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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 12CA0715

Petitioner,

THE PEOPLE OF THE STATE OF COLORADO,

v.

Respondent,

MIKEL MOREHEAD.

▲ **COURT USE ONLY** ▲

Case No. 15SC935

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PEOPLE'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains 3361 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒For each issue raised by the petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Elizabeth Rohrbough
Signature of attorney or party

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ISSUE PRESENTED FOR REVIEW

This Court granted certiorari on the following issue:

> Whether the court of appeals erred in concluding that, on remand, the trial court could not consider additional arguments regarding whether the exclusionary rule requires evidence to be suppressed.

STATEMENT OF THE CASE AND THE FACTS

On September 9, 2010, the Weld County Drug Taskforce was notified that the girlfriend of Mikel Morehead, the Defendant here, wanted to speak with them about his illegal activities (R. Tr. 7/28/11, pp. 7-8). The girlfriend told the police that the Defendant sold methamphetamine and operated gambling machines for profit out of the home they shared (R. Tr. 7/28/11, p. 12). She also told police that there was a large amount of money, drugs, scales for the distribution of narcotics, and a "gun room" in the house (R. Tr. 7/28/11, pp. 12-13).

Drugs, money, gambling machines, and a scale were found in the Defendant's home. The Defendant was charged with possession of methamphetamine (more than 2 grams), possession with intent to

manufacture or distribute a schedule II controlled substance (25 to 450 grams), engaging in professional gambling, five counts of gambling – possession of device/record, and maintaining gambling premises (R. CF, pp. 223-24).

On April 13, 2011, the Defendant, through counsel, filed a motion to suppress evidence from searches of his home (R. CF, pp. 85-88). After three evidentiary hearings, the parties submitted written arguments (R. CF, pp. 213-21, 237-56). On November 15, 2011, the trial court denied the motion to suppress in a lengthy written order, concluding that the officers' initial entry into the home was lawful, the search warrant affidavit established probable cause, and the affidavit's omission of information about the initial entry was not misleading (R. CF, pp. 259-72).

After a jury trial held January 23-25, 2012, the Defendant was found guilty as charged (R. CF, pp. 321-31). On February 27, 2012, the trial court sentenced him to concurrent terms of 4 years for possession, 12 years for possession with the intent to manufacture, and 6 months in jail for each gambling charge (R. CF, pp. 337-40).

On September 24, 2015, the Court of Appeals issued its opinion in *People v. Morehead,* 2015 COA 131, reversing the Defendant's convictions and the trial court's suppression order. In addition, the appellate court ruled that on remand, the prosecution would be precluded from arguing that any of the evidence derived from the search of the home should still be admitted under the attenuation doctrine or one of the exceptions to the exclusionary rule. *Morehead,* ¶ 42.

On September 6, 2016, this Court granted the People's petition for certiorari review regarding the permissible scope of the remand.

Further factual and procedural background will be provided as needed.

SUMMARY OF THE ARGUMENT

This Court should reverse the Court of Appeals' decision limiting the arguments that can be made on remand because that decision assumes that application of the exclusionary rule is automatic and unfairly characterizes additional arguments related to the exclusionary

rule as a "second bite at the apple." Application of the exclusionary rule is not a matter of right. On remand, consistent with cases such as *Herring v. United States,* 555 U.S. 135 (2009) and *Hudson v. Michigan,* 547 U.S. 586 (2006), the trial court should have discretion to consider whether the unlawful initial entry into the home justified the deterrent sanction of the exclusionary rule for the evidence later seized pursuant to the search warrant. Allowing such arguments related to the exclusionary rule on remand is appropriate where, as here, the prosecution previously had no need to present remedial arguments because the trial court ruled in its favor.

ARGUMENT

Application of the exclusionary rule is not a matter of right. On remand, the trial court should have discretion to consider whether the unlawful initial entry into the home justified the deterrent sanction of the exclusionary rule for the evidence later seized pursuant to the search warrant.

The Court of Appeals concluded that the prosecution would be precluded "from arguing on remand that any of the evidence from the unconstitutional search should still be admitted under the attenuation

doctrine or one of the exceptions to the exclusionary rule." *Morehead,* ¶ 42.

Standard of review: de novo. A trial court's ruling on a motion to suppress presents a mixed question of fact and law. *People v. Medina,* 25 P.3d 1216, 1223 (Colo. 2001). Questions of law are reviewed de novo, while a trial court's findings of fact are entitled to deference if supported by competent evidence. *Id.* But the trial court's suppression ruling is not the issue here.

Generally, trial courts retain discretion to grant a party leave to address new issues following remand from an appellate court unless consideration of the new issues would contravene a mandate that expressly or by necessary implication precludes such expansion. *See generally Super Valu Stores, Inc. v. Dist. Court,* 906 P.2d 72, 77 (Colo. 1995); *Nelson v. Elway,* 971 P.2d 245, 248 (Colo. App. 1998) (noting that under the civil rules of procedure, trial courts may permit parties to amend pleadings subsequent to the entry of an appellate court's order of remand, provided doing so is not inconsistent with the judgment or mandate of the appellate court).

Under the circumstances here, the People maintain that the issue of the appellate court's ruling limiting the trial court's discretion on remand constitutes a matter of law which should be reviewed de novo.

Preservation of claim: not determined by the trial court but determined by the Court of Appeals. The trial court concluded that the officers' initial entry into the home was lawful, the search warrant affidavit established probable cause, and the affidavit's omission of information about the initial entry was not misleading (R. CF, pp. 259-72). The Court of Appeals concluded that the initial entry was unlawful, and exclusionary rule arguments were not preserved because they had not been raised below, would not be considered on appeal, and could not be considered on remand. *Morehead,* ¶¶ 34, 42. Under these circumstances, this issue is appropriately postured for review by this Court.

Additional factual and procedural background. In his motion to suppress, the Defendant claimed: 1) the officers' initial entry into his home was unlawful; 2) the search warrant affidavit failed to establish probable cause; and 3) the search warrant contained

misrepresentations or omissions which cast doubt upon probable cause (R. CF, pp. 85-88).

Evidentiary hearings were held on the motion to suppress on July 28, 2011, August 16, 2011, and September 23, 2011. As relevant here, the following witnesses testified:

Investigator Dan Boyle testified that, on the afternoon of September 9, 2010, he had spoken to the Defendant's girlfriend at the Greeley police department; she told him she had been in a relationship with the Defendant for about 12 years and had been living with the Defendant in a downstairs apartment in his mother's home (R. Tr. 7/28/11, pp. 8-11). The girlfriend also related that the Defendant ran a motorcycle repair business and made money through sales of methamphetamine and use of gambling machines (R. Tr. 7/28/11, p. 12). The girlfriend described the layout of the residence in detail and explained where contraband would be found (R. Tr. 7/28/11, pp. 12-20).

After talking with the girlfriend at the police department, Investigator Boyle and other officers went with her to the residence she had shared with the Defendant (R. Tr. 7/28/11, p. 20). The girlfriend

unlocked the basement door, and the officers conducted a protective sweep lasting about a minute (R. Tr. 7/28/11, p. 22). During the protective sweep, Investigator Boyle observed "in plain view" the gambling machines as the girlfriend had described (R. Tr. 7/28/11, p. 24). The girlfriend removed a few of her personal items from the apartment (R. Tr. 7/28/11, p. 23).

Investigator Boyle then left the residence and "went back and started writing a search warrant"; the other officers stayed to secure the premises (R. Tr. 7/28/11, p. 22). Investigator Boyle's search warrant affidavit was admitted as Exhibit MH-1 (R. Tr. 7/28/11, p. 18).

Lieutenant Mark Jones testified that he accompanied Investigator Boyle and the Defendant's girlfriend to the residence and participated in the protective sweep of the main living area (R. Tr. 7/28/11, pp. 44-47). He then remained on the premises until the search warrant was obtained (R. Tr. 7/28/11, p. 48).

Officer Aaron Carmichael testified that he was one of the officers who entered the apartment with the Defendant's girlfriend and performed a protective sweep of it (R. Tr. 7/28/11, pp. 78-79). Officer

Carmichael also remained on the premises until the search warrant was obtained (R. Tr. 7/28/11, p. 80).

The Defendant's girlfriend was called by the defense and questioned about when she had moved out of the Defendant's apartment and how she had gained entry, through the assistance of the Defendant's son, with the police officers (R. Tr. 7/28/11, pp. 59-72).

A friend of the Defendant's girlfriend was called by the defense and testified about helping the girlfriend move items out of the apartment (R. Tr. 8/16/11, pp. 26-28).

The Defendant's sister was called by the defense; she testified that she arrived at the Defendant's residence on the evening of September 9 as the officers were searching it (R. Tr. 8/16/11, pp. 39-40). She indicated she was not given a copy of the search warrant until after the officers had completed the search (R. Tr. 8/16/11, p. 43).

The Defendant's son testified that the victim had already moved out of the residence at the time she had arrived with the officers (R. Tr. 9/23/11, pp. 6-11).

The search warrant affidavit set forth the details from Investigator Boyle's conversation with the Defendant's girlfriend at the police department at about 2:00 p.m. on September 9, 2010; specifically, the affidavit explained where the girlfriend had said evidence of drug-dealing and gambling would be found in the apartment (Exhibit MH-1). The affidavit also set forth that an individual dropped by the home for less than three minutes at about 6:30 p.m. on September 9, 2010, behavior considered consistent with narcotics activity, and that the Defendant's girlfriend confirmed that that individual was a methamphetamine customer of the Defendant's (Exhibit MH-1).

Trial court's ruling. After considering written arguments from the parties (R. CF, pp. 213-21, 237-56), the trial court issued a written order denying the motion to suppress and concluding:

- The Defendant's girlfriend had both actual authority and apparent authority to consent to the officers' initial entry.
- The search warrant affidavit established probable cause.
- The alleged misrepresentations in the warrant affidavit and omissions from it,

including information about the initial entry, did not negate probable cause.

(R. CF, pp. 259-72).

Court of Appeals' ruling. The appellate court reversed the Defendant's convictions and the trial court's suppression order. Specifically, the court concluded:

- The girlfriend did not have actual authority to grant entry because this case presented similar facts to *Illinois v. Rodriguez*, 497 U.S. 177 (1990). *Morehead*, ¶¶ 12, 21. She also did not have apparent authority to grant entry because it was unclear whether she had authority and the police should have made further inquiry into her authority. *Morehead,* ¶ 32.
- Arguments that the evidence discovered pursuant to the search warrant was not the fruit of the initial entry or would have been inevitably discovered were not preserved because they had not been raised below and would not be considered on appeal. *Morehead,* ¶ 34.
- On remand, the prosecution would be precluded from arguing that any of the evidence derived from the unconstitutional search should still be admitted under the attenuation doctrine or one of the exceptions to the exclusionary rule. *Morehead,* ¶ 42.

This Court should reverse the Court of Appeals' decision with regard to limiting the arguments that can be made on remand because that decision assumes that application of the exclusionary rule is automatic and unfairly characterizes additional exclusionary rule arguments as a "second bite at the apple."

A. The Court of Appeals erred in summarily concluding that application of the exclusionary rule was automatic. Consistent with *Herring* and *Hudson,* the court on remand should have discretion to consider whether exclusion is warranted in this case.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The exclusionary rule is a "deterrent sanction" created by the Supreme Court to "bar[ ] the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. United States,* 564 U.S. 229, 231 (2011).

"The exclusionary rule is not for the benefit of criminals, or even the accused." *Holman v. Page,* 95 F.3d 481, 489 (7th Cir.1996). Rather, the exclusionary rule's sole purpose is to deter future Fourth Amendment violations. *Herring v. United States,* 555 U.S. 135, 141 (2009). "Above all else, *Herring* makes plain that a search that is found to be violative of the Fourth Amendment does not trigger automatic application of the exclusionary rule." *United States v. Julius,* 610 F.3d 60, 66 (2d Cir. 2010). "That is, application of the exclusionary rule is not a matter of right upon a finding that an improper search has taken place." *Id.*

The exclusionary rule applies not only to the illegally obtained evidence itself, but also to any other evidence derived therefrom: "the fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963). The burden is upon the defendant to establish that the evidence sought to be suppressed is, in fact, a fruit of that illegality. *See Segura v. United States,* 468 U.S. 796, 815 (1984) (holding that suppression is not justified unless the challenged evidence is the product of illegal activity); *Alderman v. United States,* 394 U.S. 165, 183 (1969)

(defendant must come forward with specific evidence demonstrating that evidence is tainted to be entitled to suppression under fruit of poisonous tree doctrine).

It is only after the defendant has established that the evidence is a fruit of the illegality, that the burden shifts to the prosecution to establish an exception to the "fruits" doctrine. Three doctrines are recognized as exceptions to the exclusionary rule: independent source, attenuation, and inevitable discovery. *People v. Schoondermark,* 759 P.2d 715, 718 (Colo. 1988):

- Under the independent source exception, the unconstitutionally obtained evidence may be admitted if the prosecution can establish that it was also discovered by means independent of the illegality.
- Under the attenuation doctrine, tainted evidence may be admitted if the prosecution can show that the connection between the initial illegality and the evidence has become so attenuated as to dissipate the taint.
- Under the inevitable discovery rule, "evidence initially discovered in an unconstitutional manner may be received if that same evidence inevitably would have been obtained lawfully."

Id.

Here, the Court of Appeals erroneously concluded that because the initial entry into the home was unlawful, the appropriate remedy would be to exclude the evidence obtained pursuant to the search warrant. But the exclusionary rule is to be employed as a "last resort" rather than a "first impulse." *Hudson v. Michigan,* 547 U.S. 586, 591 (2006). Where a warrant affidavit includes illegally-obtained evidence as well as evidence derived from independent and lawful sources, a valid search warrant may issue if the lawfully-obtained evidence, considered by itself, establishes probable cause to issue the warrant. *People v. Hebert*, 46 P.3d 473, 481 (Colo. 2002). Here, no information related to the initial entry was even included in the search warrant affidavit; rather, the affidavit relied upon the prior statements of the Defendant's girlfriend and the officers' observations while surveilling the home. Accordingly, on remand, the trial court should have discretion to consider whether the initial entry tainted the search warrant and, if so, whether one of the exceptions to the exclusionary rule might apply.

B. Permitting the prosecution to present additional arguments related to the exclusionary rule on remand would not constitute a "second bite at the apple." The prosecution had no need to present remedial arguments below because the trial court ruled in its favor.

In concluding that the trial court could not consider arguments related to the exclusionary rule on remand, the Court of Appeals relied principally upon this Court's decisions in *People v. Syrie,* 101 P.3d 219 (Colo. 2004) and *People v. Moody,* 159 P.3d 611 (Colo. 2007).

The Court of Appeals' reliance on *Syrie* is misplaced because, in that case, the prosecution was not the prevailing party below. On appeal, a prevailing party may defend the judgment of the trial court on any ground supported by the record, whether or not that ground was relied on by the trial court. *People v. Aarness,* 150 P.3d 1271, 1277 (Colo. 2006). *Syrie* was an interlocutory appeal in which the trial court found that a warrantless search was unlawful because the police lacked consent to search; on appeal, the prosecution did not challenge the findings and conclusions on consent but argued the evidence was

admissible under a different theory, search incident to arrest. *Syrie,* 101 P.3d at 212. Relying on another interlocutory appeal, *People v. Salazar,* 964 P.2d 502 (Colo. 1998), this Court declined to resolve the issue of search incident to arrest on appeal because it had not been argued below. Thus, *Syrie,* and other interlocutory appeals, may be distinguished because in the present case, the prosecution prevailed in the trial court.

The Court of Appeals' reliance on *Moody* is misplaced because that case did not concern application of the exclusionary rule. In *Moody,* the Court of Appeals undertook sua sponte review of Moody's standing to challenge the search of a hotel room. *Moody,* 159 P.3d at 612. This Court held that while the Court of Appeals may address standing sua sponte, the record in that case was "barren of the facts needed to determine" standing. *Id.* at 617. Thus, *Moody* may be distinguished because it discusses standing, an issue which may be determined prior to addressing whether a Fourth Amendment violation occurred, but it does not provide guidance on the remedial question, whether exclusion is the proper remedy for a Fourth Amendment violation.

In the present case, the prosecution is not requesting a "second bite at the apple" but a first opportunity for consideration of the application of the exclusionary rule on remand. *See State v. Gonzales,* 243 P.3d 116, 118 (Ore. App. 2010) ("In this case, the state is not asking for an opportunity to revisit an adverse ruling. It is asking for an opportunity to raise issues that it was not required to raise at the first suppression hearing, given that the trial court ruled in its favor."); *see also United States v. Nicholson,* 721 F.3d 1236, 1258 (10th Cir. 2013) (Gorsuch, J., dissenting) ("While the government didn't present a remedial argument in the district court, it prevailed on the substantive Fourth Amendment question and so had little need to proceed on the question of remedy."). Giving trial courts discretion hear additional exclusionary rule arguments on remand is entirely consistent with the purposes of the rule as set forth in *Herring* and *Hudson.*

Moreover, giving trial courts discretion to consider new arguments on remand advances the interest of the orderly administration of justice. A prevailing party is entitled to rely upon the correctness of the trial court's ruling and proceed accordingly. *State v. Boone,* 393 A.2d

1361, 1370 (Md. App. 1978). If that were not true, a prevailing party would have to assume the trial court's ruling was erroneous and offer every conceivable alternative argument. *See id*. at 1369. The process would be never ending and "[t]he practical consequences of [that] would seriously affect the orderly administrations of justice." *Id*. The consequence of the Court of Appeals' ruling here is that it would require an unnecessary use of time and resources for parties to preserve every conceivable argument even in cases such as this one where the trial court ruled that the initial entry was lawful and the search warrant was valid. In contrast, granting trial courts discretion hear additional exclusionary rule arguments on remand promotes an efficient use of the trial courts' time and resources.

CONCLUSION

The People respectfully request that this Court reverse the Court of Appeals' ruling limiting the scope of the trial court's inquiry on remand.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S OPENING BRIEF** upon **MEGHAN M. MORRIS** and all parties herein, via Colorado Courts E-filing System on April 25, 2017.

/s/ Tiffiny Kallina