SUPREME COURT STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	FILED IN THE SUPREME COURT FEB 2 2 2011 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 05CA2776	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. LANCE PATRICK BRUNSTING, Respondent.	▲COURT USE ONLY▲ Case No. 09SC323
JOHN W. SUTHERS, Attorney General KATHERINE A. HANSEN, Senior Assistant Attorney General* 1525 Sherman Street, 5th Floor Denver, CO 80203 TELEPHONE: (303) 866-5785 FAX: (303) 866-3955 E-Mail: katherine.hansen@state.co.us Registration Number: 25464 *Counsel of Record	

PETITIONER'S OPENING BRIEF

RECEIVED
FEB 18 2011
CLERK
COLORADO SUPREME COURT

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:

The brief does not comply with CAR 28(g) because it exceeds the word and/or page limit. A motion to accept the over length brief has been filed contemporaneously with the brief.

The brief complies with C.A.R. 28(k). It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

Rebecca Jones #31044

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW 1

STATEMENT OF THE FACTS 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

I. The Court of Appeals erred in holding that the entry into Brunsting's yard, and subsequently his home, was not justified under the exigent circumstances exception to the warrant requirement 3

A. Standard of review and preservation of claims 4

B. Factual background 4

C. The Court of Appeals' split decision 15

D. Deputy Carroll's entry into the backyard was justified by exigent circumstances and was otherwise reasonable 21

E. The deputies' warrantless entry into the house was lawful 44

CONCLUSION 55

TABLE OF AUTHORITIES

PAGE

CASES

Brigham City v. Stuart, 547 U.S. 398 (2006) 19, 22
Brigham City, Utah v. Stuart, 126 S.Ct. 1943 (2006) 25
Chimel v. California, 395 U.S. 752 (1969) 25
Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) 34, 36, 37, 38
Estate of Smith v. Marasco, 318 F.3d 497 (3rd Cir. 2003); 42
Georgia v. Randolph, 126 S.Ct. 1515 (2006) 24
Hardesty v. Hamburg Tp., 461 F.3d 646 (6th Cir. 2006) 42
Henderson v. People, 879 P.2d 383 (Colo. 1994) 22
Illinois v. McArthur, 531 U.S. 326 (2001) 40
Maryland v. Buie, 494 U.S. 325 (1990) 20, 40, 46, 47
Mincey v. Arizona, 437 U.S. 385 (1978) 25
Minnesota v. Olson, 495 U.S. 91 (1990) 24
Oliver v. United States, 466 U.S. 170 (1984) 22
Pennsylvania v. Mimms, 434 U.S. 106 (1977) 40, 41
People v. Aarness, 150 P.3d 1271 (Colo. 2006) ..... passim
People v. Barrows, 170 A.D.2d 611 (N.Y.A.D. 2 Dept. 1991) 44
People v. Brunsting, 224 P.3d 259 (Colo. App. 2009) ..... passim
People v. Gomez, 632 P.2d 586 (Colo. 1981) 22, 53
People v. Hardrick, 60 P.3d 264 (Colo. 2002) 41
People v. Jackson, 39 P.3d 1174 (Colo. 2002) 4
People v. Kazmierski, 25 P.3d 1207 (Colo. 2001) 4
People v. Kirk, 103 P.3d 918 (Colo. 2005) 4
People v. Lindsey, 805 P.2d 1134 (Colo. App. 1990) 54
People v. Lucero, 511 P.2d 468 (Colo. 1973) 38

TABLE OF AUTHORITIES

PAGE

People v. Martinez, 200 P.3d 1053 (Colo. 2009) 37
People v. Miller, 773 P.2d 1053 (Colo. 1989) 37
People v. Milton, 864 P.2d 1097 (Colo. 1993) 54
People v. Pate, 71 P.3d 1005 (Colo. 2003) 25, 32
People v. Taylor, 41 P.3d 681 (Colo. 2002) 40
State v. Girard, 555 P.2d 445 (Or. 1976) 34
State v. Gray, 456 N.W.2d 251 (Minn. 1990) 36, 37
State v. Harper, 582 S.E.2d 62 (N.C. App. 2003) 43
State v. McKenzie, 528 P.2d 269 (Wash. App. 1974) 39
Terry v. Ohio, 392 U.S. 1 (1968) 40
United States v. Anderson, 552 F.2d 1296 (8th Cir. 1977) 42
United States v. Aquino, 836 F.2d 1268 (10th Cir. 1988) 46, 49
United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974) 42
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 40
United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983) 49
United States v. Daoust, 916 F.2d 757 (1st Cir. 1990) 42
United States v. Forker, 928 F.2d 365 (11th Cir. 1991) 50, 51
United States v. Hammett, 236 F.3d 1054 (9th Cir. 2001) 42
United States v. Henry, 48 F.3d 1282 (D.C. Cir. 1995) 47, 48
United States v. Hoyos, 892 F.2d 1387 (9th Cir. 1989) 48
United States v. Karo, 468 U.S. 705 (1984) 22
United States v. Knights, 534 U.S. 112 (2001) 40
United States v. Kulcsar, 586 F.2d 1283 (8th Cir. 1978) 53
United States v. MacDonald, 916 F.2d 766 (2nd Cir. 1990) 23, 38, 52
United States v. Merritt, 882 F.2d 916 (5th Cir. 1989) 47

TABLE OF AUTHORITIES

PAGE

United States v. Parra, 2 F.3d 1058 (10th Cir. 1993) 49, 51

United States v. Reeves, 524 F.3d 1161 (10th Cir. 2008) 24

United States v. Rodgers, 924 F.2d 219 (11th Cir. 1991) 53

United States v. Rubin, 474 F.2d 262 (3rd Cir. 1973) 40, 49, 51

United States v. Taylor, 90 F.3d 903 (4th Cir. 1996) 52

United States v. Turner, 650 F.2d 526 (4th Cir. 1981) 54

United States v. Walker, 474 F.3d 1249 (10th Cir. 2007) 24

United States v. Wicks, 995 F.2d 964 (10th Cir. 1993) .. 23, 32, 49, 52, 54

Warden v. Hayden, 387 U.S. 294 (1967) 16, 23, 24, 26

Welsh v. Wisconsin, 466 U.S. 740 (1984) 25

CONSTITUTIONS

U.S. Const. amend. IV 19, 21, 25, 39, 40, 41, 44

OTHER AUTHORITIES

3 Search and Seizure, §6.1(f), p267 38

3 Search and Seizure, §6.1(f), p273 42

3 Search and Seizure, §6.1(f), p274 50

3 Search and Seizure, §6.1(f), p278 34

3 Search and Seizure, §6.1(f), p280 33

3 Search and Seizure, §6.4(c), p333-334 47

3 Search and Seizure, §6.5(b), p353 50

3 Search and Seizure, §6.5(b), pp354-355 51

3 Search and Seizure, 3rd Ed., Wayne LaFave, §6.1(f) 23

3 Search and Seizure, W. LaFave, §6.1(f), pp263-282 37

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the court of appeals erred in concluding that no exigent circumstances existed to justify the warrantless entry and search in this case.

STATEMENT OF THE FACTS

While investigating a report of a stolen car parked in the driveway of a residence, deputies from the Arapahoe County Sheriff's Office discovered a methamphetamine lab in the basement of the residence (v7, pp59-62; v8, p21). The defendant was found hiding underneath the basement stairs, and a gun was found nearby (v7, pp55-56, 124; v8, pp28-30). He had a small plastic baggy containing a white powdery substance and a syringe in his pockets (v8, p31).

STATEMENT OF THE CASE

The defendant was originally charged with possession of chemicals or supplies to manufacture a schedule II controlled substance, manufacturing a controlled substance, possession of a weapon by a previous offender (seven counts), possession of a schedule II controlled substance, two special offender counts, and six habitual criminal counts (v1, pp26-34,178-183,192-198).

Following a jury trial, the defendant was convicted of possession of chemicals or supplies to manufacture a schedule II controlled substance and possession of a schedule II controlled substance (v1, pp246- 250; v9, p162-163). The jury also found that the defendant used or possessed a deadly weapon during the commission of his crimes (v1, pp246-250; v9, pp162-163). The prosecution then dismissed the possession of a weapon by a previous offender counts (v9, pp165-166).

On November 14, 2005, the prosecution moved to dismiss the habitual criminal counts (v10, p2). The defendant was then sentenced to a total of 45 years in the Department of Corrections, plus mandatory parole (v1, p273; v10, pp27-28).

The defendant filed a direct appeal of his conviction in Colorado Court of Appeals Case No. 05CA2776. *See People v. Brunsting*, 224 P.3d 259 (Colo. App. 2009). Brunsting challenged, *inter alia*, the trial court's order denying his motion to suppress evidence obtained following a search of his home and person. *Brunsting*, *supra* at 260. The Court of Appeals agreed with Brunsting, and reversed his judgment of conviction. *Id.*, at 266. Judge Connelly dissented from the

majority opinion, indicating that he would uphold the trial court's denial of the motion to suppress evidence. *Id.*, at 268.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in concluding that there were no exigent circumstances to justify the officers' entry into the backyard of the home and subsequently, their entry into the home.

ARGUMENT

I. The Court of Appeals erred in holding that the entry into Brunsting's yard, and subsequently his home, was not justified under the exigent circumstances exception to the warrant requirement.

The Court of Appeals found that there was no basis justifying the warrantless entry into Brunsting's backyard and residence and as such, the evidence obtained therefrom should have been suppressed. The court rejected the People's claim that the entry was justified by the exigent circumstances facing the officers at that time. The Court of Appeals erred in so ruling, and this Court should correct that determination.

A. Standard of review and preservation of claims.

In reviewing a motion to suppress, the trial court's findings of fact are entitled to deference by a reviewing court, and will not be set aside where they are adequately supported by competent evidence in the record. *People v. Kirk*, 103 P.3d 918, 921 (Colo. 2005); *People v. Jackson*, 39 P.3d 1174, 1180 (Colo. 2002). However, the trial court's ultimate conclusions of law are subject to *de novo* review. *Id.*; *People v. Kazmierski*, 25 P.3d 1207, 1210 (Colo. 2001).

Brunsting challenged the entry into his backyard and residence in the trial court, and as such, his claims are preserved.

B. Factual background.

Before trial, the defendant filed a motion to suppress (v1, pp140-150). In the motion, Brunsting asserted, *inter alia*, that the search of his residence was unlawful. At a hearing on the motion, the trial court heard the testimony of three deputies from the Arapahoe County Sheriff's Office, Sergeant Sean Dennis, Deputy Jeff Short, and Deputy

Gordan Carroll; and an officer from the South Metro Drug Task Force, Agent John Sherrill. The testimony was as follows.

On August 1, 2004, at around 11:00 p.m., Sergeant Dennis, and Deputies Carroll, Robertson, Smith and Kirkland responded to a report from Randy Talent, who said that he had spotted his stolen vehicle parked in the driveway of a residence at 4345 East Arapahoe Place (v 5, 4/20/05, pp7,10,31-32,81-82,96,110). Talent was concerned that the individuals inside the residence "had guns" and "were making meth" as he had approached the house and overheard people inside talking about guns (v5, 4/20/05, pp7-8,40-41,110). At that time, Mr. Talent appeared "scared and agitated" (v5, 4/20/05, p111).

Mr. Talent also told Deputy Carroll that his friend had had "dealings" in the past with the people suspected of stealing his truck, that one of these individuals was named "Lance," and that in his friend's past dealings with "Lance" he (i.e., "Lance") had a gun (v5, 4/20/05, p113). Mr. Talent's friend had also told him that "these people" were known to be dangerous and were involved with drugs and weapons (v5, 4/20/05, pp113-114).

Mr. Talent's friend had apparently located the stolen vehicle by driving around the location where "Lance" lived, where they spotted the truck in the driveway at 4345 East Arapahoe Place (v5, 4/20/05, pp114,134).

Deputy Carroll looked in the vehicle, noting that it "appeared that the stereo and speakers had been stripped out of it" (v5, 4/20/05, pp115-116). The deputies also noticed security cameras on the front of the house (v5, 4/20/05, pp10-11,119). At that time it was dark in the front of the house, but a light was on in the back near the garage (v5, 4/20/05, pp15,50-51).

As the deputies were obtaining information from Mr. Talent, Consuelo Jones and her two daughters exited the residence (v5, 4/20/05, pp16,36,83,83,116). An officer told her that they were investigating a report of a stolen vehicle (v5, 4/20/05, p117). Jones said that she was the owner of the house and that she had not stolen the vehicle, that the vehicle belonged to "Randy," but that a man named "Jeff" had driven the car to the residence (v4, 4/20/05, pp17-18,36,117). She also said that four people were in the house, one of whom was in the basement (v5,

4/20/05, pp18,117-118,137). She also indicated that someone named "Lance" rented out the basement of the home (v5, 4/20/05, p137).

As she spoke, she "elevated her voice," and Deputy Carroll thought "she was ... possibly trying to let somebody in the house know what was going on out front" (v5, 4/20/05, pp117,139). She also refused consent to search the home (v5, 4/20/05, pp38-39,118,139).

Sergeant Dennis, who was the supervisor at the scene, decided to contact the occupants of the house (v5, 4/20/05, p10). However, given the report of guns inside, the police were concerned that the cameras put them in danger, because people inside could track the location and movement of the police as they approached the front door (v5, 4/20/05, p12).

Concerned that the occupants of the house might be armed and thus pose a danger to the deputies if one fled out the back door, Deputy Carroll went to the back of the house to provide cover for the deputies who were going to knock on the front door (v5, 4/20/05, pp10,13,48,52-53,119,144). Deputy Short maintained a position on the east side of the house (v5, 4/20/05, pp83,97,119).

The backyard of the home was surrounded by a gate; most of it was wooden privacy fence, but as the gate reached the driveway, it was a chain link fence from that point until it joined the garage (v5, 4/20/05, pp47,56,97,120; 4/28/05, p16; Defendant's Exhibit B). The backyard was littered with debris, and there were four or five cars on the driveway (v5, 4/20/05, pp74-75).

Deputy Carroll intended to stay outside the gate near the garage, but he could not "stay there and be safe" because there was a security camera overlooking that position. Accordingly, he entered the backyard through an open gate and went into some bushes "where it was dark" (v5, 4/20/05, pp24,68,119-120,143-144,157). Deputy Carroll explained that he did not just wait from the outside of the fence because he "would have been within the view of the camera, and it would have been an officer safety issue. It would have been too dangerous." (v5, p4/20/05, p157). He also indicated that there was nowhere he could have "gone outside of that fence that would have enabled [him] to look inside the area to see if there were people fleeing without being in view of that security camera." (v5, 4/20/05, p157).

Sergeant Dennis then knocked on the front door "a few times, did not get an initial response, so he yelled "sheriff's office" about 2-3 times (v5, 4/20/05, pp13-15,51). Deputy Carroll saw movement in the kitchen area, and radioed the other deputies (v5, 4/20/05, p120).

Deputy Carroll then saw a man's "head c[o]me out from the wall where [he] was standing": he saw the head come around the corner, look in his direction, look in the other direction, then disappear back around the corner (v5, 4/20/05, pp120-121,148).

Deputy Carroll drew his weapon, walked around the corner, and ordered the man, who turned out to be Jefferson Scott Newman, to stop and put up his hands (v5, 4/20/05, pp83,98,121). Newman "looked like he was going to run back down the stairs" that led to into the basement, so Deputy Carroll repeated his command (v5, 4/20/05, pp13-15,120-121,148). Newman then complied (v5, 4/20/05, p121).

Deputy Carroll explained his actions: "we were in a situation where we felt that there were drugs and weapons involved and at least a stolen car. For officer safety reasons, I wasn't going to let him either have access to get back in to get a gun or come out and endanger any of

us, and I also didn't know if he was going to run around into the west side of house to engage those deputies" (v5, 4/20/05, p121).

Deputy Carroll put Newman in handcuffs and started to do a pat down search (v5, 4/20/05, pp22,85,98,122,148). Deputy Short had jumped the fence into the backyard when he heard Deputy Carroll tell Newman to show his hands (v5, 4/20/05, p103). Just then, two additional individuals, a male and a female, came up the stairs from the basement (v5, 4/20/05, pp85,122-123,148-153). Deputy Carroll told the individuals, later identified as Mandy Craig and Robert Lindbhad, to show their hands and they complied (v5, 4/20/05, p85). The two were patted down, handcuffed, and told to sit on the ground (v5, 4/20/05, pp19-20,86-87,99).

Meanwhile, Sergeant Dennis had also heard Deputy Carroll's repeated commands, and went to the backyard to assist him (v5, 4/20/05, pp19,83-84). Craig and Lindbhad were then escorted to the front of the house (v5, 4/20/05, pp88,99). Newman was also led to the front of the house (v5, 4/20/05, p88). At this point, he was acting "really strange" and "agitated," and "he moved pretty quickly, like he was

trying to either get away or move towards something"; as he did, a 9-millimeter semi-automatic weapon fell out of his pants (v5, 4/20/05, pp21,88-89,125-126).

The deputies believed that a person was still in the basement, since the homeowner had said that there were four people there (v5, 4/20/05, pp69,90,108,124,155). Deputy Carroll yelled "is there anyone else there" several times through the open door into the stairwell (v5, 4/20/05, pp122-124). There was no response. Deputy Short, who was assisting Deputy Carroll with the three people that had been detained, was standing in front of a basement window. Concerned that there was someone in the basement who presented a danger to him, he looked in the window and saw what appeared to be a methamphetamine lab and drug paraphernalia (v5, 4/20/05, pp87,102).

Sergeant Dennis also approached the back door and saw the items through the basement window (v5, 4/20/05, pp25,63-66). He announced himself "a few more times" but nobody came out (v5, 4/20/05, p26). The officers were concerned with the fact that there was still somebody in the basement, possibly armed, and there were methamphetamine

materials in the basement, so Sergeant Dennis, Deputy Short, and Deputy Carroll entered through the open backdoor (v5, 4/20/05, pp24-26,71,90,127-128). They announced themselves as officers one more time and received no response (v4, 4/20/05, p26).

Sergeant Harris and Deputy Short went into the basement and found the defendant hiding among boxes and clothes underneath the stairs (v5, 4/20/05, pp27,90,161). He did not initially come out of his hiding place, so the officers had to physically remove him from that location, where he was handcuffed and patted down (v5, 4/20/05, pp27,127). His pockets contained a small plastic baggy filled with a white powdery substance and a syringe (v5, 4/20/05, pp27,91).

The defendant was removed from the residence, and the officers continued their protective sweep of the basement (v5, 4/20/05, pp28,91,127). They found a loaded handgun near the stairwell and additional items associated with methamphetamine manufacturing in the basement (v5, 4/20/05, pp28,91-92,124,127).

The officers continued the protective sweep of the upstairs portion of the home, and discovered a surveillance monitor that was covering

the front of the house and the driveway area (v5, 4/20/05, p29). Additional drug paraphernalia was observed on the main floor, but no other individuals (v5, 4/20/05, p29).

Sergeant Dennis contacted the South Metro Drug Task Force, and Agent John Sherrill responded to the scene (v5, 4/28/05, p5). He looked in the basement window and also saw items associated with methamphetamine manufacture (v5, 4/28/05, pp5-7). He wrote an affidavit and obtained a search warrant (v5, 4/28/05, p7). After the warrant was signed by a judge, a complete search of the residence occurred (v5, 4/28/05, p8).

At the suppression hearing, defense counsel argued: 1) the entry into the enclosed backyard was an unlawful entry into the curtilage of the house, and thus "anything the officers saw through the window" could not be used to obtain the search warrant; 2) there were no exigent circumstances that justified the entry into the backyard; and 3) even if the officers had a right to enter the backyard, there were no exigent circumstances justifying their entry into the house (v5, 4/28/06, pp27-38).

The prosecution argued: 1) the police had probable cause to believe the truck in the driveway was stolen; 2) the information about guns and drugs, along with the security cameras and Ms. Jones' suspicious behavior, gave the officers legitimate concern about their safety; 3) it was reasonable for Deputy Carroll to enter the curtilage (i.e., backyard) to protect himself from being observed through the security camera; 3) this intrusion was "de minimus"; 4) the officers were justified in entering the home to conduct a protective sweep and protect against the destruction of evidence; and 5) all of the information observed by the officers provided probable cause for a search warrant (v5, 4/28/05, pp39-46).

The court first observed that "we all agree that if the police officers can get into the backyard legally, then the materials they found there that are indicative of a meth lab were reasonably seized and that search was reasonable." (v5, 4/28/05, p46). The court found that the officers conduct while investigating the auto theft of surrounding the house, then trying to stay out of view of the cameras, was reasonable (v5, 4/28/05, p47). The court noted that in light of the information that

the people in the house had "guns and drugs," and a weapon was in fact found on one of the occupants, knowing that there was still someone inside the house, as well as a possible methamphetamine lab, justified the officers concern for their safety and the immediate destruction of evidence (v5, 4/28/05, p48).

The court ultimately found that "the police officers had a right to go into the backyard of this house to protect themselves, and not just themselves, but the community, from these allegations, and that their entry into the backyard was reasonable." (v5, 4/28/05, p48). The court also found that the officers conducted a proper protective sweep of the house once the individual (Newman) was found with an automatic weapon and they knew that there was an additional individual inside (v5, 4/28/05, pp49-50). The court also found that Agent Sherill would have gotten the warrant for drugs and the stolen truck, independent of his own observations into the basement window (v5, 4/28/05, p51).

C. The Court of Appeals' split decision.

The court of appeals majority correctly recognized well established case law holding that under the exigent circumstances exception, the

prosecution was required to prove that (1) the deputies had probable cause, and (2) there were exigent circumstances that justified the warrantless entry. *Brunsting, supra* at 263.

The court first addressed the issue of probable cause, finding probable cause to believe the truck was stolen and the person who had stolen the vehicle was inside the house. *Id.* However, the court held that the deputies lacked probable cause to believe there were illegal drugs in the house, nor did they have probable cause to investigate an illegal weapons violation. *Id.*, at 264. The court then held, without citation to authority, that "in analyzing whether exigent circumstances existed, we do so only with respect to the sole offense for which the deputies possessed probable cause-the vehicle theft." *Id.*

The court recognized that "law enforcement officers may also conduct a warrantless search when they believe their own lives are at risk." *See Brunsting, supra* at 264, *citing People v. Aarness*, 150 P.3d 1271 (Colo. 2006), and *Warden v. Hayden*, 387 U.S. 294 (1967). The court then stated that it "must determine whether, when Deputy C[arroll] first entered the backyard and later moved to the back door,

there was a colorable claim of an emergency situation threatening the life or safety of the deputies (or others) sufficient to justify the entry." *Id.*[1]

The court stated that the prosecution bore the burden of proving that "it would have appeared to a prudent and trained police officer that an emergency situation already existed and threatened the deputies' lives or the safety of others," and held:

> Except for the testimony that the owner spoke in a loud voice, the record does not show, and the People do not argue, that when Deputy C[arroll] entered the backyard, circumstances required an immediate warrantless entry in response to a risk of immediate destruction of the vehicle or an immediate threat to the deputies or others. There is no evidence that anyone inside the house was in danger or that the allegedly stolen vehicle was in danger of destruction. ... [B]efore Deputy C[arroll] entered the backyard, he did not have an arrest warrant and did not observe a felon believed to be armed possibly reach for a weapon. Nor did Deputy C[arroll] testify that the first man he apprehended made any movements that could be interpreted as posing an immediate

[1] The court's use of this language appears to be a reference to the emergency aid exception, which was also cited immediately after the court's recognition of the officer safety exception. *Brunsting, supra* at 264.

> threat to the deputy before he moved about twenty feet further into the yard.
>
> Nor does the record show that when Deputy C[arroll] entered the yard, circumstances were already evolving so quickly that the deputies could not have (1) positioned themselves outside the curtilage; (2) secured the vehicle; (3) observed the backyard and the exits from that position; (4) stopped anyone leaving the backyard and conducted a pat-down search for weapons; and (5) protected the deputies at the door from being attacked from behind. To the extent the cameras made it more difficult to do so, they did not *create* an emergency situation that threatened the lives of the deputies, and, thus, they did not constitute an *exigency* justifying warrantless entry into the curtilage. In addition, the record is insufficient to show that when the man came out the back door and looked around, Deputy C[arroll] had any further reason to believe that the man posed either a risk of immediate destruction of the vehicle or an immediate threat to the deputies' lives or the safety of others.

Id., at 265 (emphasis included in original).

The court ultimately concluded that because Deputy Carroll's entry was unlawful, Deputy Short's entry into the backyard was also unlawful. *Id.*, at 266. Thus, both deputies' observations of methamphetamine manufacturing evidence were tainted by the unlawful entry and could not serve as probable cause for the other

deputies' warrantless entry into the house. *Id.*

One judge dissented from the majority opinion, opining that the "reasonableness of police actions should be determined by balancing the intrusion on privacy against the need for the intrusion. In my view the intrusion here (entry of backyard "curtilage") was outweighed by officer safety interests." *Id.*, at 266. The dissent recognized that "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions," *Brigham City v. Stuart*, 547 U.S. 398 (2006), and "the warrant requirement may give way if 'the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.'" *Brunsting, supra* at 267.

After recognizing that "[p]olice sometimes may enter curtilage, however, even where they could not enter the home itself, and that entering a backyard is not as intrusive as entering the home itself," the dissenting judge stated his belief that "[a]t least where countervailing officer safety interests are asserted, we should recognize this lesser degree of intrusiveness in deciding the ultimate reasonableness of a

backyard entry." *Id.*, at 267. The dissent then opined that the balancing test drawn from *Maryland v. Buie*, 494 U.S. 325 (1990), which allows "protective sweeps" after lawful arrests, should be applied in the present circumstances. *Brunsting, supra* at 267.

The dissent stated that the "officers properly could have entered the backyard if they reasonably believed, based on specific and articulable facts, that doing so was necessary to protect their fellow officers legitimately approaching the front door." *Id.* Then, applying that proposition to the facts presented here, the dissent concluded "that the officers here sufficiently articulated specific facts justifying the backyard entry as a reasonable safety measure" based on the following facts: 1) they had probable cause that a car thief was inside the home; 2) a citizen had told them the occupants were armed and dangerous; 3) the homeowner had responded loudly to the officers' legitimate questions, in a manner the officers believed was meant to signal their presence to the remaining occupants; 4) the officers reasonably were concerned they could not safely protect their fellow officers approaching the front door by remaining in view of video security cameras positioned

to monitor the front and sides of the house. *Id.*, at 267-268.

The dissent then held that by the time of the entry into the home, the police had learned several additional facts confirming the home was being used for drug manufacturing by armed individuals: 1) from their backyard view into the basement window, the police observed drug manufacturing equipment; 2) in the course of temporarily securing three of the four remaining occupants, a semi-automatic handgun fell from one man's pants; and 3) the police understood, from the homeowner's initial admission, that at least one person still remained inside the house. *Id.*, at 268. These circumstances justified entry into the home to prevent the imminent destruction of evidence and because the officer's own lives were at risk. *Id.*

D. Deputy Carroll's entry into the backyard was justified by exigent circumstances and was otherwise reasonable.

The Fourth Amendment, which protects citizens from unreasonable searches and seizures, generally requires that police officers obtain a warrant before searching a residence or its curtilage.

U.S. Const. amend. IV; *United States v. Karo*, 468 U.S. 705, 714-15 (1984). Curtilage is defined as the enclosed space and buildings directly surrounding a residence. *Henderson v. People*, 879 P.2d 383, 401 n.5 (Colo. 1994). The curtilage immediately surrounding a private house is entitled to the same level of protection as a residential dwelling. *Oliver v. United States*, 466 U.S. 170, 180 (1984). The People do not dispute that the area within the fenced backyard was the curtilage of the defendant's residence.

"Because the ultimate touchstone of the 4th Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). One of those exceptions is exigent circumstances. The doctrine of exigent circumstances is limited to "those situations where, due to an emergency, the compelling need for immediate police action militates against the strict adherence to the warrant requirement." *People v. Gomez*, 632 P.2d 586, 592 (Colo. 1981). "The essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an 'urgent

need' to render aid or take action." *United States v. MacDonald*, 916 F.2d 766, 769 (2nd Cir. 1990).

Exigent circumstances may justify a warrantless entry into a house or its curtilage when: 1) police are engaged in a 'hot pursuit' of a fleeing suspect; 2) there is a risk of immediate destruction of evidence; or 3) there is a colorable claim of emergency threatening the life or safety of another. *Aarness, supra* at 1277. There is also a long-standing, separate exception for officer safety. *See Hayden*, supra at 298-99; *Aarness, supra* at 1278; *see also* 3 *Search and Seizure*, 3rd Ed., Wayne LaFave, §6.1(f).

The officer safety exception to the warrant requirement provides that immediate danger to the lives of law enforcement officers is an exigent circumstance justifying a warrantless entry. *Aarness, supra* at 1279; *Hayden, supra* at 298-99; *United States v. Wicks*, 995 F.2d 964, 970 (10th Cir. 1993). The officer safety exigency "does not fit neatly within" the other three categories of exigent circumstances listed above. *Aarness, supra* at 1278. Additionally, the officer safety exception is separate and distinct from the emergency aid exception. *Id.* (officer

safety exception justified a warrantless entry, even though "the facts of this case do not present a colorable claim of emergency as we have defined it.").

Therefore, the appropriate test for the officer safety exigency is not the same as the test to prove that an emergency aid exigency existed. Rather, to demonstrate that officer safety justifies a warrantless entry, the government must show, "1) the officers had an objectively reasonable basis to believe that there was an immediate need to enter to protect the safety of themselves or others, and 2) the conduct of the entry was reasonable." *United States v. Reeves*, 524 F.3d 1161, 1169 (10th Cir. 2008)(quoting *United States v. Walker*, 474 F.3d 1249, 1253 (10th Cir. 2007); *see also Hayden, supra; Aarness, supra.*

Concern for officer safety is not a new concept, and has been recognized many times by our country's highest court. *See Georgia v. Randolph*, 126 S.Ct. 1515, 1523 (2006) ("Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry...."); *Minnesota v. Olson*, 495 U.S. 91, 100-101 (1990) (applying exigent circumstances doctrine to warrantless entry

into home); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (same); *Brigham City, Utah v. Stuart*, 126 S.Ct. 1943, 1947 (2006) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (same); *and Chimel v. California*, 395 U.S. 752 (1969) (protecting the safety of the police officers).

The burden is on the prosecution to prove that a warrantless entry was justified by an exception to the warrant requirement of the Fourth Amendment. *People v. Pate*, 71 P.3d 1005, 1010 (Colo. 2003). "To determine whether the prosecution has met its burden, courts must examine the totality of the circumstances as they would have appeared to 'a prudent and trained police officer' at the time the decision to conduct a warrantless entry was made." *Id.* (citations omitted).

Here, for several reasons, the Court of Appeals erred in accepting Brunsting's claim that the trial court erroneously admitted evidence that was obtained through the officer's warrantless entry into the backyard, as the court misapplied the "officer safety" exception to the warrant requirement.

First, the Court of Appeals initially recognized the officer safety exigency as distinct from the emergency aid exigency, noting that "law enforcement officers may also conduct a warrantless search when they believe their own lives are at risk." *Brunsting, supra* at 264, *citing Aarness* and *Hayden*. The court then immediately thereafter cited the test for the "emergency aid" exception, which is an entirely separate exception to the warrant requirement. *Id.* Then, in its immediately subsequent analysis, the court inappropriately conflated the test for the "officer safety" exception with the test for the "emergency aid" exception. The court reasoned that since the People did not rely on the "hot pursuit" or "immediate destruction of evidence" exigencies, the prosecution must therefore have meant to rely on the "emergency aid" exception when it argued that police entered the backyard for officer safety purposes. *Id.* Yet this was not the exigency relied on by the People.

The court repeatedly and inaccurately looked to whether there was a colorable claim of an emergency situation threatening the life or safety of the deputies (or others) sufficient to justify Deputy Carroll's

entry into the backyard. *Id.*, at 265. However, these factors are applicable to the "emergency aid" exception, rather than whether the officer safety exigency applied.

The Court of Appeals also erred in requiring that the facts establishing the exigent circumstances relate to the offense for which the officers had probable cause. *Id.*, at 264. This requirement, not supported by any authority in the Court of Appeals' opinion nor by any authority uncovered by the People, demonstrates a misunderstanding of the "officer safety" exception. The exception applies when the officers have probable cause to believe a crime has been committed, and in the course of investigating that crime or executing a warrant, they encounter circumstances that place their safety in jeopardy. As in *Aarness*, the probable cause (i.e., the outstanding warrant for a parole violation) had nothing to do with the exigency that arose when Aarness, known to have a weapon, placed his hand in his recliner upon encountering the police at his door. *See Aarness, supra* at 1274. If the Court of Appeals' proposition was correct, then the officer safety exception could only be invoked where crimes involving weapons or

other destructive materials were involved, as those are the type of circumstances that typically create safety concerns.

Furthermore, the Court of Appeals misunderstood and misstated the People's factual argument in regard to officer safety. The court unnecessarily focused on the fact that there was "no evidence that anyone inside the house was in danger or that the allegedly stolen vehicle was in danger of destruction," although neither the officers nor the prosecution suggested this was the case. *Brunsting, supra* at 265. The weight that the court gave this fact further demonstrates that the court inappropriately conflated the emergency aid exception with the officer safety exception. The court claimed that "the People do not argue, that when Deputy C[arroll] entered the backyard, circumstances required an immediate warrantless entry in response to a risk of . . . an immediate threat to the deputies." *Id.*, at 265. This was and is, however, precisely the People's argument (*See* Answer Brief in 05CA2776, p9-10).

The Court of Appeals also erred in its consideration of the applicable facts. As noted above, the Court of Appeals agreed that there

was probable cause to believe that at least one of the occupants of the house had committed auto theft. Then, the court found that "the deputies had a reasonable suspicion that the occupants of the house were armed." *Brunsting, supra* at 264. The court also found that "the undisputed evidence establishe[d] that Deputy C[arroll] entered the backyard to stop occupants from fleeing and from posing a threat to deputies at the front door." *Brunsting, supra* at 263.

These findings suggest that the People met both requirements of the officer safety exigency test: that there existed probable cause to believe a crime had been committed, and that the officer had an objectively reasonable basis to believe there was an immediate need to enter the backyard to protect his safety and the safety of his fellow officers. This is entirely consistent with Deputy Carroll's own explanation for his entry, i.e., he went to the back of the house to provide cover for the other deputies, he intended to stay outside the gate near the garage but he could not "stay there and be safe" because there was a security camera overlooking that position, if he waited from outside the fence he "would have been within the view of the camera,

and it would have been an officer safety issue," "[i]t would have been too dangerous," and there was nowhere he could have "gone outside of that fence that would have enabled [him] to look inside the area to see if there were people fleeing without being in view of that security camera."

The Court of Appeals also erred in stating that Deputy Carroll did not testify "that [Newman] made any movements that could be interpreted as posing an immediate threat to the deputy before [the deputy] moved about twenty feet further into the yard," and that "the record is insufficient to show that when [Newman] came out the back door and looked around, Deputy Carroll had any further reason to believe that the man posed ... an immediate threat to the deputies' lives or the safety of others." *Brunsting, supra* at 265. Not only are these statements contradicted by the record, the court's reliance thereupon to negate officer safety concerns ignores the context in which this man's (Newman) actions should have been interpreted.

As the record established, Sergeant Dennis knocked on the front door "a few times" and yelled "sheriff's office" about 2-3 times.

Afterwards, Deputy Carroll saw movement in the kitchen area, and then saw Newman's "head c[o]me out from the wall where [he] was standing": he saw the head come around the corner, look in his direction, look in the other direction, then disappear back around the corner. After he ordered Newman to stop and put up his hands, Newman "looked like he was going to run back down the stairs" that led to into the basement, so Deputy Carroll repeated his command. Only then did Newman comply.

Newman's actions were suspicious and therefore substantiated Deputy Carroll's concerns for officer safety, particularly in light of the other substantial information the police had received prior to this encounter, i.e.:

- the police had information from a named and present informant, with current and previous information that the occupants of the house were armed and dangerous;
- a woman who exited the house appeared to be alerting those who remained inside of the police's presence;

- the officers noticed security cameras mounted around the house's exterior, which made them believe that the occupants of the house could monitor the position and movements of the police; and
- as the Court of Appeals correctly found, the police had probable cause to believe that a car thief was inside the home. *Brunsting, supra* at 263.

Based on this information, Deputy Carroll, when entering the backyard and moving further into it as he encountered Newman, reasonably believed that Newman posed an immediate safety threat, both to himself and to his fellow officers.

The Court of Appeals also erred by failing to evaluate the concern for officer safety from the perspective of "a prudent and trained police officer at the time the decision to conduct a warrantless entry was made." *Pate, supra* at 1010; *Wicks, supra* at 970 ("We must evaluate the circumstances as they would have appeared to prudent, cautious and trained officers."). Rather, the court suggested alternative tactics that the police could have used in their investigation, such as

positioning themselves outside the curtilage, securing the vehicle, and stopping anyone from leaving and conducting a pat-down search of that person. *Brunsting, supra* at 265.

First, these clearer-in-hindsight recommendations do not address whether or not the actions police *actually took* were reasonable to a prudent and trained officer at the time of the entry. *See* 3 *Search and Seizure*, §6.1(f), p280 ("the question of whether a stakeout is or is not feasible is itself a complicated one, and is unlikely to be seen by hindsight in precisely the same way it was perceived by the police on the scene."). Instead, the court ignored the perspective of the experienced police officer that "there was no way" he could have safely remained under the view of the security camera. Therefore, the court did not apply the relevant test when assessing the perceived threat to officer safety.

Furthermore, courts have recognized that alternatives to entry, such as maintaining a position outside the residence while a warrant is obtained, are not always reasonable. For example, "[d]elay may [] increase the risk of harm to persons outside the premises," and "[t]he

passage of time may enhance the ability of those inside to make an effective forcible resistance when the police ultimately make their entry to arrest," particularly where, as here, it is highly likely that the persons inside are fully aware of the police presence outside the home. *See* 3 *Search and Seizure*, §6.1(f), p278, citing cases. Delay may also allow for escape. *Dorman, supra* at 394.

Another concern is that "if the police are required to stake out the premises while a warrant is obtained, this may cause curious bystanders to gather in the immediate vicinity, where they might well be harmed in the event of forcible resistance to the police entry." *Id.,* at 279. This case presents a perfect example of the substantial danger that the police were facing, and the serious harm that could have occurred if the occupants ultimately presented forcible resistance to a police entry, as the individuals inside the home were armed, were maintaining surveillance of the outside of the home, and a methamphetamine lab was in place, which itself posed a substantial risk of explosion or other harm to individuals exposed to it. *Cf. State v. Girard*, 555 P.2d 445, 447 (Or. 1976) (court rejected defendant's claim

that officers could have surrounded the house to avoid escape while they waited for reinforcements as "[t]hat involves a large measure of speculation, depending upon a variety of factors relating to the feasibility of 'surrounding' the house or otherwise preventing escape, including the size of the house, the number of exits, the proximity of the house to cover for a person bent on escape, visibility, etc.").

Deputy Carroll only entered the backyard because he could not stay outside the curtilage safely due to the security cameras. The Court of Appeals rejected this explanation by stating that the cameras "did not create an emergency situation" and thus "they did not constitute an exigency justifying a warrantless entry into the curtilage." *Brunsting, supra* at 265. However, even if the cameras did not "create" an emergency situation, they certainly contributed to a situation which, in light of the totality of all of the circumstances presented to the officers, posed a substantial safety risk.

The Court of Appeals also, by erroneously treating the People's argument as a claim under the "emergency aid" exception, failed to consider the factors outlined in *Aarness* for the applicability of the

officer safety exception. As noted above, the officer safety exigency "does not fit neatly within" the other three categories of exigent circumstances listed above, and is separate from the emergency aid exception. *Aarness, supra* at 1278; *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990) (recognizing traditional exigent circumstances are separate from officer safety exception using *Dorman* factors). This Court outlined the following factors which are relevant to whether an entry may be justified under the officer safety exception:

- whether a grave offense is involved, particularly a crime of violence;
- whether the suspect is reasonably believed to be armed;
- whether there exists a clear showing of probable cause to believe that the suspect committed the crime;
- whether there is a strong reason to believe the suspect is in the premises being entered;
- the likelihood that the suspect will escape if not swiftly apprehended;
- whether the entry is made peaceably; and
- whether the entry is made at night.

Aarness, supra at 1279; *citing People v. Miller*, 773 P.2d 1053, 1057 (Colo. 1989), *citing Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir. 1970); *see also* 3 *Search and Seizure*, W. LaFave, §6.1(f), pp263-282. Another factor that has been considered relevant is whether the police encounter was "planned" in advance or occurred in the "field" as part of unfolding developments. *Id.*, at 271-272; *Gray, supra* at 257.

Application of these factors to the evidence presented in this case demonstrates that the officers' entry into the curtilage of the home was justified under the officer safety exception. Here, a grave offense was involved, i.e. auto theft. And, as the Court of Appeals correctly found, the officers had a reasonable basis to believe that the occupants of the home were armed, based on both Mr. Talent's current information when he overheard the occupants discussing weapons, and the previous information from a citizen informant that the occupants of that home, including "Lance," had been seen with weapons and were known to be armed and dangerous. *See e.g.*, *People v. Martinez*, 200 P.3d 1053, 1057-1058 (Colo. 2009), *citing People v. Lucero,* 511 P.2d 468, 470 (Colo.

1973) ("Tips from either identified or unidentified citizen informants can be sufficient to form reasonable suspicion because citizens are less likely to "fabricate information in return for immunity or other compensation.").

Based on the statements of Ms. Jones, the person who drove the car to the home (i.e., the likely thief) was inside the home at that time. Mr. Talent made it very clear to the officers that the truck was stolen, and the officers' observations of the stripped dashboard supported that claim. Thus, there existed a clear showing of probable cause to believe that the suspect committed the crime, and that he was on the premises.

The entry into the curtilage was certainly made peaceably – the officer simply entered the open gate and crouched behind a nearby bush. "[T]he fact that entry was not forcible aids in showing reasonableness of police attitude and conduct." *Dorman, supra* at 393; 3 *Search and Seizure*, §6.1(f), p267; *see also United States v. MacDonald*, 916 F.2d 766, 771 (2nd Cir. 1990) ("By knocking and announcing themselves, they acted in accordance with the law, attempting the "peaceful entry" contemplated in *Dorman*.").

Finally, the entry was made at night, which increased the officer safety concerns, particularly in light of the fact that the security monitors allowed the occupants to see the officers, but the officers could not see much due to the darkness. Officer safety concerns were also heightened by the actions of Ms. Jones, who was apparently attempting to warn the occupants of the home of the police presence. *Cf. State v. McKenzie*, 528 P.2d 269, 271 (Wash. App. 1974) (when the defendant attempted to leave and then blew a warning signal, the officers justifiably entered the house without knocking and without a search warrant).

Because proper application of the relevant factors demonstrates that Deputy Carroll's entry into the curtilage of the home was reasonable for officer safety reasons, the Court of Appeals decision ruling otherwise should be reversed. Even if this Court disagrees, however, this Court should consider a general analysis, as did the Court of Appeals' dissent, in determining whether the deputy's actions violated Brunsting's Fourth Amendment rights.

The touchstone of any analysis under the Fourth Amendment is

always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio,* 392 U.S. 1, 19 (1968); *see also United States v. Knights*, 534 U.S. 112, 119 (2001); *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."); *Maryland v. Buie*, 494 U.S. 325, 331 (1990) ("the Fourth Amendment bars only unreasonable searches and seizures"); *People v. Taylor*, 41 P.3d 681, 686 (Colo. 2002); *United States v. Rubin*, 474 F.2d 262, 268 (3rd Cir. 1973).

Assessing the reasonableness of an officer's actions requires "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *see also Knights, supra* at 119; *Buie, supra* at 331; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). This inquiry also involves an examination of the totality of the circumstances. *Taylor, supra* at 686.

As noted above, courts have repeatedly stressed that officer safety is both a "legitimate and weighty" concern. *Mimms, supra* at 110 ("it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."); *People v. Hardrick*, 60 P.3d 264, 266 (Colo. 2002) ("a police intrusion based on officer safety concerns is reasonable").

Here, weighing the minimal intrusion of the deputy into the backyard of the home against the legitimate and substantial officer safety concerns presented by the facts of this case, Deputy Carroll's entry into the curtilage must be considered "reasonable" under the Fourth Amendment.

First, it is notable that the actions at issue here involved a *limited entry* into the backyard area through an open gate. As the dissent below notes, "while the Fourth Amendment protects curtilage, entering the backyard is not as intrusive as entering the home itself." (Connelly, J., dissenting at 267). Several courts have made the distinction, when assessing exigent circumstances, between entry into a home and entry into a backyard. *See e.g., Estate of Smith v. Marasco,* 318 F.3d 497,

520-21 (3rd Cir. 2003); *United States v. Bradshaw,* 490 F.2d 1097, 1100 (4th Cir. 1974); *United States v. Anderson,* 552 F.2d 1296, 1300 (8th Cir. 1977); *United States v. Hammett,* 236 F.3d 1054, 1060 (9th Cir. 2001); *Hardesty v. Hamburg Tp.*, 461 F.3d 646, 654 (6th Cir. 2006); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990). All of these circuits held that a knock and talk can be extended to the back door or backyard under certain circumstances. Although the People recognize that this is not the same as holding that entry into the curtilage is always justified, the cases nevertheless recognize the fact that the curtilage is different from entry into a home.

This minimal intrusion must be balanced with the public interest involved here. The police arrived in response to a 911 call during which the caller repeatedly asserted that his car had been stolen and that the people who took it were armed and dangerous. Mr. Talent's irate behavior on the scene, his seeming willingness to investigate a potentially dangerous matter by himself, and the report of guns within the house all pointed toward the importance of the police taking immediate action. *See* 3 *Search and Seizure*, §6.1(f), p273 ("when the

occasion for arrest arises while the police are already out in the field investigating the prior or ongoing conduct which is the basis for the arrest, there should be a far greater reluctance to fault the police for not having an arrest warrant.").

Deputy Carroll initially intended to stay near the garage on the side of the house, but as he moved into position and saw a security camera, he thought the only way to protect himself from imminent danger of harm was to enter the backyard. He entered through an open gate, and immediately hid behind some bushes. He did not go looking through windows or doors of the house. He waited, hiding until a suspiciously behaving man exited the house, whom the officer detained, again for reasons of officer safety. Only after Deputy Carroll detained the man did other officers enter the backyard to assist Deputy Carroll, which caused them to see the basement methamphetamine lab in plain sight from within the backyard. Deputy Carroll's initial entry was appropriately limited based on the specific circumstances confronting him. *Cf. State v. Harper*, 582 S.E.2d 62, 69 (N.C. App. 2003) (exigent circumstances justified officers' warrantless search of area of room

where defendant and co-perpetrator were moving toward; officers were concerned weapons might have been hidden in area where defendant and co-perpetrator were headed); *People v. Barrows*, 170 A.D.2d 611, 611 (N.Y.A.D. 2 Dept. 1991) (exigent circumstances justified warrantless entry where, within minutes of receiving radio call of shots fired, police knocked on apartment door and, when door opened, one officer noticed male in background who met description given in radio call, male was partially hidden from view and radio call had indicated that he was carrying a weapon).

Under the circumstances presented here, Deputy Carroll's entry into the curtilage of the home was "reasonable," and therefore did not violate Brunsting's rights under the Fourth Amendment.

E. The deputies' warrantless entry into the house was lawful.

Because the Court of Appeals held that the deputies were unlawfully in the backyard, it did not address whether, if their entry into the backyard was lawful, the entry into the home where they arrested the defendant, seized contraband on his person, and observed

other evidence of drug manufacturing was also lawful. *Brunsting, supra* at 266. Most of the evidence in this case resulted from entry into the home, and all but the evidence found on the defendant's person was obtained following execution of a search warrant based in large part on observations made while in the backyard and while in the home. *See* Exhibit Envelope #2, People's Exhibit 1. As such, in order to properly resolve the suppression issues involved in this case, this Court should consider whether entry into the home was also lawful. This analysis is certainly encompassed in the issue upon which this Court granted certiorari review, i.e., "whether the court of appeals erred in concluding that no exigent circumstances existed to justify the warrantless entry and search in this case."

Here, further police action and actual entry into the home was justified for several reasons: 1) to secure the residence in order to obtain a warrant; 2) to search for individuals who posed a danger to the officers, and 3) to prevent the destruction of evidence.

First, there was no dispute that evidence of the methamphetamine lab and drug paraphernalia in the home was in

plain view from the backyard through the basement window. This gave the officers grounds to at least secure the house in order to obtain a search warrant. *See Aarness*, *supra* at 1280; *United States v. Aquino*, 836 F.2d 1268, 1272 (10th Cir. 1988) (warrantless seizures upheld when they are limited to a temporary internal seizure of the home until a warrant could be obtained).

Second, the deputies had information that a person was still in the basement. The homeowner had told the deputies that four persons were in the basement. However, only three had exited, one of whom had a loaded handgun concealed under his clothing. Under these circumstances, the deputies were justified in conducting a protective sweep of the home to search for that additional person who still posed a threat to their safety. *See Maryland v. Buie*, 494 U.S. 325 (1990) (police officers have authority to conduct a protective sweep of a residence if they reasonably believe, based on specific and articulable facts, that the residence harbors an individual who could present a danger).

It is immaterial that the arrest of Newman and detention of the other occupants occurred outside of the home. *See* 3 *Search and*

Seizure, §6.4(c), p333-334 ("In some situations, the potentiality for danger surrounding the arrest may be so high that entry of premises to make a protective sweep will be permissible even though the arrest itself was achieved without entry," and "[e]ven with that person now in custody, the police may have good reason to doubt whether they can withdraw from the area with their prisoner without being fired upon, in which case an entry and protective sweep is justified," particularly where "the defendant was travelling with armed associates or that the defendant was armed and accompanied by another"); *United States v. Merritt*, 882 F.2d 916, 921 (5th Cir. 1989) (arresting officers have a right to conduct a quick and cursory check of the arrestee's lodging immediately subsequent to arrest, even if the arrest is made outside the lodging, where they have reasonable grounds to believe that there are other persons present inside who might present a security risk); *United States v. Henry*, 48 F.3d 1282, 1284 (D.C. Cir. 1995) ("Although *Buie* concerned an arrest made in the home, the principles enunciated by the Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence."); *United States v. Hoyos*, 892 F.2d

1387, 1397 (9th Cir. 1989) (the fact that an arrest occurs outside a residence does not invalidate an otherwise lawful protective sweep).

Here, there can be no real question that the officers had every reason to believe that an additional person was inside the residence. And based on their now confirmed suspicions that the occupants were armed, a sweep of the home to protect themselves justified their entry. *Cf. Aarness, supra* at 1280 (where the police had an articulable suspicion that another occupant remained inside the house because they were told someone was upstairs, and the police also had reason to believe that there may have been weapons in the apartment because they had found a loaded handgun clip on Aarness' person, the police were authorized to enter the home to conduct a protective sweep, and evidence they observed during that sweep was lawfully included in the subsequent search warrant); *Henry*, *supra* at 1284-1285 (the fact that the door was open when a confederate was arrested outside could cause the officer to believe that anyone inside would be aware that he had been taken into custody, especially as he had been heard to tell another "they got me.").

Third, given that another person was still in the basement, and the officers had observed from their lawful vantage point in the backyard the existence of a methamphetamine lab, their entry was reasonable not only to protect themselves but to also prevent the destruction of evidence. *See Wicks, supra* at 970 (when officers have reason to believe that criminal evidence may be destroyed before a warrant can be obtained, the circumstances are considered sufficiently critical to permit officers to enter a private residence in order to secure the evidence while a warrant is sought."); *United States v. Parra*, 2 F.3d 1058, 1064 (10th Cir. 1993) (same); *Aquino*, *supra* at 1272 (same); *United States v. Cuaron*, 700 F.2d 582, 586 (10th Cir. 1983) (same); *United States v. Rubin*, 474 F.2d 262, 268-269 (3rd Cir. 1973) (relevant factors include the degree of urgency involved and the amount of time necessary to obtain a warrant, the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought, information indicating the possessors of the contraband are aware that the police are on their trail, and the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and

to escape are characteristic behavior of persons engaged in the narcotics traffic"); *United States v. Forker*, 928 F.2d 365, 370 (11th Cir. 1991) (an exigent situation may arise when there is a danger that the evidence will be destroyed or removed; "the need to invoke the exigent circumstances exception to the warrant requirement is particularly compelling in narcotics cases because narcotics can be so easily and quickly destroyed"); 3 *Search and Seizure*, §6.1(f), p274 ("totally apart from the question of whether a need to save evidence should justify a warrantless entry and full search for that evidence, it makes great sense to recognize that frequently an immediate entry to arrest is necessitated so that the defendant can be disabled from destroying or distributing evidence."); 3 *Search and Seizure*, §6.5(b), p353 ("if the exigent circumstance being responded to is the possibility that there might be other persons within the premises who might destroy evidence, then the logical first step is a 'sweep' of those premises to see if in fact anyone else is present.").

Also, the fact that Ms. Jones made an apparent attempt to warn those inside the house of the police presence makes the concern about

destruction of evidence all the more compelling. *See* 3 *Search and Seizure*, §6.5(b), pp354-355 ("The assumption in such cases, which is sound, is that the arrestee's efforts to give warning is a sufficient indication that the persons within the premises would destroy the evidence if the information reached them."); *Rubin*, *supra* at 269 (agents might reasonably have believed that they were confronted with an emergency in which the delay necessary to obtain a warrant under the circumstances threatened the destruction of evidence where another individual was inside the residence when another individual who was just arrested yelled as a signal to alert persons still inside the residence of imminent police intervention); *Forker, supra* (where individual inside motel room observed a confederate arrested in the parking lot, it was "reasonably prudent to assume that not only would [he] be planning his flight from the scene, but also, that he would conceal any incriminating evidence in his possession, and pose a danger to law enforcement agents in particular and the public in general."); *Parra, supra* at 1064 (circumstances are exigent where a suspect is implicated in a drug conspiracy, is thought to be armed, discovers that his confederate is

arrested, and discovers that he has been cornered by the police and faces imminent arrest).

The 10th Circuit has also recognized that "where fear that evidence will be destroyed provides the exigency, the existence of the exigency must be supported by clearly defined indications of exigency that are not subject to police manipulation or abuse, and it is available only for serious crimes." *Wicks, supra* at 970 (internal quotations and citations omitted). Illegal drug manufacturing and distribution is unquestionably a serious offense. *Wicks, supra* at 970; *MacDonald, supra* at 770 ("the ongoing sale and distribution of narcotics constituted a grave offense").

Here, the officers observed the drug evidence, knew there was another person inside who was likely aware of their presence, and therefore were reasonably concerned about the destruction of that evidence. Under these exigent circumstances, their entry was lawful. *Cf. United States v. Taylor*, 90 F.3d 903, 909-910 (4th Cir. 1996) (where officer observed a large amount of money and what appeared to be illegal drugs on the dining room table, and someone inside the house

had quickly closed the blinds, the officer had a reasonable basis for concluding that there was an imminent danger that evidence would be destroyed unless the officers immediately entered the house and took possession of it); *United States v. Rodgers*, 924 F.2d 219, 222 (11th Cir. 1991) (exigent circumstances where the police knew there was at least one person other than Rodgers in the trailer, the handguns could easily be hidden or removed, and the people in the trailer were aware of the arrest of Rodgers).

Where, as here, the presence of is evidence reasonably believed to be in imminent danger of removal or destruction due to the presence of an individual who remains in the residence and is fully aware of the police presence, the officers were not required to wait until the evidence was "actually in the process of destruction" before entering. *See United States v. Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978); *cf. People v. Gomez*, 632 P.2d 586, 592 (Colo. 1981) (when the officer observed the defendant's illegal drug activity he was confronted with the urgent need to prevent the immediate destruction of the contraband, even though the drugs were currently in the process of being destroyed; "Time was of

the essence and only an immediate entry into the motel unit could prevent the likely disposal of the contraband by the occupants."); *United States v. Turner*, 650 F.2d 526, 528-529 (4th Cir. 1981) (exigent circumstances justified entry where individual remaining in apartment could have seen cohort's arrest and the cocaine seized at the apartment was readily destructible, despite fact that it was not in the process of being destroyed).

Finally, the entry was also justified given the possibility that Brunsting would attempt to flee, particularly since several of his associates had just been arrested and it was a safe assumption that the police aware of the drug lab. *See e.g., Wicks, supra* at 970 (exigent circumstances where concern that drug defendant would flee); *People v. Lindsey*, 805 P.2d 1134, 1137-38 (Colo. App. 1990), *overruled on other grounds by People v. Milton*, 864 P.2d 1097 (Colo. 1993) (exigent circumstances justified search of apartment when officers observed and heard movement in cluttered closet, giving them reason to believe defendant was hiding therein, and officers reasonably believed that defendant would attempt to flee).

Because entry into the backyard, as well as the home, was lawful, the defendant's arrest and search of his person was lawful, and the officers' observations during these entries were lawfully included in the warrant, which provided the basis for the search and seizure of the home itself. The Court of Appeals erred in concluding otherwise, and its decision should be reversed by this Court.

CONCLUSION

Based on the foregoing reasons and authorities, this Court should reverse the decision of the Court of Appeals and hold that the motion to suppress was properly denied.

JOHN W. SUTHERS
Attorney General

Rebecca Jones #31044 for

KATHERINE A. HANSEN, 25464*
Senior Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Respondent
*Counsel of Record

AG ALPHA: DARR QHVO
AG File: Q:\AP\APHANSKA\SUPREME COURT\BRIEFS\BRUNSTING.OPENING LSS COPY.DOCX

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PETITIONER'S OPENING BRIEF** upon **JOSEPH P. HOUGH**, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 18th day of February, 2011.