DATE FILED: December 1, 2017 2:50 PM
FILING ID: 26D77989A85BE
CASE NUMBER: 2015SC935

SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 12CA715	
Petitioner THE PEOPLE OF THE STATE OF COLORADO v. Respondent MIKEL MOREHEAD	
Douglas K. Wilson, Colorado State Public Defender MEGHAN M. MORRIS 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #43963	Case Number: 15SC935

AMENDED 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:

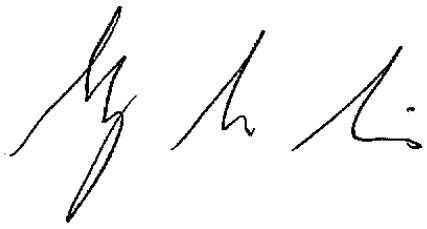
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 6,146 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(b).

> In response to each issue raised, the Respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether respondent agrees with petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

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



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INTRODUCTION

Police unconstitutionally searched Mikel Morehead's home without a warrant. *People v. Morehead*, 2015 COA 131, ¶ 33. As a result, the court of appeals held that the fruits of that search, including a subsequent warrant-based search, should be suppressed. *Id.* at ¶¶ 34-40.

The State had argued, for the first time on appeal, that the warrant-based search was attenuated from the initial, illegal entry and that evidence found during that warrant-based search would have been inevitably discovered. *Id.* at ¶ 34. Accordingly, the State argued that the exclusionary rule should not apply. The court of appeals rejected these new arguments on both procedural and substantive grounds: "[b]ecause the People did not raise these arguments in the trial court, they are not preserved for [appellate] review" and, moreover, "the record contains no evidence to support the People's new theories of admissibility." *Id.* at ¶¶ 34, 37.

The court of appeals then considered whether the State could present its new arguments to the trial court on remand. For two reasons, the court held that it could not. First,

> the prosecution presented no proof at the suppression hearing that would support admitting the evidence obtained during the warrant-based search under the attenuation doctrine or an exception to the exclusionary rule. Had the trial court here correctly determined that the

> initial search was unconstitutional, it would have been compelled to suppress the evidence on the record before it. Because that is so, we will not remand to give the prosecution the opportunity to "pad the . . . record" on remand with evidence that was not presented at the original suppression hearing.

Id. at ¶ 47 (quoting *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007)). Second, "the original suppression hearing was held four years ago, and 'given the passage of time, there is no reasonable possibility that the trial court could develop a better record upon which to proceed.'" *Id.* at ¶ 48 (quoting *Moody*, 159 P.3d at 617).

This Court left in place the court of appeals' holdings that (1) the warrantless search of Morehead's home was unconstitutional and (2) the record did not support applying any exception to the exclusionary rule. This Court granted certiorari only to review the court of appeals' holding that the State could not present its new arguments to the trial court on remand.[1] This Court should affirm, or in the alternative dismiss certiorari as improvidently granted.

STATEMENT OF THE CASE AND THE FACTS

Mikel Morehead was in a long-term relationship with Nita Hikida, but he ended the relationship around September 6, 2010. (7/28/11, p.29-30) While they

[1] This Court granted certiorari to decide "[w]hether 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."

were together, the couple had lived in a house that Morehead and his mother owned. Morehead's mother lived upstairs, while Morehead and Hikida lived in the downstairs apartment. (7/28/11, p.10) Morehead would not let Hikida stay in the house after they broke up on September 6th, so Hikida stayed with a friend. (7/28/11, p.68; 8/16/11, p.26) On the morning of September 9th, Morehead let Hikida into the house for the specific purpose of moving out her belongings. (8/16/11, p.30) At some point, Hikida and Morehead got into an altercation and the police were called. Morehead was arrested on a misdemeanor domestic violence charge. (7/28/11, p.9)

In the wake of this argument, Hikida claimed that Morehead had been selling methamphetamine and keeping gambling machines for profit. (7/28/11, p.12) Hikida said that she had been in a relationship with Morehead for twelve years and that she still had a key to his house. (7/28/11, p.9, 16)

Hikida and an investigator went to Morehead's house. Morehead's adult son Chase was there. He told officers that neither they nor Hikida could enter the basement without his father's consent. (7/28/11, p.34, 52) Officers did not attempt to either verify or discredit this information. (7/28/11, p.52-54) Instead, they decided to enter the home without a warrant. Hikida did not have a key to the exterior door of the house, so Chase unlocked that door. (7/28/11, p.62-66) Then,

Hikida unlocked the interior door to the basement apartment. (7/28/11, p.45, 77) When officers entered the basement, they observed gambling machines and padlocked rooms. (7/28/11, p.24)

This sight caused officers to seek a search warrant. (7/28/11, p.25; 8/16/11, p.41 (Morehead's sister explaining that officers told her "they saw some things that caused them to call for a search warrant"); 1/23/12, p.216 (an officer agreeing that his report said, "we observed the gambling machines which led to a search warrant at this residence")). Officers omitted from the search warrant affidavit the fact that they had already entered Morehead's home and their observations therein. (Motions Hearing Ex.1) When officers received the warrant, they fully searched the basement apartment and found narcotics. (1/23/12, p.129)

Morehead was charged with possession of over two grams of methamphetamine[2] and possession of methamphetamine with intent to distribute.[3] (CF, p.17) In addition, Morehead was charged with several misdemeanor counts relating to professional gambling. (CF, p.18)

The defense moved to suppress the results of the warrantless and warrant-based searches of Morehead's home. (CF, p.85-88) The trial court heard three days

[2] § 18-18-403.5(1), (2)(b)(II), C.R.S. (2010), a class four felony.
[3] § 18-18-405(1)(a), (2)(a)(I)(A), C.R.S. (2010), a class three felony.

of testimony on this issue. (7/28/11, 8/16/11, 9/23/11). After those hearings, the parties filed written briefs. (CF, p.200-08, 237-56) The court later issued a written ruling denying the suppression of both searches. (CF, p.259-72)

Morehead was convicted at trial, and he appealed. The court of appeals reversed the trial court's suppression order, concluding that Morehead's ex-girlfriend did not have authority to allow police into his home. *People v. Morehead*, 2015 COA 131 ¶ 33. The court further held that the record did not support applying any exceptions to the exclusionary rule, and that on remand the prosecution could not argue otherwise. *Id.* at ¶¶ 37-38, 42, 47-48. The State now challenges the court of appeals' holding that the prosecution cannot raise its exclusionary rule arguments on remand.

SUMMARY OF THE ARGUMENT

The court of appeals addressed the State's unpreserved exclusionary rule arguments on their merits, so this case does not present the issues raised in the Opening Brief. Thus, this Court should dismiss certiorari as improvidently granted.

If this Court does not dismiss certiorari, the State may not relitigate the suppression issue on remand. The court of appeals held that the record did not support applying exceptions to the exclusionary rule, and the law of the case

doctrine prohibits the trial court from reconsidering that holding. Moreover, appellate courts do not remand for the prosecution to raise arguments against suppression that were not proven in the original suppression proceedings. To hold otherwise would invite parties to repeatedly revisit suppression issues, and thus would place a heavy burden on trial courts. Accordingly, this Court should affirm.

ARGUMENT

THE PROSECUTION IS PRECLUDED FROM RELITIGATING THE SUPPRESSION ISSUE ON REMAND.

In the trial court, Mikel Morehead moved to suppress the results of police searches of his home. He argued that police unconstitutionally entered his home without a warrant based on his ex-girlfriend's consent. (CF, p.203-05) He also argued that "[b]ased upon observations made subsequent to their initial, illegal entry, law enforcement officers decided then, and only then, that they would apply for a search warrant. The application for [a] search warrant was a direct consequence of the illegal search, and thus items recovered [pursuant] to the warrant should be suppressed as fruits of that illegality." (CF, p.205)

In reply, the prosecution filed a 19-page brief titled "People's Response to Defendant's Legal Argument Regarding Defendant's Motion to Suppress Evidence/Observations/Fruits Flowing from Illegal Searches." (CF, p.237-55) The

prosecution argued that the initial entry was valid because Morehead's ex-girlfriend had actual authority over his home. (CF, p.244-50) In the alternative, the prosecution contended that the ex-girlfriend had apparent authority. (CF, p.244-50)

The prosecution did not challenge Morehead's argument that the warrant-based search was a fruit of the initial, warrantless entry. Nor did it invoke the independent source, inevitable discovery, or attenuation exceptions to the exclusionary rule. (CF, p.237-55)

The trial court issued a written ruling denying the suppression of both searches, concluding that the ex-girlfriend had either actual or apparent authority over Morehead's home. (CF, p.259-66) At trial, Morehead was convicted as charged. (CF, p.339) On appeal Morehead argued, among other things, that the trial court erred in denying his motion to suppress the searches of his home. In response, the State raised the inevitable discovery and attenuation exceptions to the exclusionary rule for the first time. *People v. Morehead*, 2015 COA 131, ¶ 34.

The court of appeals held that Morehead's ex-girlfriend had neither actual nor apparent authority over his home, so the police entry based on her consent was unconstitutional. *Id.* at ¶ 33. The court further held that the State failed to preserve its arguments in favor of exceptions to the exclusionary rule. *Id.* at ¶ 34. But the court recognized that it had "discretion to affirm decisions, particularly denial of

suppression motions, on any basis *for which there is a record sufficient* to permit conclusions of law." *Id.* at ¶ 36 (quoting *Moody v. People*, 159 P.3d 611, 615 (Colo. 2007)). Thus, the court considered the State's new exclusionary rule arguments on their merits.

The court found that the record did not support any exceptions to the exclusionary rule. *Morehead* at ¶¶ 37, 47. The evidence found in the warrant-based search would not have been inevitably discovered:

> There was no evidence that the officers' decision to seek a warrant was wholly independent of what they saw during the illegal search. The fact that they did not begin the process to obtain a search warrant until after the illegal search suggests that there was no such independent decision.

Id. at ¶ 37. Nor did Morehead's cooperation with police after "he had been placed in police custody, the police had obtained a warrant, and he knew that the officers were cutting padlocks to obtain entry to locked portions of [his] residence" dissipate any taint. *Id.* at ¶ 38. Because the record did not support any exceptions to the exclusionary rule, the court of appeals reversed the trial court's suppression order. *Id.* at ¶ 40.

Finally, the court of appeals held that the prosecution could not present arguments regarding attenuation or exceptions to the exclusionary rule on remand.

Id. at ¶ 47. The prosecution failed to meet its "burden . . . to demonstrate that evidence derived from the warrantless search was admissible" at the original suppression hearing, and the court declined to give it an additional opportunity to meet that burden. *Id.* This Court granted the State's petition for certiorari to review this final holding.

A. Standard of Review

Whether the trial court may consider additional arguments regarding the exclusionary rule on remand is a question of law, so the State is correct that de novo review applies. *Cf. Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 370 P.3d 353, 359 (Colo. App. 2016) (whether the trial court "misinterpreted the scope of the mandate on remand" was subject to de novo review); *Hardesty v. Pino*, 222 P.3d 336, 339 (Colo. App. 2009) (whether "the trial court misapplied the law of the case doctrine" was subject to de novo review).

B. The court of appeals addressed and rejected the State's unpreserved exclusionary rule arguments on their merits.

The court of appeals found that the State's proffered exceptions to the exclusionary rule did not apply here. *People v. Morehead*, 2015 COA 131, ¶¶ 37-38. It held that "the record contains no evidence to support the People's new theories of admissibility," and that "the prosecution presented no proof at the

suppression hearing that would support admitting the evidence obtained during the warrant-based search under the attenuation doctrine or an exception to the exclusionary rule." *Id.* at ¶¶ 37, 47. In other words, the court of appeals rejected the State's exclusionary rule arguments on their merits.

1. This Court should dismiss certiorari as improvidently granted.

The State appears to suggest that the court of appeals did not consider the substance of its unpreserved exclusionary rule arguments. *See* Opening Brief, p.6, 11. Accordingly, the State argues that it needs an opportunity to argue that the initial, illegal entry did not taint the subsequent warrant-based search. *See* Opening Brief, p.12-19. But the State had that opportunity in the court of appeals. *See People v. Morehead*, 2015 COA 131, ¶¶ 36-38 (considering and rejecting the State's exclusionary rule arguments on their merits).

Because the court of appeals addressed the merits of the State's unpreserved exclusionary rule arguments, this case does not present the issues raised in the Opening Brief, and this Court should dismiss certiorari as improvidently granted. *See* C.A.R. 54(b); *Michaelson v. Michaelson*, 884 P.2d 695, 703 (Colo. 1994) (dismissal is appropriate when "the issue on which [this Court] granted certiorari is not properly presented"); *People v. Chavez*, 853 P.2d 1149, 1152 n.6 (Colo. 1993)

(dismissing certiorari as improvidently granted because the facts did not present the issue on which the court granted review); *see also Boyer v. Louisiana*, 569 U.S. 238, 241 (2013) (Alito, J., concurring in the Court's dismissal of certiorari as improvidently granted because certiorari had been granted "on the basis of a mistaken factual premise").

2. Under the law of the case doctrine, the trial court is bound by the court of appeals' holding that the record did not support applying any exceptions to the exclusionary rule.

The court of appeals' opinion has three main holdings: (1) the police unconstitutionally entered Mikel Morehead's home without a warrant, (2) the State did not preserve arguments regarding exceptions to the exclusionary rule, but in any event the record contained no proof of any such exceptions, and (3) the State could not re-present its exclusionary rule arguments on remand to the trial court. *People v. Morehead*, 2015 COA 131, ¶¶ 33-50.

The State petitioned for a writ of certiorari on all three holdings. People's Petition for Certiorari, p.1.[4] This Court denied certiorari on the first two issues. It granted review only of the final issue regarding what should occur on remand. Thus, the court of appeals' holding that the record contained "no proof . . . [of] the

[4] Like its Opening Brief in this Court, the State's Petition for Certiorari failed to recognize that the court of appeals addressed and rejected the State's exclusionary rule arguments on their merits.

attenuation doctrine or an exception to the exclusionary rule," *Morehead* at ¶ 47, remains in place and is now the law of the case. *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983) ("The pronouncement of an appellate court on an issue in a case presented to it becomes the law of the case.").

On remand, the trial court will be required to abide by the court of appeals' holding that the record contains no proof of attenuation or an exception to the exclusionary rule. *Powell v. Hart*, 854 P.2d 1266, 1267 (Colo. 1993) ("It is axiomatic that an inferior trial court must comply with the mandate of a superior appellate court."). It has no discretion to reconsider this legal issue. *Roybal*, 672 P.2d at 1005 ("The law of the case as established by an appellate court must be followed in subsequent proceedings before the trial court."); *see also State v. Parry*, 390 P.3d 879, 885 (Kan. 2017). Since the trial court cannot consider arguments that the record establishes attenuation or an exception to the exclusionary rule, a remand for further argument would be futile. *See Powell*, 854 P.2d at 1267; *Roybal*, 672 P.2d at 1005. Thus, this court should affirm.

3. The court of appeals did not automatically apply the exclusionary rule.

The State contends that the court of appeals automatically applied the exclusionary rule. Opening Brief, p.12-15. Since the court of appeals considered

whether exceptions to the exclusionary rule applied here, *see Morehead* at ¶¶ 36-38, the State is incorrect.

The State's reliance on *Herring v. United States*, 555 U.S. 135 (2009) and *Hudson v. Michigan*, 547 U.S. 586 (2006), is misplaced. Those cases have nothing to do with the procedural issue here: whether the State may obtain a remand to argue unpreserved exceptions to the exclusionary rule when an appellate court has held that those arguments lacked support in the record. Instead, those cases established new substantive exceptions to the exclusionary rule, which they carved out based on a balance between the deterrent effect of the rule and the social cost of applying it. *Id.* at 599 (holding that violations of the knock-and-announce rule do not merit suppression); *Herring*, 555 U.S. at 147-48 (holding that isolated negligent police recordkeeping mistakes do not merit suppression). Thus, *Herring* and *Hudson* are inapposite here.

C. Remanding for further argument is not warranted.

1. The prosecution had a full and fair opportunity to litigate the suppression issue in the trial court.

The court of appeals correctly refused to remand for further suppression proceedings because the prosecution had a full and fair opportunity to raise exceptions to the exclusionary rule in the trial court. As the State notes, there are

three exceptions to the exclusionary rule that may justify the admission of evidence even if it stems from a Fourth Amendment violation: independent source, attenuation, and inevitable discovery. *People v. Schoondermark*, 759 P.2d 715, 718 (Colo. 1988). These exceptions were all well-established in 2011, when the suppression proceedings occurred in this case. *See id.*

It was also well-established that the prosecution bore the burden of proving these exceptions. *Brown v. Illinois*, 422 U.S. 590, 604 (1975) ("[T]he burden of showing admissibility rests, of course, on the prosecution."); *Schoondermark*, 759 P.2d at 719 ("[T]he People must bear the burden of establishing . . . that the officers would have sought the warrant even absent the information gained by the initial illegal entry."). Yet the prosecution did not offer evidence of any exception to the exclusionary rule. *People v. Morehead*, 2015 COA 131, ¶¶ 37-38, 47.

Because the prosecution did not meet its burden of proving exceptions to the exclusionary rule in the trial court, it cannot rely on those exceptions now. *See Evans v. United States*, 122 A.3d 876, 885 (D.C. 2015) (holding that the government was precluded from relying on the independent source exception because it did not prove that exception at the original suppression hearing); *see also Steagald v. United States*, 451 U.S. 204, 209 (1981) (stating that the government is "initially entitled" to raise many alternative arguments against

suppression, and may forfeit those arguments by "fail[ing] to raise [them] in a timely fashion during the litigation"); *People v. Roybal*, 672 P.2d 1003, 1006 (Colo. 1983) ("[U]nless suppression hearings are to be conducted by installment, . . . the prosecution must be prepared to abide the consequences of an adverse ruling when it elects not to offer available probative evidence." (internal markings omitted)); *Barnett v. United States*, 525 A.2d 197, 200 (D.C. 1987) (stating that the government "had a full and fair opportunity to present whatever facts it chose" to meet its burden at the original suppression hearing).

Nor can the State obtain a remand to raise these alternative arguments for admissibility. *Steagald*, 451 U.S. at 209-11 (declining to remand on an unpreserved standing issue); *Giordenello v. United States*, 357 U.S. 480, 488 (1958) (refusing to consider the State's "belated contentions" on an alternative basis for an arrest and stating that remanding would not be "sound judicial administration," since those contentions "were fully known to [the government] at the time of trial"); *Moody v. People*, 159 P.3d 611, 617 (Colo. 2007) (declining to remand on an unraised standing issue); *People v. Null*, 233 P.3d 670, 681 (Colo. 2010) (stating, regarding a statutory suppression issue, "[t]he prosecution failed to carry its evidentiary burden. We shall not give it a second bite at the apple." (internal quotes omitted)); *People v. Quintero*, 657 P.2d 948, 951 (Colo. 1983) (declining to

remand on an inevitable discovery issue that was unpreserved and unsupported by the record).

Courts in other jurisdictions agree that where the prosecution fails to establish an alternative argument for admissibility in the trial court, no remand is warranted. *United States v. Nicholson*, 721 F.3d 1236, 1246 (10th Cir. 2013) (declining to remand for further findings on an unpreserved argument regarding the good faith exception), *abrogated on other grounds by Heien v. North Carolina*, 135 S. Ct. 530 (2014); *State v. Boteo-Flores*, 288 P.3d 111, 114 (Ariz. Ct. App. 2012) (declining to remand because it would be "unfair to the defendant to allow the State, which bears the burden to establish the legality of a confession, another opportunity to do so"); *Evans*, 122 A.3d at 885 (declining to remand where the government failed to raise the independent source exception at the original suppression hearing); *Barnett*, 525 A.2d at 200 (refusing to remand on an unpreserved alternative argument against suppression because "the burden is on the government to go forward with evidence that will bring the case within one or more exceptions to the exclusionary rule"); *Faith v. State*, 45 So.3d 932, 933-34 (Fla. Dist. Ct. App. 2010) ("[W]e know of no authority, nor does the State offer any, that would entitle the prosecution, under these circumstances, to a second chance to present evidence opposing the motion to suppress."); *State v. Carter*, 939

So.2d 600, 604 (La. Ct. App. 2006) ("[W]e see no basis for re-opening the suppression hearing to allow the State a 'second bite at the apple' by attempting to introduce evidence it certainly had available to it at the first hearing."); *Southern v. State*, 807 A.2d 13, 20-21 (Md. 2002) ("[A]llowing the State to introduce new evidence on remand, *i.e.* taking a second bite at the apple . . . undermines the State's burden during the suppression proceedings."). *But see State v. Gonzales*, 243 P.3d 116, 118 (Or. Ct. App. 2010) ("The State is free on remand to raise its alternative arguments in opposition to suppression.").[5]

Instead, if the prosecution fails to raise and prove available alternative arguments for admissibility, those arguments are generally considered waived. *Steagald*, 451 U.S. at 211 (finding that the government "lost its right" to challenge standing); *People v. Crippen*, 223 P.3d 114, 116-17 (Colo. 2010) ("[T]he good faith exception to the exclusionary rule must be asserted by the prosecution at the suppression hearing or reliance on it will be considered waived."); *People v. Syrie*, 101 P.3d 219, 223 (Colo. 2004) (holding that the State "surrendered" an alternative theory of admissibility by not raising it in the trial court); *People v. Salazar*, 964

[5] On remand in *Gonzales* the government raised its alternative arguments. The trial court accepted one of those arguments, and the defendant appealed. Four years after the original appeal, the Oregon Court of Appeals again held that the trial court erred in denying the defendant's suppression motion. *State v. Gonzales*, 337 P.3d 129, 131-32 (Or. Ct. App. 2014).

P.2d 502, 507 (Colo. 1998) (refusing to consider the State's argument that a stop was actually a consensual encounter where that argument had not been raised below); *People v. Davis*, 903 P.2d 1, 3 & n.5 (Colo. 1995) (refusing to consider the State's argument that an arrest was justified by probable cause for an offense other than the offense that the State had relied on below); *People v. Titus*, 880 P.2d 148, 152 (Colo. 1994) ("The issue of whether the evidence should be admitted under the good-faith exception to the exclusionary rule was not raised in the trial court, and therefore is not appropriately before us.").[6]

This is not to say that an appellate court can never affirm a suppression ruling based on an unpreserved theory of admissibility. It may, but only if that theory is apparent "as a matter of law" from the record of the original suppression proceedings. *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006); *see also Moody*, 159 P.3d at 615.

Where, as here, an unpreserved theory of admissibility is not apparent from the record as a matter of law, the court does not remand to give the prosecution an additional chance to argue that theory. *Nicholson*, 721 F.3d at 1246 (stating, "the

[6] The range of suppression issues on which courts have found waiver demonstrates that, contrary to the State's argument, the prosecution's failure to raise a standing issue is not treated more harshly than its failure to raise other arguments against suppression, like exceptions to the exclusionary rule. *See* Opening Brief, p.17.

government's failure to raise [the good faith exception] in district court means . . . there is no support in the record for affirming the district court on the government's theory" and "[w]e see no reason the government should receive the benefit of relitigating this motion as a result of its own failure to raise an issue in district court"); *Evans*, 122 A.3d at 885 ("We are not inclined to remand to give the United States a second opportunity to develop the record on [the independent source exception]."). Thus, no remand is appropriate here. *See id.*

The State contends that when the prosecution wins a suppression hearing, as it did here, it has no need to make alternative arguments against suppression. The State thus contends that remanding for further argument would not give the prosecution a "second bite at the apple," but rather its "first opportunity" to make exclusionary rule arguments. Opening Brief, p.16-19.

This argument fails to appreciate the structure of suppression hearings. At a suppression hearing, the parties present all the evidence that they want the court to consider. After the close of evidence, the parties make arguments regarding the legality of police actions and the admissibility of resulting evidence. The trial court then issues a ruling. The prosecution generally does not get to make additional arguments if the trial court rules against it; otherwise, suppression hearings would be conducted "by installment." *See People v. Roybal*, 672 P.2d 1003, 1006 (Colo.

1983). Thus, the prosecution has the opportunity, and indeed the obligation, to make alternative arguments for admissibility at the original suppression hearing before the trial court issues a ruling. *See id.*

Outside the suppression context, the prosecution may be able to adjust its strategy after receiving an adverse ruling. The State relies on a case where there would have been insufficient evidence if the court had not erroneously admitted certain evidence. Opening Brief, p.18-19 (citing *State v. Boone*, 393 A.2d 1361, 1369-70 (Md. App. 1978)). Under those circumstances, courts have remanded for a new trial rather than vacating the conviction. *See Lockhart v. Nelson*, 488 U.S. 33, 40 (1988). They do so on the theory that, if the trial court had correctly excluded the evidence, the prosecution could have presented additional evidence to support the conviction. Remanding for a new trial "thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence." *Id.* at 42.

But due to the structure of suppression hearings, remanding for additional arguments would not recreate what would have happened if the trial court had ruled correctly. *See Roybal*, 672 P.2d at 1006. Instead, it would give the prosecution "a second bite at the apple" that it would not have otherwise received. *Null*, 233 P.3d at 681 (refusing to remand where the prosecution "failed to carry its evidentiary burden" on a statutory suppression issue); *see also Morehead* at ¶ 47

("Had the trial court here correctly determined that the initial search was unconstitutional, it would have been compelled to suppress the evidence on the record before it. Because that is so, we will not remand to give the prosecution the opportunity to 'pad the . . . record' on remand with evidence that was not presented at the original suppression hearing." (quoting *Moody*, 159 P.3d at 614)); *Nicholson*, 721 F.3d at 1246; *Evans*, 122 A.3d at 885. Thus, no remand is appropriate here.

2. There are some circumstances where a remand for further findings on a suppression issue might be appropriate, but none of those circumstances exist here.

A remand for further argument and findings on a suppression issue is justified only when the prosecution did not have a full and fair opportunity to litigate the issue below. This might be the case if, after trial, appellate courts established a new exception to the exclusionary rule. *See Murray v. United States*, 487 U.S. 533, 542-43 (1988) (remanding for further findings after adopting the rule that a warrant-based search can be an independent source for evidence already seen in an unconstitutional warrantless search); *People v. Schoondermark*, 759 P.2d 715, 719 (Colo. 1988) (same); *People v. Spring*, 713 P.2d 865, 876 & n.6 (Colo. 1985) (allowing the prosecution to raise a fruits issue for the first time on remand where that issue would be governed by the newly-decided *Oregon v. Elstad*, 470 U.S. 298 (1985)), *rev'd on other grounds*, 479 U.S. 564 (1987); *People v. Briggs*,

709 P.2d 911, 924 n.17 (Colo. 1985) (noting that the State might not be precluded from arguing inevitable discovery on remand because the cases adopting that doctrine "were announced after the trial was held in this case"); *id.* (citing *People v. Madson*, 638 P.2d 18, 33 n.18 (Colo. 1981) and *People v. Lee*, 630 P.2d 583, 591 (Colo. 1981), the first two Colorado cases to mention the inevitable discovery rule). *But see Nix v. Williams*, 467 U.S. 431, 449-50 (1984) (adopting the inevitable discovery rule but declining to remand for further suppression proceedings because the parties had an adequate opportunity to develop the record at the original suppression hearing).

Similarly, another suppression hearing might be warranted if after the first hearing the prosecution discovered new, relevant evidence. *People v. Roybal*, 672 P.2d 1003, 1006 n.7 (Colo. 1983) ("If the prosecution had proffered newly-discovered evidence, the result might be different. . . . Here, however, the evidence that the prosecution now wishes to adduce was available at the first hearing, but the district attorney made a tactical decision not to present it.").

A remand might also be appropriate if arguments against suppression were presented to the trial court, but the court failed to make findings on them. *See Madson*, 638 P.2d at 33 (remanding where the trial court did not make findings on suppression arguments that were "raised in the course of the suppression hearing").

Finally, a remand might be warranted after an interlocutory appeal. *See Moody v. People*, 159 P.3d 611, 617 (Colo. 2007) ("Only in limited situations, such as with interlocutory appeals, has this court seen fit to remand for further findings.") But generally after a direct appeal, due to the "passage of time, there is no reasonable possibility that the trial court could develop a better record upon which to proceed." *See id.*

None of the above reasons for remanding exist here. This is a direct appeal, and the suppression proceedings occurred over six years ago. In those proceedings, the State failed to raise exceptions to the exclusionary rule—independent source, attenuation, and inevitable discovery—that were well-established at the time. *See Schoondermark*, 759 P.2d at 718 (recognizing these exceptions in 1988). There is no newly-discovered evidence. Thus, the State has had its one full and fair opportunity to litigate the suppression issue, and no remand for further argument is appropriate. *See People v. Null*, 233 P.3d 670, 681 (Colo. 2010); *Roybal*, 672 P.2d at 1006; *Evans v. United States*, 122 A.3d 876, 885 (D.C. 2015).

3. The court of appeals' ruling strikes the proper balance between judicial efficiency and the fair administration of justice.

The court of appeals' opinion requires prosecutors to present all their evidence and arguments for admissibility in the original suppression proceedings.

People v. Morehead, 2015 COA 131, ¶¶ 34-39. But the opinion also acknowledges that appellate courts may affirm suppression rulings on alternative grounds if those grounds are apparent as a matter of law. *Id.* at ¶ 36 (citing *Moody v. People*, 159 P.3d 611, 615 (Colo. 2007) and *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006)). This strikes the proper balance between efficiency and fairness.

The State contends that requiring prosecutors to present alternative arguments in the original suppression proceedings is inefficient and overly burdensome. Opening Brief, p.18-19. Instead, the State appears to envision a scenario where prosecutors are only required to raise a single ground for admissibility. Then, if a denial of suppression was reversed on appeal, the prosecution could obtain a remand to make additional, alternative arguments. *See State v. Gonzales*, 243 P.3d 116, 118 (Or. Ct. App. 2010). *But see People v. Roybal*, 672 P.2d 1003, 1006 (Colo. 1983) (disapproving of conducting suppression hearings "by installment").

Contrary to the State's view, prosecutors regularly argue in the alternative in suppression proceedings. *E.g.*, *People v. Arias*, 159 P.3d 134, 135 (Colo. 2007) (prosecutor argued that a single officer had reasonable suspicion for a stop, or that, in the alternative, officers' collective knowledge created reasonable suspicion under the fellow officer rule); *People v. Diaz*, 793 P.2d 1181, 1183 & 1186 (Colo.

1990) (prosecutor argued that officers properly searched the defendant incident to arrest, or that, in the alternative, the defendant consented to the search); *People v. Evans*, 886 P.2d 288, 289 (Colo. App. 1994) (prosecutor argued that evidence was obtained before any seizure occurred, or that, in the alternative, any seizure was justified by reasonable suspicion); *State v. Parry*, 390 P.3d 879, 881 (Kan. 2017) (prosecutor argued that "there were exigent circumstances excusing the need for a search warrant, or, alternatively, the drug evidence inevitably would have been discovered").

Indeed, here the prosecution made alternative arguments regarding suppression. (CF, p.248 ("Alternatively, if the court were to find that Ms. Hikida did not have actual or common authority to consent to the initial entry, the court can find that she had apparent authority to consent."), *id.*, p.250 ("Therefore, based on the evidence before the court, if the court finds there is no actual and/or common authority to consent then the court should alternatively find that there was apparent authority to consent by Ms. Hikida."); *see also id.*, p.96, 135)

Providing alternative arguments in suppression proceedings allows for the efficient use of judicial resources and supports the aim of finality. *See Widefield Water & Sanitation Dist. v. Witte*, 340 P.3d 1118, 1122 (Colo. 2014) (recognizing the goals of "finality and efficiency in judicial decision-making"). It allows the

court to make a single, final ruling on admissibility. *See Parry*, 390 P.3d at 884 (recognizing the goals of "avoid[ing] indefinite relitigation of the same issue" and "afford[ing] one opportunity for argument and decision of the matter at issue").

Meanwhile, adopting the State's position that the prosecution need not present all alternative arguments for admissibility would have unintended adverse consequences. It would erode the prosecution's burden of proof, *see Southern v. State*, 807 A.2d 13, 20-21 (Md. 2002), and create an incentive to withhold arguments in case of an appeal, *see People v. Cardman*, 2017 COA 87, ¶ 27 (stating that allowing the defendant to raise a suppression issue for the first time on appeal "would create an incentive for defendants to forgo raising the issue . . . and then to seek remand on appeal if found guilty at trial"); 6 Wayne R. LaFave, *Search and Seizure* § 11.7(e) at 585 (5th ed. 2012) (quoting *Sykes v. United States*, 373 F.2d 607 (5th Cir. 1966) for the proposition that allowing the defense to raise new suppression arguments for the first time on appeal would encourage saving arguments in order to get "two bites of the apple").

Moreover, adopting the State's position would lead to the serial relitigation of suppression issues. *See Southern*, 807 A.2d at 21 n.4 ("The question necessarily arises, 'What if the State fails to perceive and meet its burden at the reopened suppression proceeding?' Does it get another chance, and another chance?"). The

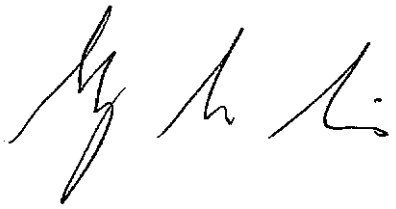
prosecution could obtain remands on suppression issues indefinitely, or at least as many times as there are alternative theories of admissibility. *See id.* The corollary to this rule would be that "when the state successfully appeals an order granting a motion to suppress, the defendant [would be] free to litigate issues that the trial court did not reach, even if the issues were not raised at the initial suppression hearing." *See Gonzales*, 243 P.3d at 118.

It is this state of affairs, not the one required by the court of appeals, that would be inefficient and overly burdensome on trial courts. *See Southern*, 807 A.2d at 21 n.4. Thus, this Court should not adopt the State's position.

CONCLUSION

The court of appeals rejected the State's unpreserved exclusionary rule arguments on their merits, and the State should not receive another opportunity to make those arguments. Thus, Mikel Morehead respectfully asks this Court to affirm, or, in the alternative, to dismiss certiorari as improvidently granted.

DOUGLAS K. WILSON
Colorado State Public Defender



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CERTIFICATE OF SERVICE

I certify that, on December 1, 2017, a copy of this Amended Answer Brief was electronically served through Colorado Courts E-Filing on Elizabeth Rohrbough of the Attorney General's Office.