

<p>COLORADO COURT OF APPEALS Address: Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED August 8, 2025 4:27 PM</p> <p>▲ COURT USE ONLY ▲</p>
<p>Appeal of El Paso County 2018CR801 Honorable Jann DuBois and Honorable Samuel Albert Evig, District Court Judges</p>	
<p>Plaintiff-Appellee:</p> <p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Defendant-Appellant:</p> <p>PATRICK PESCHONG</p>	<p>Appeal Case No.: 2023CA2</p>
<p>Attorney: McClintock Law Firm, LLC Elizabeth A. McClintock Address: 301 South Weber Street Colorado Springs, CO 80903 Phone: 719-375-0112 Fax: 719-375-0164 Email: mail@McClintocklegal.com Atty. Reg. #25990</p>	
<p align="center">DEFENDANT-APPELLANT'S REPLY BRIEF</p>	

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with the applicable word limit set forth in C.A.R. 28(g). It contains 2745 words.

The undersigned acknowledges that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Elizabeth A. McClintock
Elizabeth A. McClintock

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INTRODUCTION

Patrick Peschong submits the following reply to the attorney general's answer brief. He requests the court consider the information and arguments contained in conjunction with those contained in his amended opening brief.

ARGUMENT

- I. Whether the trial court violated Peschong's right to due process of the law and to present a defense by refusing to admit as defense Exhibit A, the co-defendant's guilty plea to manufacturing 144 grams of methamphetamine, after allowing the co-defendant to invoke a blanket right against self-incrimination.

At trial, Mr. Peschong's counsel sought to admit the guilty plea paperwork of Dakota Willmann. Mr. Willmann was the man driving the vehicle where the 144 grams of methamphetamine that Mr. Peschong was convicted of possession with intent to manufacture or distribute were located. Mr. Willmann pled guilty to manufacturing the same 144 grams of methamphetamine in his plea agreement 18 months before Mr. Peschong's trial. (Suppressed File, Defense's Prop. Exh. A "Willmann Plea Agreement").

Mr. Willmann was an unavailable witness because he had been allowed to avoid testifying by invoking his Fifth Amendment right against self-

incrimination. Mr. Willmann did this when the prosecution sought to have him testify, asserting he was concerned about being federally prosecuted. Based upon his unavailability, Mr. Peschong's defense sought to admit Mr. Willmann's plea agreement to counter the prosecution's claims that only the small baggie of meth in the vehicle belonged to Mr. Willmann and that the 144 grams of methamphetamine found in the black lunch bag belonged solely to Mr. Peschong.

On appeal, Mr. Peschong has asserted that the trial court erred in its decision to allow Mr. Willmann to invoke his right against self-incrimination in a blanket manner and its decision to keep the defense from introducing Mr. Willmann's plea agreement in response to the trial court's decision. The State, in its answer brief, has argued that Mr. Peschong is barred from raising these challenges to the trial court's decision, even under plain error review, because the defense counsel did not address each of those specific points in the trial court.

A. Waiver

The Attorney General has advanced in its brief the argument that Mr. Peschong has "waived his argument concerning the lack of federal immunity for the driver." To be clear, Mr. Peschong did not advance an argument that the

trial court erroneously failed to grant Mr. Willmann, the driver, federal immunity, so there was no such argument to be “waived.” The argument on appeal is that the trial court erred in granting Mr. Willmann’s invocation of immunity in a blanket manner after he had pled guilty, without requiring him to do so in front of the jury. Additionally, extending that to his guilty plea, a written court document that was admissible under the rules of evidence, was erroneous. Mr. Willmann should not have been immune from testifying because he had already pleaded guilty and the prosecution could have granted him use immunity to testify in the state court, which would have kept his testimony from being used against him in a federal prosecution. Both of those points had been made in the trial court previously, specifically after Mr. Peschong’s motion for a new trial had been remanded due to the State’s appeal. (TR 7/11/22, pg. 45). The record is clear that Mr. Peschong has not “intentionally relinquished a known right or privilege” so that this court should find he has waived the ability to raise this issue before the court on appeal. *Phillips v. People*, 443 P.3d 1016, 1022 (Colo. 2019).

B. Invocation of Blanket Immunity

The prosecution may not call a witness who intends to invoke the Fifth Amendment. *De Gesualdo v. People*, 364 P.2d 374, 378 (Colo. 1964) and *Rios-*

Vargas v. People, 532 P.3d 1206, 1216, (Colo. 2023). At the time of Mr. Peschong's jury trial, and his motion for an evidentiary hearing on remand, this prohibition extended to the defense as well. *People v. Dikeman*, 555 P.2d 519 (1976). It was not until the Colorado Supreme Court's opinion in *Rios-Vargas* that the Court determined *Dikeman* had been erroneously decided. The Colorado Supreme Court ruled the defense was allowed to call recalcitrant co-defendants and third parties, such as Willmann, who were invoking their Fifth Amendment rights against self-incrimination, in front of the jury to invoke the right. The defendant on trial could request that the trial court undertake an examination of the witness prior to their testimony to determine if their invocation was correct and if it interfered with the defendant's right to present a defense.

The situation in *Rios-Vargas* was nearly identical to that in Mr. Peschong's, except that the third party here had already entered a guilty plea, not one who could potentially be subject to criminal prosecution. Defense counsel for Mr. Peschong tried to address this inability to question the "unavailable" witness about the guilty plea he had entered into before Mr. Peschong's trial, by asking to have the written plea agreement entered as an exhibit. As noted at the time, the inability to question Mr. Willmann about this

guilty plea to having manufactured the 144 grams of methamphetamine the prosecution claimed belonged solely to Mr. Peschong, deprived Mr. Peschong of the ability to present a complete defense to the charges against him and due process of the law. (TR 9/24/19, pg. 306, ln. 16-21).

Mr. Willmann had already opened himself up to possible federal prosecution by making an admission on the record to manufacturing a large amount of methamphetamine; it is difficult to see how testifying about that same amount of drugs could expose him further. Yet he was allowed to avoid testifying and being subject to cross-examination or invoking the Fifth Amendment with a refusal to testify in front of the jury if he chose to do so, all at Mr. Peschong's expense of a fair trial and due process of the law.

The prosecution objected to admitting the plea agreement. As noted in the opening brief, the issues raised on appeal were brought up in the trial court and decided. However, the State argues that Mr. Peschong "waived his challenge to the exclusion of the driver's testimony on the basis that the plea agreement already exposed the driver to federal prosecution." (Ans. Br. Pg. 7). It is unclear how Mr. Peschong could have "waived" the issue when Mr. Willmann, a witness endorsed and subpoenaed by the prosecution at trial, refused to testify on the day of his testimony without any notice to the

defense. While the prosecution could have granted Mr. Willmann use immunity for his testimony, the State chose not to do so. The prosecutors, Mr. Willmann's counsel, and the trial court misunderstood that state-level immunity made Mr. Willmann's statements compelled and would prevent the federal government from using them in future prosecution. See *Kastigar v. U.S.*, 406 U.S. 441 (1972) (finding that a grant of use immunity makes the statements compelled and prohibits their use by any state or federal prosecutor) and *U.S. v. Barker*, 542 F.2d 479 (1976).

The State argues in its answer brief that Mr. Willmann's plea agreement was not relevant as it only "reflected his willingness to be sentenced as if he had manufactured the drugs for the benefit of a more lenient sentence." (Ans. Brief pg. 24). The plea agreement shows that Mr. Willmann admitted to manufacturing 144 grams of methamphetamine and that he received an illegal sentence of probation. Under §18-18-405(2)(a), C.R.S. and §18-1.3-401.5(7), C.R.S. (2018), in effect at the time, Mr. Willmann's plea agreement to that amount of methamphetamine would have made him guilty of a level 1 drug felony, subject to a mandatory department of corrections prison sentence, not probation, as stipulated to by the El Paso County District Attorney's Office. The plea agreement the prosecution gave to Mr. Willmann was especially

advantageous considering it was not a legal sentencing agreement for the amount of methamphetamine Mr. Willmann admitted he manufactured. On cross-examination, he would undoubtedly have been questioned about why he was given an agreement that was illegal and typically would have required the defendant to serve a mandatory 12 years in the Colorado Department of Corrections.

Mr. Peschong could not grant Mr. Willmann immunity to testify. Under the controlling precedent of *Dikeman*, Mr. Peschong could not call Willmann to the stand and force him to invoke his Fifth Amendment right against self-incrimination once the trial court allowed him to assert it outside the presence of the jury. To the extent that Mr. Peschong could raise the issue and how it impacted his ability to have a fair trial and present his defense, he did make a record of that occurring, and this court may consider the issue before it.

In the alternative, the Attorney General states that Mr. Peschong's argument regarding the error of allowing Mr. Willmann to invoke his Fifth Amendment right not to testify outside the presence of the jury, should be reviewed under a plain error standard, rather than the abuse of discretion standard argued in the opening brief. The Attorney General's argument seems to be based upon an inaccurate representation that Mr. Willmann entered an

Alford plea to the charge of manufacturing 144 grams of methamphetamine. Despite the Attorney General's repeated characterization of the plea agreement as an "Alford plea," the agreement was not an *Alford* plea. In an *Alford* plea, a defendant is allowed to plead guilty even when he is maintaining factual innocence. *North Carolina v. Alford*, 400 U.S. 25, 34, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and *Medina v. People*, 535 P.3d 82, 87, (Colo. 2023) *cert. denied sub nom. Medina v. Colorado*, 144 S. Ct. 1345, 218 L. Ed. 2d 422 (2024). Mr. Willmann admitted that there was "a factual basis for the plea of guilty to the crime charged in this matter" (Supp. File, Defense's Prop. Exh. A, "Willmann Plea Agreement," ¶15). An admission to a factual basis for a plea is the exact opposite of an *Alford* plea. Mr. Willmann did not maintain his factual innocence to the charge of manufacturing 144 grams of methamphetamine. He admitted there *was* a factual basis to the charged offense.

There is no evidence in the record to support the contention that Mr. Willmann's plea was an *Alford* plea. There is only one mention of it being an *Alford* plea, from the DA arguing that it should not be considered at trial. (TR 9/24/19 pg. 288, ln. 19). Other than the one reference, there is no record support that the plea was an *Alford* plea. The plea itself demonstrates that Mr.

Willmann *did* admit to a factual basis for his guilty plea, which is the exact opposite of an *Alford* plea.

Despite the attorney general's repeated representation of Mr. Willman's plea agreement as one that was an *Alford* plea, a review of the document demonstrates that it was not an *Alford* plea at all. Mr. Willman specifically agreed in his plea that there was a factual basis for the plea of guilty to the crime charged in the matter, which was manufacturing of 144 grams of methamphetamine. (See Defendant's Proposed Exh. A, Suppressed Env. ¶ 15). The only reference to Mr. Willman's plea possibly being an "Alford plea" was made when the trial prosecutor was making arguments why the plea should not be admitted. The actual plea itself does not demonstrate that Mr. Willman entered an *Alford* plea, but very specifically admitted that a factual basis was present for his guilty plea in the paperwork he signed.

C. Relevance of the Plea Agreement

Mr. Willman's plea was no different from any other co-defendant's guilty plea. It was an admission of guilt to manufacturing 144 grams of methamphetamine. But in this case it was relevant to show that particular 144 grams was not solely could not solely be possessed by "drug dealer" Patrick Peschong, who was forcing "drug addict" Dakota Willmann to drive

him around. This was the story the prosecution told the jury in Mr. Peschong's trial and it was a false narrative. The prosecution had already given Mr. Willmann probation instead of mandatory prison sentence for manufacturing 144 grams of methamphetamine. The plea agreement, in the absence of having Mr. Willmann himself testify, was the only information Mr. Peschong would have had to present to the jury to show that things were not as the prosecution was portraying them in this case. The plea agreement would have made a fact of consequence more or less probable than it would have been without the evidence. The trial court's refusal to admit the evidence was an abuse of discretion.

Instead of putting all the facts in front of the jury and letting the 12 citizens decide the evidence, the prosecution fought to cherry-pick the evidence and keep Mr. Peschong from presenting evidence that could have shown the jury that the methamphetamine in the vehicle that evening did not belong to him. The trial court's error in allowing the prosecution to do this warrants reversal of Mr. Peschong's convictions by this court.

II. The prosecution committed misconduct during closing arguments by repeatedly misstating the co-defendant's culpability, by calling Peschong a "drug dealer," and by saying Peschong "showed consciousness of guilt."

In its answer, the State argues the prosecution did not mislead the jury by "characterizing the driver (Willmann) as only a drug user." The State argues the argument was reasonable because the police only found 3 grams of methamphetamine and drug paraphernalia under the driver's seat, "So the prosecution was permitted to make that characterization during closing arguments, despite its knowledge of the plea agreement, which was not admitted at trial anyways." (Ans. Brief, pg. 36). Essentially, the A.G. is arguing that it was alright for the prosecutor to tell the jury that Mr. Willmann was "only a drug user" because the jury did not get to hear about the plea agreement where Mr. Willmann pled guilty to manufacturing 144 grams of methamphetamine. So even though the prosecutor knew Willmann was a convicted methamphetamine manufacturer, the jury didn't, so it was fine to tell the jury he was just a drug user. Essentially, it was acceptable for the prosecutor to lie to the jury because the truth was not revealed during the trial.

“Prosecutors have a higher ethical responsibility than other lawyers because of their dual role as both the sovereign's representative in the courtroom and as advocates for justice. Because the prosecutor represents the State and the People of Colorado, their argument is likely to have significant persuasive force with the jury. For that reason, the possibility that the jury will give greater weight to the prosecutor's arguments because of the prestige associated with the office and the presumed fact-finding capabilities available to the office is a matter of special concern. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The prosecutor must therefore scrupulously avoid comments that could mislead or prejudice the jury. The prosecutor's actions during a criminal trial must always comport with the sovereign's goal that justice be done in every case and not necessarily that the prosecution “win.” ... Closing argument can never be used to mislead or unduly influence the jury.” *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005)(*internal citations omitted*).

When a prosecutor knows what he is arguing is not the truth, he is not supposed to discuss it. The proper course isn't to argue it, as the truth didn't

come in as evidence during the trial. The prosecutor here could have argued many other things and stayed away from saying Mr. Willmann was simply a drug user who only possessed 3 grams of meth. The prosecutors should have left Mr. Willmann alone after he refused to testify, as they had blocked all information about him from coming in at trial. However, instead, they attempted to capitalize on their advantage and created a false narrative. That is where the prosecutors lost sight of their purpose, which is to seek justice, not just secure a conviction.

Even under a plain error standard of review, the prosecution's statements, as argued herein and in the opening brief, were flagrant, glaring, and tremendously improper. Reversal by this court is warranted.

CONCLUSION

Patrick Peschong requests that this court consider the information and arguments presented in this reply brief and his amended opening brief regarding all the issues raised. He requests that the court reverse the convictions and sentences imposed in this case.

Respectfully submitted this 8th day of August 2025.

/s/Elizabeth A. McClintock
MCCLINTOCK LAW FIRM, LLC
Elizabeth A. McClintock (#25990)
301 South Weber Street
Colorado Springs, CO. 80903
(719) 375-0112

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing “Defendant-Appellant’s Reply Brief” was served upon all parties appearing of record on August 8th, 2025 through the E-filing system.

/s/Geoffrey Wolter
Geoffrey Wolter