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COURT OF APPEALS STATE OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Adams County District Court Honorable Frederick Goodbee, Judge 10CR3242	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JAMES ALBERT DARDANO, Defendant-Appellant.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General KEVIN E. MCREYNOLDS, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, Colorado 80203 Telephone: 720-508-6485 E-Mail: kevin.mcreynolds@state.co.us Registration Number: 40978 *Counsel of Record	Case No. 12CA2025

PEOPLE'S 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:

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

It contains less than 9500 words.

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

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Or

The opponent did not address standard of review or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal.

/s/Kevin E. McReynolds

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Dardano was entitled to dismissal of the criminal charges against him where he cultivated and distributed "medical marijuana" without a local license after the City of Federal Heights had issued a moratorium.

II. Whether the trial court should have suppressed evidence because the search warrant affidavit did not refute the potential legality of Dardano's marijuana cultivation and distribution business.

III. Whether the trial court erred by instructing the jury on the statutory elements of conspiracy to distribute marijuana instead of incorporating a different *mens rea* from a separate offense.

IV. Whether no rational juror could reasonably infer that Dardano knowingly cultivated marijuana and conspired to distribute marijuana in violation of Colorado law.

STATEMENT OF THE CASE

This case involves Jim Dardano, who grew and sold "medical marijuana" out of an unmarked residential trailer in the City of Federal Heights. Dardano had previously applied for local licenses to operate a medical marijuana business at a commercial storefront, but the City passed a moratorium on approving more such businesses.[1] Both the text of the moratorium and the City planner informed Dardano that he could not operate his proposed marijuana business during the moratorium.[2]

Dardano ignored the law and sold marijuana out of the kitchen of his residential trailer for a year. After receiving numerous complaints

[1] Another medical marijuana business in Federal Heights obtained its local licenses before the moratorium.

[2] By contrast, the City allowed the single locally licensed medical marijuana business to operate during the moratorium.

about Dardano's escalating operation, police executed a search warrant and found 128 dried marijuana plants, more than 100 pounds of processed marijuana, loaded guns, drug paraphernalia, and more than $40,000 in cash.

After a four-day trial, an Adams county jury convicted Dardano of cultivation and conspiracy to distribute marijuana. The trial court sentenced him to two years of probation.

On appeal, Dardano contends he was entitled to dismissal of the criminal charges as a matter of law, the evidence against him should have all been suppressed, and that no rational jury could have convicted him.

These claims fail because they are either legally incorrect or belied by a record that included substantial evidence of Dardano's guilt.

STATEMENT OF THE FACTS

In June 2009, Dardano became interested in medical marijuana and began adverting his business, "Front Range Dispensary", in Westword magazine (*see* CD 6/27/11 pp. 116-21). Dardano ran this

business out of his residence in the City of Federal Heights (*see id.* pp. 153-60).

Later that year, Dardano spoke with the City planner, Timothy Williams, about opening a commercial medical marijuana dispensary (*see id.*; 6/25/11 pp. 145-48). Mr. Williams told Dardano that he would need a local business license and that he should apply quickly because the city council was discussing a moratorium that would prevent any new medical marijuana businesses from opening (*see* CD 6/25/11 pp. 147-49).

Dardano applied for City licenses for Front Range Dispensary to operate out of a commercial location on Federal Boulevard (*see id.* at 145-52, 59; Vol. 13, Trial Exhibit 8). Unfortunately for Dardano, the City passed a moratorium on new medical marijuana businesses before Dardano's licenses had been processed or approved (*see* CD 6/25/11 pp. 162-65, 170-72).

Mr. Williams told Dardano about the moratorium and that, like any other business, it would be illegal for Dardano to operate without

local licenses (*see id.* 170-72). Dardano was disappointed, but stated he understood that he could not operate his planned dispensary (*see id.*).

Because of repeated complaints about Dardano operating an unlicensed dispensary, Mr. Williams visited both the commercial site listed on the City license application and Dardano's residential trailer to investigate (*see* CD 6/26/11 pp. 8-9, 13-15, 17-19). During these visits, Dardano assured Williams that he was not operating a dispensary and again stated he understood he could not operate a medical marijuana business without City approval (*see id.*).

In October 2010, escalating complaints about Dardano's marijuana operation led Mr. Williams to contact police (*see* CD 6/25/11 pp. 26-27; Vol. 12, Exhibit 1 ("Search Warrant")). A brief investigation showed that Dardano was selling marijuana as Front Range Dispensary out of his residential trailer on Elm Court (*see, e.g.,* Vol. 12, Exhibit 1). As part of the investigation, an undercover officer bought marijuana from Front Range Dispensary using a false identity, legally insufficient "medical marijuana" paperwork and without providing any identification (*see id.*; CD 6/26/11 pp. 165-76, 217-18). Police then

executed a search warrant at Dardano's residence (*see* CD 6/26/11 pp. 219-27).

Dardano was charged with (1) cultivation of marijuana, more than 30 plants; and (2) conspiracy to distribute marijuana, more than five pounds but less than 100 pounds (*see* Vol. 1 pp. 1-5).[3]

At trial, Dardano argued he was operating a legal dispensary under the Medical Marijuana Amendment and that his prosecution was motivated by the City's politics (*see* CD 6/25/11 pp. 114-26; 6/28/11 pp. 189-201; Vol. 1 p. 88-95). Alternatively, Dardano argued he made a reasonable mistake of fact about whether he could lawfully run his marijuana business (*see* Vol. 1 pp. 90, 95).[4]

The jury was unconvinced and convicted him (*see* Vol. 1 pp. 97-98).

This appeal followed.

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[3] Dardano stipulated to these amounts at trial (*see* Vol. 1 p. 85; *but see* OB:2 (claiming Dardano only grew 18 marijuana plants)).

[4] To support this claim, Dardano's appellate counsel appeared as a Defense fact and expert witness (*see* CD 6/28/11 pp. 3-96).

SUMMARY OF THE ARGUMENTS

The trial court correctly denied Dardano's pre-trial motion to dismiss the criminal charges because:

(1) the Medical Marijuana Amendment created an affirmative defense to criminal prosecution that was conditional on Dardano's compliance with state and local laws; and

(2) Dardano could not show he complied with state and local law because he operated his "medical marijuana" business in violation of these laws after the City issued a moratorium.

The trial court also properly rejected Dardano's motion to suppress because the search warrant affidavit demonstrated probable cause that Dardano's marijuana cultivation/distribution was illegal and the possibility that he may be able to present an affirmative defense to these charges was not material to whether the search warrant should be issued.

The trial court correctly instructed the jury on the conspiracy to distribute marijuana charge based on the elements from the applicable statute and model jury instruction. Contrary to Dardano's position, the

trial court was not required to import a different *mens rea* element from a different conspiracy statute in order to properly instruct the jury.

The jury did not irrationally convict Dardano of illegal cultivation of marijuana and conspiracy to distribute marijuana because the testimony of Mr. Williams and other evidence in the record logically satisfies the elements of these offenses and the jury's rejection of Dardano's affirmative defenses.

ARGUMENTS

I. Dardano Failed to Establish the Affirmative Defense to Prosecution As a Matter of Law.

Dardano contends the trial court erred in denying his motion to dismiss the criminal charges against him because: (1) the Medical Marijuana Amendment wholly exempted him from state criminal law; and (2) his alleged compliance with the Medical Marijuana Code precluded his prosecution (*see* OB:5-16).

But these arguments fail because the Medical Marijuana Amendment provided Dardano with an affirmative defense to criminal

prosecution – not an exemption – and he failed to show he was entitled to this defense as a matter of law.[5]

A. Standards of review.

The People agree that Dardano preserved this issue by filing pre-trial motions that mirror his current claims that he was exempted from any criminal prosecution because he had applied to be a "primary care-giver" of medical marijuana at a location in Federal Heights (*see* Vol. 1 pp. 16-19, 31-37). After a two-day evidentiary hearing, the trial court denied these motions in a written order (*see id.* pp. 58-60).

The People also agree that the interpretation of a constitutional provision is reviewed under a *de novo* standard. *See People v. Clendenin*, 232 P.3d 210, 212 (Colo. App. 2009) (applying a *de novo* standard when interpreting the Medical Marijuana Amendment and the defendant's right to "assert the affirmative defense provided" therein).

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[5] Additionally, the jury rejected this affirmative defense as a factual matter, finding Dardano knowingly cultivated and conspired to distribute marijuana (*see* Vol. 1 pp. 97-98).

Because Dardano's claims are based in part on interpretations of Colorado's Medical Marijuana Code and local laws, this Court should also apply a *de novo* standard of review to these underlying statutory interpretation issues. *See People v. Garcia*, 113 P.3d 775, 780 (Colo. 2005).

B. The trial court correctly denied Dardano's claims of an absolute constitutional exemption from prosecution.

In 2000, Colorado voters passed the Medical Marijuana Amendment to the Colorado Constitution, which provides:

> (2)(a) [A] patient or primary care-giver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana will be deemed to have established an affirmative defense to such allegation where:
>
> (I) The patient was previously diagnosed by a physician as having a debilitating medical condition;
>
> (II) The patient was advised by his or her physician . . . that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and
>
> (III) The patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section.

> This affirmative defense shall not exclude the assertion of any other defense where a patient or primary care-giver is charged with a violation of state law related to the patient's medical use of marijuana.
>
> (b) Effective June 1, 1999, it shall be an exception from the state's criminal laws for any patient or primary care-giver in lawful possession of a registry identification card to engage or assist in the medical use of marijuana . . .

Colo. Const. art. XVIII, § 14(2)(a), (b) (hereafter "the Amendment").

In his pre-trial motions and on appeal, Dardano contents his status as a "primary care-giver" made him constitutionally exempt from any criminal prosecution for cultivating and selling marijuana out of his trailer in Federal Heights (Vol. 1 pp. 17-19, 35-36; OB:6-9). Specifically, Dardano selectively cites to portions of sections 14(2)(a) and (2)(b) of the Amendment to argue he was "excepted from state criminal laws" and therefore the District Attorney and trial court lacked jurisdiction to try him for marijuana-related crimes as a matter of law (OB:6, 8-9).

But this reading of the Amendment misapprehends the limited scope of the Medical Marijuana Amendment, which "by its very terms creates an '*affirmative defense*' to conduct that is otherwise prescribed

by criminal statutes." *Jones v. Lehmkuhl*, No. 11-cv-02384, 2013 U.S. Dis. LEXIS 139229 at * 66 (D. Colo. Apr. 26, 2013) (emphasis added); *see People v. Watkins*, 2012 COA 15 at ¶ 25 (Feb. 2, 2012) (recognizing that "the Amendment created a defense to criminal prosecution" and did not grant medical marijuana users an unlimited right to the drug).

In fact, this Court considered the limited nature of the Amendment and its application to alleged care-givers (like Dardano) who are prosecuted for cultivating marijuana. *See Clendenin*, 232 P.3d at 211-16. Far from finding a total constitutional exemption from prosecution, the *Clendenin* court concluded that the defendant "was entitled to assert the affirmative defense provided in section 14(2)(a)", but that this "affirmative defense does not apply 'where the provision of marijuana is itself the substance of the relationship.'" *Id.* at 212, 214 (quoting *People v. Mentch*, 195 P.3d 1061, 1070 (Cal. 2008)). This conclusion applies with particular force in the present case because Dardano testified at the motions hearing that he was not the primary care-giver for a number of the people to whom he sold marijuana (*see,*

e.g., CD 10/4/11 pp. 40-41;[6] *see also* 9/26/11 pp. 147-48 (noting it is illegal to operate a dispensary and act as a care-giver at the same location)). *See also* § 25-1.5-106(8), C.R.S. (2010) (limiting care-givers to treating up to five patients effective July 1, 2010). Accordingly, section 14(2)(b) is inapplicable.

Moreover, the Amendment itself provides for the legislature to define the limits of this affirmative defense and for the regulations governing the use of medical marijuana. Colo. Const. art. XVIII, § 14(8). The General Assembly created this statutory framework effective July 1, 2010 by passing the Medical Marijuana Code ("the Code"). *See* § 12-43.3-101, *et seq*., C.R.S. (2010). Critically, the Code requires that "any facilities providing medical marijuana to eligible patients be licensed by both state and local authorities, and specifically allows local governments, including counties, to prohibit the licensing of dispensaries." *Giuliani v. Jefferson County Bd. of County Comm'rs*,

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[6] Because of an apparent scanning issue that altered the pagination of the October 4, 2011 transcript, all citations are by .pdf page number.

2012 COA 190 at ¶ 19 (Nov. 1, 2012) (citing §§ 12-43.3-106, 202, 301, 310).

Accordingly, the proper inquiry here is not merely whether Dardano was a "primary care-giver", but whether he fully complied with the state and local law in order to qualify for the Amendment's conditional affirmative defense. *See* § 12-43.3-102(2), C.R.S. (2010) (". . . it is unlawful to cultivate, manufacture, distribute or sell medical marijuana, except in compliance with the terms, conditions, limitations, and restrictions in [the Amendment] and [the Code] . . .").

As discussed in the next section, Dardano did not and could not make this showing because his business never received local approval and he continued selling marijuana for a year after Federal Heights issued a moratorium to prevent the operation of unlicensed medical marijuana businesses.[7]

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[7] By contrast, another individual received a business license from the City of Federal Heights before the moratorium went into effect and was permitted to operate this locally approved medical marijuana business until the City banned all such businesses in December 2010 (*see* CD 9/30/11 pp. 34-36, 53-54, 67; 10/4/11 p. 65).

C. The trial court correctly found Dardano could not show his undisputed compliance with state and local law.

Dardano contends he was entitled to dismissal of the criminal charges against him because he complied with the Code by applying for state and local licenses to operate a medical marijuana center and the City of Federal Heights did not deny his application and outlaw all medical marijuana businesses until after his arrest.

Critically, however, Dardano never received a local license to operate a medical marijuana center and did so in violation of state and local law. Because compliance with local law and the Code was a condition for the Amendment's affirmative defense to criminal prosecution, the trial court did not err by refusing to dismiss Dardano's criminal charges.

1. Stipulated facts.

After Dardano filed his motion to dismiss, the parties stipulated to certain facts "for the purposes of the Motion to Dismiss only" (*see* Vol. 1 p. 53). Specifically, the parties stipulated that:

- In June 2009, Dardano became a licensed care-giver and received a medical marijuana registry certificate (*see id.*);
- On September 28, 2009, Dardano applied for local tax and business licenses with the City of Federal Heights (*see id.*);
- Eleven days later, the City of Federal Heights responded by issuing a moratorium "on the submission, acceptances, processing, and approval of all applications for City permits and licenses relating to the operation of a business that engages in actions or activities involving medical marijuana" (*see id.* at 54, 57 Joint Exhibit C (imposing a 120 day moratorium in response to applications from individuals seeking to operate medical marijuana businesses within the City));
    - This ordinance also reiterated "that it shall be unlawful for any person to operate a place of business or sell goods within the City without first obtaining a license to conduct such

business” (*see id.* at 57 Joint Exhibit C (citing Fed. Heights Muni. Code § 14-20);[8]

- Dardano’s applications with the City of Federal Heights had not been processed and remained pending at the time of the moratorium (*see id.* p. 54);
- In January 2010, the City extended the moratorium through July 1, 2010 (*see* Vol. 1 p. 54 (citing Ordinance No. 10-02));
- Effective July 1, 2010, the General Assembly enacted the Code (*see id.* p. 54);
- In anticipation of the Code going into effect, the City extended the moratorium on medical marijuana businesses to June 30, 2011 (*see id.*; *see also* Vol. 12, Exhibit 1 (“Search Warrant”) (quoting Ordinance No. 10-08));
- On July 31, 2010, Dardano filed applications for state licenses to operate a medical marijuana center (*see* Vol. 1 pp. 54-55, 57 Joint Exhibits E, F);

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[8] Copies of relevant parts of the Federal Height Muni. Code are attached to this Answer Brief.

- On October 27, 2010, an undercover law enforcement officer purchased "medical marijuana" at Dardano's alleged medical marijuana center (*see id.* p. 55; Vol. 12, Exhibit 1);
- On October 28, 2010, law enforcement executed a search warrant and Dardano was arrested for the current case (*see* Vol. 1 p. 55);
- At the time of this arrest, Dardano's had a "Front Range Dispensary" sign on Federal Boulevard near the business location (*see id.*);
- At the time of his arrest, Dardano's applications for state licenses had not been granted (*see id.*).

After acknowledging these stipulated facts, the trial court denied Dardano's motion to dismiss (*see id.* pp. 58-60). Specifically, the trial court focused on § 12-43.3-103(1)(a) of the Code and concluded that Dardano's mere application for a local license for his medical marijuana business was insufficient because it was not "subsequently granted" as a result of the City's moratorium (*see id.* at 59).

2. Analysis.

Dardano contends he was legally entitled to sell "medical marijuana" during the City's moratorium pursuant to section 12-43.3-103(1)(a) of the Code, which provides:

> On July 1, 2010, a person who is operating an e*stablished, locally approved business* for the purpose of cultivation, manufacture, or sale of medical marijuana or medical marijuana-infused products or a person who has applied to a local government to operate a locally approved business for the purpose of cultivation, manufacture, or sale of medical marijuana or medical marijuana-infused products *which is subsequently granted* may continue to operate that business in accordance with any applicable state or local laws. "Established", as used in this paragraph (a), shall mean owning or leasing space *with a storefront* and remitting sales taxes in a timely manner on retail sales of the business as required pursuant to section 39-26-105, C.R.S., *as well as any applicable local sales taxes*.

§ 12-43.3-103(a) (emphasis added). Such businesses were also required to meet certain application deadlines and certifications by September 2010. *See* § 12-43.3-103(b), (2)(b). The Code further provided that all medical marijuana businesses, including those not operating on July 1,

2010, would be subject to the terms and conditions of the Code starting on July 1, 2011. *See* § 12-43.3-103(2)(c).[9]

Dardano contends that he "was legally allowed to continue operating his business until [July 1, 2011], or until such time that either the state or local licensing authority took action to approve or deny his license applications" (OB:13).[10] More specifically, Dardano contends the "subsequently granted" language anticipates that local

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[9] As Dardano's own counsel recognized at the time, the plain language of this statute creates "a defacto moratorium in that you cannot operate after 7/1/10 unless you were 'established'/locally approved for both the grow and retail location(s) before 7/1/10. Otherwise, you cannot operate until both local and state approval[s] are obtained." *See* Jeff Gard, 7/1/10 "Black Thursday" (posted June 29, 2010 at http://www.marijuanalawscolorado.com/medical-marijuana-colorado/7110-black-thursday/) (copy attached). Mr. Gard apparently had a different view when he testified as a Defense expert and fact witness at trial (*see* CD 6/28/11 p. 48 (stating that he advised Dardano he could legally operate "until such time as the moratorium might end in denial . . .")).

[10] *But see* Jeff Gard, 7/1/10 or 7/1/11? Which is it? (posted July 7, 2010 at http://www.marijuanalawscolorado.com/medical-marijuana-colorado/7110-or-7111-which-is-it/) (". . . it appears that continued operation of a MMJ business without strict compliance with HB1284 until 7/1/11 could be a serious problem . . . if you defer your compliance until July 1, 2011, you may find that your application is denied, or worse, that you may face criminal prosecution for operating a business without the benefit of HB 1284 protection") (copy attached).

authorities will act and that, at the time of his arrest, Dardano merely needed to apply for local approval to comply with the Code (*id.* pp. 13-14). Alternatively, Dardano argues that even if he did not comply with local law, “he is, at most, guilty of the municipal infractions of operating without a valid sales tax or business license . . . [and] would still be entitled to exception from the state law crimes under which he was charged, based on his compliance with the Medical Marijuana Code, which required that he only apply for local licensing” (*id.* p. 13) (emphasis in original).

Critically, however, these arguments ignore the plain language of the very law they are discussing. Section 103(1)(a) provides a limited allowance for “established” medical marijuana businesses to continue operating if they have received a local approval *or* have filed an application for such approval that is “subsequently granted”. § 12-43.3-103(a). At the time of his arrest, Dardano did not and could not meet these requirements.

First, Dardano never received local approval because the City enacted a moratorium specifically to prevent new medical marijuana

businesses from operating within Federal Heights until the City could investigate its "ability to regulate such businesses, and to develop and implement any appropriate regulations deemed necessary". (*see* Vol. 1 p. 57 Joint Exhibit C). Thus, by operating a "medical marijuana" business without a license during the moratorium, Dardano undisputedly violated local law (*id.*). *See* Fed. Heights Muni. Code §§ 14-19, 20 (stating any business operation conducted without a local business license is unlawful).

Second, the enactment of the Code did nothing to legalize Dardano's unlawful "medical marijuana" operation because Dardano's application for a local license was not "subsequently granted". Again, the City's moratorium on medical marijuana businesses remained in place at the time of Dardano's October 2010 arrest (*see* Vol. 1 p. 54). Thus, at the time of his arrest, Dardano had been operating for a year in violation of the local moratorium and without even the possibility of his application being "subsequently granted" for at least another nine months. While Dardano theorizes he might have been approved for a local license after the moratorium expired in June 2011, this never

happened because the City instead banned all medical marijuana businesses in December 2010. *See* Fed. Heights Muni. Code §§ 70-920, 921. As a result, Dardano never had a local license "subsequently granted" as required to operate a legitimate medical marijuana business in compliance with the Code.

Third, Dardano was selling marijuana out of an unmarked residential trailer on Elm Court – not the commercial location on Federal Boulevard that he listed in his license applications (*see* CD 9/30/11 pp. 101-06, 110-12; Vol. 13, Motion Exhibits A, F, G (listing Federal Blvd. address); Vol. 12, Exhibit 1 (search warrant for Elm Court address)). Thus, contrary to his current argument, Dardano never had a "pending application" to grow and sell marijuana at the location where he did so (*see, e.g.,* CD 9/30/11 pp. 101-06, 110-12; Vol. 12, Exhibit 1).

The location of Dardano's drug operation also belies any claim that he complied with state law, which required him to operate from a property "with a storefront". *See* § 12-43.3-103(1)(a). The kitchen of a residential trailer hardly qualified (*see, e.g.,* Vol. 13, Trial Exhibits 14-

16, 21-26). *See also* Webster's American College Dictionary (Spec. Ed.1998) (defining "storefront" as "the side of a store facing a street, usu[ally] containing display windows; [or] a room, set of rooms, or establishment at street level with frontage on a street or thoroughfare").

Fourth, the evidence at the motions hearings also showed that his business was not "established" as required by section 103(1)(a) of the Code because Dardano was operating without a local sales tax license and did not remit local sales taxes "in a timely manner" (*see* CD 9/30/11 pp. 84; Vol. 13, Motion Exhibit K). *See* § 12-43.3-103(1)(a). Dardano never received a local sales tax license and only paid part of these taxes after his arrest a year later (*see id.*). This shows yet another way Dardano ran his business in violation of both state and local law. *See* Fed. Heights Muni. Code § 54-28 (stating it is unlawful to operate a business without first having obtained a local sales tax license); *see also id.* at §§ 54-29-30 (describing taxpayer responsibilities under the local tax code and setting the deadlines for paying such taxes).

Thus, at the time of his arrest, Dardano's drug operation violated both the state and local law. *See* § 12-43.3-103(1)(a); *see also* § 12-43.3-

310(2) ("A medical marijuana center, optional premises cultivation operation, or medical marijuana-infused products manufacturer may not operate until it has been licensed by the local licensing authority and the state licensing authority pursuant to this article").

Dardano's alternative argument – that his violations of local law did not preclude dismissal of the criminal charges – reverses the structure of Colorado law. Neither the Amendment nor the Code did anything to change the fact that the cultivation and distribution of marijuana is illegal under Colorado law. *See* § 18-18-406.3(1)(b), C.R.S. (2010). Rather, these provisions created a limited affirmative defense that only applies to those who comply with all of the terms and conditions of the Amendment and the Code. *See id.*; § 12-43.3-102(2). Because the Code itself required compliance with local law and licensing requirements, Dardano's undisputed violation of those laws stripped him of the ability to claim the Amendment's affirmative defense applied to him as a matter of law.

Accordingly, this Court should affirm the trial court's denial of Dardano's motion to dismiss.

II. The Trial Court Did Not Err by Denying Dardano's Motion to Suppress.

Dardano next contends the trial court erred by not suppressing the evidence against him because the search warrant affidavit "was insufficient to establish probable cause of criminal activity" (OB:17). Specifically, Dardano contends the police and magistrate erred by finding probable cause without determining if he had complied with state medical marijuana laws (*see* OB:17-20).

But as this argument is based on an incorrect legal premise because the mere possibility that Dardano's marijuana distribution could be legal is not relevant to the probable cause analysis. *People v. Sexton*, 2012 COA 26 ¶¶ 14-16 (Feb. 16, 2012); *Jones*, 2013 U.S. Dis. LEXIS 139229 ** 66-67; *United States v. Ellis*, 910 F.Supp.2d 1008, 1017 (W.D. Mich. 2012) (rejecting a similar argument regarding Michigan's Medical Marihuana Act because "[a]s an affirmative defense, the MMMA merely has the potential to excuse a defendant's criminal act; it does not negate any element of the crime. Thus, when a magistrate judge is asked to determine whether there is probable cause

to believe a suspect's home harbors evidence of the crime of manufacturing marijuana, MMMA licensure is really beside the point") (internal citations omitted).

A. Standard of review.

The People agree that Dardano preserved this issue by filing a motion to suppress (*see* OB:17; Vol. 1 pp. 23-28).

But the People do not fully agree with Dardano's standard of review, which suggests the trial court is entitled to deference in suppression rulings without actually articulating the standard (*see* OB:17).

To be clear, because the suppression ruling involves a mixed question of fact and law, the trial 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", and that this Court uses a *de novo* standard in determining whether the trial court's legal conclusions are supported by sufficient evidence and whether it applied the correct legal standard. *People v. Ortega*, 34 P.3d 986, 990 (Colo. 2001); *see People v. Hughes*, 252 P.3d 1118, 1121 (Colo. 2011).

B. The trial court correctly concluded the search warrant affidavit was supported by probable cause.

The United States and Colorado constitutions provide that a search warrant may only issue upon a showing of probable cause supported by an affidavit describing the place to be searched and the items to be seized. *See* U.S. Const., Amend. IV; Colo. Const., Art. II. § 7; *People v. Kerst*, 181 P.3d 1167, 1171 (Colo. 2008). A search warrant affidavit must set forth the facts and circumstances showing probable cause to allow the magistrate to make an independent evaluation. *Kerst*, 181 P.3d at 1171. Search warrant affidavits are presumed to be valid. *Id.* (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978)).

"Probable cause exists when an affidavit for a search warrant alleges facts sufficient to cause a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched." *People v. Scott*, 227 P.3d 894, 897 (Colo. 2010) (internal quotations and citations omitted). This determination is based on the totality of the circumstances and is not governed by hypertechnical rules, but rather a common-sense conclusion as to whether there is a

fair probability that a search will reveal contraband or evidence of a crime. *Id.*

1. Search warrant affidavit.

In the search warrant affidavit, Detective Murphy stated:

- He is a member of the North Metro Task Force and is familiar with the appearance and packaging of marijuana and other narcotics (*see also* Vol. 12, Exhibit 1);
- He was aware of an alleged marijuana grow operation at Dardano's residence in September 2009 and that Dardano sought a local business license to operate a "medical marijuana" dispensary at that time (*Id.*);
- Dardano did not receive this license because the City enacted a moratorium on approving "medical marijuana" business (*Id.*);
- In October 2010, local officers contacted Detective Murphy with information about marijuana odors and an unauthorized greenhouse being constructed at Dardano's residential trailer at 8850 Elm Court (*Id.*);

- On October 26, 2010, Federal Heights City Planner Tim Williams, confirmed Dardano's residential address on Elm Court and that Dardano had previously applied to operate a medical marijuana business under the name "Front Range Dispensary" at a commercial location on Federal Boulevard (*Id.*);
- An Internet search for "Front Range Dispensary" gave directions to Dardano's unmarked residential trailer and reviews of the marijuana sold at this location (*Id.*);
- On October 27, 2010, an undercover officer with incomplete medical marijuana paperwork went to Dardano's trailer and was sold 5.77 grams of marijuana (*Id.*).

2. Analysis.

Dardano contends the search warrant affidavit failed to show probable cause for a search of his residential trailer because it did not demonstrate his "medical marijuana" business was illegal (OB:20).

But this argument is legally incorrect because, as this Court held in similar circumstances, the mere possibility Dardano's operation

might be legal did not invalidate the search warrant. *See Sexton*, 2012 COA 26 at ¶¶ 14-16 (upholding the probable cause determination in the search of alleged medical marijuana because "[o]fficers need not 'refrain from searching premises under circumstances in which the activity in question could *potentially* be legal,' as long as the circumstances also support a reasonable belief that evidence of illegal activity will be found") (internal citations omitted).

Moreover, the "potential" legality of a medical marijuana operation is irrelevant to the probable cause determination because the Medical Marijuana Amendment merely provides for an affirmative defense to criminal conduct – and affirmative defenses only arise after criminal charges are filed and the prosecution commences. *See Jones*, 2013 U.S. Dis. LEXIS 139229 ** 66-67 (*citing Ellis*, 910 F.Supp.2d at 1017); *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) (recognizing that affirmative defenses "admit the defendant's commission of the elements of the charged act, but seek to justify, excuse or mitigate the commission of [this] act").

Thus, because the search warrant affidavit showed Dardano's residential trailer was being used to distribute marijuana, the trial court correctly refused to overrule the magistrate's probable cause determination.

III. The Trial Court Correctly Instructed the Jury on the Statutory Elements of Conspiracy to Distribute Marijuana.

Dardano contends there was insufficient evidence to convict him because the trial court "erred in its interpretation of the laws of conspiracy, thereby relieving the prosecution of its burden of proof as to the third element of C.R.S. 18-2-201,[11] i.e. the specific intent to commit an unlawful purpose, the trial court's denial of Mr. Dardano's motion for judgment of acquittal with respect to Count 2 was erroneous" (OB:35).

This is not a "sufficiency of the evidence" issue, but rather a question of whether the trial court erred in instructing the jury on the elements of the conspiracy to distribute marijuana charge under section 18-18-406(6)(B)(I) for which Dardano was convicted. As shown below, there was no error.

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[11] § 18-2-201, C.R.S. (2010).

A. Standards of review.

This Court reviews jury instructions *de novo* to determine whether the instructions as a whole accurately informed the jury of the governing law. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). Importantly, however, the trial court retains discretion in formulating the jury instructions so long as they are correct statements of the law and fairly and adequately cover the issues. *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006).

Because Dardano's claim of instructional error is based his interpretation of Colorado's conspiracy laws, this Court should apply a *de novo* standard of review to this statutory interpretation issue. *See Garcia*, 113 P.3d at 780.

While trial courts are obligated to instruct the jury, "it is equally the duty of counsel to assist the court by objection to erroneous instructions, and by the tender of instructions covering matters omitted by the court." *People v. Stewart*, 55 P.3d 107, 120 (Colo. 2002) (internal citation and quotation omitted). As the Colorado Supreme Court noted:

> A defendant must make all objections she has to instructions prior to their submission to the jury. *See* Crim. P. 30. The purpose of this rule is to enable the trial judge to prevent error from occurring and to correct an error if improper instructions are tendered. Where counsel fails to object or to tender instructions on the omitted issues, appellate courts will not consider any error assigned to the giving, or failure to give, pertinent instructions unless there was plain error.

Id. (internal citations omitted); *see also* Crim. P. 30.

Under a strict interpretation of Crim. P. 30, Dardano's claims should be reviewed for plain error because he did not tender a proposed instruction applying the "specific intent" *mens rea* from section 18-2-201 to his conspiracy to distribute marijuana charge under section 18-18-406(6)(B)(I) (*see* CD 6/28/11 pp. 131-34).

The People agree, however, that a more permissive view of this rule would require harmless error review because the prosecution presented alternative instructions and Dardano's counsel expressed a preference for the one that incorporated an "intent" *mens rea* (*see id.*). The trial court rejected this instruction and agreed with the prosecution that it should provide the "knowingly" instruction that tracked the

language of section 18-18-406(6)(B)(I) and the model instruction (*see id.* p. 134).

The applicable error standard is, however, irrelevant because the trial court correctly instructed the jury on the law.

B. The trial court properly instructed the jury on the conspiracy to distribute marijuana charge.

Trial courts are obligated to correctly instruct the jury on the applicable law. In formulating such instructions, courts look to pattern jury instructions and applicable statutes. *See, e.g., People v. Laurson*, 15 P.3d 791 (Colo. App. 2000) (affirming an instruction that tracked the language of the statute and pattern jury instruction).

Here, the prosecution charged Dardano with conspiracy to distribute marijuana under § 18-18-406(6)(B)(I) (see Vol. 1 p. 84). The parties agreed that the prosecution's elemental instruction conformed to the statutory language (*see* CD 6/28/11 pp. 132-34). *Compare* § 18-18-406(6)(B)(I) *with* Vol. 1 p. 84 (Instruction No. 11).

On appeal, Dardano contends the trial court reversibly erred by giving this instruction because it is based on a misinterpretation of

Colorado law (*see* OB:31-35). Specifically, Dardano cites to the separate conspiracy offense in section 18-2-201 and argues that conspiracy to distribute marijuana required proof that he specifically intended to act towards an unlawful purpose (*see id.*).

But this argument improperly asks this Court to rewrite the plain language of subsection 18-18-406(6)(B)(I) rather than interpreting it according to our Supreme Court's rules of construction.

When interpreting a statute, this Court must give effect to the legislature's purpose and intent by examining the plain and ordinary meaning of the statutory language. *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005). Additionally, courts must "respect the legislature's choice of language" and "not add words to the statute or subtract words from it." *Turbyne v. People*, 151 P.3d 563, 567-68 (Colo. 2007). Thus, courts should not read language into a statute that the General Assembly chose not to include after adding it to other statutory provisions. *See, e.g., Colo. Dep't of Revenue v. Hibbs*, 122 P.3d 999, 1005 (Colo. 2005); *People v. Jaramillo*, 183 P.3d 665, 671 (Colo. App. 2008); *see also Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) (citing the

interpretive canon *expressio unius exclusio alterius* ("the inclusion of certain items implies the exclusion of others") and concluding that because the legislature had included a particular remedy in one statute but not in another, the legislature could not have intended the particular remedy in the latter).

The conspiracy to distribute marijuana statute provides:

> Except as is otherwise provided . . . , it is unlawful for any person *knowingly* to dispense, sell, distribute, or possess with intent to manufacture, dispense, sell or distribute marijuana or marijuana concentrate; or to attempt, induce, attempt to induce, or *conspire with* one or more other persons, to dispense, sell distribute, or possess with intent to manufacture, dispense, sell or distribute marijuana or marijuana concentrate.

§ 18-18-406(6)(B)(I) (emphasis added). Based on this statute, the Supreme Court Committee on Criminal Jury Instructions created a model instruction for this offense:

> The elements of [distribution] [manufacturing] [dispensing sale possessing with intent to (distribute) (dispense) (sell)] [marijuana] [marijuana concentrate] are:
>
> 1. That the defendant,
>
> 2. in the State of Colorado, at or about the date and place charged;

3. *knowingly*

4. [distributed] [manufactured] [dispensed] [sold] [possessed with intent to (distribute) (manufacture) (dispense) (sell)], with or without remuneration]

– or –

4. [induced] [attempted to induce] [*conspired with*] one or more persons to,

5. [distribute] [manufacture] [dispense] [sell] [possess with intent to (distribute) (manufacture) (dispense) (sell)], with or without remuneration]

5. or 6. [marijuana] [marijuana concentrate]

[6. or 7. Without the affirmative defense in instruction number ___.]

. . .

COLJI-Crim. No. 18:06 (2008) (emphasis added).

By contrast, the legislature chose different *mens rea* language for the separate conspiracy offense in section 18-2-201, which provides that a "person commits conspiracy to commit a crime if, *with the intent* to promote or facilitate its commission, he agrees with another person or persons that they . . . will engage in

conduct which constitutes a crime . . . *See* § 18-2-201(1) (emphasis added); COLJI-Crim. No. G2:02 (2008).

This difference in the statutory language demonstrates a clear legislative choice. The General Assembly's use of "intent" *mens rea* language in section 18-2-201 shows that it clearly understood how to criminalize an offender's specific intent to commit a crime, and had it intended to do so, it could have included such language in section 18-18-406(6)(B)(I). Moreover, this distinction is consistent with the legislature's previously recognized application of different standards in criminalizing conspiracy to traffic narcotics from the general conspiracy statute. *See People v. Goodale*, 78 P.3d 1103, 1108 (Colo. 2003) (recognizing that "it was within the legislature's discretion to punish marihuana conspiracies more severely than other conspiracies") (internal quotations and citations omitted).

Accordingly, this Court should respect the General Assembly's choice of language and not entertain Dardano's speculative claim that the legislature must have intended something other than what it wrote.

IV. The Jury Did Not Act Irrationally By Finding Dardano Guilty as Charged.

Dardano contends the trial court erred by denying his motion for judgment of acquittal because he was acting as a caregiver and complied with state law (*see* OB:23-31).[12]

This argument fails because there was substantial evidence from which the jury could rationally conclude, as a factual matter, that Dardano was guilty and rejecting his alleged mistake of fact/reasonable belief defenses.

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[12] Dardano also contends the trial court violated his constitutional rights to due process and a fair trial by instructing the jury on his affirmative defenses under the Code, which "impermissibly allowed the finder of fact to make determinations of law" (OB:21, 35-38). The Court should not consider this unpreserved constitutional claim, particularly because Dardano invited any such error by agreeing for the jury to be instructed on these issues (*see* CD 6/28/11 pp. 152-53, 157-59, 170-75). *See Martinez v. People*, 244 P.3d 135, 139 (Colo. 2010); *c.f. People v. Houser*, 2013 COA 11 ¶¶ 29, 45, 49 (Jan. 31, 2013) (discussing the limited circumstances for discretionary review of unpreserved constitutional claims); *see also Horton v. Suthers*, 43 P.3d 611, 619 (Colo. 2002) (stating the invited error doctrine precludes any review "where one party expressly acquiesces to conduct by the court or the opposing party").

A. Standards of review.

The People agree that Dardano preserved sufficiency claims by making a motion for judgment of acquittal (*see* OB:22-23; CD 6/28/11 pp. 102-09).

The People agree that courts consider the sufficiency of the evidence *de novo* and, because jury verdicts deserve deference and a presumption of validity, courts apply a "daunting standard" to these types of challenges: "constru[ing] the record in the light most favorable to the prosecution to determine whether any rational juror could have found guilt proven beyond a reasonable doubt." *People v. McBride*, 228 P.3d 216, 226 (Colo. App. 2009); (*see also* OB:21-22).

B. There was sufficient evidence for a rational juror to find Dardano guilty.

The proper analysis for sufficiency of the evidence is the *Bennett*[13] test, which considers "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion

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[13] *People v. Bennett*, 183 Colo. 125, 515 P.2d 466 (1973).

by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291, 1288-89 (Colo. 2010) (internal quotations and citations omitted). Importantly, it does not matter that a reviewing court might have reached a different conclusion, but only that there is a logical connection between the facts established and the conclusion inferred. *Id.* at 1291-92; *Bennett*, 515 P.2d at 469 (stating the prosecution need not "exclude every reasonable hypotheses other than guilt" or disprove the defendant's theory in order for there to be sufficient evidence).

Here, the instructions and the parties' closing arguments focused on a limited number of factual disputes that went to whether Dardano knowingly cultivated and distributed marijuana without his claimed affirmative defenses (*see* Vol. pp. 83-91, 95; CD 6/28/11 pp. 180, 184-87, 193-02, 203-04). Though Dardano disagrees with the jury's verdict, the record shows there was sufficient evidence to logically connect the facts to the jury's determination of guilt, including:

- Testimony from the City planner that he specifically told Dardano that he could not legally operate his proposed

medical marijuana businesses because of the Federal Heights moratorium – as the trial court noted, the jury's view of this testimony and its credibility would be critical to the question of whether Dardano knowingly violated the law (*see* CD 6/25/11 pp. 162-65, 170-72; 6/26/11 pp. 13-14, 17-19, 27, 75-76; 6/28/11 pp. 124-25 (trial court comments in rejecting motion for judgment of acquittal);

- This testimony also disproved Dardano's claimed mistaken belief that he was allowed to operate a marijuana distribution center out of his trailer, particularly because he allegedly told the planner that he knew he could not operate (*see* CD 6/26/11 pp. 13-14, 17-19; Vol. 1 p. 90 (mistaken belief defense instruction);
- This testimony also undermined Dardano's theory of defense that he relied on the advice of counsel because the City planner also told one of Dardano's attorneys that he could not operate his proposed medical

marijuana business (*see* CD 6/26/11 pp. 17-19; Vol. 1 p. 95);

- Evidence that Dardano did not operate his marijuana business at the commercial location associated with his license applications, but instead operated from his unmarked residential trailer – raising the inference that Dardano knew his operation was illegal and sought to conceal it from local authorities (*see* Vol. 13, Trial Exhibits 8 (local business license application), 14-16, 21-26 (pictures of trailer/marijuana operation), Exhibit 4 (map); CD 6/26/11 pp. 9-15, 27, 200-06, 216-25; 6/27/11 pp. 18-19, 43);
- Evidence that Dardano's business sold marijuana to an undercover police officer without requesting identification or verifying his insufficient "medical marijuana" paperwork – again raising the inference that Dardano knowingly violated the law (*see* CD 6/26/11 pp. 165-72, 175, 193, 217-19);
  - This testimony also undermined Dardano's affirmative defense that he was acting as a "caregiver" because his

business provided marijuana to anyone – not just to five registered patients to whom he provided services beyond simply supplying marijuana (*see* CD 6/26/11 pp. 93-94, 98 (discussing caregiver model); 6/27/11 pp. 88-90, 93, 149, 155-56 (Dardano's witnesses confirming he did nothing for his patients except supply marijuana and open the door for them); *see also* § 25-1.5-106(8); *Clendenin*, 232 P.3d at 214);

- Testimony that compliance with the Medical Marijuana Code required compliance with local law (*see* CD 6/26/11 pp. 105-10, 149-54);
- Evidence that Dardano never received a local business license from the City because it outlawed medical marijuana businesses before lifting the moratorium – thus, as the prosecution argued at closing, Dardano was not entitled to any affirmative defense for having been "subsequently granted" local approval (*see* CD 6/28/11 pp. 185-86; 6/25/11

pp. 162-72; 6/26/11 pp. 13-19, 27; *see also infra* Argument I.C.2.).

- Evidence that a different medical marijuana business received its local licenses and approval before the moratorium went into effect and was allowed to operate until the City outlawed such businesses in November 2011 – refuting Dardano's claims that he was being prosecuted for political reasons rather than because he operated an illegal dispensary (*see* CD 6/25/11 pp. 146-47; 6/26/11 pp. 26-27, 70, 75-76; 6/28/11 pp. 200-02 (defense closing)).

Thus, given the quantity and quality of the evidence and the deferential standard that applies, this Court should affirm the jury's convictions.

CONCLUSION

For these reasons, this Court should affirm the trial court's judgment.

JOHN W. SUTHERS
Attorney General

/s/Kevin E. McReynolds
KEVIN E. MCREYNOLDS, 40978*
Assistant Attorney General
Appellate Division
Attorneys for the People of the State of Colorado
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon counsel for Defendant, Jeffery S. Gard, Anna E.V. Bond, and Michael L. Aaronson via Integrated Colorado Courts E-filing System (ICCES) on December 27, 2013.

/s/ C. D. Moretti

Sec. 14-19. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Business means all activities engaged in, or caused to be engaged in, for the object of gain, financial profit, benefit or advantage, directly or indirectly.

Person means any individual, firm, partnership, joint venture, corporation, business entity of any nature, estate or trust, receiver, trustee, assignee, lessee or any person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, or any group or combination acting as a unit.

(Code 1985, § 12-1-1)

Sec. 14-20. - Business license required.

It shall be unlawful for any person to operate a place of business or sell goods within the city without first having obtained a license therefor from the city.

(Code 1985, § 12-1-2)

Sec. 54-19. - Legislative intent.

(a) It is the intent of the city that all sales, transfers or consumption of tangible personal property within the city shall be subject to the sales and/or use tax imposed herein unless the same is specifically exempted from taxation as specified in this article. It is also the intent of the city to designate revenues of the one percent increase in sales and use tax, approved by the municipal voters in 2002, for emergency services, public safety, public works, parks and public improvements as described herein.

(b) The city council hereby affirms its authority as a home rule municipality, pursuant to article XX, section 6 of the state constitution, to assess, levy and collect local sales and use taxes as deemed appropriate by the city council in the exercise of its lawful discretion.

(c) This article shall be known as and may be cited or referred to as the "Sales and Use Tax Code."

(Code 1985, § 3-3-5)

State law reference— *Referendum required, C.R.S. § 29-2-102.*

Sec. 54-28. - Sales tax license required.

(a) *Unlawful without license*. It shall be unlawful for any person to engage in the business of selling tangible personal property at retail without first having obtained a city license therefor. Where any person conducts business at more than one location within the city, a separate license for each place of business shall be required. Each license shall be numbered and shall show the name, residence, place, and character/description of the licensee's business, and shall be posted in a conspicuous place within the business for which it is issued.

(b) *Application*. A license shall be granted and renewed only upon application, stating the applicant's name, name and location of the business, and such other facts as the finance director requires. Such license shall be granted and issued by the finance director and shall be in effect until December 31 of the year for which it is issued, unless terminated or revoked sooner.

(c) *Fees*. For each license issued under the provisions of this article, city council may, by resolution, require that a fee be paid. If required, an annual fee shall be paid for each year or fraction thereof for which such license is issued or renewed. No license shall be issued until the required fee has been paid in full, if applicable.

(d) *Annual renewal*. It shall be the duty of each licensee, before January 1 of each year, to obtain a renewal, if such person remains in the retail business or liable to account for the tax provided for in this article.

(e) *Nontransferable*. No license shall be transferable, except that a licensee may move a business's location within the city. Upon moving a place of business within the city, each licensee shall promptly notify the finance director in writing of such change.

(f) *Suspend/revoke*. The finance director may, in accordance with the procedure set forth in chapter II, article XI, suspend or revoke the license of any person determined to have violated any provision of this article.

(Code 1985, § 3-3-50)

Sec. 54-29. - Taxpayer responsibilities.

(a) *Tax required*. The tax imposed by this article shall be in addition to all other taxes imposed by law, except as otherwise provided in this article.

(b) *Statement of tax*. It shall be unlawful for any retailer to advertise or hold out or proclaim to the public or to any customer, directly or indirectly, that the sales tax or any part thereof imposed by this article shall be assumed or absorbed by the retailer or that it shall not be added to the selling price of the property sold or, if added, that it or any part thereof shall/may be refunded.

(c) *Alcohol exception*. Except for the sale price of any malt, vinous or spirituous liquor sold by the drink or items sold from coin-operated devices including the price used to operate such devices, each retailer shall add the tax imposed to the sale price or charge, showing such tax as a separate and distinct item and, when added, such tax shall constitute a part of such price or charge, shall be a debt from the consumer or user to the retailer until paid, and shall be recoverable at law in the same manner as other debts.

(d) *Tax schedules*. The tax schedules promulgated under this article shall be used by a retailer in determining amounts to be included in the sales price. The use of the schedules shall not relieve a retailer from liability for payment of the full amount of the tax imposed pursuant to this article.

(e) *Excess collection*. If any retailer during any reporting period shall collect as sales tax an amount in excess of the amount of the sales tax imposed under this article, the retailer shall remit to the finance director the full amount of the sales tax imposed under this article, including all excess amounts.

(f) *Disputes*. When a dispute arises between a retailer and a purchaser who claims the sale is exempt from tax, the retailer shall collect and the purchaser shall pay such tax. The purchaser may then submit a refund claim to the finance director on a form provided by the finance director. Any claim must be made within 90 days of the purchase. If the finance director determines a refund should be granted, it will be paid directly to the purchaser.

(Code 1985, § 3-3-55)

Sec. 54-30. - Filing returns; due dates.

(a) *Return due date*. Every taxpayer shall file a return, whether or not tax is due, and remit any tax due to the city on or before the 20th day of the month following the reporting period.

(b) *Multiple locations*. A retailer engaged in business at two or more locations, whether inside or outside the city, who collects sales tax may file one return for all such locations, when accompanied by a supplemental schedule showing the gross sales and net taxable sales for each location.

(c) *Return schedule*. Unless otherwise approved by the finance director, taxpayers shall file returns and pay tax as follows:

  (1) A taxpayer whose monthly tax due is $100.00 or more shall file returns and pay tax monthly.

  (2) A taxpayer whose monthly tax due is less than $100.00 shall pay tax quarterly.

  (3) If the tax due is less than $100.00 per month for an entire calendar year, the filing status shall change to quarterly for the following calendar year. The annual filing status will be determined by the first full month of tax collected.

(d) *Reporting period*. The reporting period for a final return shall end on the date of the transfer of ownership of the business.

(e) *Temporary license reporting period*. The reporting period for a temporary license shall end on the day the temporary location closes or the event concludes.

(f) *Timely payment*. Timely payment shall be evidenced by the postmark date, if mailed; otherwise, timely payment shall be evidenced by the date of the receipt issued by the city's finance department.

(g) *Due date*. Any due date, payment date, or deadline for paying tax, providing information or taking other action which falls on a Saturday, Sunday or legal holiday recognized by either the federal government or the state shall be extended to the first business day following such weekend or holiday.

(h) *Due date exceptions*. The finance director may, upon written request of the taxpayer and in the director's sole discretion, authorize the filing of returns and payment of taxes at such intervals as will better accommodate the convenience of the taxpayer. The finance director may grant such request, if it is determined, in the director's sole discretion, that the collection of the tax will not be jeopardized, that the realization of amounts owed will not be delayed, and that administrative hardship to the city will not be caused by reason of the granting of such request. Authorization for such alternate method of reporting may be revoked by the director, if the taxpayer becomes delinquent or, if the director otherwise determines, in the director's sole discretion, that such alternative method will jeopardize collection of the tax, result in delay of amounts owed, or otherwise cause administrative hardship to the city. Following notice of such revocation, the taxpayer shall immediately file returns and pay the tax required by this article.

(Code 1985, § 3-3-60)

ARTICLE XVI. - MEDICAL MARIJUANA CENTERS

Sec. 70-920. - Definitions.
Sec. 70-921. - Prohibitions.

Sec. 70-920. - Definitions.

Colorado Medical Marijuana Code means Article 43.3 of Title 12 of the C.R.S. § 12-43.3-101 et seq., as same may be amended from time to time.

Medical marijuana means marijuana that is grown and sold pursuant to the Colorado Medical Marijuana Code (C.R.S. § 12-43.3-101 et seq.,) for a purpose authorized by Article XVIII, Section 14 of the Colorado Constitution.

Medical marijuana center means a person licensed pursuant to the Colorado Medical Marijuana Code to operate a business, as described in Colorado Medical Marijuana Code, that sells medical marijuana and medical marijuana-infused products to registered patients or primary caregivers as defined in Article XVIII, Section 14 of the Colorado Constitution, but is not a primary caregiver, and which a municipality is authorized to prohibit as a matter of law.

Medical marijuana-infused products manufacturer means a person licensed pursuant to the Colorado Medical Marijuana Code to operate a business manufacturing medical marijuana-infused products in accordance with the Colorado Medical Marijuana Code, and which a municipality is authorized to prohibit as a matter of law.

Optional premises cultivation operation means a person licensed pursuant to the Colorado Medical Marijuana Code, to grow and cultivate marijuana in accordance with the Colorado Medical Marijuana Code, and which a municipality is authorized to prohibit as a matter of law.

(Ord. No. 10-19, § 1, 12-21-2010)

Sec. 70-921. - Prohibitions.

Uses prohibited. It is unlawful for any person to operate, cause to operate, or permit to be operated a medical marijuana center, an optional premises cultivation operation, or a medical marijuana-infused products manufacturing facility in the city.

(Ord. No. 10-19, § 1, 12-21-2010)

7/1/10 “Black Thursday”

Posted by Jeff Gard on June 29, 2010 · Leave a Comment

Try as I might, I cannot possibly get to all of you before Thursday (I have tried!). Accordingly, I am writing this blog in an effort to address various issues that appear common to most MMJ business people.

1. 7/1/10 is the effective date for all MMJ businesses going forward. I understand that Mr. Matt Cook has told some of you that you have until 7/1/11 to comply. This is not the case. I have spoken with Mr. Cook and corresponded with him on several occassions. In his correspondence he makes clear that your MMC and/or MIP application will be evaluated using the 7/1/10 date. For those of you seeking to add a retail or add a grow after 7/1/10, Mr. Cook advises that both aspects of the MMC must be locally approved on or before 7/1/10.
2. There is no one year state moratorium. However, there is a defacto moratorium in that you cannot operate after 7/1/10 unless you were “established”/locally approved for both the grow and retail location(s) before 7/1/10. Otherwise, you cannot operate until both local and state approval are obtained.
3. Hash is going to be considered an “infused product.” The distinction provided by Mr. Cook is that green stuff in a bag is for MMCs, everything else is for MIPs.
4. There can be no deliveries except in the narrow circumstances provided in HB1284.
5. One grow can supply a MMC with multiple locations and common ownership.
6. One grow cannot supply MMJ to mulitiple MMCs not wholly and commonly owned by the same people. NO INDEPENDENT CONTRACTOR GROWS NO MATTER WHAT ANYONE IS TELLING YOU!!!
7. The residency, “no felony w/i five years of completion of sentence” and “no felony drug convictions ever” standards apply for owners, employees and managers of the MMC. The criminal background issues apply equally to investors.
8. The 70/30 rule applies on 7/1/10 and the certification is due 9/1/10. Again, in evaluating your application and 70/30 certification, the state will look back to 7/1/10.
9. MIPs must be locally approved by 7/1/10 to be considered established under HB1284 even if there is no such licensing procedure locally available.
10. The MIP may, but is not required to, grow its own MMJ using a locally approved OPC or may contract, in writing, with up to 5 MMCs to purchase the MMJ for use in making the products. The MIP MMJ cannot be resold to any other business or person, but the MIP can sell its products to any MMC.

I know how hard it is out there. Better to be on the sideline and do it right, then be further down the road doing it wrong. Remember, doing it wrong can result in delay, denial, permanent bar from future MMJ business or removal of any protection from criminal prosecution.

Stay legal, stay safe.

7/1/10 or 7/1/11? Which is it?

Posted by Jeff Gard on July 7, 2010 · Leave a Comment

Confusion continues to guide the MMJ industry. Many of you have attended presentations by Mr. Matt Cook, the head of the state's MMJ business regulation division. At these presentations, Mr. Cook repeatedly states that the bill goes into effect on 7/1/11 and that local regulations apply until then. I have spoken with many MMJ business people who take this information as the gospel truth and intend to continue with their businesses in their current form until 7/1/11. Many such businesses are "grow only" or "retail only" operations that have been locally approved (or not). Many are owned by people who have not resided in the state for two years, have a felony drug conviction or a felony conviction less than five years old or all three. In my discussions and correspondence with Mr. Cook (see prior blogs), it appears that continued operation of a MMJ business without strict compliance with HB1284 until 7/1/11 could be a serious problem.

Let's examine the idea that you have until 7/1/11 to comply with HB1284. If the bill does not take effect until 7/1/11, is there any requirement to apply to the state by 8/1/10? Can you refuse to pay the $7500-$18,000 application fee until July 2011? When you list your optional grow premises, can you tell the state that you plan to get around to it before July 2011? When you list a drug felon or out-of-state resident as an owner or employee on your application, will you be able to address this issue sometime before 7/1/11. Finally, when you certify, under penalty of perjury, on 9/1/10 that you are growing 70% of your own MMJ, can you tell the state that you are planning on doing this, but currently are buying all of the MMJ from various growers?

The point of this exercise is to point out that compliance with HB1284 appears to be immediate. If it were otherwise, none of the provision of HB1284 would apply, including the 8/1/10 application, the license/application fee, the 9/1/10 certification, etc.

Based on the information we received from Mr. Cook and our reading of HB1284, we suggest immediate compliance with HB1284. If you follow this advice, the worst that can happen is that you ran an HB1284 compliant business for one year longer than necessary. However, if you defer your compliance until July1, 2011, you may find that your application is denied or, worse, that you may face criminal prosecution for operating a business without the benefit of HB1284 protection. In our view, it is better to be safe than sorry.