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| COURT OF APPEALS,<br>STATE OF COLORADO<br><br>Ralph L. Carr Judicial Center<br>2 East 14th Avenue<br>Denver, Colorado 80203<br><br>Appeal; Moffat District Court; Honorable Michael O'Hara; and Case Number 2014CR95 | |
| Plaintiff-Appellant<br>THE PEOPLE OF THE<br>STATE OF COLORADO<br><br>v.<br><br>Defendant-Appellee<br>Brian J. Good | |
| Douglas K. Wilson,<br>Colorado State Public Defender<br>LISA WEISZ<br>1300 Broadway, Suite 300<br>Denver, Colorado 80203<br><br>Phone: (303) 764-1400<br>Fax: (303) 764-1400<br>Email: PDApp.Service@coloradodefenders.us<br>Atty. Reg. #27553 | Case Number: 2014CA2434 |

# ANSWER BRIEF

## 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:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains **7,093** words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(b).

> In response to each issue raised, the Defendant-Appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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.

Lisa Weisz

LISA WEISZ, #27553

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## ISSUE PRESENTED

Whether the trial court correctly ruled that the defendant was entitled to immunity from prosecution under C.R.S. 18-1-711.

## STATEMENT OF THE CASE

Defendant was charged with possession of a controlled substance (DF4), § 18-18-403.5(1), (2)(a), C.R.S.; unlawful use of a controlled substance (DM2), § 18-18-404(1), C.R.S.; and possession of drug paraphernalia (PDO), § 18-18-428(1), C.R.S. (R. CF, p. 1) Defendant filed a pretrial motion to dismiss the charges under § 18-1-711, which provides immunity from prosecution for persons who suffer or report an emergency drug or alcohol overdose event. (R. CF, pp. 16-19) The prosecutor filed a written response. (R. CF, pp. 20-23) The trial court conducted an evidentiary hearing. (R. Tr. 12/8/14) The trial court granted the defense motion via both an oral ruling from the bench and a written order. (R. Tr. 12/9/14; R. CF, pp. 31-33)

## STATEMENT OF THE FACTS

On June 22, 2014, defendant rode his bicycle to the Moffat County Public Safety Center. (R. Tr. 12/8/14, pp.57-58) This building houses the jail, the 911 dispatch center, and all local law enforcement officers. (R. Tr. 12/9/14, p. 2) He began banging on a door at the rear of the Public Safety Center and was eventually contacted by Sergeant Booker. *Id.* Sergeant Booker was not in a patrol uniform, but

was a member of the sheriff's department. *Id.* Sergeant Booker was wearing fire resistant green cargo pants and a navy blue T-shirt bearing the insignia of the Mesa County Sheriff's Office Wildland Fighting Team. (R. Tr. 12/8/14, p. 18) He was with other officers wearing that same uniform. *Id.* The trial court found that anyone in defendant's shoes would expect that knocking on this particular door would result in contact from a law enforcement officer. (R. CF, p. 52)

Defendant identified himself and "said that he had essentially ingested methamphetamine that was laced with poison, that he believed the Mafia and his wife were trying to kill him." (R. Tr. 12/9/14, p. 2) Defendant remained on the scene and cooperated with law enforcement. *Id.* at 3. Sergeant Booker testified that defendant was "mashing his jaw real bad and seemed very fidgety," and that he was "visibly agitated." (R. Tr. 12/8/14, pp. 23-24) Defendant stated numerous times that he believed he had been poisoned. *Id.* at 36. Sergeant Booker asked defendant, "Do you feel like you need to go to the hospital?" *Id.* at 14. Defendant replied, "Yes, I feel like I need to go to the hospital." *Id.*

Sergeant Booker went inside to see if he could find someone from the police department or a patrol deputy that might be able to assist him. *Id.* at 26. Sergeant Booker asked Deputy Baptist to stay with defendant and watch him in the meantime.

*Id.* at 14. Deputy Baptist observed that defendant's speech was "rambled." (R. Tr. 12/8/14, p. 34)

Sergeant Booker located Corporal Luker inside and requested assistance. *Id.* at 41. Sergeant Booker explained that defendant had ingested methamphetamine, that defendant believed the methamphetamine was poisoned, and that defendant believed that the poisoned meth was affecting his health. *Id.* at 39, 41.

Corporal Luker followed Sergeant Booker outside. *Id.* at 26. Corporal Luker was wearing his police uniform. *Id.* at 47. Defendant told Corporal Luker that his wife had laced his methamphetamine with an unknown poison, that the unknown substance was causing him distress, and that he believed that whatever he was poisoned with was going to injure him permanently. *Id.* at 41. Defendant said that he could prove this, and produced a pipe for smoking methamphetamine and a baggie of methamphetamine. *Id.* at 42. Defendant continued repeating that he had been poisoned. *Id.* at 36-37. Corporal Luker asked defendant, "Do you want me to call an ambulance?" *Id.* at 29, 36-37, 43. Defendant replied, "Yes, call an ambulance." *Id.* Corporal Luker testified, "He said he was ingesting methamphetamine, believed it to be poisoned of some sort. So, yes, I called an ambulance for him." Id. at 44.

Corporal Luker contacted dispatch and requested an ambulance "for a possible methamphetamine overdose." (R. CF, p. 31; R. Tr. 12/8/14, p. 49) In the audio

recording of this dispatch call, Corporal Luker states, "Page an ambulance have them come to my location here at the safety center, check out this male party for a possible methamphetamine overdose." (R. Ex. #B (red envelope)). The hospital records indicated that the patient was arriving for a possible methamphetamine overdose. (R. CF, p. 33; R. Ex. #1, p. 2 ("Chief Complaint: Overdose"). Corporal Luker's written police report described the incident as a possible methamphetamine overdose. (R. Tr. 12/9/14, p. 5)

Corporal Luker testified that he interacted with the defendant for about five minutes. (R. Tr. 12/8/14, p. 48) The trial court found that defendant's entire interaction with the police lasted about fifteen minutes. (12/8/14, p. 79) At the hospital, defendant stated that he had snorted and smoked methamphetamine approximately 90 minutes prior to contacting police. *Id.* at 52.

At the hospital, defendant told the police and medical staff that he believed he had ingested poisoned methamphetamine, that "he didn't feel right from his meth," that his symptoms came on suddenly, and that his wife wanted to give him bad drugs to make him too stupid to talk to the police about what was going on. *Id.* at 59, 63-65. Defendant signed release forms to help the police determine the nature of the chemicals in his system. *Id.* at 64. He said that he felt generally weak, and "like I'm losing my mind." (R. Ex. #1, p. 7 medical records)

A urine screen confirmed that defendant had been using methamphetamine. *Id.* at 10. The hospital diagnosed defendant with "drug intoxication and dehydration." *Id.* p. 12. They treated the dehydration by providing a fluid bolus with 2000 ml of sodium chloride. *Id.* They treated the drug intoxication by providing 1 mg of Lorazepam (Antivan). *Id.* They refused to release defendant to the police until he was stabilized. It took four hours for the hospital to stabilize him. (12/8/14, p. 59) The medical records did not characterize the event as an emergency overdose. (R. Tr. 12/9/14, p. 5)

At the motions hearing, Corporal Luker testified that he did not perceive this as a high alert situation like respiratory arrest, but called an ambulance because, as he explained, "I again am not a medical professional. I don't know how much it was affecting his health to any degree of certainty. I did know that he exhibited signs of possible methamphetamine ingestion." (R. Tr. 12/8/14, p. 50) Corporal Luker testified that defendant was not overdosing or in need of emergent medical treatment, but that an ambulance was necessary because the jail would require medical clearance prior to booking defendant for possession of methamphetamine. Corporal Luker acknowledged that his dispatch call did not request a jail clearance, but requested assistance with a possible methamphetamine overdose. He also acknowledged that he

wanted the emergency medical professional to have the information that defendant had possibly been poisoned. (R. Tr. 12/8/14, pp. 52-54; 12/9/14, p. 5)

The trial court found Corporal Luker's motions hearing testimony, that an ambulance was called for jail clearance rather than a potential overdose, inconsistent with the oral and written statements that he made on the day of the incident. The trial court found that Corporal Luker's contemporaneous statements describing the statement as a possible methamphetamine overdose were credible and logical, and that the motions hearing testimony was incredible. The trial court rejected Corporal Luker's motions hearing testimony "that he did not really mean what he admittedly said on June 22." (R. Tr. 12/9/14, pp. 9-10; R. CF, p. 33)

Sergeant Booker and Deputy Baptist agreed that defendant was "high on methamphetamine," but they were not trained to conclude whether defendant had been poisoned. (R. CF, p. 33) They did not perceive defendant's condition as an emergency, but the trial court ruled that their differing perspective did not undermine the fact that Corporal Luker perceived the situation as a possible overdose that required an ambulance and medical attention at a hospital. (R. Tr. 12/9/14, p. 5)

The trial court ruled that defendant qualified for immunity under § 18-1-711 because he initiated this contact with law enforcement, identified himself, and reported what he believed to be an emergency caused by his ingestion of

methamphetamine combined with poison. The trial court rejected the prosecutor's argument that the statute only confers immunity to conditions that are medically confirmed to be a true emergency. Applying the statutory definition of an "emergency drug or alcohol overdose event," the trial court found that "there is no way that a reasonable lay person, much less a trained law enforcement officer designated as a drug recognition expert, could conclude that this was anything other than an emergency drug or alcohol overdose event, as defined." *Id.*

## SUMMARY OF THE ARGUMENT

The trial court's ruling should be affirmed because it is supported by competent facts in the record.

The Attorney General agrees that defendant initiated this contact, made a report to a law enforcement officer, remained at the scene, identified himself, cooperated, and was arrested based on the same course of events for which he is claiming immunity. The only contested element is whether defendant's report qualifies as "an emergency drug or alcohol overdose event."

This phrase is defined in pertinent part, as an acute condition resulting from the consumption of a controlled substance, or another substance with which a controlled substance was combined, that a layperson would reasonably believe to be a drug overdose that requires medical assistance.

Defendant reported in good faith that he had ingested methamphetamine combined with poison, and he told Corporal Luker, "I feel like I need to go to the hospital." Corporal Luker called an ambulance for a possible methamphetamine overdose. Corporal Luker described the incident in his written report as a possible methamphetamine overdose. These facts provide ample support for the trial court's ruling that a layperson would reasonably believe that the condition was a drug overdose requiring medical assistance.

Defendant had the burden of proving the elements of immunity by a preponderance of the evidence. The trial court's determination that this standard was met is well supported by the court's findings of historical fact. No error occurred, much less obvious and substantial plain error. Even if this error was preserved, the trial court did not abuse its discretion in granting defendant's motion.

The parties agree that the statute is unambiguous and there is no need to resort to tools of statutory construction. If this Court determines that the statute is ambiguous, nothing in the legislative history of the statute suggests that this law precludes application of this law to the circumstances of this case. The legislators were initially concerned that immunity could be extended to non-drug offenses like homicide occurring in the same criminal episode as the drug event. Those concerns were alleviated by amendments to the bill that limited immunity to drug crimes, and

clarified that the reporting party could still be prosecuted for non-drug offenses. Defendant here was charged with drug crimes, so there is no concern that he is receiving immunity for non-drug offenses. Any uncertainty must be resolved in favor of the defendant under the rule of lenity.

## ARGUMENT

### The trial court correctly ruled that the defendant was entitled to immunity from prosecution under C.R.S. 18-1-711.

*a. Standard of Review.*

The parties agree that the defendant had the burden of establishing the statutory conditions for immunity by a preponderance of the evidence in the trial court. *People v. Guenther*, 710 P.2d 971, 972, 980-81 (Colo. 1987) (construing make my day statute in 18-1-704.5 as authorizing trial court to dismiss pending criminal charge when defendant establishes statutory conditions for immunity by a preponderance of the evidence).

The preponderance of the evidence standard is satisfied if the trial court determines that it is more likely than not that the facts are as claimed. *People v. Groves*, 845 P.2d 1310, 1313 (Colo. App. 1992). The preponderance standard is more easily met than the clear and convincing standard, which is satisfied if the trial court determines that the contention is highly probable. *People ex rel. A.J.L.*, 243 P.3d 244,

251 (Colo. 2010). Both of these standards are easier to meet than proof beyond a reasonable doubt. *Id.*

The parties also agree that a trial court's findings of historical fact are entitled to deference. *People v. Arapu*, 2012 CO 42, ¶ 47 (trial court's factual determinations are afforded great deference and will not be disturbed unless they are unsupported by the record and clearly erroneous).

Defendant disagrees that this issue is preserved. The prosecutor below argued that there was no **actual** emergency. For example, the prosecutor argued that defendant "failed to establish that he was suffering from an overdose or emergency"; that his "lack of emergent situation is evidenced by the fact that he checked out of the hospital and attempted to walk out on his own volition"; that he "never said overdose"; and that the only reason that the officer called for medical assistance was because the jail would not accept intoxicated individuals for liability purposes. (R. CF, p. 23; R. Tr. 12/8/14, pp. 77, 75)

On appeal, the State is arguing for the first time that no reasonable person would have perceived an apparent emergency. (OB 21) This argument was not raised below and is reviewable for plain error only. *See* Crim. P. 52(b); *Martinez v. People*, 2015 CO 16, ¶¶14-15 (plain error applies when trial counsel objected for reasons other than those advanced on appeal).

Plain error review addresses error that is obvious and substantial and that so undermines the fundamental fairness of the proceeding itself as to cast serious doubt on the reliability of the judgment. *People v. Lancaster*, 2015 COA 93, ¶ 42.

Assuming that this issue is preserved, defendant disagrees with the State's position that this issue should be reviewed as a mixed question of fact and law. In support of its position, the State cites only *People v. Sotelo*, 2014 CO 74, ¶ 18, which is a Fourth Amendment case that is inapposite here. Defendant's position is that this issue should be reviewed for an abuse of discretion.

A trial court's determination that the defendant has satisfied his burden of proving the statutory conditions of immunity by a preponderance of the evidence, is reviewed for an abuse of discretion. *People v. Eckert*, 919 P.2d 962, 965 (Colo. App. 1996) (concluding that trial court did not abuse its discretion in determining that defendant had not established by a preponderance of the evidence that he was entitled to immunity under 18-1-704.5); *People v. Wood*, 255 P.3d 1136, 1140-41 & n.4 (Colo. 2011) (pretrial finding of immunity under 18-1-704.5 is analogous to dismissal at a preliminary hearing; appellate courts review whether the trial court exceeded its general authority in finding immunity); *People v. Huggins*, 220 P.3d 977, 378 (Colo. App. 2009) (dismissal of charges at preliminary hearing is reviewed for abuse of discretion).

Defendant agrees that statutory interpretation is reviewed *de novo*, but contends that it is unnecessary to resort to legislative history or other rules of statutory interpretation where, as here, the State concedes that the statute is unambiguous. *Candelaria v. People*, 2013 CO 47, ¶ 12 (when statutory language is unambiguous, courts do not resort to legislative history or other rules of statutory construction).

The State argues that statutory immunity must be strictly construed, citing *Colorado Dep't of Corr. v. Nieto*, 993 P.2d 493, 506 (Colo. 2000), which held that statutes in derogation of common law are strictly construed. Drug offenses did not exist at common law, so immunity from drug offenses are not in derogation of the common law. F. Lee Bailey and Kenneth J. Fishman, *Handling Narcotic and Drug Cases* § 243 (most narcotics statutes define offenses not known to common law); Wayne R. LaFave, 1 *Substantive Criminal Law* § 2.1(b),(c) (2003 & sup. 2015) (discussing common law offenses).

The State relies on cases decided in 1979 and 1984 in New Hampshire, but those non-binding extra-jurisdictional authorities pertain to wholly unrelated topics (physician-patient privilege and mandatory child abuse reporting statutes); and the 1979 case was superseded by statute. *In re Tracy M.*, 624 A.2d 963, 966 (N.H. 1993) (recognizing abrogation of *In re Brenda H.*, 402 A.2d 169, 171 (N.H. 1979)).

The correct standard of review is either plain error if unpreserved, or an abuse of discretion if preserved.

*b. Plain Language.*

The trial court granted immunity under the following statute:

**§ 18-1-711. Immunity for persons who suffer or report an emergency drug or alcohol overdose event--definitions**

(1) A person shall be immune from criminal prosecution for an offense described in subsection (3) of this section if:

(a) The person reports in good faith an emergency drug or alcohol overdose event to a law enforcement officer, to the 911 system, or to a medical provider;

(b) The person remains at the scene of the event until a law enforcement officer or an emergency medical responder arrives or the person remains at the facilities of the medical provider until a law enforcement officer arrives;

(c) The person identifies himself or herself to, and cooperates with, the law enforcement officer, emergency medical responder, or medical provider; and

(d) The offense arises from the same course of events from which the emergency drug or alcohol overdose event arose.

(2) The immunity described in subsection (1) of this section also extends to the person who suffered the emergency drug or alcohol overdose event if all of the conditions of subsection (1) are satisfied.

(3) The immunity described in subsection (1) of this section shall apply to [the offenses charged in this case]

. . . .

(5) As used in this section, unless the context otherwise requires, "emergency drug or alcohol overdose event" means an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance or alcohol was combined, and that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.

Subsections (1)(b)-(d) are not at issue; the opening brief concedes that those conditions were met. The only pertinent provisions are (1)(a), which requires that the "person reports in good faith an emergency drug or alcohol overdose event," and the definition of this phrase in subsection (5). The State's position is that the language of the statute is unambiguous and that this Court should apply the plain language of the statute.

The trial court's determination that defendant established the statutory conditions for immunity by a preponderance of the evidence is supported by competent facts in the record. The State agrees that defendant initiated this contact, made a report to a law enforcement officer, remained at the scene, identified himself, cooperated, and was arrested based on the same course of events for which he is claiming immunity.

The only contested element is whether defendant's report qualifies as "an emergency drug or alcohol overdose event." This phrase is defined in pertinent part, as an acute condition resulting from the consumption of a controlled substance, or

another substance with which a controlled substance was combined, that a layperson would reasonably believe to be a drug overdose that requires medical assistance.

Here, defendant reported to police that he had ingested methamphetamine combined with poison, that the substances were causing him distress, that the poison was going to injure him permanently, and that, "I feel like I need to go to the hospital." Defendant made this statement to Sergeant Booker near the beginning of this encounter, even before Corporal Luker became involved. It was apparent to everyone present that this was not a joke to defendant, that he was speaking earnestly and in good faith, that he was truthful about the fact that he had used methamphetamine that was potentially combined with some other substance, and that whatever defendant had ingested was affecting him adversely. He was fidgety, mashing his jaws, visibly agitated, afraid, and rambling about the mafia. Corporal Luker testified that he could not be sure of the extent to which the substances were affecting defendant. He called an ambulance for a possible methamphetamine overdose, and he described the incident in his written report as a possible methamphetamine overdose. The hospital staff confirmed that defendant was suffering from "drug intoxication" and treated him with lorazepam.

These facts provide ample support for the trial court's ruling that a layperson would reasonably believe that the condition was a drug overdose requiring medical

assistance. Defendant was not required to prove the conditions of immunity beyond a reasonable doubt, or even establish that they were highly probable. He was required to prove the conditions by a preponderance of the evidence, and the trial court did not abuse its discretion in ruling that this burden was satisfied. There was no error, much less plain error.

The State argues that defendant does not qualify for immunity because he reported a crime rather than a medical condition. Defendant "said that he had essentially ingested methamphetamine that was laced with poison, that he believed the Mafia and his wife were trying to kill him." This statement reports both a crime and a medical condition. The fact that defendant reported his medical condition simultaneously to reporting a crime, does not negate in the slightest his contention that he had been poisoned. Nothing in section 18-1-711 precludes immunity in situations where the report of a medical condition also encompasses a criminal accusation.

Under the State's logic, an underage girl who goes to the police station and states that her boyfriend put drugs in her cocktail causing her to feel unwell and fear permanent injury, would receive no protection under the statute because her report also encompasses a criminal accusation.

The State argues that defendant did not complain of any physical illness. Section 18-1-711 on its face applies to either physical or mental distress. Regardless, defendant suffered from both. He told police that the poisoned drugs were not only causing him distress, but that he believed they would cause him permanent injury. He stated at the hospital that he was weak, that he did not "feel right from the meth," that he felt he was losing his mind, and that these symptoms had a sudden onset. He gave police full access to his medical records so that they could help determine the nature of the chemicals in his body. The hospital treated him with fluids and lorazepam. Thus, defendant's complaints pertained to both his mental and physical condition.

The State argues that defendant did not request medical attention "of his own accord," and did not request an ambulance until one was offered. Section 18-1-711 does not require talismanic language, such as a request for an ambulance or for medical attention. It only requires that the suffering individual report the "event" to a law enforcement officer, the 911 system, or to a medical provider. Defendant went to the police station on his own accord, and he reported the medical event on his own accord. It made no difference whether defendant requested an ambulance spontaneously, or whether he accepted an ambulance when offered. The trial court correctly determined that "ultimately what we're left with is an individual contacting

law enforcement for help because he's poisoned, combined with the use of [a] controlled substance. It fits directly into the definition provided in subsection (5)." (R. Tr. 12/9/14, p. 7)

The State argues that the police did not subjectively believe defendant was overdosing. This argument contradicts the trial court's findings of fact. The trial court found that at the time of the incident, Corporal Luker believed that defendant was experiencing a possible methamphetamine overdose. This finding is supported by the record. Corporal Luker made statements orally and in writing to this effect, and the medical records indicate that the patient's chief complaint was "overdose." Because the trial court resolved this factual dispute in a way that is fully supported by the record, and because the trial court was in the best position to make credibility determinations, the finding is not clearly erroneous and entitled to deference.

The State argues that defendant was not comatose and that his symptoms were not so severe as to cause a reasonable person to conclude that defendant was suffering from an emergency drug overdose event. Section 18-1-711 is not limited to situations where the individual becomes nonresponsive. The statute does not require the reporting party to wait to call police until circumstances become desperate. The definition of "overdose event" includes physical illness, mania, and hysteria—conditions a layperson would reasonably perceive to describe defendant's condition.

This is confirmed by the fact that Corporal Luker reasonably believed that defendant was suffering from possible methamphetamine overdose. The State argues that Corporal Luker did not really believe what he said, but the trial court rejected this claim as a matter of fact.

As the trial court noted, "really this turns less on the law than it does on the facts." (R. Tr. 12/8/14, p. 3) The trial court's factual findings should govern this case. Even if the trial court's ruling is legally incorrect, no Colorado case has interpreted this statute to date, so there are no cases that could have alerted the trial court to any alleged errors arising from its ruling. Any such errors would not be obvious. No error occurred, much less obvious and substantial plain error.

*c. Legislative History.*

The parties agree that the statute is unambiguous and that there is no need to resort to tools of statutory construction. To the extent that there is any ambiguity, the State argues that the legislative history demonstrates that the legislature sought to prevent the exact factual scenario presented in this case. Specifically, the State contends that the legislature limited immunity to "emergency alcohol or drug overdose events" in response to prosecutors' concerns that the law "could be misapplied to provide blanket immunity from felony prosecution where an individual

simply reported his or her own drug use to escape prosecution." (OB 26) This is inaccurate.

The language limiting immunity to "emergency alcohol or drug over dose events," was not added to the bill as an amendment. This phrase, and its statutory definition, existed in the original language of the bill when it was first introduced in the Senate on January 11, 2012. *See* http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/710AEDBE85DD498087257981007F0F6E?open&file=020_01.pdf

The bill was referred to the Senate Judiciary Committee, which met on February 1, 2012. The bill's sponsor stated, "I understand that the DA's Council is opposed to it but I'm not quite sure what their reasoning is." *Hearing on S.B. 12-020 before the S. Judiciary Comm.*, 68th Gen. Assemb., 2d Reg. Sess. (February 1, 2012) (statements of Senator Irene Aguilar at 27:42).

The Executive Director of the Colorado District Attorney's Counsel (CDAC) responded that the CDAC believed as a policy matter that felonies should *never* qualify for immunity. *Id.* (statements of Tom Raynes). He asked that the bill be modified so that an individual reporting a medical event would not receive immunity, but could have that fact considered by the judge at sentencing. He explained that this would be similar to section 12-47-901(1)(a.5), (1.5), C.R.S., which offers immunity to minors,

and sentence mitigation to adults, who report that an underage person is "in need of medical assistance due to alcohol consumption." Mr. Raynes said:

> To start, I want to say real clearly that the effort here is laudable, and everybody's interested in getting people, motivating people to make these calls. The concern for the district attorneys and I think you're gonna hear from other law enforcement, is that immunizing potentially serious criminal conduct is not the way to go about this. And I'm a little concerned given the way the testimony's gone so far that we're talking about two very different things. One is this bill, and what it's attempting to do, and the other is a difference of opinion on the drug policy of the State of Colorado. I'm not here to argue that necessarily, but I hear it.
>
> And 1352 was an effort two years ago to really look at the drug policy in Colorado and I think it's important to understand that those discussions during the formation of that bill, in talking about drugs and what level they should be set at, chose to keep low level possession in Colorado at a felony level. I think that's important to remember as you listen to testimony because that was a policy that was followed. That may change, it may change this year, I understand that, but that's the current policy and those are the parameters I'm operating under when I'm addressing this bill.
>
> So, you have felony level for drug possession. And that's what you're talking about immunizing right now. It's a felony crime in Colorado. A few of the states that were referenced that have initiated some of this type of legislation, the one I heard again is New York. And it's important to know that in New York, low level possession is a misdemeanor. I think there's a distinction there because you're talking about immunizing misdemeanors versus felonies.
>
> So with that, I would say it's important to recognize what you're potentially doing with this. Yes, we want the calls made. We want people to do the right thing. But at what kind of

balancing with the current scheme of drug law? Do you really want to, say, under these offenses, even though it's a felony in Colorado, we're not gonna do this?

So if an individual gives a young lady a roofie, you know, and incapacitates that young lady to the point of other crimes, potentially, the fact that he is the one who administered this thing, were they sharing it? Did she know? Maybe she knew, I don't know. There could be situations in sharing that this is not a good policy. Heroin use, where a friend who injects you with heroin, do you really want to immunize that individual from that type of conduct?

So while I understand the goal, I do think there's a way to achieve a better result and there's a template for it and I think that template's in front of you, the handout I just gave you. In Title 12, the alcohol code, we heard a lot of these similar concerns with minors and alcohol several years ago. And this legislature took a very responsible approach to that.

And what it did, if you look at the statute in front of you [§ 12-47-901, C.R.S.], we tried to highlight a couple of relevant sections. So, in the first one that you have highlighted it talks about individuals who are over 18, who are providing alcohol or somehow giving alcohol to minors, that if they make the call, they don't get immunity. But they do get an instruction. The judge at any sentencing for the crime for which they were charged if they were the one who provided the alcohol to the minor, that's a mitigator the judge has to consider at sentencing, if the adult did that. Because, it's a recognition of, you did something wrong, we're gonna hold you accountable, but we're also going to take it into consideration at any sentencing on the crime.

On the flip side of that, on the next highlighted section in the handout, subsection 1.5, it talks about underage individuals. Now we're talking about the minors. So we're talking about the minors who are involved in the conduct. And the real effort of the legislation when we looked at this, is how can we encourage

minors who are participating in this activity illegally, but want to feel like they've got some safety net to call in if their friend is sick or potentially convulsing or passed out from alcohol. And we created an immunity provision for limited offenses in the alcohol code. These are low level offenses and they get immunized if they do the right thing and there's certain steps they have to follow.

So I think this is still the proper template to look at what the senator is trying to achieve here. And if you find something along the lines of immunity for minors in misdemeanor situations, and misdemeanor crimes, and I recognize right now the only drug crime we're potentially talking about a misdemeanor's a low level marijuana use, of any drug which we've made a misdemeanor in 1352, and perhaps paraphernalia. But if you immunize misdemeanors in that realm, and then as to the adults, you said, we're not giving you immunity, but we're gonna make the court take it into consideration, if you were the one who makes the call, I think you're gonna get good results.

I don't think even anyone who opposes me in this perspective would argue against me in saying that this piece of the alcohol code has had very positive effects. Law enforcement would anecdotally tell you the same thing. So those would be my concerns, and the solution I would attempt to offer, because I think that it can be done. I understand that we still have possession as a felony. But that's a whole different argument. That's a policy argument for another day, perhaps. . . .

[W]e're talking about the difference in misdemeanors and felonies. When you're talking about the minor in possession charges, the use, you're talking about misdemeanors. And what we're talking about in the bill, we're talking potentially about felonies. I think there's a distinction that you have to accept as a policy of the state that we don't align there for now. . . . So the distinction I would draw, Madam Chair, is that one, the felony misdemeanor distinction.

*Hearing on S.B. 12-020 before the S. Judiciary Comm.*, 68th Gen. Assemb., 2d Reg. Sess. (February 1, 2012) (statements of Tom Raynes at 29:00-36:48).

When Mr. Raynes finished speaking, Senator Steve King requested clarification about the rohypnol hypothetical. He asked if the man who administered the rohypnol would be immune from the charge of homicide under this bill if he called 911 before the woman died from an overdose. Mr. Raynes replied:

> No, but it's gonna be difficult to get through that case because if we immunized the conduct that he did—the sharing, the drug use—it's gonna be an odd case to say you committed homicide, but what you did you're immunized from in giving her the drug, it certainly convolutes the case.

*Id.* at 37:54-38:13.

The bill's sponsor expressed her understanding that the individual in rohypnol hypothetical "would still be chargeable for homicide." *Id.* at 40:11-25. The chairwoman added:

> Right, I was gonna follow up on that 'cause I think, I don't even think the facts are necessarily, as a matter of law, would be excluded, right? 'Cause as I'm reading this, what they would be immune from would be a charge of possession. So all the facts, I think, and tell me if I'm wrong about this, but all the facts—that they provided, maybe that they had the drugs on them, that they were the one that offered, that somehow that led to the death of the other—I think as a matter of proof, you could still introduce and prove all the same elements that they would have had to prove before on the charge of homicide. And if that's not right let me know, but I think that, it's not that they're barred from

> talking about it on a non-possession crime, I think they could still introduce 100% of the same facts.

*Id.* at 40:27-41:21 (statements of Sen. Morgan Carroll). She asked Mr. Raynes to comment on this. He replied:

> Madam Chair, no I think you're right. My point was just that it makes it kind of an intriguing presentation of the case to say, "I can't charge you with this piece of what you did, but I can charge you with this, and I'm gonna tell you about the other part anyway."

*Id.* at 41:21-41:37.

Margaret "Peg" Ackerman, a lobbyist for the County Sheriffs of Colorado, testified next. The sheriffs objected to the original bill because it extended immunity to distribution, manufacturing, dispensing, and sale. The sheriffs would support the bill if it limited immunity to low level users. *Id.* at 41:54-44:48.

Michael Doherty testified for the Attorney General's Criminal Justice Section. He objected to the original bill because it (1) extended immunity to all individuals acting in concert with the reporting party, and (2) extended immunity to distributors. He indicated that he would support the bill if immunity was limited to the individual who reported the event, and if distributors were excluded. *Id.* at 46:29-48:18.

A few days later, on February 13, 2012, the sponsor amended the bill so that it no longer provided immunity for the crime of drug distribution, or for any other crimes arising "from the same criminal episode" as the event that was the subject of

the report. Hearing on S.B. 12-020 before the S. Floor on Second Reading, 68th Gen. Assemb., 2d Reg. Sess. (Feb. 13, 2012) (statements of Rep. Aguilar). The Judiciary Committee's chairwoman summarized the February 1 meeting explained:

> The fundamental moral, and legal, and policy choice we were making is this: is it more important to save someone's life? Or is it more important to prosecute someone criminally for drug possession? . . . Who are we as a society if we think it is more important to criminally prosecute possession? . . . . Senator Aguilar has done great work to be very narrow in how she's crafted, this is not a situation that would lend itself to well to abuse. It is narrow.

*Id.* (statements of Rep. Carroll). Senator King expressed reservations:

> I think that there is a fear of unintended consequences from the district attorney's counsel, the county sheriffs of Colorado, and the attorney general, and a worry that potentially we are setting up an alibi or a situation where a person has committed a felony and as a result of this legislation has immunity. And I think that that is the concern of the attorney general, that is the concern of the county sheriffs, and that is the concern of the district attorney's counsel. And I just needed to voice that concern also.

*Id.* (statements of Sen. King).

The bill underwent various changes and was sent to a conference committee, which agreed that low level felonies would receive immunity in addition to misdemeanors. To ensure that immunity applied only to drug offenses and did not extend to non-drug offenses like the homicide discussed in the rohypnol hypothetical, the committee added the language to the bill:

> Nothing in this section shall be interpreted to prohibit the prosecution of a person for an offense other than [the enumerated drug offenses that qualified for immunity] or to limit the ability of a district attorney or a law enforcement officer to obtain or use evidence obtained from a report, recording, or any other statement provided . . . to investigate and prosecute an offense other than [the enumerated drug offenses that qualified for immunity].

*Senate Journal* 1085, 68th Gen. Assemb., 2d Reg. Sess. (May 3, 2012) ("First Report of First Conference Committee on S.B. 12-020").

On May 8, 2012, co-sponsor Representative Ken Summers moved that the House adopt this "amendment that was approved by the district attorneys that would help facilitate the 911 call to report incidences of drug or alcohol overdose events." The House adopted the report and unanimously passed the bill. Hearing on S.B. 12-020 before the H. Floor on House Consideration of First Conference Committee Report, 68th Gen. Assemb., 2d Reg. Sess. (May 8, 2012) (statement of Rep. Summers). The bill passed the senate and was signed by the Governor.

Thus, it is true that the Attorney General's Office and the District Attorney's Office expressed concerns, but they were not the same concerns described in the opening brief. Contrary to the claims made in the opening brief, the District Attorney's Council and the Attorney General's Office did not express any concerns that a proliferation of individuals would preemptively approach the police to confess their drug use to escape prosecution for drug crimes. As the trial court explained:

> I've been an attorney since '85 and a judge since '03. I've never seen someone go to law enforcement—go to law enforcement for help with a problem as a result of ingesting drugs. I've never heard of someone doing that until this case, and I suspect I'm not going to see that recur in my career. Generally speaking, individuals who voluntarily ingest controlled substances have zero interest in having interaction with law enforcement officers. It occurs to me that this is exactly why this statute was enacted.

(R. Tr. 12/9/14 p. 6)

The State relies on comments made by Senator King on February 13, 2012, and by Rep. Summers on May 8, 2012. (OB 26) Those comments pertained to whether immunity would preclude prosecution for non-drug offenses such as homicide that occurred contemporaneously with the drug event. There is no concern that defendant is inadvertently receiving immunity for some crime other than the possession and use of drugs that prompted him to approach law enforcement. The offenses charged in this case were drug offenses enumerated in the list of crimes that qualify for immunity under section 18-1-711: possession of a controlled substance under 18-18-403.5(2)(a), C.R.S.; use of a controlled substance under 18-18-404(1), C.R.S.; and possession of drug paraphernalia under C.R.S. 18-18-428, C.R.S.

With respect to the State's argument that defendant does not qualify for immunity because his report to police included a criminal accusation, the legislature

contemplated that drug events could occur simultaneously with other non-drug crimes. The legislative history demonstrates that one does not negate the other.

The State is correct that the purpose of the bill was to provide timely medical attention that would hopefully save lives. That purpose is fulfilled where, as here, an individual in good faith approaches police with a report of poisoning and is successfully treated at the hospital, thereby averting the potential for serious permanent injuries that could have resulted but for this intervention.

Finally, the rule of lenity requires courts to resolve ambiguities in the penal code in favor of a defendant's liberty interests. *Curtiss v. People*, 2014 COA 107, ¶ 7; U.S. Const. amend. V, XIV; Colo. Const. art. II, § 25.

## CONCLUSION

Mr. Good requests this Court to affirm the district court's ruling.

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CERTIFICATE OF SERVICE

I certify that, on August 31, 2015, a copy of this Answer Brief of Defendant-Appellee was electronically served through ICCES on Jacob Lofgren of the Attorney General's office.