

DISTRICT COURT, DOUGLAS COUNTY STATE OF COLORADO Douglas County Justice Center 4000 Justice Way #2009 Castle Rock, Colorado 80109	DATE FILED December 17, 2025 2:18 PM CASE NUMBER: 2023CV30737
Appeal from the County Court of Douglas County, Division D County Court Case Number: 21M1544 Honorable Lawrence Bowling, Judge	COURT USE ONLY
Plaintiff-Appellee: <b>THE PEOPLE OF THE          STATE OF COLORADO</b>  v.  Defendant-Appellant: <b>PAMELA WYNN</b>	Case Number: <b>23CV30737</b>  Division: <b>5</b>
<b>ORDER ON APPEAL</b>	

**Introduction**

THIS MATTER comes before the Court on appeal from county court. Defendant-Appellant Pamela Wynn (“Defendant”) requests that the Court reverse her misdemeanor conviction for unlawful possession of a controlled substance and remand for a pretrial evidentiary hearing.

Based on the Court’s review of the record, the applicable law, and the briefing in this matter, the Court **REVERSES** the judgment of conviction and **REMANDS** to the county court for further proceedings and a new trial consistent with the findings in this Order.

### **Factual and Procedural Background**

The issue raised in this appeal requires a careful examination of the case's procedural history. On July 21, 2021, after a traffic stop and search of the vehicle, the Defendant was arrested and issued a summons for displaying expired license plates, possession of drug paraphernalia, and unlawful possession of a controlled substance. TR 7/26/23 pp 121:15-133:25; CF Part I, p 1. After a trial on July 26, 2023, a jury found the Defendant guilty of all charges. CF Part II, pp 40-43. In this appeal, the Defendant challenges only her conviction for unlawful possession of a controlled substance. Opening Br. p 23; Notice of Appeal p 1.

The Defendant was charged with unlawful possession of a controlled substance after the Parker Police Department located two baggies containing cocaine and MDA in the vehicle. TR 7/26/23 pp 146:22-148:24; TR 7/26/23, p 195:1-8; Ex. 12. Prior to trial, on May 5, 2023, the Defendant moved to dismiss the unlawful possession of a controlled substance charge based on C.R.S. § 18-18-403.5(4). TR 5/5/23 pp 8:10-9:4. This statute provides:

Notwithstanding the provisions of subsection (2) of this section, on or after March 1, 2020, a district attorney shall not charge or prosecute a person pursuant to this section for any minuscule, residual, or unusable amount of a controlled substance that may be present in a used hypodermic needle or syringe, or other drug paraphernalia, as defined in section 18-18-426. The circumstances described in this subsection (4) may be used as a factor in a probable cause or reasonable suspicion determination of any criminal offense if the original stop or search was lawful.

§ 18-18-403.5(4), C.R.S. The police report indicated that the two substances seized weighed 0.01 grams. CF Part I, p 113; TR 7/26/23 pp 163:22-164:6. Based on this report, the Defendant argued dismissal was appropriate because the amounts were minuscule, residual, or unusable. TR 5/5/23 p 9:15-18.

In response, the People presented a crime laboratory report indicating that the two substances tested positive for cocaine and MDA. CF Part I, p 108. Further, the report found each

substance weighed .05 grams. *Id.* The People argued that because the crime laboratory was able to perform testing of the substances in both baggies, the amounts were not minuscule, residual, or unusable under C.R.S. § 18-18-403.5(4).

On May 23, 2023, the county court denied the motion to dismiss without a hearing. CF Part I, p 117. Specifically, the county court issued the following order:

Denied – given the People’s response and in the absence of any evidence currently before the court regarding what amount of the involved drug constitutes a “usable amount,” the court finds that whether or not the amount of the drug involved in this case was a “usable” amount is properly a factual determination to be made by jury. The court will expect to hear evidence if this case proceeds to trial regarding the same, from someone with knowledge of the issue.

*Id.* On the next day, the Defendant filed a motion to reconsider. CF Part I, pp 127-29. The Defendant argued that C.R.S. § 18-18-403.5(4) vests the court with authority to make a finding that the amount of the controlled substance is not sufficient. CF Part I, p 128. Further, the Defendant asserted that the burden falls upon the People to present sufficient evidence for the court to make a *de minimis* finding. *Id.* In response, the county court ordered a hearing and required the People “to produce the physical evidence, so that the court and counsel for both sides [had] an opportunity to view what 0.01 grams of the charged substance look[ed] like.” CF Part I, p 131.

The county court reviewed the two substances at a hearing on June 13, 2023. TR 6/13/23 p 4:12-15. The county court noted that, based on the language of C.R.S. § 18-18-403.5(4), it could grant a motion to dismiss if it found the amount was minuscule, residual, or unusable. TR 6/13/23 p 10:7-13. The county court then held the following:

Again, the statute – the – legislature didn’t define minuscule, residual, or unusable, and I’m not familiar with the use of drugs. So I don’t know whether the two amounts together here that I see are usable or unusable, but I think that they are not so minuscule, residual, or unusable that I can make that finding as a matter of law and grant the Defense motion to dismiss.

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I think that based on whatever evidence the jury hears at trial, they get to decide. I mean, I think given the way the statutes (sic) worded. One of the elements, at least impliedly, if not already actually set forth would be the jury would have to find that that is not minuscule, residual, or unusable.

TR 6/13/23 pp 10:16-11:14. Importantly, the record from the hearing on June 13, 2023, is unclear on what burden of proof the county court applied in making its determination. TR 6/13/23 pp 1-12. Similarly, it is unclear whether the Defendant was permitted to present evidence. *Id.*

After this ruling, the Defendant filed a motion to bifurcate the unlawful possession of a controlled substance count. CF Part I, pp 136-38. In the motion, the Defendant requested that an impaneled jury first decide whether the unlawful possession of a controlled substance count had been “improperly brought” consistent with C.R.S. § 18-18-403.5(4). *Id.* at 136. To support this request, the Defendant argued:

Unlike other statutes which provide either element negating or affirmative defenses, C.R.S. 18-18-403.5(4) does not provide a defense to the charge of possession. Rather, it provides that even if the defendant has committed the crime of possession, the prosecution cannot prosecute the defendant provided the amount at issue is so minuscule, residual or unusable as to be nonprosecutable. The issue of confusion for the jury becomes apparent when one considers whether a jury might mistakenly infer that assertion of 18-18-403.5(4) constitutes an admission to the knowing element of 18-18-403.5(1), (2)(c).

*Id.* at 137.

On the morning of trial, the county court, relying on the Court of Appeals decision in *People v. Richardson*, 8 P.3d 562, made a record regarding C.R.S. § 18-18-403.5(4). TR 7/26/23 pp 8:6-10-5.<sup>1</sup> The county court ruled that a court, not a jury, had to determine whether C.R.S. § 18-18-403.5(4) applied. *Id.* To make this finding, the county court determined that it would give a special interrogatory to the jury. TR 7/26/23, p 10:19-22. If the jury found the amount was “.1

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<sup>1</sup> The Court notes that both the People and the county court reference a pretrial hearing on July 24, 2023, where the county court initially proposed the special interrogatory. People’s Resp. p 6; CF Part II, p 179-80; TR 7/26/23, p 11:14-15. A transcript of the July 24, 2023, hearing has not been included in the appellate record.

gram or .2 grams,” the county court would then find the amount was usable and not residual or miniscule. TR 7/26/23, p 11:14-19. However, if the jury found the amount was “.01 grams,” the county court would find that the amount was minuscule and would entertain a motion for judgment notwithstanding the verdict. TR 7/26/23, p 11:20-25.

The People objected and argued that the amount is not an element that the People are required to prove beyond a reasonable doubt. TR 7/26/23, p 12:14-18. The transcript notes that defense counsel’s response was indiscernible at times. TR 7/26/23, p 13:5-25. However, it appears that counsel for the Defendant believed the county court’s reasoning comported with the motion for reconsideration and the court found a “creative solution” in response to the “suggestion of bifurcating the trial.” TR 7/26/23, p 13:5-25. After this record, the People no longer contested the special interrogatory. TR 7/26/23, p 18:3-5. Ultimately, the Defendant did not object to the jury instructions. TR 7/26/23, p 231:13-21.

At trial, Officer Cashman from the Parker Police Department testified that each substance weighed .1 grams. TR 7/26/23, p 159:20-23. Further, Officer Cashman testified that he inadvertently wrote in his report that each substance weighed .01 grams, which he described as a clerical error. TR 7/26/23, p 160:13-16; TR 7/26/23, pp 163:22-164:10. Additionally, Forensic Chemist Tucker Hecimovich testified that each substance weighed .05 grams. TR 7/26/23, p 195:1-8; Ex. 12. In closing, defense counsel primarily argued that the “knowingly” element had not been proven at trial; however, he also asserted that the People could not obtain a conviction “because the drugs in the container were minuscule, residual, and unusable.” TR 7/26/23, pp 262:1-264:16. After finding the Defendant guilty, the jury answered the special interrogatory and found that each substance weighed .05 grams. CF Part II, p 41.

After the trial, the county court permitted the parties to file briefs on the issue of whether .05 grams was a minuscule, residual, or unusable amount of a controlled substance. TR 7/26/23, pp 276:23-277:9; CF Part II, pp 45-47. After briefing, the county court noted the difficulty of its decision. CF Part II, p 184. But it combined the amounts together to find that “the .1 grams of controlled substances possessed by [the] Defendant exceeds a miniscule, residual, or unusable amount.” *Id.* Thus, the Court denied the Defendant’s “motions for judgement of acquittal and/or to set aside the judgement.” *Id.* Subsequently, the Defendant filed a notice of appeal on September 24, 2023.<sup>2</sup> CF Part II, p 185.

### **District Court Appellate Review**

Appeals from final county court judgments “shall be taken to the district court for the judicial district in which the county court entering such judgment is located.” C.R.S. § 13-6-310(1); *see also* Crim. Pro. 37(a). This Court “shall review the case on the record on appeal and affirm, reverse, remand, or modify the judgment; except that the district court, in its discretion, may remand the case for a new trial with such instructions as it may deem necessary, or it may direct that the case be tried de novo before the district court.” C.R.S. § 13-6-310(2).

### **Issue Presented<sup>3</sup>**

As framed by the Defendant, the issue is whether the county court violated the Defendant’s due process rights by the improper interpretation and application of C.R.S. § 18-18-403.5(4). Opening Br. p 5. The Defendant argues that her due process rights under the Colorado and United States Constitutions and Colorado statutes were violated because the trial court permitted the

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<sup>2</sup> Defendant’s appeal was initially dismissed on April 8, 2024. However, on April 2, 2025, the Court reinstated Defendant’s appeal and appointed Alternate Defense Counsel. Briefing on this appeal concluded October 8, 2025.

<sup>3</sup> The Defendant also presented the issue of “[w]hether the prosecution unlawfully asked the jury to defy the court’s instruction to consider a prior conviction for a limited purpose during closing arguments.” Opening Br. p 5. Because the Court reverses and remands based on C.R.S. § 18-18-403.5(4), the Court does not address the Defendant’s prosecutorial misconduct claim.

prosecution of the Defendant without an evidentiary hearing as to whether the substances at issue were minuscule, residual, or unusable under C.R.S. § 18-18-403.5(4). Opening Br. p 9.

### **Analysis**

As more fully detailed below, the Court initially finds that the Defendant preserved her claim based on C.R.S. § 18-18-403.5(4). Because the Defendant’s claim is preserved and grounded in statute, any error in the proceedings is subject to the “nonconstitutional harmless error” standard of review. Applying this standard, the Court finds the errors<sup>4</sup> in this case affected the fairness of the trial proceedings and there is a reasonable possibility that the errors contributed to the Defendant’s conviction. Therefore, the Court finds the errors were not harmless.

#### **a. Preservation of the Issue**

The Defendant and the People disagree on whether the Defendant preserved the issue for appeal. In her opening brief, the Defendant asserts she “repeatedly objected” prior to the jury’s verdict that the amounts were miniscule, residual, or unusable. Opening Br. p 10. Conversely, the People assert that the Defendant waived, forfeited, or invited any error. People’s Br. p 5. The People argue that, by filing a motion to bifurcate the trial, the Defendant requested the issue proceed beyond a pretrial procedure. *Id.* at 5-6. Further, the People contend the record does not clearly demonstrate a contemporaneous objection to the court’s procedure. *Id.* at 6. Based on the entire record, the Court finds the Defendant preserved her claim under C.R.S. § 18-18-403.5(4).

“To preserve an issue for appeal, a defendant must alert the trial court to the particular issue.” *People v. Cordova*, 293 P.3d 114, 120 (Colo. App. 2011). Further, a party “must have supplied the right ground for the request.” *Id.* (internal quotation marks and citation omitted). This

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<sup>4</sup> Alternatively, for reversal based on cumulative error, a reviewing court must identify multiple errors that collectively prejudiced the substantial rights of the defendant. *Howard-Walker v. People*, 2019 CO 69, ¶ 25. Under this standard, even if the Court were to assume the errors were individually harmless, the errors in this case, in the aggregate, “show the absence of a fair trial” and collectively prejudiced the substantial rights of the Defendant. *Id.* at ¶ 26.

rule prevents a defendant from raising an issue for the first time on appeal and receiving the most beneficial standard of review. *Id.*

In addition to issue preservation, “[t]he doctrine of invited error prevents a party from complaining on appeal of an error that he or she has invited or injected into the case; the party must abide the consequences of his or her acts.” *People v. Rediger*, 2018 CO 32, ¶ 34. “Invited error is a narrow doctrine and applies to errors in trial strategy but not to errors that result from oversight.” *Id.* For example, a party invites an error in a jury instruction when that party “drafted or tendered the erroneous instruction.” *Id.*

In contrast, waiver is “the *intentional* relinquishment of a *known* right or privilege.” *Id.* at ¶ 39 (emphasis in original) (internal quotation marks and citation omitted). A court does not presume acquiescence in the loss of fundamental constitutional rights and, therefore, indulges every reasonable presumption against waivers. *Id.* Waiver is distinguishable from forfeiture, which is “the failure to make the timely assertion of a right.” *Id.* at 40 (internal quotation marks and citation omitted). The distinction is important because “a waiver extinguishes error, and therefore appellate review, but a forfeiture does not.” *Id.*

Here, the Court finds that the Defendant preserved a claim based on C.R.S. § 18-18-403.5(4) because the Defendant clearly alerted the county court of the issue before trial. On May 5, 2023, the Defendant made an oral motion to dismiss the unlawful possession of a controlled substance charge based on C.R.S. § 18-18-403.5(4). TR 5/5/23 pp 8:10-9:4. The county court initially denied the Defendant’s motion to dismiss without a hearing. CF Part I, p 117. Immediately after the county court’s ruling, the Defendant filed a motion to reconsider, arguing that C.R.S. § 18-18-403.5(4) vests the court with authority to make a finding that the amount of the controlled substance is not sufficient to prosecute. CF Part I, pp 127-29. The county court then held a hearing

prior to trial. TR 6/13/23 p 3:11-24. For these reasons, the Court finds the Defendant preserved a claim under C.R.S. § 18-18-403.5(4).

Contrary to the People's contention, the Court does not find a waiver, forfeiture, or failure to preserve her claim because the Defendant filed a motion to bifurcate the trial and defense counsel did not object to the special interrogatory proposed by the county court. The Defendant filed a motion to bifurcate only after the county court denied the Defendant's motion to dismiss and the motion to reconsider. CF Part I, pp 136-37. After these rulings, the Defendant's motion to bifurcate assumed that C.R.S. § 18-18-403.5(4) "does not provide a defense to the charge of possession." CF Part I, p 137. Additionally, in response to the county court's determination to use a special interrogatory, counsel for the Defendant did not object and noted it was a "creative solution" in response to the "suggestion of bifurcating the trial." TR 7/26/23, p 13:5-25. At best, this record demonstrates that the Defendant abandoned her request *to bifurcate the trial*, as opposed to not preserving her claim under C.R.S. § 18-18-403.5(4).

Further, defense counsel's comment that he believed the county court's reasoning comported with the motion for reconsideration does not constitute a waiver, forfeiture, or failure to preserve the Defendant's claim. Two months before these comments, the county court was presented with an adequate opportunity to address Defendant's claim under C.R.S. § 18-18-403.5(4). *See People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) (noting that, to preserve an argument for appeal, the trial court must be presented with an adequate opportunity to make findings of fact and conclusions of law on the issue).

Additionally, the Defendant did not draft or tender the special interrogatory instruction, which further supports a finding that the invited error doctrine is inapplicable. *See Rediger*, ¶ 34. Therefore, the Court finds that the Defendant preserved her claim under C.R.S. § 18-18-403.5(4).

### **b. Standard of Review**

Finding that the Defendant preserved her claim for appeal, the Court must determine the applicable standard of review. The Defendant alleges that “her rights to due process under the Colorado and United States Constitutions and the Colorado Revised Statutes” were violated. Opening Br. p 9. While the Defendant cites to the Colorado and United States Constitutions, the Defendant’s claim essentially stems from a statutory provision, C.R.S. § 18-18-403.5(4). Accordingly, the Court finds that the Defendant’s claim is governed by the nonconstitutional harmless error standard of review. *See Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010) (noting that “only errors that specifically and directly offend a defendant’s constitutional rights are ‘constitutional’ in nature.”).

“Under this standard, reversal is required only if the error affects the substantial rights of the parties.” *Hagos v. People*, 2012 CO 63, ¶ 12; *see also* Crim. P. 52(a) (“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.”). The error must substantially influence the verdict or affect the fairness of the trial proceedings. *Id.* In other words, “an error in a criminal trial will be disregarded if there is not a reasonable possibility that the error contributed to the defendant’s conviction.” *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986).

### **c. Immunity from Prosecution under C.R.S. § 18-18-403.5(4)**

The Defendant notes that the issue raised in this appeal is a matter of first impression. Opening Br. p 9. Further, the People have not cited a case that interprets C.R.S. § 18-18-403.5(4). Indeed, the county court aptly described it as “uncharted water.” TR 7/26/23, p 7:4-6. The Court agrees this is a matter of first impression because there does not appear to be caselaw addressing the application of C.R.S. § 18-18-403.5(4).

As set forth in the statute, a district attorney “shall not charge or prosecute” a person for “any minuscule, residual, or unusable amount of a controlled substance that may be present in a used hypodermic needle or syringe, or other drug paraphernalia, as defined in section 18-18-426.” C.R.S. § 18-18-403.5(4).<sup>5</sup> The statute does not define what constitutes a “minuscule, residual, or unusable amount of a controlled substance.” Further, the statute contains no procedures for its implementation.

Colorado caselaw has somewhat addressed the “usable” quantity issue. In these cases, the Colorado Supreme Court’s analysis primarily focused on the “knowingly” element of the crime. *People v. Theel*, 505 P.2d 964 (Colo. 1973); *People v. Ceja*, 904 P.2d 1308 (Colo. 1995); *Richardson v. People*, 25 P.3d 54 (Colo. 2001). Accordingly, a “usable quantity of a contraband is not by itself an element of the crime,” but “[p]ossession of a usable quantity is evidence of knowing possession.” *Richardson*, 25 P.3d at 58 (internal quotation marks and citation omitted). Stated differently, “[i]n situations where there is not (sic) evidence of a usable quantity, the People must present other evidence regarding the defendant’s knowledge to justify the jury’s consideration of that element.” *Id.*

However, these cases are distinguishable from the present issue. The Colorado Supreme Court’s analysis in *Theel*, *Ceja*, and *Richardson* did not address immunity from prosecution under C.R.S. § 18-18-403.5(4). Indeed, *Theel*, *Ceja*, and *Richardson* were decided before House Bill 19-1263, which added C.R.S. § 18-18-403.5(4), was signed into law on May 28, 2019. Importantly, the “minuscule, residual, or unusable amount” language added by C.R.S. § 18-18-403.5(4) appears

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<sup>5</sup> The People argue that “[t]he possession of controlled substances packaged in plastic bags or ‘baggies’ does not fit the statutory intent.” People’s Resp. p 8. The county court rejected this argument. CF Part II, p 180-81. The Court agrees with the county court because the People’s argument is untenable with the plain language of the statute. See C.R.S. § 18-18-426(1) (defining drug paraphernalia to include equipment and materials for “packaging,” “storing,” and “containing”); see also *People v. Trujillo*, 2019 COA 74, ¶ 14 (“If a statute’s language is clear, we apply it as the legislature wrote it.”).

to directly contradict part of the rationale in *Ceja*. See *Ceja*, 904 P.2d at 1310 (“From the plain language of the statute, it is clear that the legislature did not intend to criminalize only knowing possession of a usable amount of a controlled substance; they intended to criminalize knowing possession of any amount.”).<sup>6</sup> Accordingly, the Court finds that the *Theel*, *Ceja*, and *Richardson* cases do not provide a substantially helpful analysis in the application of C.R.S. § 18-18-403.5(4).

In another case, the Colorado Supreme Court found that .16 grams of cocaine was sufficient evidence to sustain a conviction because “while not a large weight, was a usable quantity and not a mere trace.” *People v. Stark*, 691 P.2d 334, 339 (Colo. 1984) (internal quotation marks and citation omitted). But this case is also distinguishable. The controlled substance’s weight was greater. More importantly, the case was decided before the addition of C.R.S. § 18-18-403.5(4).

In a more recent case, *People v. Avila*, the Colorado Court of Appeals noted a jury may return a guilty verdict “if it finds, beyond a reasonable doubt, that the defendant knowingly possessed any quantity of a controlled substance.” *People v. Avila*, 2019 COA 145, ¶ 11, *overruled on other grounds by Tibbels v. People*, 2022 CO 1 (emphasis in original) (internal quotation marks and citation omitted). However, this Colorado Court of Appeals decision, which cited *Theel*, *Ceja*, and *Richardson*, was issued on September 12, 2019. *Id.* The provisions of C.R.S. § 18-18-403.5(4) apply on or after March 1, 2020. Thus, the *Avila* decision is equally unhelpful.

Both the Defendant and the People have cited *People v. Guenther*, a case where the Colorado Supreme Court analyzed the immunity from prosecution provision under C.R.S. § 18-1-704.5(3). *People v. Guenther*, 740 P.2d 971 (Colo. 1987). This statute provides that, under certain

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<sup>6</sup> In *Ceja*, the Colorado Supreme Court was analyzing C.R.S. § 18-18-105. See *Ceja*, 904 P.2d at 1308. This statute was repealed and reenacted as C.R.S. § 18-18-405 in 1992. See H.B. 92-1015. Subsequently, in 2010, C.R.S. § 18-18-405 was amended to only reference possession “with intent to manufacture, dispense, sell, or distribute a controlled substance.” See H.B. 10-1352. Simple possession of a controlled substance was recodified at C.R.S. 18-18-403.5. *Id.*; *People v. Gonzales*, 2017 COA 62, ¶ 16 n.2. Thus, the Colorado Supreme Court’s decisions in *Theel*, *Ceja*, and *Richardson* analyzed prior versions of the statute.

circumstances, an occupant of a dwelling using any degree of physical force against an intruder, including deadly force, “*shall be immune* from criminal prosecution for the use of such force.” C.R.S. § 18-1-704.5(3) (emphasis added).

The Colorado Supreme Court construed this statute to authorize a court to dismiss a pending charge before trial when the defendant establishes the statutory conditions for immunity by a preponderance of the evidence. *Guenther*, 740 P.2d at 972. In addition, the Colorado Supreme Court held that if the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense, the statutory conditions under C.R.S. § 18-1-704.5(2). *Id.* at 981. In such an instance, the burden of proof generally applicable to affirmative defenses would apply. *Id.* The defendant would be required to present some credible evidence supporting the applicability of C.R.S. § 18-1-704.5(2); and, if such evidence is presented, the prosecution would then bear the burden of proving beyond a reasonable doubt the guilt of the defendant as to the affirmative defense and the other elements of the crime. *Id.*

The Court finds that the Colorado Supreme Court’s analysis in *Guenther* provides an appropriate procedural framework to apply C.R.S. § 18-18-403.5(4) for several reasons. First, the statutory provision analyzed in *Guenther* and the provision in this case both contain mandatory language barring criminal prosecution. *Compare* C.R.S. § 18-1-704.5(3) (“shall be immune from criminal prosecution”) *with* C.R.S. § 18-18-403.5(4) (“a district attorney shall not charge or prosecute a person”); *see People v. Dist. Ct., Second Jud. Dist.*, 713 P.2d 918, 921 (Colo. 1986) (noting the Colorado Supreme Court “has consistently held that the use of the word ‘shall’ in a statute is usually deemed to involve a mandatory connotation.”); *see also Guenther*, 740 P.2d at 975 (noting that C.R.S. § 18-1-704.5(3) “can only be construed to mean that the statute was intended to bar criminal proceedings” if the statutory circumstances were established.). Second,

the immunity created by C.R.S. § 18-18-403.5(4) requires establishing facts. Its application is limited to “minuscule, residual, or unusable” amounts of a controlled substance “that may be present in a used hypodermic needle or syringe, or other drug paraphernalia, as defined in section 18-18-426.” C.R.S. § 18-18-403.5(4). As the Colorado Supreme Court noted, “[d]etermining whether, in the context of a pending criminal prosecution, a sufficient factual predicate exists for the application of the statutory bar is no different from other forms of adjudication requiring the application of a statutory standard to the facts as found by the court.” *Guenther*, 740 P.2d at 977. Third, if immunity is not established pretrial, “it cannot plausibly be argued that the legislature thereby intended to deprive an accused of *the lesser benefit* of an affirmative defense at trial when those same statutory conditions are established under appropriate standards of proof applicable to the trial of a criminal case.” *Id.* at 981 (emphasis added).

Accordingly, consistent with *Guenther*, the Court finds that the proper procedure to implement C.R.S. § 18-18-403.5(4) is the following:

- (1) When C.R.S. § 18-18-403.5(4) is invoked prior to trial, the burden is on the defendant seeking the benefit of the statutory immunity to establish by a preponderance of the evidence that it applies. If the court finds that the defendant seeking immunity has met the burden of proof, then the court must grant immunity from prosecution and dismiss the charge.
- (2) If the court determines that the defendant has not met the burden of proof and denies the motion to dismiss, the defendant may nonetheless raise at trial, as an affirmative defense<sup>7</sup>, that the controlled substance is a “minuscule, residual, or unusable amount ... present in a used hypodermic needle or syringe, or other drug paraphernalia, as defined in section 18-18-426.”
- (3) In such instance, the burden of proof generally applicable to affirmative defenses would apply. The defendant would be required to present some credible evidence supporting the application of C.R.S. § 18-18-403.5(4). If such evidence is presented, the prosecution would bear the burden of proving beyond

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<sup>7</sup> The Court notes finding that C.R.S. § 18-18-403.5(4) may constitute an affirmative defense is consistent with other decisions regarding the availability of an affirmative defense. *See People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (noting that a “distinct subsection” was an affirmative defense were the definition of the offense was defined in other subsections); *People v. Gonzales*, 2017 COA 62, ¶ 15 (noting that an affirmative defense was not available under C.R.S. § 18-18-403.5 because it was contained under a separate statutory offense); *People v. Whaley*, 159 P.3d 757, 760 (Colo. App. 2006) (finding an affirmative defense available even though General Assembly did not label it as such).

a reasonable doubt the guilt of the defendant as to the issue raised by the affirmative defense and the other elements of the offense charged.

Applying these principles, the Court finds the procedures implemented in this case resulted in errors. These errors affected the fairness of the trial proceedings, and there is a reasonable possibility that the errors contributed to the Defendant's conviction. Therefore, the Court finds the errors were not harmless.

The Court certainly recognizes that, as a matter of first impression, the county court and parties were operating without further guidance from the General Assembly and caselaw interpreting C.R.S. § 18-18-403.5(4). Still, several errors affected the Defendant's substantial rights. First, the Defendant's motion to dismiss was initially denied without a hearing. CF Part I, p 117. While the county court reconsidered its denial, the record is unclear what burden of proof governed the June 13, 2023, hearing. Specifically, the Court is unable to determine if the county court applied a preponderance of the evidence standard. *See Guenther*, 740 P.2d at 972. Most importantly, the Court cannot decipher whether the Defendant had an opportunity to present evidence and testimony at the June 13, 2023, hearing. In fact, the record supports a finding that the hearing was held only to view the evidence. *See* CF Part I, p 131; TR 6/13/23 p 4:12-15.

Further, the county court's decision to determine whether C.R.S. § 18-18-403.5(4) applied after the jury's verdict impacted the fairness of the trial. The county court ruled that the issue was a determination for the court, not the jury. TR 7/26/23 pp 9:4-10-5. However, this is correct for purposes of determining immunity from prosecution *before trial*. *See Guenther*, 740 P.2d at 977. Additionally, the county court relied on the Colorado Court of Appeals decision in *Richardson*. TR 7/26/23 pp 8:6-10-5. But the *Richardson* decisions by the Colorado Court of Appeals and Supreme Court were decided within the context of a motion for judgment of acquittal and allowing the case to proceed to the jury. *See Richardson*, 25 P.3d at 56. Further, the *Richardson* cases go to

the sufficiency of the evidence needed to establish the “knowingly” element of unlawful possession of a controlled substance, not immunity from prosecution. *Id.*

Critically, this procedure foreclosed the opportunity for the Defendant to assert an affirmative defense at trial.<sup>8</sup> Indeed, a properly raised affirmative defense “is treated as though it were another element of that offense” and “[i]f a trial court errs in disallowing an affirmative defense, then it improperly lowers the prosecution’s burden of proof.” *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005). The procedure precluded any possibility that the jury would be instructed on the affirmative defense available under C.R.S. § 18-18-403.5(4). While a special interrogatory was used to determine the amount of the controlled substances, there was no affirmative defense instruction and, therefore, no finding that the People disproved, beyond a reasonable doubt, the amounts were not minuscule, residual, or unusable. Thus, the Defendant was not afforded the “lesser benefit” of asserting the affirmative defense under C.R.S. § 18-18-403.5(4). *See Guenther*, 740 P.2d at 972.

### **Conclusion**

Accordingly, the Court **REVERSES** the judgment of conviction and **REMANDS** to the county court for further proceedings and a new trial consistent with the findings in this Order.  
**SO ORDERED**, December 17, 2025.

BY THE COURT:



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Ben L. Leutwyler, III  
District Court Judge

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<sup>8</sup> A defendant is not entitled to an affirmative defense unless “some credible evidence” supports it. C.R.S. § 18-1-407(1); *People v. Gallegos*, 2023 COA 47, ¶ 47. This has been characterized as a “scintilla of evidence,” which is an “exceedingly low” standard. *Gallegos*, ¶ 47.