SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 22, 2024 8:27 AM
Court of Appeals No. 2020CA1565 On Appeal From The District Court Of Clear Creek County Case No. 2017CR0076	
KEVIN MATTHEW DHYNE, Petitioner, v. PEOPLE OF THE STATE OF COLORADO, Respondent.	▲ **COURT USE ONLY** ▲ Case No. 2022SC869
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REPLY 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 5,129 words.

This brief complies with the requirements set forth in C.A.R. 28(c).

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.

/s/ Adam M. Tucker

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ARGUMENT

I. In Terms of Issue Posture, This Case is a Mess.

In multiple places in the answer brief, Respondent claims that Petitioner failed to raise arguments before the Court of Appeals and, therefore, those matters should be deemed abandoned by this Court. *See*, e.g., AB[1] at pp. 11, 12, and 43. Respondent fails to recognize, under logic and commonsense, certain issues could not reasonably have been raised below based upon the posture of the case at specific times.

For example and to summarize: the district court found that the search of Petitioner's apartment violated the Fourth Amendment (but no mention was made of the Colorado Constitution, article II, section 7), but that the seized evidence was admissible under the inevitable discovery exception. (CF, pp. 146-50). Therefore, the major issue ripe for consideration and initially raised on appeal was whether the district court's decision regarding inevitable discovery was correct, and that challenge occurred. (CR, Opening Brief to the Court of Appeals, pp. 7-13; Reply Brief, pp. 8-10). Petitioner raised the issue of the original search warrant's validity in their opening brief. (CR, Answer Brief to the Court of Appeals, pp. 11-17). The Court of Appeals found the initial warrant was valid; however, in so doing, it derived a brand new standard for

[1] References to the Opening Brief are denoted herein as "OB." References to the Answer Brief are denoted herein as "AB."

determining the constitutionality of search warrants that involve separate residences covered by a single, accessible internet signal. *People v. Dhyne*, 2022 COA 122. Second, the majority in *Dhyne* and Judge Richman's concurrence did not specifically find that the searching officers acted reasonably when executing the warrant. *Id.* Furthermore, the *Dhyne* opinion also did not address the applicability of the Colorado Constitution, article II, section 7 to the search of Petitioner's apartment. *Id.* Here, this Court granted certiorari to review the constitutionality of this brand new standard. In so doing, it specifically granted certiorari on whether both the Fourth Amendment *and* the Colorado Constitution, article II, section 7 were violated by the search of Petitioner's apartment by police.

Petitioner raises this summary to show that, at each stage of the proceedings, different issues were ripe for consideration by the subsequent reviewing court, and different issues were requested to be addressed which inevitably draw in matters not considered by the courts below.

Respondent now argues that this Court should dismiss certain arguments put forth by Petitioner because he did not play "issue whack-a-mole" and address each and every potential contingency that might arise instead of what was straightforwardly before the respective lower court.

If this Court should determine that any of the important Fourth Amendment arguments put forward by Petitioner were not raised below, they should still be reviewed because the resulting decisions will promote efficiency and judicial economy. *See Hinojos-Mendoza v. People*, 169 P.3d 662, 667 (Colo. 2007) ("[w]e therefore exercise our discretion to review these constitutional challenges, particularly in light of the fact that doing so will promote efficiency and judicial economy."), and *People v. Wiedemer*, 852 P.2d 424, fn. 9 (Colo. 1993) ("[a]lthough the People urge us to decline to review this constitutional claim on the basis that the defendant failed to present it to the district court, we believe it would best serve the goals of efficiency and judicial economy to address his arguments as they are presently before us.") The current case is the first to come before this Court to address the scope of search warrants for a solitary internet signal that cover multi-unit dwellings, and presents brand new standards for evaluating that scope. Considering the ubiquity of internet signals, cell phones, and computers, this Court should review any issues if not raised below to provide direction for lower courts when such matters inevitably arise.

II. Respondent's Argument Saying that the Search's Violation of the Colorado Constitution is Not Properly Before this Court is an Argument Without Impact.

Respondent claims that any argument regarding the search here violating the Colorado Constitution was not raised below and should not be addressed by this Court. (AB, pp. 11, 43, 44).

As stated above, the Colorado Constitution's applicability to the search was not addressed by either the district court or the Court of Appeals, and was first raised by this Court regarding the questions to be addressed on certiorari.

The state constitution's impact should be addressed under this Court's discretion to promote efficiency and judicial economy. *Hinojos-Mendoza; Wiedemer.*

Anyway, Respondent's argument is one without an impact. The search here violated the federal Fourth Amendment. Because it did, it inevitably violated the state constitution's prohibitions against unreasonable searches and seizures under the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2.*; People v. Schaufele,* 2014 CO 43, ¶ 33 ("[The Colorado Supreme Court has] a duty to follow the [United States Supreme] Court's existing instructions concerning federal constitutional law.").

III. This Court Should Not Consider Whether Police Acted Reasonably When Executing the Search Warrant at Petitioner's Apartment. Alternatively, Police did not Act Reasonably When Executing the Warrant.

The Attorney General first argues in its answer brief that police had obtained a facially valid warrant, and the investigating officer acted reasonably in executing the

warrant by determining that it covered Petitioner's basement apartment; therefore, no Fourth Amendment violation occurred. (AB, p. 19).

As an initial matter, Petitioner states this issue was not raised below. In the answer brief to the Court of Appeals, Respondent argued that the scope of the search warrant should have extended to the basement. (CF, Answer Brief, pp. 13-14). The reasonableness of the searching officer's execution was never addressed. This is new argument. As the Attorney General has already stated in its brief, this Court does not review arguments not raised in the Court of Appeals. *People v. Mershon*, 874 P.2d 1025, 1036 (Colo. 1994).

Alternatively, police did not act reasonably when executing the search warrant and the evidence should be suppressed. Police knew prior to the time of the illegal entry into Petitioner's basement apartment that he was not a consideration at all in law enforcement's investigation into the illegal downloading at the target residence, they were told prior to the search's execution that he lived in a distinct unit at the house, and Colorado law regarding multi-unit dwellings had been well-established for almost 50 years.

Respondent cites to *Maryland v. Garrison*, 480 U.S. 79 (1987), to argue about the reasonableness of the police search and why this Court should affirm. (AB, pp. 15-16). However, the *Garrison* opinion serves an opposite effect – it demonstrates the

unreasonableness of police conduct in Petitioner's case. The fact pattern in *Garrison* revealed that police had obtained a facially valid search warrant for a third floor apartment occupied by a suspect named McWebb, searched the specified unit, discovered incriminating evidence but belatedly discovered after finding the incriminating evidence that there were two units on that floor. *Id.* at 80. The unit holding the evidence was occupied by Garrison. *Id.* Importantly, and opposite of what happened in Petitioner's case, police immediately discontinued the search of Garrison's apartment upon making this discovery. *Id.* at 81.

The *Garrison* court found that the reasonableness of the police conduct must be evaluated in light of the information available to officers at the time they acted:

> Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. *But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted.* (Emphasis added).

Garrison at 85.

Here, there is no dispute that the investigating officers were aware *before* they made entry to Petitioner's basement apartment that he had a separate and distinct living unit from where D.C. and B.C. lived in the upstairs portion of the house. They were informed of same prior to executing the search warrant. Instead of going through the constitutional but troublesome effort of obtaining another search warrant for the

separate unit, they incorrectly assumed the generic "house" language of the warrant justified their search of Petitioner's residence. Therefore, they did not act reasonably, and the fruits of the search should be suppressed.

Respondent then cites to *People v. Lucero*, 483 P.2d 968 (1971), to support the conclusion that the search in the instant case did not violate the Fourth Amendment and the warrant's execution was reasonable. (AB, pp. 16-17). Again, this argument is unavailing. Part of the holding in *Lucero* stated: "the rule in *Avery* is subject to an exception, among others, where the officers did not know nor did they have reason to know that they were dealing with a multi-family dwelling when obtaining the warrant…" *Id.* at 970. Again, officers knew at the time they executed the warrant and entered Petitioner's apartment that it was a separate and distinct residence, and he was not a consideration in their initial criminal investigation. Their actions by pursuing the search under the original warrant were unreasonable.

The final reason why Petitioner's argument regarding the reasonableness of the police search of Petitioner's unit is unconvincing is the holding in *People v. Avery*, 478 P.2d 310 (Colo. 1970) itself. This case held that a structure which was a multi-unit dwelling with no common occupancy by all of the tenants required a search warrant for the particular sub-unit to be searched; otherwise, the issued warrant was insufficient to meet the constitutional requirement of particularity. *Id.* However, it is less the holding

of the case that is important when assessing the reasonableness of the police search in Petitioner's case than the age of the decision. By the time investigators illegally entered Petitioner's basement unit, *Avery* had been good law in Colorado for about 46 years. *Garrison* had been nationwide law for almost 30 years. The fact that police would flagrantly violate well-established law and search Petitioner's apartment after learning about his separate unit should direct this Court to conclude that they acted unreasonably. Respondent's argument to the contrary should be rejected.

IV. Respondent's Reliance on *People v. Martinez* is Unavailing.

The People cite to *People v. Martinez*, 165 P.3d 907 (Colo. App. 2007) for the proposition that the searching officers did not have to rely upon Petitioner's representations that he lived in the basement when they were executing the search warrant. (AB, pp. 24-25).

Martinez made clear that a reviewing court will examine whether a Fourth Amendment violation occurred in a search of a multi-unit dwelling based upon the facts known to the officers at the time of the warrant's execution. "The supreme court's subsequent decisions demonstrate that the interplay of the *Avery* rule and the *Lucero* exception turns on an objective examination of whether the facts known to the

police suggested that the premises to be searched contained more than one dwelling unit." *Martinez* at 911.

The facts known to officers at the Dhyne residence were: police encountered Petitioner at 10:00 AM a distance away from both the house and basement unit, and informed him they were there to execute a search warrant (indicating that entry had not yet been made) (CF, p. 5; TR. 5/14/18, pp. 13:25-14:4, 14:19-22; 22:21-25); Petitioner informed police he had lived in the basement for over a year prior to the search date (CF, p. 5); the lead detective escorted Petitioner into the basement to retrieve cigarettes where he observed the unit had its own kitchen, bedroom and living room (*Id.*; TR. 5/14/18, p. 15:10-15; 17:17-21); the only access to the basement apartment was a door at the unit's ground level (TR 5/14/18, p. 15:24-16:1; 27:12-18); and Petitioner's separate residence was the last section of the property to be searched by police. (CF, pp. 9-10).

The objective facts known to police prior to the search of the basement apartment reveal that the lead investigator was well-aware that it was a separate unit. Utilizing the *Martinez* standard, police here had plenty of reasons to suspect the basement was a distinct unit not covered by the warrant and was not under the control of the suspect person (in this case, B.C.) who was referenced when outlining the warrant's probable cause. These facts were not only based on what Petitioner told police, but in what

officers observed with their own senses. *Avery* would have controlled if this case was decided under the standards announces in *Martinez*, and the police search was unreasonable.

V. Yes, the Court of Appeals' "Common Occupancy" Holding is Odd – to the Point of Being Unconstitutional.

One inevitable conclusion drawn from the majority's "common occupancy" holding is that Petitioner's basement apartment, at the time police discovered its existence, was either a private space afforded the maximum protections of the Fourth Amendment, or it was a common space not subject to such heightened protection – but it could not be both at the same time.

Respondent tries to minimize the impact of the "common occupancy" holding of the majority's opinion in *Dhyne* by saying that it is not so odd as portrayed by Petitioner. (AB, pp. 25-26). Respondent argues this by claiming the "common occupancy" holding regarding internet coverage is "conceptually similar" to the idea of a shared space, such as a living room equally accessible and used by tenants of separate apartments within one unit. (AB, pp. 27-28).

As Judge Richman explained in his concurrence, the common occupancy exception applied to physical spaces – real, three dimensional spaces shared by common tenants. *Dhyne* at ¶ 37. He thereafter asks the question which indicates the

bizarre character of the majority's opinion: "[b]ut how does one 'occupy' an IP address?" *Id.*

This Court has not formally defined what constitutes a "common area" (and, according to Petitioner's review, no other appellate court has, either). The *Avery* opinion, however, at least implies that common areas are those places inside a residential building not occupied by a tenant where no individual expectation of privacy exists. *Avery* at 317.

What the Court of Appeals failed to explain in the *Dhyne* opinion is how the metaphysical, ethereal internet signal somehow transformed Petitioner's private, physical residence, only included within the warrant's scope by the overly broad and generic description of "house" (CF, p. 118), into a "common area." In other words, the lower appellate court did not explain how the internet signal subordinated Petitioner's Fourth Amendment rights except to merely say "it's now a common area." This omission is what makes the *Dhyne* opinion odd.

The U.S. Supreme Court held that the Fourth Amendment protects "people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). One of the guideposts established by the Supreme Court to ascertain whether a search and seizure was unreasonable was the principle that "a central aim of the [Constitutional] Framers was 'to place obstacles in the way of a too permeating police surveillance.'" *Carpenter v.*

United States, 138 S. Ct. 2206, 2214 (U.S. 2018), *citing United States v. Di Re*, 332 U. S. 581, 595 (1948).

The "common space" majority holding in *Dhyne* puts these principles on their heads. The holding permits police, armed with a search warrant and investigating internet-based crimes, the authority to examine unidentified, private spaces in multi-unit buildings *even before the warrant is actually executed* (emphasis added) based on the internet signal's coverage – all because the signal is shared in common. This holding is obviously not an obstacle to police – it is a free-pass permitting searches that lack particularity in internet crime investigations. While it loosens particularity requirements for search warrants, it also weakens a citizen's protections under the Fourth Amendment.

Respondent essentially concedes that the "common occupancy by internet signal" holding in *Dhyne* is a first in any court. (AB, p. 27). Petitioner has already detailed the maximum level of protection afforded to an individual's private residence under the Fourth Amendment. (OB, pp. 11-12). The "common occupancy by internet signal" holding, without explaining how this idea trumps the Fourth Amendment's privacy protections, cannot stand in light of *Garrison*, *Florida v. Jardines*, 569 U.S. 1, 6 (2013), and *People v. Tafoya,* 2021 CO 62, ¶ 26.

In *Carpenter v. United States*, 138 S. Ct. 2206, 2233 (U.S. 2018), Justice Kennedy said in his dissent that the governing standard to weigh new law enforcement investigative tools against the competing privacy interests of individuals under the Fourth Amendment is "reasonableness." The majority in *Dhyne* should have assessed whether it was reasonable that Petitioner's private living quarters, where his privacy protections are greatest, are converted into a common area because of a shared internet signal. The answer should clearly be "no." The "majority's "common space" holding is both odd in its creation and unconstitutional.

VI. Judge Richman's "Entire Premises Are Suspect" Exception Does Not Save the Search Here in Light of the Facts of this Case and *Maryland v. Garrison*.

Respondent further argues that investigating police acted reasonably in this case because, under the language of Judge Richman's concurrence, the "entire premises were suspect" because of the illegal downloading at the target residence. (AB, pp. 28-42).

While a relatively small number of federal and state cases[2] generally cite to the "entire premises are suspect" exception, an even smaller number discuss the interaction of this doctrine with the holding in *Garrison*.

One of the only cases that does is *United States v. Schave*, 2020 U.S. Dist. LEXIS 200449 (D.Minn. Aug. 26, 2020). In *Schave*, police investigated illegal downloading of child pornography at a specific residence that "might" have been a rooming house for multiple males. *Id.* at *3. When the lead investigator applied for a search warrant, he specifically named Schave in the affidavit based on his identification as a sex offender and possessing both a cell phone and a computer. *Id.* at **3-4. Once the warrant was obtained and prior to its execution, police learned that Schave had his own bedroom in the house. *Id.* at *4. The search warrant was executed, computer devices were recovered from Schave's bedroom and those devices held child pornography. *Id.* at *5.

Schave moved to suppress the fruits of the search on lack of particularity and probable cause. *Id.* at **6-7. While addressing the probable cause issue, the district court cited to the cases of *United States v. Axelrod,* 2011 U.S. Dist. LEXIS 47586 (D. Md. May 3, 2011), and *United States v. Tillotson*, 2008 U.S. Dist. LEXIS 97741 (E.D. Tenn. Dec. 2, 2008) to stand for the proposition that the targets of the investigation

[2] *See*, e.g., *Torres v. United States*, 200 F.3d 179, 187 (3rd Cir. 1999); *United States v. De La Torre,* 1993 U.S. App. LEXIS 17049, *7 (9th Cir. 1999)(unpublished); *State v. Teague*, 469 So. 2D 1310, 1316-17 (Ala. Crim. App. 1985); and *State v. Adams*, 197 Ariz. 569, 576 (2000).

may have had access to the entire home and, therefore, the entire premises were suspect. *Schave* at **13-14. Of note, the *Axelrod* and *Tillotson* cases were those used by Judge Richman to support his "entire premises were suspect" concurrence in *Dhyne*, and also cited by Respondent to argue that the police search was reasonable. *Dhyne* at ¶¶ 43-49; AB, pp. 31-33.

In *Schave*, the federal district court considered the execution of the warrant (in other words, the reasonableness of the police action) as a separate matter. *Id.* at **14-15. The reviewing court acknowledged *Garrison* and also recognized that, if police knew or should have known that a residence contained separate living units, the officers' search would have been confined to those units identified in the warrant. *Id.* at *15. When examining the warrant's execution, the federal district court inevitably touched upon probable cause (*Id.*), and found the search's execution did not violate the defendant's constitutional rights. One major reason cited by the court was that Schave was specifically named within the affidavit, and "there was still a fair probability that the illegal transmissions were made within the home" and, specifically, portions he had access to. *Id.*

Schave recognizes that probable cause and the warrant's execution (which, again, implicates the reasonableness of police conduct) are two separate matters. Whether or not the entire premises are suspect, if police executed the warrant in an unreasonable

fashion, then the defendant's constitutional rights against unreasonable searches and seizures were violated.

The key difference between *Schave* and the instant case is, again, the Petitioner was never mentioned in the warrant. The search warrant affidavit mentions B.C. by name seven (7) times and Petitioner zero. (CF, pp. 119-22). Furthermore, prior to the execution of the search warrant on both the property generally and Petitioner's basement unit specifically, police had objective information that he lived in a separate and distinct unit on the target property. *Supra*. It does not matter if the "entire premises were suspect." Under *Garrison* and this Court's holding in *Avery*, once police learned that Petitioner had his own private space on the address listed in the warrant, they should have never initiated their search, withdrawn, and obtained a new warrant.

VII. The Prosecution Did Not Establish that the Evidence Would Have Been Discovered in the Absence of Police Misconduct.

Respondent echoes the conclusory statements made by the trial court regarding inevitable discovery to find that this exception applied to Petitioner's case: "[t]he trial court found the People had carried their burden of proof because the detective had evidence that an IP address associated with D.C.'s internet account had been used to download child pornography, and the detective knew that Dhyne was using that IP

address too. (CF, p 149.) If the detective hadn't interpreted the search warrant as including Dhyne's room, the trial court 'ha[d] no doubt' the detective would have obtained a search warrant for Dhyne's room, which would have been supported by probable cause. (CF, p 149.)" (AB, pp. 46-47).

The standard which the prosecution must satisfy for inevitable discovery to apply is "a reasonable probability that the evidence would have been discovered in the absence of police misconduct, and that the police were pursuing an independent investigation at the time the illegality occurred." *See People v. Diaz*, 53 P.3d 1171, 1176 (Colo. 2002). In the instant case, the prosecution did not meet this burden.

The matter of *People v. Breidenbach*, 875 P.2d 879 (Colo. 1994) is instructive on this point. This Court held in that case the prosecution did not meet its evidentiary burden to have inevitable discovery apply to the wrongly seized evidence:

> In the present case, the prosecutor presented no evidence of independent investigatory measures by which the four plants inevitably would have been discovered. Although officers had authority to search the areas of the compound where the four plants were found, there was absolutely no testimony concerning whether the officers would have searched those areas without the information gained from Steve Jr. during the illegal custodial interrogation. For example, we are given no description of the search undertaken or the likelihood that the plants would have been discovered in the course of the planned search. In other words, the prosecution failed to carry its burden of proof and has left us to speculate that these plants would have been discovered anyway. We therefore affirm the district court's suppression order with regard to these four plants.

Breidenbach at 889 (citation omitted). The prosecution has a burden at a suppression hearing to put forward some body of evidence showing that police could have pursued obtaining evidence in the area where they trespassed under any circumstances.

Here, the prosecution failed to meet this burden. They were clearly aware of inevitable discovery and the standard they would have to meet because they referenced it in their written response to Petitioner's motion to dismiss on March 23, 2018. (CF, pp. 129-30). However, when the investigator who obtained the search warrant testified at the motion to suppress hearing, he never referenced in his testimony that he would have searched Petitioner's basement apartment under any and all circumstances, or what the scope of the search at the [redacted] residence looked like except to say that he had a search warrant for "the whole property." (TR. 5/14/18, pp. 4-31; pp. 20:16-21:2). This non-specific and generic testimony is insufficient under *Breidenbach* for the district court to find that investigators would have inevitably recovered laptops with incriminating downloads from Petitioner's basement apartment. The prosecution did not meet its evidentiary burden for the inevitable discovery exception to the exclusionary rule to apply in this case.

VIII. The Appeal Before This Court is Petitioner's First Opportunity to Raise the Proposed Formulation of the Inevitable Discovery Exception. Therefore, It is Ripe for Consideration.

This Court's pronouncements on the inevitable discovery exception to the exclusionary rule are the standards by which both the district courts and the Court of Appeals evaluate this issue. *See People v. Fields,* 2018 CO 2, ¶ 16; *People v. Burola*, 848 P.2d 958, 962 (Colo. 1993); *People v. Dyer*, 2019 COA 161, ¶ 38 (citing both *People v. Diaz*, 53 P.3d 1171, 1176 (Colo. 2002), and *People v. Syrie*, 101 P.3d 219, 223 (Colo. 2004)), and *People v. Nelson*, 2012 COA 37M, ¶ 51 (citing both *Diaz* and *Burola).*

Both the district courts and the Court of Appeals are bound to follow this Court's decisions. *People v. Kern*, 474 P.3d 197, 205 (Colo. App. 2020) ("we are bound to follow supreme court decisions unless they have been overruled or abrogated"); *King Soopers Inc. v. Indus. Claim Appeals Off. of Colo.*, 2023 COA 73, ¶ 34 (same). Neither the trial court nor the Court of Appeals was the appropriate forum in which to raise the matter of what lens this Court should examine the inevitable discovery exception.

Furthermore, as inevitable discovery is an exception to the exclusionary rule and evidence obtained from an illegal search can be used against a defendant at trial, it implicates core Fourth Amendment rights. *See Williams v. People*, 2019 CO 108, ¶ 13 (discussing the interplay between the Fourth Amendment and the inevitable discovery exception).

Therefore, the issue of whether this Court should adopt a stricter standard for application of the inevitable discovery rule pursuant to *Rodriguez v. State*, 187 So. 3D 841,

849 (Fla. 2015) is properly presented at this time. It clearly implicates core Fourth Amendment concerns, and is within the certiorari question posed by this Court.

CONCLUSION

For all the reasons and authorities stated above, Mr. Dhyne respectfully requests that this Court reverse the decisions of the Court of Appeals and the lower district court, reverse his convictions and remand the case to the trial court for further proceedings.

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CERTIFICATE OF SERVICE

I certify that on February 22, 2024, a copy of this Reply Brief of Petitioner was electronically served through Colorado Courts E-Filing on the Attorney General's office through their AG Criminal Appeals account.

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