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| SUPREME COURT<br>STATE OF COLORADO<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: October 30, 2023 3:14 PM |
| Court of Appeals No. 2020CA1565<br><br>On Appeal From The District Court Of<br>Clear Creek County<br>Case No. 2017CR0076 | |
| KEVIN MATTHEW DHYNE,<br><br>Petitioner,<br><br>v.<br><br>PEOPLE OF THE STATE OF COLORADO,<br><br>Respondent. | ▲ **COURT USE ONLY** ▲<br>Case No. 2022SC869 |
| Counsel for Petitioner:<br>Adam M. Tucker, Esq. #34631<br>C. Shelbi Danner, Esq. #55153<br>Jason C. Fisher, Esq. #44350<br>Law Office of Adam Tucker, P.C.<br>1775 Sherman Street #1650<br>Denver, CO 80203<br>Phone No. 720-355-2522<br>Fax No. 303-832-4552<br>adam@tucker.legal<br>shelbi@tucker.legal<br>jumpfish@yahoo.com | |

# OPENING 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 8,669 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

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 and C.A.R. 32.

/s/ Adam M. Tucker

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## STATEMENT OF THE ISSUES PRESENTED

I. Whether the court of appeals erred, and the petitioner's constitutional rights under the U.S. Constitution Fourth Amendment and the Colorado Constitution, article II, section 7 were violated, when the lower appellate court found that a search of his private residence was proper because an internet protocol (IP) address, located at a separate private residence specified in the search warrant, was accessible by the petitioner.

II. Whether the district court erred, and the petitioner's constitutional rights under the U.S. Constitution Fourth Amendment and the Colorado Constitution, article II, section 7 were violated, when the lower court found that the inevitable discovery exception applied to the search of the petitioner's residence.

## STATEMENT OF THE CASE

The Petitioner, Kevin Dhyne, was charged in Clear Creek County on August 1, 2017, with two counts of sexual exploitation of a child. (CF, pp. 31-34)[1].

A bench trial was conducted on stipulated evidence before the court on February 26, 2020. (CF, p. 391; TR 2/26/20).

[1] Note – all references to the court file are denoted herein as "CF." All references to district court transcripts are denoted herein as "TR," with the date of the specific proceeding listed in the citation.

The trial court found the Petitioner guilty of both counts on June 2, 2020. (CF, p. 485).

The Petitioner was sentenced on August 10, 2020, to 90 days in jail, 10 years sex offender intensive supervision program probation, and costs. (CF, p. 485).

Petitioner timely filed a notice of appeal on September 14, 2020. (CF, pp. 466-70).

The matter was fully briefed by the parties, and on October 20, 2022, the Court of Appeals issued a published opinion in *People v. Dhyne*, 2022 COA 122. The lower appellate court unanimously affirmed the district court's denial of the Petitioner's motion to suppress. *Id.*

On November 24, 2022, the Petitioner timely filed a petition for writ of certiorari. *Dhyne v. People*, 22 SC 869 (Colo. *filed* Nov. 24, 2022). On August 7, 2023, this Court issued an Order on the petition for writ of certiorari specifying two issues for briefing. *Dhyne v. People*, 2023 Colo. LEXIS 779.

This opening brief follows.

## STATEMENT OF THE FACTS

The Court of Appeals made the following statement of facts regarding the underlying criminal case:

> A detective discovered that child pornography was being downloaded to an Internet Protocol (IP) address assigned to an internet subscriber in his jurisdiction. Upon further investigation, the officer learned that the subscriber's son, B.C., lived with the subscriber and was a registered sex offender.
>
> Based on this information, the officer obtained a search warrant describing "computer and computer systems . . . [b]elieved to be situated on the person, place, or vehicle known as: House, garage, and any outbuildings located at [the subscriber's address]." The affidavit provided in support of the warrant stated the officer's belief that there was probable cause that computers located at this physical address may contain images of child pornography and that B.C. was a possible suspect.
>
> The warrant was issued, and police went to the subscriber's house to execute it. While outside the property, they encountered Dhyne, who had emerged from what appeared to be a basement dwelling unit in the house. Dhyne told the officers that he rented the basement apartment and shared internet access with the subscriber.
>
> Police searched the premises, including Dhyne's apartment. They seized several computers, including a laptop Dhyne admitted was his property. A later search of this computer revealed sexually exploitative material involving children.
>
> Dhyne was charged with two counts of sexual exploitation of a child. Before trial, he moved to suppress the material found on his computer, arguing it was discovered in violation of his Fourth Amendment right to be free from unreasonable searches. The district court denied the motion. Although the court concluded that the search of Dhyne's apartment exceeded the scope of the warrant, it nevertheless concluded that the material found on his computer was admissible because it would have inevitably been discovered through lawful means.

*Dhyne*, 2022 COA at ¶¶ 2-6.

On appeal, the Petitioner claimed that the trial court erred in denying his motion to suppress evidence obtained from the search warrant, and also erred in applying the inevitable discovery exception to the Fourth Amendment's exclusionary rule. *Dhyne* at ¶ 9. In its opinion, the Court of Appeals declined to reach the inevitable discovery rule issue because, in the lower appellate court's opinion, the search of the Defendant's residence did not exceed the scope of the warrant. *Id.* In his special concurring opinion, Judge Richman agreed with the majority result; however, he did not agree that the majority's "common occupation" exception applied to the analysis of the issue. *Dhyne* at ¶ 36. Instead, Judge Richman opined that the entire premises were suspect because of the "nature of the evidence that the officers were searching for and the information they had about the subscriber's house," and an "entire premises are suspect" exception should be the reviewing lens through which the court examined the matter. *Id.* at ¶ 50.

## SUMMARY OF THE ARGUMENTS

The Colorado Court of Appeals erred when it found that the original search warrant for the [redacted] residence covered the Petitioner's separate basement apartment, which was identified to police prior to the search's commencement. The Fourth Amendment demands that law enforcement have a valid warrant, supported by probable

cause, for an individual's residence when they are aware that a multi-unit dwelling contains separate dwellings.

The majority's "common occupancy" creation should be rejected by this Court. The case law used to create this new exception does not support the doctrine's position. Furthermore, the weak police investigation in Petitioner's case does not justify creating a "common occupancy" exception for internet crime cases. It also fails to respect that the ethereal internet space still involves tangible, physical places like personal residences and computers, which are protected to the greatest degree by the Fourth Amendment.

Judge Richman's "entire premises are suspect" exception should be rejected in its entirety because of the further erosion to Fourth Amendment protections it implicates. It should also be rejected because of the potentially negative and egregious policy implications it could create.

The prosecution failed to prove to the district court a reasonable possibility that the wrongfully seized evidence would have been discovered in the absence of police misconduct. Therefore, the district court's application of the inevitable discovery rule to Petitioner's case was error. The weak and incomplete investigation performed by law enforcement in Petitioner's matter should have directed a reasonable jurist to the conclusion that probable cause for searching the Petitioner's residence was lacking.

Colorado's rule for application of the inevitable discovery rule should be stricter. The current rule allows too much discretion to law enforcement, and permits officers to make on-the-spot assessments that a search is permissible, thereby substituting a police officer's judgment for that of a neutral magistrate.

## ARGUMENTS

### I. The majority of the Court of Appeals erred when it concluded that the Petitioner and the [redacted] shared a common occupancy – the internet through a common router – and also erred by affirming the trial court's decision to deny his motion to suppress.

*A. Standard of Review*

The issue is preserved. Petitioner filed a motion to suppress the fruits of an illegal search of his residence on March 16, 2018. (CF, pp. 111-13). A hearing was held on the motion on May 14, 2018. (Supp TR 5/14/18). The trial court denied the motion on May 17, 2018. (CF, pp. 146-50).

Petitioner raised the suppression motion's denial to the Colorado Court of Appeals, and the lower appellate court affirmed the district court's decision but for different reasons. *Dlyne* at ¶¶ 9, 20.

A trial court's ruling on a suppression motion presents a mixed question of fact and law. *People v. Martin*, 222 P.3d 331, 334 (Colo. 2010). This Court defers to the trial court's findings of fact if they are supported by competent evidence in the record.

*People v. Stock*, 397 P.3d 386, 390 (Colo. 2017). However, this Court reviews the trial court's conclusions of law *de novo*. *Id.*

An appellate court may affirm a trial court's suppression ruling on any grounds supported by the record. *Moody v. People*, 159 P.3d 611, 615 (Colo. 2007).

If an asserted error is of constitutional dimension, reversal is required unless the court is convinced that the error was harmless beyond a reasonable doubt. *People v. Burola*, 848 P.2d 958, 964 (Colo. 1993).

*B. Procedural History*

After receiving a tip from another law enforcement agency, Clear Creek County police obtained a search warrant on March 31, 2016, for [redacted] Colorado, looking for electronic devices and related materials used for the downloading and storage of pornographic images of children. (CF, p. 118). The search warrant specified that it covered the "house, garage and any outbuildings." (*Id.*). The search warrant affidavit also specified that the illegal downloading was related to a Comcast internet account. (CF, p. 120).

Police executed the search warrant on June 1, 2016. (Supp TR 5/14/18, pp. 8:20 – 10:19). When law enforcement encountered the Petitioner outside the [redacted] residence, he informed them that he lived in the basement, he shared internet access with the house's owner, and police discovered there was no other entrance into the

Petitioner's space except for an outside door to which Petitioner had exclusive access. (Supp TR 5/14/18, pp. 15:6 – 9, 15:24 – 16:1, 16:5 – 10, 27:8 – 28:4). Despite these facts, law enforcement officers prevented the Petitioner from re-entering his own residence and subsequently searched the premises. (Supp TR 5/14/18, pp. 20:18 – 21:2, 24:15 - 20). Law enforcement thought they could search the Petitioner's apartment because they believed the issued warrant covered his residence as well. (*Id.*). Police seized multiple items, including three computers and hard drives. (Supp TR 5/14/18, p. 21:3 – 13). Images that constituted child pornography were recovered from the Petitioner's computer equipment. (TR 2/20/20, p. 2:2 – 9).

After commencement of the search on the Petitioner's residence, police learned that both B.C. and [redacted] had routers. (CF, p. 7). Officers learned that [redacted] router was password protected. (CF, pp. 5-6). B.C. informed investigators that his router was cable-wired to his mother's, admitted to police that his router was not protected by a password, and someone driving by his residence could use it (in other words, it was an open access point for internet service via the [redacted] router). (CF, p. 7).

In his motion to suppress the fruits of the search warrant, Petitioner argued that his Fourth Amendment rights were violated because the warrant did not specify

his separate apartment, distinct from [redacted]s house, to be searched (CF, pp. 111-12).

At the motion to suppress the search hearing, the prosecution argued that the motion should be denied because any items seized from the Petitioner were the product of the inevitable discovery exception to the exclusionary rule. (Supp TR 5/14/18, pp. 33:25 – 34:12). Petitioner, through counsel, argued that inevitable discovery did not apply to his situation. (Supp TR 5/14/18, pp. 38:4 – 9). Petitioner further argued that instead of proceeding with the search of Petitioner's residence, police should have withdrawn and obtained a warrant for his specific basement apartment. (Supp TR 5/14/18, pp. 39:20 – 24). Petitioner also argued that the search warrant was invalid because it did not describe with particularity the item to be searched (*i.e.* – the Petitioner's residence). (Supp TR 5/14/18, pp. 39:25 – 40:1).

The trial court denied Petitioner's suppression motion. (CF, pp. 146-50). The trial court did find that Petitioner's Fourth Amendment rights were violated by the police continuing to search his separate residence after they learned he lived in a distinct unit within the [redacted] house. (CF, p. 148). However, the trial court also found that the items seized from the Petitioner's residence "probably would have been discovered because of the ongoing investigation of [redacted]" (CF, p. 149). The trial court further concluded that:

> Defendant had possession of computers that were using [redacted] s internet connection. If the search of [redacted] had taken place without Defendant's apartment being searched I have no doubt that the Lt. would have thereafter obtained a search warrant for Defendant's apartment also since he knew Defendant was using the same internet connection. The fact that child pornography was being downloaded at [redacted] would give law enforcement sufficient probable cause to search any computers located at that address.

(CF, p. 149).

On appeal, a majority of the Court of Appeals found that the original warrant validly covered the Petitioner's separate residence and, therefore, the denial of the motion to suppress was proper. *Dhyne* at ¶ 20. The majority found the search was proper within the exception announced in *People v. Martinez*, 165 P.3d 907 (Colo. App. 2007) because the Petitioner shared a common, ethereal internet space with the [redacted] *Dhyne* at ¶ 16.

Writing in a separate, concurring opinion, Judge Richman agreed with the denial of the motion to suppress. *Dhyne* at ¶ 36. However, he instead adopted the reasoning stated in the case of *United States v. Axelrod*, No. WDQ-10-0279, 2011 U.S. Dist. LEXIS 47586, 2011 WL 1740542, at *1 (D. Md. May 3, 2011) (unpublished opinion), which found that "the entire premises is suspect" when a multi-unit building is covered by a single IP address. *Dhyne* at ¶ 47.

*C. Law and Analysis*

This case presents a unique question: can two households, with distinct, individual residences within the same building but sharing a common internet router, be considered a "common premises" under the Fourth Amendment and article II, section 7 of the Colorado Constitution,? The answer should be no. Access to the internet still requires physical, tangible items used by individuals and maintained within people's private spaces. If used in criminal activity, these physical items within private spaces are afforded the maximum protections of the Fourth Amendment. The right to be free from unreasonable searches within one's home demands that police have a specific search warrant, supported by probable cause, to search an individual's residence for devices which access the internet.

Applicable Law Regarding Separate, Physical Residences Within A Single Building

The Fourth Amendment of the United States Constitution protects citizens against invasion of their privacy by government agents. *See People v. O'Hearn*, 931 P.2d 1168, 1172 (Colo. 1997). The clearest right is to be free from unreasonable governmental intrusion into one's home. *Id.* Among spaces protected by the Fourth Amendment, a person's private home is granted the maximum protection. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). *See also People v. Tafoya,* 2021 CO 62, ¶ 26 (reiterating *Jardines* statement that "when it comes to the Fourth Amendment, the home is first among equals.")

The Colorado Constitution, article II, section 7 protects a greater degree of privacy interests than its Fourth Amendment counterpart, and proscribes a greater degree of unreasonable searches and seizures. *People v. Oates*, 698 P.2d 811, 815 (1985).

"The Fourth Amendment to the United States Constitution prohibits the police from making a warrantless and unconstitutional entry into a suspect's home…" *Payton v. New York*, 445 U.S. 573, 576 (1980). Unreasonable physical entry of the home is the chief of evil against which the Fourth Amendment is directed. *Id.* In the absence of probable cause and exigent circumstances, warrantless entry into a home is proscribed. *O'Hearn*, at 1172.

Police officers are not authorized to search a separate dwelling unit that exists on a premises but is not separately identified in the warrant. *See Maryland v. Garrison*, 480 U.S. 79, 86 (1987).

Here, police clearly had no warrant to search the Petitioner's basement apartment at the [redacted] residence. Investigators instead "assumed" their warrant covered the Petitioner's separate residence on the [redacted] property. However, his separate living space was protected to the maximum extent possible by the Fourth Amendment. *Payton.* The correct procedure officers should have followed was to prepare a new affidavit outlining probable cause referencing the Petitioner, and submit it to a neutral magistrate for another search warrant; however, this did not occur. The

search of the Petitioner's separate living quarters was unconstitutional, and the trial court was correct for finding that Petitioner's Fourth Amendment rights were violated when police searched Petitioner's premises and seized materials from same.

1. The majority decision from the Court of Appeals erred by finding that the *Martinez* exception applied to the search of the Petitioner's residence, and further erred by making the internet a "common occupancy" space.

To justify that the original search warrant for the [redacted] residence also covered the Petitioner's basement apartment, the Court of Appeals created a new common space – the ethereal internet space covered by the [redacted] wireless router.

To achieve this, the majority in the Court of Appeals held that the *Martinez* exception justified police using the original warrant to search Petitioner's residence. *Martinez* held that "where a significant portion of the premises is used in common and other portions, while ordinarily used by but one person or family, are an integral part of the described premises and are not secured against access by the other occupants, then the showing of probable cause extends to the entire premises." *Id.* at 911. The majority opinion concluded: "[b]ecause police had information that the IP address linked to the subscriber's physical address (the basis for probable cause) was commonly used by Dhyne in his separate residence at that physical address, the search of Dhyne's apartment was authorized by the warrant, notwithstanding his separate unit." *Dhyne* at ¶ 16.

*Martinez* derived its exception from this Court's ruling in *People v. Lucero*, 483 P.2d 968 (Colo. 1971), which held that searches in multi-dwelling buildings are constitutional where officers did not know nor did they have reason to know that they were dealing with a multi-family dwelling when obtaining the warrant, and providing that they confine the search to the area that was occupied by the person or persons named in the affidavit. *Lucero* was an exception to this Court's ruling in *People v. Avery*, 478 P.2d 310, 312 (Colo. 1970), which stated that a warrant in a multi-unit building must delineate the specific unit to be searched.

This Court cited the *Martinez* exception with approval in an opinion issued in *People v. Webb*, 2014 CO 36, ¶ 12. There, this Court stated: "[s]o long as the suspect has the ability to access a given area, that area is 'under the control' of the suspect and the police can legitimately search the area to protect against the possibility that the suspect may have hidden items in the area." *Id.* In *Webb*, the facts showed that the defendant and her adult son (who was on parole and was the subject of interest to police) had separate bedrooms on the same level of a single story house, and they shared the remaining parts of the residence. *Id.* at ¶ 3. The warrant obtained by police to search for illicit narcotics permitted police to search "all buildings and outbuildings thereon, and all property real or personal on said property." *Id.* at ¶ 6.

Officers located methamphetamine in the defendant's purse that was in her separate bedroom and charged her with narcotics possession.

Application of the *Martinez* exception to Petitioner's case goes too far. In the instant matter, police were informed *before* they made entry to Petitioner's living space and *before* executing the search warrant that the basement was his exclusive space. Officers also discovered that there was no way to access the Petitioner's living quarters except for a separate doorway used exclusively by the Petitioner – the basement was isolated from the rest of the house. The Petitioner's residence had its own kitchen area, bedroom, and living space. (Supp TR 5/14/18, p. 15:12-15). No significant portions of the premises were used in common.

*Webb* is also inapplicable to the Defendant's case. The concern expressed in that opinion was twofold: who was the suspect and could that person access the location to be searched? *Webb* at ¶ 19. There, the suspect was the defendant's adult son, and the facts showed that he could easily access the defendant's separate bedroom. In other words, the defendant was integral to determining if probable cause existed, and his access to the defendant's bedroom searched by police was unrestricted. In Petitioner's matter, the suspect was "B.C." - the adult son of the property owner. The search warrant affidavit mentions him by name seven (7) times whereas it does not mention the Petitioner at all. (CF, pp. 119-22). In this case and

already stated above, the Petitioner's basement apartment was an isolated space dedicated to his exclusive use.

To justify their use of the *Martinez* case in *Dhyne*, the majority in the Court of Appeals created a brand new common area out of thin air – the internet space. According to the majority, because the [redacted]s internet signal covered the Petitioner's basement apartment, his entire residence became a common space. Therefore, the police search of Petitioner's residence under the original warrant was permissible.

The Petitioner has performed a reasonable search of existing case law to see if this "common space" or "common occupancy" position has been adopted anywhere else in either state or federal court. He has been unable to locate any similar position in any other jurisdiction. Colorado stands alone in this holding.

Before adopting this position as its own, this Court should appreciate the weak foundation upon which it is built in Petitioner's case. Police performed an incomplete investigation. While the Petitioner admitted he had access to the [redacted] internet signal, officers failed to discern whether access to the world wide web via the [redacted] router was limited to Petitioner and the [redacted] only. They only learned after the search warrant was executed that the [redacted] internet signal was essentially open ([redacted] s internet access point was was password protected; B.C.'s was open).

Internet signals created by routers can be open (without password security) or protected (the user requires a password to access the internet). (Source - Whitson

Gordon and David Murphy, *Know Your Network, Lesson 1: Router Hardware 101*, Feb. 5, 2020, https://lifehacker.com/know-your-network-lesson-1-router-hardware-101-5830886). Therefore, knowledge of who has access to an internet signal is an integral part of any criminal investigation when illegal conduct is conducted via the internet and should affect the probable cause analysis of search warrants.

Here, the police conducted no investigation regarding who had access to the internet signal prior to obtaining the search warrant besides the assumption that the [redacted] were obviously using it and the Petitioner's admission that he was online via the [redacted] service. Theoretically, any person standing in range of the [redacted] router could access the internet since the device was open.

What should a reviewing magistrate do to see if probable cause has been met for a search warrant related to internet crimes? Demand that law enforcement do a better investigation with computer crimes to establish probable cause for a search. The lead investigator in this case who obtained the warrant and executed the search admitted that he had "very little" experience investigating cases where IP addresses are involved. (Supp TR 5/14/18, p. 5:15 – 18). As explained below, police did a bare bones investigation to determine who exactly lived at the [redacted] house and the devices accessing the internet via the [redacted] internet signal. The Clear Creek authorities were aware that the [redacted] household used Comcast as its service provider; however, the

record is absent of any attempts by those same investigators to subpoena the Comcast records.

According to Defendant's research, to date no state or federal court has held conclusively that the ethereal place known as the "internet" or the "world wide web" is a private or public space. The lower appellate court's majority decision answers that question with its "common occupancy" holding. However, it did so without consideration of the ramifications of its decision – for example, would all dormitory rooms in one university residence hall be subject to search under one warrant if they all shared one internet signal because the entire building is now classified as commonly occupied?

The majority decision in *Dhyne* also failed to recognize the shoddy and incomplete investigation performed by law enforcement to ascertain who exactly was accessing the [redacted] router, and that probable cause was lacking based on this.

Most importantly, the majority in *Dhyne* failed to recognize that access to the internet still requires equipment such as routers, computers, smartphones, etc. - physical, tangible devices that are commonly used in private spaces. Those private spaces are afforded the greatest degree of protection under the Fourth Amendment pursuant to *Jardines*, *Payton* and *Avery*. Furthermore, they are protected to an even greater degree of privacy, and from unreasonable searches and seizures, under article II, section 7 of the Colorado Constitution and *Oates*. The majority decision, if upheld,

now says that "common occupation" of the metaphysical internet space trumps the physical, private residence under the Fourth Amendment and under the right circumstances.

For the aforementioned reasons, Petitioner submits that the majority decision of the Court of Appeals should be reversed.

2. Judge Richman's "entire premises are suspect" exception to the probable cause for search warrants should be rejected in its entirety by this Court.

Judge Richman, writing in a separate, concurring opinion, agreed with the majority's result; however, he disagreed that the "common occupation" exception expressed in *Martinez* applied to the Petitioner's case. *Dhyne* at ¶ 36. As Judge Richman expressed: how can the Petitioner and the [redacted] commonly occupy a metaphysical space such as the internet? *Id.* at ¶ 37.

Instead, Judge Richman would apply another exception to the *Avery* rule: "the entire premises are suspect." *Dhyne* at ¶ 40. This exception was cited in a footnote in *United States v. Whitney*, 633 F.2d 902 (9th Cir. 1980). *Whitney*, however, explained the general principle that a search warrant for a multi-residence dwelling must identify the specific unit to be searched (*Id.* at 907, fn. 3), which mirrors this Court's *Avery* rule. The "entire premises are suspect" exception was identified in *Whitney* as originating in a legal treatise. Annot., 22 A.L.R.3d 1330, 1340-47 (1967, Supp. 1980).

Judge Richman thereafter cited two unpublished federal cases involving the download of child pornography to support his use of this new, untested exception: *United States v. Axelrod*, No. WDQ-10-0279, 2011 U.S. Dist. LEXIS 47586 (D. Md. May 3, 2011), and *United States v. Tillotson*, No. 2:08-CR-33, 2008 U.S. Dist. LEXIS 120701 (E.D. Tenn. Dec. 2, 2008). *Dhyne* at ¶¶ 48, 49.

Judge Richman conceded that "the entire premises are suspect" exception for multi-unit dwellings has not been adopted or applied to the scope of search warrants in any Colorado courts. *Dhyne* at ¶ 41.

This Court should reject Judge Richman's concurring opinion in its entirety. First, it would serve as a further erosion of the Fourth Amendment protections to the space where those protections are greatest: a person's home. Adoption of Judge Richman's new exception would diminish the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton* at 601. It would also, in essence, overturn this Court's rule announced in *Avery* when internet crimes are involved because police could thereafter determine that an entire multi-unit premises was suspect and conduct a search of all units in any such building based on the criminal computer activity of a single tenant.

Second, Judge Richman's reliance on *Axelrod* and *Tillotson* to support his new exception are inapposite to Petitioner's matter because of two key details – in Petitioner's case, the police knew prior to executing the search warrant that Defendant

lived separately from the [redacted] and the police knew their probable cause statement for the warrant at the target address did not mention the Petitioner at all. In *Axelrod*, police testified that they did not know the defendant's suite was a separate residence. *Id.* at **5-6. In *Tillotson*, the opinion does not discuss whether law enforcement officers knew in advance of executing the search warrant that the target address contained multiple separate dwellings. Instead, the court found the presence of a single computer used for downloading and sending child pornography sufficient probable cause to search the entire residence. Here, the probable cause statement heavily relied on information about "B.C.", [redacted]s son who was a convicted sex offender.

Third, the policy implications of Judge Richman's "entire premises are suspect" exception dictate that it should be completely rejected. Internet access is ubiquitous in American society. As of 2020, an estimated 85.5% of United States households have some form of internet subscription. Source: https://www.statista.com/statistics/189349/us-households-home-internet-connection-subscription/. In 2021, 90.9% of households in Colorado had broadband internet subscriptions. Source: https://www.census.gov/quickfacts/fact/table/CO/BZA210221. Although Petitioner was unable to locate internet subscription rates for Colorado businesses, it would be reasonable to assume those numbers are comparable to residences if not greater. The negative and injurious effects of Judge Richman's

exception should be obvious when considering, for example, illicit downloading on a common internet signal in a hotel or university dormitory that offers complimentary wifi services to its customers or students. The customers, students and employees share at least part of the physical space of such residential buildings (front lobby, gym, pool, etc.), and also share the "metaphysical space" of the internet. In this scenario, the entire premises of the hotel or dormitory are suspect, police could obtain a search warrant for one unit occupied by a resident who law enforcement believes would satisfy probable cause, and then proceed on a superficial level through the entire residential building seeking other individuals who are equally suspect. Once found, these people's residences would be subject to search because "the entire premises are suspect." It provides an opportunity for abuse by law enforcement against an individual's Fourth Amendment rights.

3. Police could have pursued another option – preventing Petitioner's access to the basement while they pursued another warrant. They did not, and the search violated Petitioner's Fourth Amendment rights.

The *Martinez* case, utilized by the majority in *Dhyne* to find the police search here to be valid, cited to an option police could have exercised (but did not) to preserve any evidence in the Petitioner's basement apartment: they could have temporarily restrained him from entering the residence while they prepared another search warrant affidavit, submitted it to a magistrate for review, and obtained a new

search warrant for the Petitioner's apartment. *Martinez* at 910, *citing Illinois v. McArthur*, 531 U.S. 326, 336-37 (2001).

While no Colorado appellate decision has expressly cited *McArthur* for the proposition that police can temporarily restrain a home's occupant while investigators obtain a new search warrant for a residence, case law in related circumstances states that such law enforcement behavior is permissible. *See People v. Carlson,* 677 P.2d 310, 314-15 (Colo. 1984) (temporary intrusion upon a motorist by police is proper even if probable cause to search or arrest is lacking), *citing Michigan v. Summers*, 452 U.S. 692 (1981) (officers having a search warrant for a residence may temporarily detain the occupant of a home, on less than probable cause, when the occupant is leaving the domicile immediately prior to commencement of a search).

Had police officers pursued this option here upon receiving notice that Petitioner lived in a separate residence at the [redacted] house, they would have avoided the harm of replacing magistrate review and judicial reasoning with their own current sense impressions and judgments. *Rodgers v. State*, 264 So. 3D 1119, 1124 (Fla. App. 2Nd 2019), *citing Rodriguez v. State*, 187 So. 3D 841, 849 (Fla. 2015).

Investigators executing the search warrant at Petitioner's residence took the extreme measure of assuming their warrant for the entire premises covered the Petitioner's separate basement unit instead of submitting a second affidavit for a new search warrant to a reviewing judge. An option to temporarily restrain him from

entering the basement was available, which they did anyway while *not* pursing an option for a new warrant. The search of the basement apartment violated the Fourth Amendment and the Colorado Constitution, article II, section 7, and this Court should reverse the Court of Appeals' decision.

## II. The district court erred when it found the inevitable discovery exception applied to the Petitioner's case, thereby violating Petitioner's right to be free from unconstitutional searches under the Fourth Amendment.

### *A. Standard of Review*

As stated *supra.* under I(A), the issue is preserved. Petitioner filed a motion to suppress the fruits of an illegal search of his residence on March 16, 2018. (CF, pp. 111-13). A hearing was held on the motion on May 14, 2018. (Supp TR 5/14/18). The trial court denied the motion on May 17, 2018. (CF, pp. 146-50).

Petitioner raised the issue presented to the Colorado Court of Appeals, and the lower appellate court affirmed the district court's decision but did not opine that inevitable discovery applied to the matter. *Dhyne* at ¶¶ 9, 20.

A trial court's ruling on a suppression motion presents a mixed question of fact and law. *Martin* at 334. This Court defers to the trial court's findings of fact if they are supported by competent evidence in the record. *Stock* at 390. However, this Court reviews the trial court's conclusions of law *de novo*. *Id.*

An appellate court may affirm a trial court's suppression ruling on any grounds supported by the record. *Moody* at 615.

If an asserted error is of constitutional dimension, reversal is required unless the court is convinced that the error was harmless beyond a reasonable doubt. *Burola* at 964.

*B. Procedural History*

As stated *supra.* under I(B), the district court found that the evidence of downloading child pornography would have been inevitably discovered by police. (CF, p. 149). The trial court concluded that it had "no doubt" that an investigator "would have thereafter obtained a search warrant for [Petitioner's] apartment also since he knew [Petitioner] was using the same internet connection." *Id.* The district court denied the Petitioner's motion to suppress. (CF, pp. 146-50).

On appeal, the lower appellate court found that inevitable discovery did not apply to the case on review. *Dhyne* at ¶ 9. Instead, the Court of Appeals concluded that the search of the Petitioner's residence did not exceed the scope of the warrant. *Id.*

*C. Law and Analysis*

The exclusionary rule seeks to deter improper police conduct by suppressing evidence obtained by the police in violation of the Fourth Amendment from use by

the prosecution during its case-in-chief. *People v. Kazmierski*, 25 P.3d 1207, 1213 (Colo. 2001). The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

However, certain doctrines exist as well-established exceptions to the exclusionary rule, thereby permitting the use of evidence improperly obtained under the Fourth Amendment. The inevitable discovery exception is one such doctrine, and allows evidence initially discovered in an unconstitutional manner to be used at trial, but only if the prosecution can establish that the information ultimately or inevitably would have been discovered by lawful means. *People v. Diaz*, 53 P.3d 1171, 1176 (Colo. 2002); *People v. Burola*, 848 P.2d 958, 962 (Colo. 1993).

A key factor under Colorado law to determine if inevitable discovery applies is whether the police were pursuing another lawful means of discovery at the time the illegality occurred. *Id.* at 963.

1. The prosecution failed to prove to the district court a reasonable possibility that the wrongfully seized evidence would have been discovered in the absence of police misconduct.

In *Burola*, this Court held that the better-reasoned federal court decisions on the inevitable discovery exception required a thorough and independent investigation:

> In order for the inevitable discovery exception to the exclusionary rule to apply, the prosecution must demonstrate both a reasonable possibility that the evidence would have been discovered in the absence of police misconduct and that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation.

*Id.* at fn. 4, *citing United States v. Cherry*, 759 F.2d 1196, 1205-06 (5th Cir. 1985), *cert. denied*, 479 U.S. 1056 (1987).

This Court further explained in *Burola* that certainty of discovering evidence subject to the inevitable discovery exception was essential:

> Courts must be extremely careful not to apply the "inevitable discovery" rule upon the basis of nothing more than a hunch or speculation as to what otherwise might have occurred. The necessary probability of the inevitable discovery exception to the exclusionary rule is defined in terms of the word "would," and that requirement must be strictly adhered to. The significance of the word "would" cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained.

*Id.* at fn. 5, *citing* 4 Wayne R. LaFave, *Search and Seizure* § 11.4(a), at 383 (2d ed. 1987).

The fact that makes discovery of the evidence inevitable must "arise from circumstances other than those disclosed by the unlawful search itself." *Burola* at 962. (*quoting United States v. Thomas*, 955 F.2d 207, 211 (4th Cir. 1992)). In other words, courts are not allowed to make a *post hoc* judgment of what the search would have turned up based on the fruits of the earlier, illegal search.

In the Petitioner's case, the prosecution failed to prove, in light of the federal cases that support *Burola*, a reasonable possibility that the evidence would have been

discovered in the absence of police misconduct. At the time the illegal search commenced, police were aware that the router at the [redacted] residence was used to download child pornography. They were aware that three individuals resided at the residence: [redacted] (the homeowner), B.C. (who was a convicted sex offender), and the Petitioner (who had previously been accused of a sex crime but was later acquitted). They were aware that Petitioner shared the internet router with the [redacted] However, police made no inquiry if the Petitioner had his own individual, separate router inside his basement residence or if the [redacted] router was the only internet access that he utilized. Police also did not ascertain whether the [redacted] router was secured via password, or whether it was open for anyone to access.

When an investigator questioned [redacted] after the search commenced, she confirmed that the house internet account was through Comcast, and that Petitioner shared the internet account with her and her son, B.C. (Supp TR 5/14/18, pp. 18:24 – 19:6). However, she also did not provide any information whether Petitioner had a router of his own in the basement residence. *Id.*

Therefore, all police knew at the time of the illegal search was Petitioner had access to the router that was used for downloading child pornography. However, they did not know if that router was his sole and exclusive avenue to access the internet. They also did not know if the router and internet access were open, thereby

permitting any person with an internet device to access the world wide web via the [redacted] router.

Besides the police failing to ascertain whether the Petitioner had access to another router in his separate residence and determining that the [redacted] router was secured, they performed an insufficient investigation to determine who exactly lived at the [redacted] residence. At the suppression hearing, an officer testified that he determined who resided at the target address through personal knowledge and a check at the property assessor's office – and that is all. (Supp TR 5/14/18, pp. 7:16 – 8:19). Police performed no surveillance of the [redacted] house; they made no inquiries with neighbors about who lived there; and they made no inquiry with postal staff about who received deliveries at the address.

The weakness of the police investigation into who resided at the [redacted] house, who had access to the internet router, whether the device was secured, and the greater level of facts that should be required to show probable cause in cases heavily dependent on IP addresses should direct a reasonable person to one conclusion: the prosecution failed to prove to the district court a reasonable possibility that the wrongfully seized evidence would have been discovered in the absence of police misconduct. The trial court erred by finding that the inevitable discovery exception to

the exclusionary rule applied in Petitioner's case. His Fourth Amendment rights were violated, and the district court decision should be reversed.

2. Colorado's rule for application of the inevitable discovery exception should be stricter.

The Petitioner's case highlights why the current rule for application of the inevitable discovery exception in Colorado should be amended. The current standards allow too much discretion for law enforcement to violate the Fourth Amendment and still allow illegally-obtained evidence to be used against a defendant at trial.

As already mentioned, under current Colorado law, evidence obtained in violation of the Fourth Amendment may still be used in court "if the prosecution can establish that the information ultimately or inevitably would have been discovered by lawful means." *Diaz* at 1176. To accomplish this, the prosecution must affirmatively show that the lawful means of discovering this evidence was already initiated when the evidence was illegally obtained. *People v. Syrie*, 101 P.3d 219, 223 (Colo. 2004).

This standard is too lax. When questioned as to why he did not get a separate search warrant for the Petitioner's residence when the original warrant was executed on the [redacted] house, the police investigator responded: "I felt I didn't need to get a separate warrant, because that warrant covered that whole property at [redacted] and also covered the garage and the house where [Petitioner] was living in, and

any out buildings." (Supp TR 5/14/18, pp. 20:24 – 21:2). The police made this determination *after* being told by the Petitioner that he rented the basement, and that portion of the house was dedicated for his living space.

The law enforcement officer's decision flies in the face of Fourth Amendment protections dedicated to a person's home, which are at their maximum. *See Rodriguez v. State*, 187 So. 3D 841, 849 (Fla. 2015) ("[T]his case involves the sanctity of the home —a bedrock of the Fourth Amendment and an area where a person should enjoy the highest reasonable expectation of privacy. The constitutional guarantee to freedom from warrantless searches is not an inconvenience to be dismissed in favor of claims for police and prosecutorial efficiency.") However, because police had a warrant that covered (in their estimation) the whole [redacted] residence, they thought they could enter the Petitioner's home as well.

*Diaz* provides great leeway to police to make on-the-spot assessments that law enforcement officers have already engaged lawful means to discover evidence instead of utilizing judicial oversight to determine if probable cause exists and a suspect's rights under the Fourth Amendment are respected.

Instead, Petitioner submits this Court should adopt the legal standard for the inevitable discovery rule as articulated by the Florida Supreme Court in *Rodriguez*: the doctrine should only be applied when police are actively pursuing a search warrant. *Id.*

at 847, 849. *See also United States v. Cunningham*, 413 F.3d 1199, 1204 (10th Cir. 2005) (applying the inevitable discovery doctrine after a warrantless search of a home where police clearly indicated they took steps to obtain a search warrant and that they intended to obtain the warrant); *United States v. Souza*, 223 F.3d 1197, 1203 (10th Cir. 2000) ("While the inevitable discovery exception does not apply in situations where the government's only argument is that it had probable cause for the search, the doctrine may apply where, in addition to the existence of probable cause, the police had taken steps in an attempt to obtain a search warrant."); and *United States v. Quinney*, 583 F.3d 891, 894 (6th Cir. 2009) (the government's attempt to circumvent the search warrant requirement via the inevitable discovery doctrine when probable cause to obtain a warrant existed but officers failed to do so was rejected).

Adoption of a stricter standard for the inevitable discovery rule would rehabilitate this Court's holding in *Oates* and reaffirm the principle that the protections from unreasonable searches and seizures under the Colorado Constitution, article II, section 7 are greater than those afforded under the Fourth Amendment.

This Court should appreciate how the standard for application of the inevitable discovery rule in Colorado has evolved over time away from law enforcement obtaining any warrant when an illegal search was conducted. In *People v. Schoondermark*, 717 P.2d 504 (Colo. App. 1985), the lower appellate court held:

> We conclude that the inevitable discovery rule is inapplicable to rehabilitate evidence which has been seized during a search conducted in violation of a defendant's Fourth Amendment rights. To hold otherwise would justify, if not encourage, warrantless searches. To allow admission of evidence seized in an illegal search on the theory that proper execution of a search warrant would have disclosed the seized evidence would emasculate the search warrant requirement of the Fourth Amendment and would eviscerate the exclusionary rule. It would authorize the police to circumvent the magistrate which the United States Constitution interposes, as a safeguard, between the exercise of governmental power and the rights of the citizenry.

*Schoondermark*, 717 P.2d at 506. While this Court reversed the Court of Appeals decision in *People v. Schoondermark*, 759 P.2d 715 (Colo. 1988), it did not find the lower appellate court's reasoning on inevitable discovery was erroneous; instead, it found the independent source doctrine was a better "fit" to the scenario presented in that case. *Schoondermark*, 759 P.2d at 718. What should be evident to this Court is that the burden on law enforcement to effectuate a lawful search has been greatly eased by the evolution of the inevitable discovery rule between *Schoondermark* and *Diaz*.

If the officers who conducted the search in Petitioner's case had sought a valid search warrant for his residence, they would have learned from a knowledgeable, neutral magistrate that their assumption of the original warrant being valid for the basement residence was incorrect pursuant to *Garrison* and *Avery*. However, they did not do so, and the district court compounded this violation of the Petitioner's Fourth Amendment rights by applying the current, relaxed *Diaz* holding for application of the

inevitable discovery rule. This Court should adopt a more demanding standard for the inevitable discovery rule.

## 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.

/s/ Adam M. Tucker
Colorado Reg. No. 34631
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on October 30, 2023, a copy of this Opening Brief of Petitioner was electronically served through Colorado Courts E-Filing on the Attorney General's office through their AG Criminal Appeals account.

/s/ Adam M. Tucker
Colorado Reg. No. 34631
Attorney for Petitioner