

<p>SUPREME COURT STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: March 8, 2018 3:59 PM FILING ID: AD987866B14E8 CASE NUMBER: 2015SC935</p>
<p>On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 12CA0715</p>	
<p>Petitioner,</p> <p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>v.</p> <p>Respondent,</p> <p>MIKEL MOREHEAD.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>PEOPLE'S REPLY BRIEF</p>	

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 1204 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

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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In response to the Answer Brief, and in addition to the arguments and authorities raised in the Opening Brief, the People submit the following Reply Brief.

ARGUMENT

The prosecution is not requesting a “second bite at the apple” to relitigate the legality of the officers’ entry in the home but a first opportunity for consideration of the application of the exclusionary rule on remand, an issue it had no need to litigate below because the trial court ruled in its favor on the legality of the officers’ entry.

In this case, the trial court denied the motion to suppress, 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. 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. *People v. Morehead*, 2015 COA 131, ¶¶ 34, 42.

The Answer Brief states repeatedly that the Court of Appeals rejected the People’s “exclusionary rule arguments on their merits.” Answer Brief at 8, 9, 10. On the contrary, the Court of Appeal applied procedural bars in concluding that the arguments were not preserved because they were not raised below and could not be considered on appeal because there was insufficient factual record to support them. Here, the circumstances are nearly identical to those in *People v. Schoondermark*, 759 P.2d 715 (Colo. 1988), because the observations from the unlawful entry were not included in the search warrant affidavit:

In the case before us, it is clear that the warrant was not based upon any information obtained during the initial entry into the house. However, the trial court did not determine whether the officers would have sought the warrant even if they had not entered the house and observed the incriminating evidence on the coffee table. The defendant points out that a search of the home was not necessary to obtain the evidence needed to prosecute him for dispensing amphetamine. Since the trial court’s findings did not address whether the things observed during the initial entry affected the decision to obtain a warrant, the case must be returned to that court for further findings. In making these findings the

trial court should allow the parties an opportunity to supplement the existing record with additional evidence, and the People must bear the burden of establishing by a preponderance of the evidence that the officers would have sought the warrant even absent the information gained by the initial illegal entry.

Id. at 719. Similarly, in the present case, the People should have the opportunity on remand to supplement the existing record with additional evidence regarding the application of the exclusionary rule.

See Hudson v. Michigan, 547 U.S. 586, 591 (2006) (the exclusionary rule is to be employed as a “last resort” rather than a “first impulse”).

The Answer Brief argues that the People should be precluded from presenting exclusionary rule arguments by the doctrine of law of the case. The doctrine of law of the case provides that pronouncements of an appellate court on an issue in a case presented to it, as well as rulings logically necessary to the appellate court’s ruling, become law of the case. *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983). Here, the law of the case doctrine is inapposite because the exclusionary rule issues have not previously been decided on the merits. *See United States v. Hanhardt*, 155 F.Supp.2d 840, 855 (2001) (declining to apply

law of the case where the independent source exception had not been previously litigated). In the present case, the People do not dispute that the Court of Appeals' ruling that the officers' entry was unlawful is law of the case, given that the this Court did not grant certiorari review on the issue. But the issue of the scope of the remand is being considered by this Court, and it is axiomatic that this Court's ruling will be binding on the lower courts.

Many of the cases relied upon by Respondent, for example, *People v. Null*, 233 P.3d 670 (Colo. 2010), are interlocutory appeals. As discussed in the opening brief, such cases are distinguishable because in the present case, the prosecution prevailed in the trial court. Other cases may be distinguished as involving issues other than the exclusionary rule. *See, e.g., Southern v. State*, 807 A.2d 13, 20-21 (Md. 2002) (prosecution not entitled to a limited remand to introduce new evidence on probable cause to arrest).

The Answer Brief asserts that requiring the prosecution always to litigate remedial issues concerning the application of the exclusionary rule prior to trial would constitute an efficient use of judicial resources.

Answer Brief at 23-27. This is simply not true. Many suppression hearings are held. Some, but by no means all, of those cases proceed to trial. Some, but by no means all, cases tried result in convictions. Some, but by no means all, of those cases resulting in convictions are reversed on appeal. Accordingly, it is a more efficient use of judicial resources to permit exclusionary rule issues to be litigated on remand in the limited category of cases in which a suppression ruling has been reversed on direct appeal rather than requiring those issues to be litigated at the initial motions hearings in all cases.

An analogous situation is found in eyewitness identifications. In examining the constitutionality of pretrial identification procedures, a court must engage in a two-tiered analysis: first, the court must determine whether the procedure was unnecessarily suggestive; second, if, despite the improper suggestiveness, the identification was nevertheless reliable under the totality of the circumstances. *Bernal v. People*, 44 P.3d 184, 191 (Colo. 2002). The two tiers must be analyzed separately, and it is only necessary to reach the second tier if the court first determines that the procedure was impermissibly suggestive. *Id.*

In the event that an appellate court reverses a trial court's determination that the procedure was not suggestive, and the trial court has not reached the issue of reliability, the remedy is to remand to the trial court to make findings on the reliability of the witnesses' identifications. *Id.* at 194-95. Similarly, it makes sense to permit trial courts to consider exclusionary rule issues upon remand where they did not reach those issues initially.

Finally, the People urge this Court not to be swayed by the reasoning that "given the passage of time, there is no reasonable possibility that the trial court could develop a better record upon which to proceed." *Morehead*, ¶ 48, quoting *People v. Moody*, 159 P.3d 611, 617 (Colo. 2007). While it is generally true that witnesses' memories may dim with time, whether particular witnesses remember particular events is a factual matter; witnesses may have memories of key details even many years later. *See People v. Hardin*, 2016 COA 75, ¶ 22 (finding no due process violation in a 12-year delay in litigating postconviction proceedings).

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 REPLY BRIEF** upon **MEGHAN M. MORRIS** and all parties herein via Colorado Courts E-filing System (CCES) on March 8, 2018.

/s/ Tiffiny Kallina