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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Arapahoe County District Court County Honorable Ben L. Leutwyler, III, Judge Case No. 16CR0975	
Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO, v. Defendant-Appellant, CHRISTOPHER NICHOLAS CRUSE.	▲ **COURT USE ONLY** ▲ Case No. 18CA0034
PHILIP J. WEISER, Attorney General JACOB R. LOFGREN, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: 720-508-6459 E-Mail: jacob.lofgren@coag.gov Registration Number: 40904 *Counsel of Record	

RESPONSE TO DEFENDANT'S PETITION FOR REHEARING

DIVISION II Opinion by Judge Fox, Román and Gomez, JJ. concur	**JUDGMENT AFFIRMED**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 32 and C.A.R. 40, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R.40(b), and this Court's order dated January 21, 2021.

It contains **1499** words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 40.

/s/ Jacob R. Lofgren

I. This Court is not an advocate for the defendant, and, applying the party presentation principle, it should not raise issues on his behalf.

In *People v. Turner*, 17CA2294 (Colo. App. Dec. 24, 2020) (unpublished), this division of this Court reversed the co-defendant's convictions, holding the co-defendant's public trial rights were violated by the exclusion of the defendant's wife from the courtroom for three days. The People intend to file a petition for writ of certiorari in that case; it is currently due on March 18, 2021.

In this case, the defendant did not raise a public trial claim, and this Court declined to raise and rule upon it on his behalf. *See People v. Cruse*, 18CA0034, ¶ 1, n.1 (Colo. App. Dec. 24, 2020) (unpublished). That decision was correct. *See Galvan v. People*, 476 P.3d 746, 757 (Colo. 2020) (holding court of appeals erred by addressing an issue "sua sponte and without briefing").

In support of the contrary, the defendant relies on C.A.R. (1)(d) (D-PR, p 1). While C.A.R. 1(d) permits a court to address unraised claims in special circumstances, it is not an outlet for this Court to act as an additional advocate for the defense, and it does not trump the

party presentation principle. That principle "relies on the parties to frame the issues to be decided and assigns to courts the role of neutral arbiters of the matters raised[,]" and it assumes represented parties " 'know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.' " *Galvan*, 476 P.3d at 757 (quoting *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020)). Indeed, our Supreme Court has cautioned trial courts that, when they "elect[] to raise matters to promote a just determination of a trial, [they] must take great care to insure that [they] do[] not become an advocate." *People v. Adler*, 629 P.2d 569, 573 (Colo. 1981).

Recently, our Supreme Court recognized that "courts must function as 'passive instruments of government' and should not 'sally forth each day looking for wrongs to right.' " *Id.* (quoting *Sineneng-Smith*, 140 S.Ct. at 1579). To that end, "courts are well-advised to 'wait for cases to come' to them and to 'decide only questions presented by the parties.' " *Id.* (quoting *Sineneng-Smith*, 140 S.Ct. at 1579).

Going a step further, the United States Supreme Court recognized that, "[i]n criminal cases, departures from the party presentation

principle have usually occurred 'to protect a pro se litigant's rights.' " *Sineneng-Smith*, 140 S.Ct. at 1579 (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)). That differs notably from the circumstances presented here, where the defendant was represented by a competent appellate defender, who raised six substantive issues on his behalf.

To do as the defendant now suggests would require this Court to engage in precisely the kind of advocacy frowned upon in *Sineneng-Smith* and cases that have cited to it since. Indeed, what the defendant seeks here—for this division to identify, raise, and rule upon an issue on his behalf—vastly differs from circumstances where a reviewing court might identify a missed legal theory or an uncited case that proves decisive in resolving an already-raised claim. *See, e.g., Does v. Wasden*, 982 F.3d 784, 793 (9th Cir. 2020) (distinguishing *Sineneng-Smith*); *United States v. McReynolds*, 964 F.3d 555, 568 (6th Cir. 2020) (same); *see also, e.g., United States v. Michel*, 832 Fed.Appx. 631, 636 (11th Cir. 2020) (declining to consider a tangentially related issue that was not raised by the defendant).

Accordingly, this Court should decline the defendant's request that it raise and rule upon a claim on his behalf.[1]

The defendant also suggests this Court should cast aside the party presentation principle because "the State—through the same Assistant Attorney General—already fully briefed the issue in [the co-defendant's] case" (D-PR, p 5). This argument ignores a central premise of the party presentation principle—that is, that a party *to this case* raised the issue that the Court is deciding. Here, the defendant did not raise the public trial issue *in his case*, and this Court should not raise it for him.[2]

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[1] On a related note, the People observe that appellate courts routinely reject arguments raised in only a cursory fashion. *See People v. Mershon*, 874 P.2d 1025, 1035 n. 13 (Colo. 1994); *People v. Bondurant*, 296 P.3d 200, 206 n.2 (Colo. App. 2012). It would create a bizarre dichotomy to reverse on a claim that was not raised at all but decline to review claims actually raised but too cursory to review.

[2] In effect, the defendant suggests the People should have assumed every issue raised in his co-defendant's appeal was also before this Court in his appeal—essentially incorporating his co-defendant's 8700-word brief into his own 9500-word brief. More colloquially, he demands that he be given "two bites at the apple" simply because he happened to be tried jointly with a co-defendant whose appellate counsel raised a claim that his counsel apparently thought was weaker than the issues that she identified, and because the appeals happened to proceed simultaneously before the same division. The defendant cites no authority for that proposition, and this Court should reject it.

To the extent that the defendant asserts the interests of judicial economy suggest that this Court should decide the issue (D-PR, pp 3-5), he assumes too much. Indeed, the defendant's argument hinges on the assumption that an ineffective assistance of appellate counsel claim will inevitably succeed. But that may not be the result of a future Crim. P. 35(c) proceeding for any number of not-yet-litigated reasons, not the least of which is the potential that the Colorado Supreme Court could grant certiorari and overturn the opinion in *Turner*. If that occurs, any ineffective assistance claim based on appellate counsel's failure to raise the public trial claim immediately weakens and likely fails.

In short, the defendant's argument requires this Court to assume both that our Supreme Court will reject certiorari in *Turner* and that a not-yet-litigated ineffective assistance of appellate counsel claim will inevitably succeed. Such broad assumptions should not serve as the basis for this Court to bypass the party presentation principle.

Finally, if this Court bypasses the party presentation principle as the defendant suggests, the appropriate remedy here should not be immediate reversal. Instead, this Court should order supplemental

briefing. *See Sanchez v. People*, 325 P.3d 553, 559-60 (Colo. 2014) (reviewing an unraised claim under C.A.R. 1(d), but noting "[t]he parties to this review have been given specific notice of the court's concern, as well as an opportunity to address it . . . ."); *see also Galvan*, 476 P.3d at 758 (noting the division failed to call for supplemental briefing before deciding an issue sua sponte).

Because the defendant here has not briefed the public trial claim in any way, the People have not had a chance to respond to his framing of the issue, which would almost certainly differ from the way the claim presented itself in *Turner*. More significantly, proper briefing would provide necessary and essential background for any future consideration of the public trial issue by our Supreme Court.

II. This Court should remove footnote one from its opinion.

As a corollary to the arguments above, the People respectfully request that this Court modify its opinion to remove footnote one to the extent that a lower court might read it as an advisory opinion on the

merits of a not-yet-filed postconviction action.[3] *See Galvan*, 476 P.3d at 758; *Bd. of Cty. Comm'rs v. Cty. Rd. Users Ass'n*, 11 P.3d 432, 438-40 (Colo. 2000); *People v. Kadell*, 411 P.3d 281, 289 (Colo. App. 2017).

CONCLUSION

For these reasons, the People respectfully request this Court deny the defendant's petition for rehearing; however, this Court should modify its opinion to remove footnote one.

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[3] Even if the Colorado Supreme Court rejects the People's petition for a writ of certiorari in *Turner*, the defendant would still be required to demonstrate that he is entitled to relief under Crim. P. 35(c). To do so, he would be required "to show that 'in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance.' " *People v. Trujillo*, 169 P.3d 235, 238 (Colo. App. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). The postconviction court would "evaluate counsel's performance from [her] perspective at the time of the representation, ignoring the distorting effects of hindsight." *Id.*; *see also People v. Lustgarden*, 914 P.2d 488, 491 (Colo. App. 1995) (the Constitution does not require competent counsel to foresee expansions or changes in the law).

Here, while a potentially meritorious ineffective assistance of appellate counsel claim exists, it is not *inevitable* that such a claim would succeed, and it is impossible to know its outcome before it is even filed, let alone litigated. This Court should not relieve the defendant of his burden of showing the ineffective assistance of appellate counsel in an appropriate postconviction action.

PHILIP J. WEISER
Attorney General

/s/ Jacob R. Lofgren
JACOB R. LOFGREN, 40904*
Assistant Attorney General
Criminal Appeals Section
Attorneys for the Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **RESPONSE TO DEFENDANT'S PETITION FOR REHEARING** upon **JESSICA A. PITTS**, Deputy State Public Defender, and all parties herein via Colorado Courts E-filing (CCE) on February 5, 2021.

/s/ Michael Rapp

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