v. Roccaforte*, 919 P.2d 799, 803 (Colo. 1996); *People v. Hearty*, 644 P.2d 302, 312 (Colo. 1982) (particularity requirement "prevents the seizure of one thing under a warrant describing another").

In this case, it is not disputed that law enforcement's "photographing of the jewelry and recording serial numbers of all the guns at the defendant's house was a search of the defendant's home that was not authorized by the initial warrant." Vol. I, 226-7 (Order Regarding Motions). That this law enforcement conduct exceeded the warrant's scope and became a warrantless search is an admitted fact.

A warrantless search is presumptively "invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement." *Flippo v. West Virginia*, 528 U.S. 11, 12, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999); *New York v. Belton*, 453 U.S. 454, 457, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) ("It is a first principal of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so"); *Hoffman v. People*, 780 P.2d 471 (Colo.1989). While the Constitution of the United States and the Colorado Constitution treat warrantless searches similarly, Article II,

§ 7, of the Colorado Constitution affords even broader protections than the Fourth Amendment. *People v. Rodriguez,* 945 P.2d 1351 (Colo.1997); *People v. Rossman,* 140 P.3d 172 (Colo.App.,2006). The Government bears the burden of proof in justifying a warrantless search. *U.S. v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998); *U.S. v. Edwards*, 242 F.3d 928, 937 (10th Cir. 2001) ("Thegovernment has the burden of proving that an exception to the warrant requirement applies").

In this case, the People attempted to justify the warrantless search as falling within the Plain View exception to the warrant requirement. Tr.,09/07/11,117:18-19. The Plain View exception to the warrant requirement does not require law enforcement officers to "close their eyes to any evidence they plainly see while conducting otherwise legitimate searches." *Peoplev. Pitts*, 13 P.3d 1218,1222(Colo. 2000). Rather, police may seize any evidence in plain view "so long as: (1) the initial intrusion onto the premises was legitimate; (2) the police had a reasonable belief that the evidence seized was incriminating; and (3)the police had a lawful right of access to the object." *Id*.

Here, Mr. Trogdon does not contest the initial search or the warrant, save the identification of cash. Therefore, the first prong of the Plain View exception to the warrant requirement is not contested either.

The second prong of the Plain View exception to the warrant requirement demands that police have more than reasonable suspicion to believe the objects in plain view are incriminating, they must have probable cause to believe the evidence is incriminating and the incriminating nature must be immediately apparent. *See Arizona v. Hicks,* 480 U.S. 321, 326-28, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987); *People v. Smith,* 13 P.3d 300, 308-309 (Colo.2000); *People v. Najjar,* 984 P.2d 592, 597 (Colo.1999).

For example, "[i]f, during a search, a police officer sees stereo equipment that he suspects, but has no probable cause to believe, is stolen property, the officer may not move the equipment to record its serial number without violating the constitutional prohibition against an unreasonable search and seizure. The 'plain view' exception may be invoked only if the serial numbers can be recorded without moving the equipment, because then no possessory interest is involved." *People v. Conley*, 804 P.2d 240, 244-45 (Colo. Ct. App. 1990).

The November 30, 2010 search warrant authorized law enforcement officers to search Mr. Trogdon's home for a limited number of very specific items that were meticulously described in the warrant itself. However, instead of finding the all of the listed property, they found that some of the things sought were not there, but also

that there were many more things. [Tr., 09/07/11, 79:17-20] (Q: "Were all of the rifles kept in cases that required you to open them to inspect the rifles?" A: "I can't remember specifically if they all were, but it seems to me like they were"). Given the three sought-after rifle's very specific descriptions, once the cases were open it should have been immediately apparent whether or not the police had found what they were looking for, especially since Investigator Patterson described himself as being "fairly familiar" with rifles and their makes. [Tr., 09/07/11, 86:3-5]. Notably, the police didn't even have serial numbers for two of the three rifles they were searching for. [Tr., 09/07/11, 67:17-20.]

When the police observed that a particular rifle was not described in the warrant, their authority under the warrant to search that specific firearm and its case ended. Absent probable cause to believe that each individual rifle was "stolen property, the officer may not move the equipment to record its serial number without violating the constitutional prohibition against an unreasonable search and seizure." *Conley*, 804 P.2d at 244.

Mr. Trogdon acknowledges that some of the rifles' serial numbers were exposed to plain view upon opening the cases, however, law enforcement failed to note for which rifles this was the situation and there was no evidence presented to

the trial court that would differentiate the rifles with serial numbers in plain view from the rifles for which the police "had to roll the rifle over because the serial number was on the other side." [Tr., 09/07/11, 67:6-12]. Since it was the People's burden to prove by a preponderance of the evidence that the search was valid, the absence of evidence differentiating the two situations prevents them from arguing to save some of the rifles since there is no way to know which rifles could theoretically be saved.

Investigator Patterson testified as follows:

Q: "When you opened up one of the rifle cases, for instance, is it fair to say that when you opened it up, whether you recognized it as one of the three rifles that you were searching for or not, you were intent on taking the serial number from it?"

A: "Yes."

Tr., 09/07/11, 86:3-11. This shows that law enforcement intended to "bootstrap" the evidence into admissible evidence. Officer Patterson knew he had a "poison" problem. It is not a stretch to suggest, based on Officer Patterson's testimony during the suppression hearing that he had a suspicion that he would find stolen property at Mr. Trogdon's house, that he set up a warrantless search, and devised a way to try to save it later. Hence, the photographs.

During the search, law enforcement officers continued to completely ignore any possessory interest Mr. Trogdon or Mrs. Trogdon may have had in their jewelry that was not described in the warrant – which was all of it. At the motions hearing, Investigator Patterson was asked on cross-examination:

Q: "So that's what you did, asked about the jewelry or you saw the jewelry, you took it out, put it in the kind of position that somebody could photograph it so you could document all the jewelry in the house?"

A: "Yes."

Q: "That was true, whether it was a bracelet or a ring, you were just taking all the jewelry to see if in the future sometime somebody might identify it as having been stolen?"

A: "Yes."

[Tr., 09/07/11, 77:22-25, 78:1-6]. The Trogdons's bedroom was "covered with jewelry" that was "laid out" on display to be photographed. [Tr., 09/07/11, 29:1-7]. In total, law enforcement estimated that they found, moved, and photographed "maybe 50" pieces of jewelry of "all different kinds."[ Tr., 09/07/11, 30:18-22, 31:2-7]. This action was taken despite law enforcement knowing that they were moving and photographing jewelry that was not described in the warrant.[Tr.,

09/07/11, 87:3-6]. This is precisely the kind of general exploratory search tantamount to a rummaging that the Framers intended to prohibit.

Notably, law enforcement officers had two additional reasons for their conduct with respect to the jewelry: First, it was done for convenience; in anticipation of the jewelry being stolen the police did not want to have to execute multiple search warrants. [Tr., 09/07/11, 106:3-14]. Secondly, the police wanted to photograph all the jewelry "in case a victim might be able to identify it." [Tr., 09/07/11, 77:18-20]. At the time law enforcement officers had no knowledge of any victims beyond those already described in the warrant.

This conduct cannot satisfy the second prong of the Plain View exception to the warrant requirement. Law enforcement officers did not have probable cause to believe that any of the items they found were stolen. All facts leading the investigation to Mr. Trogdon were contained in the November 30, 2010 warrant's supporting affidavit. [Tr., 09/07/11 46:14-25, 47:1]. A neutral and detached magistrate determined that there was probable cause to search for the items listed in the warrant. However, law enforcement went into the search with a suspicion that they would find more items [Tr., 09/07/11, 57:25, 58:1-4]. The record is replete with examples that the incriminating nature of the firearms and jewelry was not

immediately apparent. In fact, law enforcement's sense of what was potentially stolen was so general that they "felt like under the circumstances that if there was a picture on the wall that it could have been stolen and I wanted to document it. So I pretty much documented his whole house." [Tr., 09/07/11, 32:13-17].

The jewelry was moved and photographed "to see if in the future sometime somebody might identify it as being stolen," and "in case a victim might be able to identify it," not because it was clearly stolen goods. Tr., 09/07/11, 77:18-25, 78:1-6.

The way Investigator Patterson treated the located guns was similar with regard to the lack of an incriminating nature. Investigator Patterson has his own policy about searching firearms that he applied to this case: "As a general rule, I have always checked serial numbers on any weapons I come in contact with to make sure they're not stolen, whether it's a search warrant or a traffic stop or whatever the case may be, and it's every time we opened up a case and looked at the weapon, we went ahead and documented the serial number." [Tr., 09/07/11, 57:3-12].

The record even goes so far as to show that had the incriminating nature of the evidence observed in plain view been immediately apparent, Investigator Patterson would have seized it:

Q: "If you, Officer, are involved in a search warrant and you see things that you

believe are contraband, whether it's noted in the search warrant or not, you would take that into your possession, would you not?"

A: "Yes."

Q: "If you were involved in a search warrant and things that you say – yourself use the term plain view and that when you looked at them you knew, even if it wasn't in the search warrant, that these things were illegal, you would take them." A: "Yes." [Tr., 09/07/11 94:13-24]. Investigator Patterson did not take a single gun or a single piece of jewelry during the search pursuant to the November 30, 2010 warrant.

There is nothing in the record to support the conclusion that any particular one of the forty-two guns was stolen as opposed to owned by Mr. Trogdon, as ownership interests can't be readily discerned by mere possession and Investigator Patterson's intent was to check the serial numbers later to see if the guns were stolen.

Investigator Patterson's conduct is a far cry from happening upon an item where there is probable cause to believe the item is stolen *and* its incriminating nature is immediately apparent. Neither the probable cause nor the immediacy and incriminating nature requirements of the Plain View exception to the warrant requirement were satisfied. Any items in plain view were indiscriminately moved, searched, and recorded, without regard to the strict constitutional requirements

governing these actions.

B. The Trial Court's Findings of Fact and Conclusions of Law Regarding Probable Cause Were Incorrect and Not Supported By the Record

The trial court elected to save the searches (of which there appear to be roughly one hundred individual warrantless searches) by finding that Investigator Patterson had probable cause to conduct a warrantless search of the forty-two guns and numerous pieces of jewelry. Vol. 1, p.227. In the Order Regarding Motions, the trial court found Investigator Patterson possessed a suspicion that everyone who had used the Defendant's exterminator services was a potential victim, and that this suspicion "grew into probable cause during thesearch." Vol. I, p.227. The trial court based this conclusion on three things: First, the November 30, 2010 warrant named eight victims who had previously employed the Defendant. *Id.* Second, the Defendant had "conducted his pest control business for at least eight years and had presumably been in numerous homes in the two counties," with more victims coming forward as the case progressed. *Id*. Third, the first two factors combined with the large amount of jewelryand guns amounted to probable cause to believe that "most of the jewelry and guns, if not all of them, were stolen." *Id*.

The trial court's finding of probable cause, however, is directly contradicted

byInvestigator Patterson's own admission that he did not possess probable cause to conduct a warrantless search. ("I felt I had *reasonable suspicion* to believe that most of those guns might be stolen") Tr., 09/07/11, 69:2-3 (emphasis supplied).

Investigator Patterson has been employed as a law enforcement officer with the La Plata County Sherriff's Office for twenty years and was the lead investigator on the case. [Tr., 09/07/11, 43:3-13]. A twenty-year veteran lead investigator knows the difference between probable cause and reasonable suspicion. *See, e.g., United States v. Nicholson*, 721 F.3d 1236, 1239 (10th Cir. 2013) ("[m]istakes of law made by an officer are objectively unreasonable"), *see also Sherouse v. Ratchner*, 573 F.3d 1055, 1059 (10th Cir. 2009) ("While an officer's reasonable but mistaken understanding of the facts justifying a search or seizure does not negate the legitimacy of a probable cause determination, an officer's reasonable but mistaken understanding of the applicable law he is enforcing does").

If Investigator Patterson believed he had probable cause he would have said so. Instead, Investigator Patterson testified under oath that he possessed reasonable suspicion, and the court must take him at his word. Moreover, Investigator Patterson testified that he believed *most* of the guns *might* be stolen, but failed to specify (and the trial court's ruling omits this as well) how he would know which of the guns

might *not* be stolen. That is, the record lacks any indication which would allow the trial court to find Investigator Patterson had any way to distinguish between the guns he thought might be stolen and the ones he thought were legitimately owned. Since he believed that only most of the guns might be stolen, Investigator Patterson reasonably believed that some unknown portion of the guns was lawfully Mr. Trogdon's property, and had no way of knowing which ones were which. Also of note is that trial court expanded Investigator Patterson's suspicion to include "most, if not all of them [the guns]," instead of just "most of those guns." [Vol 1., p. 227, Tr., 69:2-3].

Additionally, and as noted above, Investigator Patterson's lack of probable cause is emphasized by his actions: no guns were seized. If Investigator Patterson had probable cause to believe the guns were stolen, and the incriminating nature of those guns was immediately apparent, then he would have seized them. To have done otherwise means that a seasoned law enforcement officer allowed firearms which he had probable cause to believe were stolen remain in the possession of the man he believed had stolen them. The likelihood of this scenario is so remote as to be non-existent, and is in fact confirmed to be non-existent by Investigator Patterson's own testimony.

Even setting aside Investigator Patterson's words and conduct which do not support the ruling, the trial court's reasoning does not support a finding that probable cause existed to conduct a warrantless search. The trial court's first supporting factor is that the warrant named eight victims who had previouslyemployed Mr. Trogdon. Vol. 1, p.227. Howeverthisfactoradds little to the probable cause calculation and fundamentally amounts to a propensity argument.

The trial court was correct that the investigation had turned up eight victims. The trial court was also correct that a search warrant had issued for Mr. Trogdon's residence. Thesefactsonlyshow that law enforcement had sufficient cause to obtain a search warrant for thelisted items which werenot foundat Mr. Trogdon's home. The totality of information gathered by the investigation was included in the supporting affidavit, and the record does not show that any new information was gained by law enforcement between signing the affidavit and executing the warrant later the same day.

Instead, the trial court's reasoning here is that the issuance of a search warrant for items not found can help support probablecauseto believethatdifferentitemsmay somehow be illicit. This reasoning defeats the purpose of the warrant requirement and runs the risk of expanding warrants well beyond their authorized scope.

The trial court's second basis was that Mr. Trogdon "conducted his pest control business for at least eight years and had presumably been in numerous homes in the two counties." Vol. 1, p.227. This, again, fails to add any meaningful analysis to the probable cause calculation. The trial court had no basis in the record, or any other way of knowing, whether Mr. Trogdon had actually been in anyone's home besides the eight listed victims. For example, there was nothing before the trial court at the motions hearing to say that Mr. Trogdon never had any employees. The trial court here is presuming that Mr. Trogdon's business history was essentially a front, granting him access to unsuspecting individuals' homes where he had the opportunity to steal. This is pure speculation by the trial court, and cannot help form the basis for probable cause.

Finally, the trial court combined the first two factors with the quantity of jewelry and guns found, and determined that probable cause existed to believe that "most of the jewelry and guns, if not all of them, were stolen." *Id.* "Although the constitutional requirement of a warrant can be excused if exigent circumstances are present, the probable cause requirements are at least as strict in warrantless searches as in those [executed] pursuant to a warrant." *People v. Winpigler*, 8 P.3d 439, 444 (Colo. 1999) (internal quotations omitted). Probable cause "requires the police to

establish that reasonable grounds existed to believe that contraband or evidence of criminal activity was located in the area to be searched" based on a totality of the circumstances. *Id*.

The police established probable cause to search Mr. Trogdon's home for a limited number of specific items based on the complaints of eight alleged victims. The police suspected Mr. Trogdon's pest control business was the link between 'cold' burglary cases and recovering the missing property. Once in Mr. Trogdon's home, the police failed to find any of the items which the totality of their investigation led them to believe would be there. However, the trial court found that sheer volume of items *not* believed to be stolen at the time amounted to a reasonable basis to believe that "most […] if not all" of those items were in fact stolen. [Vol. 1, p. 227]. This stretches the meaning of probable cause analysis beyond its breaking point.

In addition the logically flawed reasoning, the trial court's ruling was not supported by the record, in fact it was contradicted by it, and therefore the ultimate constitutional decision is properly subject to correction on appeal. *See People v. Quezada*, 731 P.2d 730, 732-3 (Colo. 1987) ("A court's findings of historical fact are entitled to deference by a reviewing court and will not be overturned *if supported by*

*competent evidence* in the record.... An ultimate conclusion of constitutional law that is inconsistent with or unsupported by evidentiary findings, however, is subject to correction by a reviewing court, as is a court's application of an erroneous legal standard to the facts of the case") (emphasis supplied).

To this point, Mr. Trogdon notes that the trial court found only that Investigator Patterson possessed probable cause as to the guns and jewelry. The trial court did not find that the Plain View exception to the warrant requirement (the People's justification for the warrantless search) applied as it made no findings of fact as to the incriminating nature of the jewelry and guns. Therefore, the trial court could not have believed that the People had proved the Plain View exception applied to this warrantless search.

C.<u>The Trial Court Applied an Incorrect Legal Standard to the Exigent Circumstances Doctrine and Its Findings of Fact and Conclusions of Law Are Insufficient to Support the Exception</u>

Since the trial court did not make any findings of fact or conclusions of law regarding the incriminating nature of the warrantless search's objects, yet acknowledged that a warrantless search occurred, a different exception to the warrant requirement (one not argued by the People) must apply for the search to pass

constitutional standards. In its Order Regarding Motions, the trial court justifed the warrantless search as being permissible under exigent circumstances. Vol. 1, p.227. "A warrantless search is invalid unless it is supported by probable cause and is justified under one of the narrowly defined exceptions to the warrant requirement." *Mendez v. People*, 986 P.2d 275, 281-82 (Colo. 1999), *People v. Garcia,* 752 P.2d 570, 581 (Colo.1988). "One such exception applies when exigent circumstances exist that necessitate immediate police action." *Id., People v. Kluhsman,* 980 P.2d 529, 534 (Colo.1999). Colorado courts have "recognized the exigent circumstances exception in the following three situations: (1) the bona fide "hot pursuit" of a fleeing suspect; (2) the risk of immediate destruction of evidence; and (3) a colorable claim of an emergency which threatens the life or safety of another." *People v. Winpigler*, 8 P.3d 439, 443-44 (Colo. 1999). "The scope of the intrusion must be strictly circumscribed by the exigency justifying the initiation of the warrantless intrusion." *Id*., *People v. Wright,* 804 P.2d 866, 869 (Colo.1991).

The trial court found that an exigency existed because "Investigator Patterson had no way of knowing while conducting the search that the weapons and jewelry would not be disposed of or hidden by the defendant or his wife after the officers completed their search." Vol. 1, p. 227. This is not the correct legal standard for

justifying a warrantless search on exigent circumstances.

The correct legal inquiry courts must make when determining whether the risk of immediate destruction of evidence exists is: "whether there is a real or substantial likelihood that the contraband or known evidence on the premises might be removed or destroyed before a warrant could be obtained." *People v. Turner,* 660 P.2d 1284, 1288 (Colo. 1983), *disapproved on other grounds by People v. Schoondermark*, 759 P.2d 715, 719 (Colo. 1988). Moreover, "this perceived danger must be real and immediate." *Mendez*, 986 P.2d at 282, *People v. Crawford,* 891 P.2d 255, 258 (Colo.1995). "The mere fact that evidence is of a type that can be easily destroyed does not, in itself, constitute an exigent circumstance." *Id*.

The trial court did not make findings of fact or conclusions of law as to a real or substantial likelihood that evidence would be removed or destroyed before a new warrant could issue. The trial court's ruling is similarly absent any findings of fact or conclusion of law as to the veracity or immediacy of that danger.

Instead, the trial court found only that Investigator Patterson "had no way of knowing" if the guns and jewelry would be preserved. This finding does not fall within one of the "narrowly defined exceptions to the warrant requirement." *Id*, at 281. If Investigator Patterson really possessed probable cause to believe the guns and

jewelry were stolen, then he would have either seized the property or secured the residence while seeking a new search warrant. Investigator Patterson did neither, and his actions contradict the trial court's finding of exigency in both its immediacy and its veracity.

D. No Exception to the Exclusionary Rule Applies in This Case

"The Supreme Court adopted a good-faith exception to the application of the exclusionary rule and specifically applied that exception where'an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope,' even though the search warrant was later deemed to be invalid." *United States v. Herrera*, 444 F.3d 1238, 1249 (10th Cir.2006). "In this circuit, we have concluded that 'Leon's good faith exception applies only narrowly, and ordinarily only when an officer relies, in an objectively reasonable manner,on a mistake made by someone other than the officer.' " *United States v. Cos*, 498 F.3d 1115, 1132 (10th Cir.2007) (quoting Herrera, 444 F.3d at 1249). Since the issue in this case is that of a warrantless search, the Good Faith exception to the exclusionary rule does not apply.

Similarly, the Inevitable Discovery exception to the exclusionary rule does not apply. "The ability to subsequently obtain a lawful search warrant, after the illegal

search has occurred, does not satisfy the inevitable discovery exception requirements." *People v. Diaz*, 53 P.3d 1171, 1176 (Colo. 2002). Additionally, "[e]vidence is not admissible under the inevitable discovery exception based on speculation that the evidence would have been discovered anyway." *Id*. "The 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 werepursuing an independent investigation at the time the illegality occurred." *Id*. The evidence before the trial court on the Defendant's motion to suppress does not fulfill the Inevitable Discovery doctrine's requirements. To the contrary, the unjustified warrantless search provided law enforcement with the photographs and serial numbers which formed the basis of each subsequent search warrant and the lynchpin of the People's case. Without the photographs or serial numbers, law enforcement would have entirely lacked the ability to connect Mr. Trogdon's property to burglaries, especially the property on the counts of conviction. Any theory to the contrary is at best speculative ,and notably was not established by the People at the hearing.

Based on all of the foregoing, and the fact that the People relied heavily on the evidence improperly admitted to obtain the convictions they did. The trial court's

error in admitting the evidence against Mr. Trogdon, despite the illegal searches, was not harmless beyond a reasonable doubt. *People v. Burola*, 848 P.2d 958, 964-965 (Colo. 1993).

## II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. TROGDON ON EACH COUNT

**ISSUE RAISED AND RULED UPON**: This issue is raised by virtue of Mr. Trogon's convictions. He seeks a ruling from this court ordering his convictions vacated and remanding the matter to the trial court for entry of judgments of acquittal on all counts of conviction.

**STANDARD OF REVIEW:** This Court reviews a sufficiency of the evidence claim "de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the convictions." *Dempsey v. People,* 117 P.3d 800, 807 (Colo.2005). In doing so, the Court "must ask 'whether the evidence, viewed as a whole, and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crimes charged beyond a reasonable doubt.' *Kogan v. People,* 756 P.2d 945, 950 (Colo.1988), *abrogated on other grounds by Erickson v. People,* 951 P.2d 919, 923 (Colo.1998). The prosecution receives the benefit of every reasonable inference that could fairly

be drawn from the evidence. *Id.* However, presumption and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. *People v. Ayala,* 770 P.2d 1265, 1268 (Colo.1989) (citing *Tate v. People,* 125 Colo. 527, 541, 247 P.2d 665, 672 (1952)); *People v. Gibbons,* —— P.3d ——, ——, 2011 WL 4089964 (Colo.App. No. 09CA1184, Sept. 15, 2011). *See also, People v. Perez,* —P.3d----, 2013 WL 1908991(Colo.App.No.10CA0587, May 9, 2013,*cert. granted* People v. Perez, 2013 WL 6795153 (Colo. Dec 23, 2013) (NO. 13SC465)(Court of Appeals reversed conviction for identify theft because People failed to present sufficient evidence of an element of the crime).

In addition, more than a modicum of evidence is necessary to support a conviction beyond a reasonable doubt, *People v. Gonzales,* 666 P.2d 123, 128 (Colo.1983), and a criminal verdict may not be based on "guessing, speculation [,] or conjecture." *id*. (quoting *People v. Urso,* 129 Colo. 292, 297, 269 P.2d 709, 711 (1954)). *Perez, id.*

**SUMMARY:** Mr. Trogdon argues that the evidence, including the testimony from alleged victims is insufficient to support his convictions. These convictions were set forth above in the fact section at pages 7-9. It is Mr. Trogdon's contention that these convictions should be vacated because the evidence supporting the jury's verdict was

based on conjecture and an impermissible inferences.

**DISCUSSION:** In the cases of the counts of conviction it is clear from the testimony of the victims that the nexus between the property they lost and the alleged thefts or burglaries by Mr. Trogdon is tenuous. Further, it requires in all cases that an inference be drawn that because Mr. Trogdon was their exterminator that he had access to their homes AND stole from them. In the case of Mr. & Mrs. Miller, there is simply no nexus between their loss of money and the obvious and clear conjecture that it was Mr. Trogdon who took their money. This is true with Ms. Hyde and Ms. Lynd. That is, Mr. Trogdon did not have free access to their homes and he was only there with their permission. Regarding Ms. Lynd, Tr. 1/12/12, p. 951, lines 13-15; Regarding Ms. Hyde, Tr. 1/12/12, p. 1016, lines 7-9.

Second degree burglary requires that the People prove that a person knowlingly broke an entrance into, entered unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit a crime therein. §18-4-203(1), C.R.S. 2010, as amended. It is clear that Mr. Trogdon was allowed to stay in the Miller's home after being confronted by Ms. Miller. Not only that, there is no evidence that after finding him in her bedroom that she asked him to leave or that she engaged in any conduct that he would infer that she wanted

him to leave. This was underscored by the fact that he asked if he could get her dog a treat and she said that he could and she stayed with him while he gave the dog a treat out by the truck. One has to make an unreasonable inference from her description of events that he was not invited to her home or had no authority to be there. Ms. Miller never asked him to leave. *See,* Tr. Jan 13, 2012, pp. 1225, lines 18-20 ("I did not want to talk to him [Mr. Trogdon] because of what [Ms. Sower] told me"]; lines 21-25; pp. 1226 - 1229, lines 1-10; pp. 1239- 1241, lines 1-12.

When asked about the missing money on cross examination, Ms. Miller confirmed that regarding the loss of money in 2009 she did not contact police. And, that money had been in the dresser drawer where she found Mr. Trogdon on October 27, 2010. After the first moneys were lost or stolen, Mr. & Mrs. Miller put their case in a safe. And, the $4,400.00 she reported missing to the Sheriffs in October 2010, was stolen from the safe. And, Ms. Miller conceded that whomever took the money from the safe, must have known it was in the safe and not the dresser drawer. Ms. Miller watched Mr. Trogdon go directly to the dresser not to the safe. Tr. Jan 13, 2012, pp. 1241, lines 13-25 - 1244, line 1.

Ms. Miller speculated about who stole her money. That speculation led to inferences. Her cash was not identified and though cash was found, it should have

been suppressed, as argued above. Regardless, the evidence is insufficient for conviction on Count 1.

First, as argued above regarding the cash seized from Mr. Trogdon's property on November 30, 2010, there is no identifying information that that cash was taken from the Millers. In fact, Ms. Miller herself admitted on cross examination that she could not tell if any money was taken.

In similar fashion the People failed to make connections between the speculation of the victims and the elements of the crimes of conviction. In the case of Mr. Neder, it cannot be said that property found in Mr. Trogdon's home was from a recent burglary or theft of Mr. Neder's home. Mr. Neder reported the property stolen in 2008 [Tr. 1/12/12, p. 1040, lines 3-12]. These same principles apply to all of the counts of conviction. Ms. Hyde's thefts were not recent in so far as the finding of property at Mr. Trogdon's place was concerned. Nor was the property that allegedly belonged to Arthur Combs. The "recent" element was simply not present in these cases.

For the foregoing reasons, Mr. Trogdon's convictions should be vacated and the matter remanded for entry of judgments of acquittal on the counts of conviction.

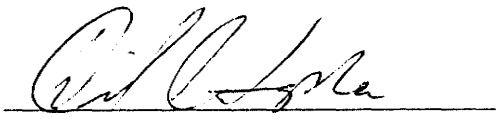
## CONCLUSION

WHEREFORE, Mr. Trogdon requests that this Court vacate his convictions and sentences and remand the matter for entry of judgment consistent with that result.

Dated this 25TH day of March, 2014

RESPECTFULLY SUBMITTED,

THE LAW OFFICE OF DAVID C. JAPHA, P.C.



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**CERTIFICATE OF SERVICE**

I hereby certify that a true an correct copy of the foregoing **CORRRECTED AMENDED OPENING BRIEF** has been served on the following either by US Mail or by ICCES, on this 25th day of March, 2014:

Ms. Victoria M. Cisneros, Assistant Attorney General
Office of the Attorney General
ICCES

Via US Mail to:
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