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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; El Paso District Court; Honorable David L. Shakes; and Case Number 17CR705	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JESSIE MEDINA JR.	
Megan A. Ring Colorado State Public Defender JESSICA SOMMER 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #50860	Case Number: 18CA192
REPLY 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 and formatting requirements set forth in C.A.R. 28(g).

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

ARGUMENT

I. MR. MEDINA WAS ENTITLED TO THE OVERDOSE IMMUNITY INSTRUCTION.

The State first contends that any error related to the overdose immunity defense was harmless because the overdose immunity instruction should not have been given in the first place. AB at 11. The State does not contest that there was sufficient evidence to justify the defense. Rather, it claims that because Mr. Medina denied knowingly possessing the methamphetamine in his trial testimony, he forfeited any right to this instruction. *Id.*

This argument misconstrues the overdose immunity statute. This statute is not merely an affirmative defense; it provides for *immunity*. §18-1-711, C.R.S. ("A person is *immune* from arrest and prosecution for an offense described in subsection (3) of this section if…"); *People v. Guenther*, 740 P.2d 971, 975-76, 80 (Colo. 1987) (distinguishing between immunity statutes and affirmative defenses, and noting that immunity statutes provide "extraordinary protection" beyond affirmative defenses); *cf. People v. Alaniz*, 2016 COA 101, ¶35 (distinguishing

case law applying affirmative defenses in construing "make-my-day" immunity because "those cases did not involve statutory immunity provisions").

An affirmative defense admits the charged conduct but seeks to "justify, excuse, or mitigate it." *People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo. 1989); §18-1-710, C.R.S. ("The issues of justification or exemption from criminal liability under sections 18-1-701 to 18-1-709 are affirmative defenses."). In contrast, an immunity statute sets forth statutory conditions which, if met, "create a bar to criminal prosecution and *not merely an affirmative defense*." *See Guenther*, 740 P.2d at 975-76 (interpreting the "make-my-day" statute) (emphasis added).

To be sure, despite the fundamental differences between an affirmative defense and a statutory grant of immunity, where immunity is denied in a pretrial motion, the same statutory conditions for immunity can be raised as an affirmative defense. *Id.* at 981. However, simply because immunity can be raised in this manner does not mean that it has all of the characteristics of an affirmative defense. *Id.* (describing affirmative defenses as a "lesser benefit," but concluding that "make-my-day" immunity could be raised as one if immunity was denied in a pretrial motion).

Under the overdose immunity statute, so long as the statutory conditions are met—a good faith report of an overdose, the reporter remained at the scene,

identified himself, and cooperated with law enforcement, and the charge arose from the same course of events as the overdose—a defendant is immune from prosecution, and even arrest, for any enumerated offense. None of these statutory conditions either implicitly or explicitly require the defendant to admit to the offense. *See* §18-1-711(1)(a).

Contrary to the State's suggestion, the text of the overdose immunity statute does not presuppose the admission of an offense. AB at 12. The statute's reference to "offenses" simply delineates the crimes for which the statute bars criminal proceedings against the defendant. §§18-1-711(1) ("A person is immune from arrest and prosecution for an offense described in subsection (3) of this section if…"); 18-1-711(3) ("The immunity described in subsection (1) of this section shall apply to the following criminal offenses…"). This language limits the applicability of the immunity to a certain class of potential charges, but it does not assume the admission of an offense.

The overdose immunity statute is unlike the entrapment statute, at issue in *People v. Grizzle*, 140 P.3d 224, 225-26 (Colo. App. 2006), and relied upon by the State. AB at 16. The entrapment statute specifically requires "[t]he commission of acts which would otherwise constitute an offense," and merely provides that those acts are "not criminal" if the affirmative defense is proven. §18-1-709, C.R.S. No

similar requirement can be found in the overdose immunity statute. Indeed, "the purpose of the statutory immunity is to spare the defendant the burden of trial." *Wood v. People*, 255 P.3d 1136, 1141 (Colo. 2011); *see also Guenther*, 740 P.2d at 976 ("make-my-day" immunity was designed to "protect a home occupant from the burden of defending a criminal prosecution"). To effectuate this purpose, the statute cannot require the defendant to admit the charged offense.

Thus, because the overdose immunity statute is not an affirmative defense which, by its nature, admits the charged conduct but seeks to justify it, Mr. Medina was not "ineligible" for the overdose immunity instruction simply because he denied the offense. *Cf. People v. Trujillo*, 83 P.3d 642, 646 (Colo. 2004) ("make-my-day" instruction given as an affirmative defense even though defendant testified that he did not have the required specific intent for the underlying offense); AB at 14.

Rather, the crux of the issue is whether the jury could have only found Mr. Medina satisfied the conditions of the overdose immunity statute "based on a finding that he has perjured himself." AB at 11-12; *People v. Garcia*, 826 P.2d 1259, 1263 (Colo. 1992). Although Mr. Medina testified that he did not have methamphetamine on him when he went to the hospital and that he did not knowingly possess the drug, this testimony does not contradict the conditions of

the immunity statute, which only require the defendant to have 1) reported an overdose event in good faith; 2) remained at the scene; 3) identified himself and cooperated with law enforcement; and 4) that the charge arose from the same course of events as the overdose. §18-1-711(1). Because Mr. Medina's testimony did not negate any of these conditions, the jury could have acquitted him based on the overdose immunity statute without finding he lied on the stand. *See* OB at 18; *compare with Garcia*, 826 P.2d at 1263-64 (where defendant testified an intruder stabbed the victim, he was not entitled to heat of passion instruction because the jury could have only found heat of passion if it concluded he lied about the intruder).

Even if Mr. Medina were required to admit the offense, he did admit to knowingly possessing and consuming controlled substances, testifying: "I did have controlled substances, barbiturates, Adderall, and amphetamines capsules…I tried to initially shoot up to take my life but I didn't know what I was doing.… And that morning I just, I couldn't take it. I popped all the pills that I had." TR 8/29/2017, p 30:6-12. He simply did not admit to the prosecution's theory of the case. And the State recognizes this when it argues that the evidence was overwhelming because "the defendant, by his own admission, possessed and was using other drugs." AB

at 18. Thus, to the extent he was required to admit the offense, Mr. Medina did just that.

II. THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE LAW ON THE OVERDOSE IMMUNITY DEFENSE.

A. The prosecutor misdescribed the "good faith" requirement. "Good faith" is only measured at the time the overdose is reported.

The State contends that the overdose immunity statute's mandate that a person "reports in good faith," is "at least somewhat ambiguous." AB at 29. But a division of this court recently adopted the definition from Black's Law Dictionary, cited in the Opening Brief, OB at 11, that, in the context of this subsection, good faith means "[a] state of mind consisting in…honestly in belief or purpose…or…absence of intent to defraud or to seek unconscionable advantage." *People v. Harrison*, 2019 COA 63, ¶24.

Moreover, the division in *Harrison* made clear that "[s]ection 18-1-711(1)(a) only requires that the person reporting the overdose event do so 'in good faith,' *based on the caller's state of mind at the time of the 911 call*." *Id.* (emphasis added). Thus, when considering the good faith element, the proper inquiry is whether, *at the time of the report*, the reporter had an honest belief or purpose and was not attempting to defraud or seek some advantage.

But the prosecutor's statements told the jury that Mr. Medina had to have good faith *at the time he took the pills*. *See* TR 8/29/2017, p 73:23-25 ("When you take something to hide evidence, that's not good faith."). This misstates the good faith requirement, under both the plain language of the statute and as made clear by *Harrison*. OB at 10-12.

The State argues that "even if a defendant offered an accurate report of an overdose, he still might not have manifested 'good faith' if he made his report in service of a corrupt, malicious, or bad faith purpose."[1] AB at 31. While this may be true, *Harrison*, ¶24 (requiring "absence of intent to defraud or to seek unconscionable advantage"), it does not follow that a defendant who overdoses because he took drugs to hide them from law enforcement cannot report in "good faith." Rather, so long as he honestly reports his overdose, and does so in order to get help—not to subvert further investigation—the report was made in good faith according to the definition adopted in *Harrison*.

[1] The State characterizes Mr. Medina's definition of "good faith" as "reports accurately." AB at 29. But in the Opening Brief, Mr. Medina did not argue that the touchstone of good faith was "accuracy;" rather, it is subjective honesty. OB at 11. Thus, whether or not there actually is an overdose is irrelevant to good faith, so long as the reporter truly believed there to be one. This subjective component distinguishes the good faith requirement from subsection (5)'s objective element that a "layperson would reasonably believe" there to be a drug overdose. *See* AB at 31; *Harrison*, ¶¶22-23.

The prosecutor did not argue that Mr. Medina *reported* his overdose in order to curtail the parole officer's investigation or for any other bad faith purpose. Instead, his argument focused solely on the reason he took the drugs. *See* TR 8/29/2017, p 73:11-12 ("And when asked why [he took the pills] he said he took them so you wouldn't find them. Is that good faith?"). Thus, even under the State's proffered definition of "good faith," the prosecutor misstated the law.

This interpretation of the statute does not lead to the "perverse possibility" that the State suggests of encouraging people to swallow drugs and then self-report an overdose in order to claim immunity. AB at 32. In the State's hypothetical, because the purpose of the report was to "escape punishment," and not to get help, the report would not have been in good faith as defined by *Harrison*. In contrast, where, as here, a defendant consumes too many drugs in an effort to hide them, but then realizes that he needs medical assistance and reports the overdose to get help, there is nothing "perverse" about encouraging that person to save his life.[2]

The State's out-of-state authority is unpersuasive. First, it is inapposite that other jurisdictions' statutes specifically address overdose reports made during the

[2] Prospectively, the desire to put one's life at risk in order to escape punishment seems particularly remote now that the legislature has defelonized the possession of controlled substances. *See* 2019 Colorado House Bill No. 1263, Colorado First Regular Session of the Seventy-Second General Assembly, *available at* https://leg.colorado.gov/sites/default/files/2019a_1263_signed.pdf.

course of a lawful search. Colorado's overdose immunity statute does not contain a similar statutory directive. *See People v. Benavidez*, 222 P.3d 391, 393-94 (Colo. App. 2009) (courts cannot read terms into the statute "that simply are not there").

Second, *People v. Taylor*, 57 Misc. 3d 272, 280-81 (N.Y Co. Ct. 2017) is not instructive. While that case may have found the defendant did not seek medical care "in good faith" because he disposed of drugs and paraphernalia before calling 911, other jurisdictions have reached the opposite result. In Florida, for example, an appellate court found that a reporter who called 911 to help his friend acted in good in faith, even though he subsequently tried to hide the drugs and was uncooperative with emergency responders.[3] Although his behavior was "far from exemplary" and he "could have and should have done more," the court found that he acted in good faith because he called to save his friend. *See Pope v. State*, 246 So. 3d 1282, 1284 (Fla. Dist. Ct. App. 2018) ("Regardless of whether Pope should have behaved better, his purpose in contacting 911 was to save his friend. That was a good-faith purpose.").

[3] Florida's statute does not have a cooperation requirement. *See* §893.21(1) Fla. Stat. ("A person acting in good faith who seeks medical assistance for an individual experiencing a drug-related overdose may not be charged, prosecuted, or penalized pursuant to this chapter for possession of a controlled substance if the evidence for possession of a controlled substance was obtained as a result of the person's seeking medical assistance.").

Regardless of how other jurisdictions, each with different statutes, have approached this issue, *Harrison* made clear that subsection (1)(a) is only concerned with the time of the report. And contrary to this clear law, the prosecutor's argument told the jury that it could consider Mr. Medina's state of mind *before* the report, when he took the drugs. Accordingly, the prosecutor misstated the law and committed misconduct.

B. The prosecutor misdescribed the requirement that the offense arose out of the same course of events as the overdose. This condition does not limit immunity to the specific drug which caused the overdose.

The State contends that an offense only "arises from the same course of events from which the emergency drug or alcohol overdose event arose" if the offense "was *caused by* whatever caused the 'acute condition' at issue." AB at 23-24 (emphasis in original). But this is not what the statute says. Had the legislature intended to limit the offenses to those with a causal connection to the overdose, "it would have said so directly." *People v. Griffin*, 397 P.3d 1086, 1089 (Colo. App. 2011). Instead, the legislature chose to use a broader phrase: "arises from the same course of events." §18-1-711(1)(d).

The State argues that had the legislature intended to extend immunity to "acts that did *not* cause the medical condition at issue, then it would have done so explicitly." AB at 24 (emphasis in original). But it did. By using the different,

inherently more encompassing phrase of "arises from the same course of events," the legislature made clear that immunity applies to charges for drugs that did not specifically cause the overdose, so long as the charge arose from that "course of events."

Not only is this interpretation compelled by the plain language of the statute, but it better effectuates the purpose of the statute and the statutory scheme. The purpose of the immunity statute is to encourage prompt reporting of overdoses in order to save lives. OB at 12. And the statute grants immunity to both the person who overdosed and the person who reported the overdose. §18-1-711(1)-(2). But a third party reporter might possess a different drug than that which caused the overdose, and the State's narrow interpretation of the immunity statute would discourage this person from reporting.

Consider a situation where two people are taking heroin together, one overdoses, and the other calls 911. Under the State's interpretation of this statute, even if the reporter did everything required by section 1(a)-(c), that person would be subject to prosecution for any other controlled substances in his or her possession besides heroin. In this situation, the statute would fail to incentivize the third party to call for help. In contrast, according to the plain language of the statute, the reporter would be immune from prosecution for any drugs in his or her

possession, as any possession charge would have arisen from the conduct of taking drugs with the person who overdosed and calling for help. Consequently, unlike the State's interpretation, the plain language of the statute would encourage reporting in this common situation.

Thus, neither the language nor the purpose of the statute supports the prosecutor's argument that, because Mr. Medina reported overdosing on Adderall, he was not immune from prosecution for the methamphetamine found in his possession while he was receiving medical attention for the overdose.

Further, the prosecutor's argument did not merely suggest that Mr. Medina could not be immune from prosecution for possession of methamphetamine because he *took* Adderall. Rather, the prosecutor argued that Mr. Medina could not have immunity because he *reported* Adderall, not methamphetamine. TR 8/29/2017, p 73:18-74:19.

The State does not address this misstatement of law. While the State contends that the prosecutor was "right to say" that "there is no evidence" that the methamphetamine "caused the overdose symptoms," this is not what the prosecutor argued. AB at 26. The prosecutor specifically asserted that "we wouldn't be here" "if [Mr. Medina] would have *said*" "I have a bunch of meth on me. I took a bunch myself." TR 8/29/2017, p 74:11-19 (emphasis added). This

argument tells the jury that, regardless of what actually caused the overdose, the scope of the statute's immunity is determined by what the reporter *said*, as had Mr. Medina simply said methamphetamine and not Adderall, the immunity would apply. As explained in the Opening Brief, this is not supported by the language of the statute. *See* OB at 14-15; *cf. Harrison*, ¶¶20-22 (state produced insufficient evidence to disprove overdose immunity defense even where the reporter did not subjectively understand the defendant to be overdosing on drugs and did not report any specific drug use).

Consequently, the prosecutor misstated the law and committed misconduct.

C. The errors were plain and reversal is required.

The State contends that neither misstatement of law was obvious because there was no explanatory case law on point. AB at 26-27; 35. But, as explained in the Opening Brief, since both arguments contravened the plain language of the overdose immunity statute, the errors were obvious even without case law. *See* OB at 15-16; *Harrison*, ¶24 (relying solely on the plain language of the overdose immunity statute); *People v. Kadell*, 2017 COA 124, ¶¶26-27 (error in statutory analysis was plain despite lack of interpretative case law where the court's interpretation of the statute was "informed by nothing more than its plain language").

Moreover, as described in the Opening Brief, these errors undermined the fundamental fairness of the trial and cast serious doubt on the reliability of Mr. Medina's conviction. OB at 16-19.

Neither the prosecutor's "accurate recitation of the statutory elements at issue" nor the jury instructions eliminated the risk that the jury misunderstood the law. AB at 37. The prosecutor's comments on these elements were presented as explanatory applications of the law to the present case. Thus, even though the jury was informed of the statutory elements, it would have understood these conditions through the lens of the prosecutor's improper argument. *See Wilson v. People*, 743 P.2d 415, 421 (Colo. 1987) (court's instructions did not "neutralize the impact of the prosecutor's improper remarks" because, "[a]lthough jurors are obviously aware that the arguments of counsel are not evidence,…jurors do pay heed to the arguments of counsel in arriving at a result").

The State further argues that these misstatements "must be set against the other overwhelming evidence of the defendant's guilt" and argues there was overwhelming evidence that Mr. Medina possessed the methamphetamine. AB at 37-38. But this is irrelevant. When considering how the misstatements about the overdose immunity defense likely impacted the verdict, the relevant consideration is the evidence disproving that defense, not the evidence supporting the other

elements. *See Harrison*, ¶29 (vacating defendant's conviction where prosecution failed to disprove the overdose immunity defense beyond a reasonable doubt even though drugs were found in defendant's backpack and purse).

And while the State contends that "the defendant's evidence he qualified for the affirmative defense was starkly limited," AB at 38, it was the prosecution's burden to disprove this offense beyond a reasonable doubt, not Mr. Medina's burden to prove it. *See Harrison*, ¶10 (prosecution had burden to disprove overdose immunity defense beyond a reasonable doubt). But the State does not point to any evidence aside from its statutory interpretation arguments to disprove any element of the overdose immunity defense. And because there was little evidence disproving the overdose immunity defense, the prosecutor's misdescriptions of this defense require reversal. *See* OB at 16-19.

III. THE COURT ERRONEOUSLY DENIED MR. MEDINA'S INSTRUCTION INFORMING THE JURY THAT SELF-REPORTERS ARE ENTITLED TO IMMUNITY UNDER THE OVERDOSE IMMUNITY STATUTE.

The State argues that Mr. Medina's proposed instruction—which directly tracked subsection (2) of the overdose immunity statute—was properly denied because this subsection only "extends the affirmative defense to overdose sufferers who do *not* report an overdose" and therefore the instruction "is inapplicable here." AB at 42 (emphasis in original). But the language of subsection (2) is not so

limited. Rather, this subsection clarifies that immunity extends to both the reporter and "to the person who suffered" the overdose. §18-1-711(2); *Harrison*, ¶11. It does not exclude self-reporters. §18-1-711(2). Nor does subsection (1) specifically include self-reporters. §18-1-711(1). Thus, in order to understand that Mr. Medina was entitled to the defense, the jury should have been instructed with the proposed language from subsection (2).

To the extent subsection (2) does not reference self-reporters, the court should have worked with Mr. Medina, who appeared pro se, to craft an instruction which conveyed this information to the jury, as immunity based on his self-report of the overdose was his theory of defense. *See People v. Nunez*, 841 P.2d 261, 265 (Colo. 1992) ("[A] trial court has an affirmative obligation to cooperate with counsel to either correct the tendered theory of the case instruction or to incorporate the substance of such in an instruction drafted by the court.").

And while it is true that a statute which tracks the statutory language is typically sufficient, Mr. Medina's proposed instruction did not ask the court to go outside the statute. Rather, the proposed instruction merely sought to have the jury instructed with additional statutory language.

To be sure, the jury instruction referenced Mr. Medina by stating "he" and "the defendant." CF, p 134. But, when considered from the perspective of a self-

reporter, the requirements of the overdose immunity statute are, at best, confusing. OB at 22-23; *see also Commonwealth v. Lewis*, 180 A.3d 786, 790 (Pa. Super. Ct. 2018) (finding similar statute covered self-reporters even though "application of the Act to this fact pattern is not straightforward"). Instructing the jury with the language in subsection (2) would have clarified this muddled issue for the jury.

The failure to give this instruction was not harmless simply because Mr. Medina argued in closing that he was entitled to the instruction as a self-reporter and the prosecutor did not contest this aspect of the immunity defense.[4] Unlike a jury instruction, the jury was not bound to follow Mr. Medina's statement of the law. CF, p 120 (Jury Instruction 1: "It is my job to decide what rules of law apply to the case. While the attorneys may comment on some of these rules, you must follow the instructions I give you.").

IV. MR. MEDINA DID NOT OPEN THE DOOR TO HIS UN-MIRANDIZED STATEMENTS.

The State first contends that Mr. Medina opened the door to his statement that he took 17 Adderall pills so the parole officers would not find them when he

[4] While the State characterizes the prosecution's closing argument as "acknowledge[ing] that an overdose victim could report under § 711(1)," the prosecutor never said this explicitly. AB at 44; TR 8/29/2017, p 74:21-23 ("[T]he defendant seems to want to have both ways, right? On one hand, he wants the protections of the overdose immunity protection for reporting this, but at the same time these aren't his drugs."); 73:13-14 ("He then remained at the scene which he did. He identified himself and cooperated, largely cooperated.").

testified that the parole officer's pattern of misconduct drove him to take the pills in an attempted suicide. AB at 47. But this evidence only came in *after* the court already ruled that the door had been opened, and after Officer Bensko testified that Mr. Medina "stated that he had swallowed prescription pills…[t]o avoid us finding it…He did not want us to find the pills." TR 8/28/2017, p 138:3-139:4. At this point, Mr. Medina's testimony was merely responsive to the statements that had already come in and sought to rectify the damage from their erroneous admission. *See People v. Cohen*, 2019 COA 38, ¶26 (a party opens the door by injecting a particular issue into a case); *cf. People v. Pollard*, 2013 COA 31M, ¶¶35-38 (a party does not inject an issue into a case when it "responds to an error committed by the opposing party"); *People v. Wambolt*, 2018 COA 88, ¶42 , n.5 (an "attempt to mitigate any harm" does not inject an issue into a case).

Nor could Mr. Medina have opened the door to this statement during opening argument. AB at 46. Because opening statements have no evidentiary value, they cannot open the door to otherwise inadmissible evidence. *See Melton v. Larrabee*, 832 P.2d 1069, 1071 (Colo. App. 1992) ("[D]efense counsel's opening statement, standing alone, did not require the court to admit plaintiffs' proffered evidence."); *United States v. Green*, 648 F.2d 587, 595 (9th Cir. 1981) ("An opening statement,…having no evidentiary value, cannot operate to place an

issue in controversy."); *but see People v. Pernell*, 2014 COA 157, ¶40 (concluding that opening statements can open the door); *People v. Davis*, 312 P.3d 193, 196 (Colo. App. 2010) (collecting cases on the split of authority but agreeing with authorities that conclude that opening statements can open the door); *see also Cohen*, ¶27 (assuming without deciding that defense counsel's implicit argument in opening statements opened the door, even though the prosecutor first brought up the inadmissible subject matter).

Next, the State argues that Mr. Medina opened the door by alleging that the parole officers were vindictive against him, and thus the prosecution was entitled to present evidence to "correct this misperception." AB at 49. But "otherwise inadmissible rebuttal evidence is permitted only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." *Cohen*, ¶23 (internal quotation marks omitted). Here, nothing about the fact that Mr. Medina swallowed pills to hide them from his parole officers corrects the impression or removes any prejudice from the original evidence that parole officers were harassing Mr. Medina. This evidence does not make it any less likely that the officers were engaged in the pattern of misconduct alleged by Mr. Medina. Rather, any parolee might try to hide drugs—a parole violation—from their parole officer. *Id.* (discussing the "necessary 'fit'" between the original

evidence and the rebuttal evidence and describing the question as "whether the latter answers the former") (quoting 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 1:12, at 75 (4th ed. 2013)).

The State further contends that the door was opened when Mr. Medina elicited testimony that he was cooperative with law enforcement, and that this evidence is misleading without hearing that—before the officers even arrived—Mr. Medina took his pills so the officers would not find them. AB at 50. But it is unclear how evidence of his cooperation was misleading, where the prosecutor conceded that he was cooperative with law enforcement and did not contest this element of the overdose immunity statute. *See* TR 8/29/2017, p 73:13-14 ("He identified himself and cooperated, largely cooperated.").

Finally, the State alleges that Mr. Medina opened the door to this evidence by eliciting that he was taken to the hospital for an overdose. AB at 51.[5] As explained in the Opening Brief, this evidence did not present only one side of the story or create a misleading impression. OB at 29-32. There was no "misleading impression that law enforcement did not suspect unusual or nefarious misconduct." AB at 52. The jury heard evidence explaining that the parole officers were responding to a tracker low battery alert on Mr. Medina's GPS ankle monitor and

[5] This was the basis of the trial court's ruling. *See* TR 8/28/2017, p 136:8-137:18; OB at 28.

that, once inside the room, there was evidence of parole violations. The fact that the overdose may have been precipitated by Mr. Medina's efforts to the hide those parole violations had no relevance to the officer's search, investigation, or the charges ultimately filed. Thus, the court erred when it admitted this evidence under the theory of "opening the door." *See Cohen*, ¶23 ("'Where the rebuttal evidence does not directly contradict the evidence previously received, or goes beyond the necessity of removing prejudice in the interest of fairness,' it shouldn't be admitted.") (quoting *United States v. Martinez*, 988 F.2d 685, 702 (7th Cir. 1993)).

CONCLUSION

For these reasons, and for those stated in the Opening Brief, Mr. Medina respectfully requests that this court reverse his conviction and remand the case for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on June 12, 2019, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on Daniel E. Rauch of the Attorney General's Office.

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