

SUPREME COURT  
STATE OF COLORADO

101 West Colfax Avenue, Suite 800  
Denver, CO 80202

On Certiorari to the Colorado Court of  
Appeals

Court of Appeals Case No. 05CA2776

THE PEOPLE OF THE STATE OF  
COLORADO,

Petitioner,

v.

LANCE BRUNSTING,

Respondent.

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OF THE STATE OF COLORADO  
Christopher T. Walsh, Clerk

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Case No.: 09SC323

**REPLY BRIEF**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 1597 words.



A handwritten signature in cursive script, appearing to read "Kade", is written over a horizontal line. The signature is positioned to the right of the center of the page.

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

## 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.**

Three types of "exigent circumstances" are well established: (1) when police are engaged in "hot pursuit" of a fleeing suspect; (2) there is a risk of immediate destruction of evidence; or (3) there is a colorable claim of an emergency situation threatening the life or safety of another (identified as the "emergency" exception in *People v. Unruh*, 713 P.2d 370, 379 (Colo. 1986)). See *People v. Pate*, 71 P.3d 1005, 1010 (Colo. 2003). This Court in *Pate* noted that the "emergency situation has been invoked in burglary cases when police officers make a warrantless entry into a residence to secure the premises and search for suspects and victims." *Id.*, at 1010.

Another recognized “exigent circumstance” is the “emergency aid” exception. This Court in *Pate* recognized that the “emergency” exception (i.e., number (3) above) is distinct from the “emergency aid” exception, the latter of which requires an immediate crisis inside the home and the probability that police assistance will be helpful in alleviating that crisis. *Pate, supra* at 1011; *see also People v. Allison*, 86 P.3d 421, 426-427 (Colo. 2004). This Court cited to situations, “[f]or example, when police respond to a fire or other similar emergency.” *Pate, supra* at 1011.

This Court in *People v. Aarness*, 150 P.3d 1271 (Colo. 2006), applied an additional and separate exception for officer safety, as outlined in *Warden v. Hayden*, 387 U.S. 294 (1967). This Court recognized that the officer safety exigency “does not fit neatly within” the other categories of exigent circumstances listed above. *Aarness, supra* at 1278. The appropriate test for the officer safety exigency is whether 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 whether the manner of entry was reasonable.

*Aarness, supra; Hayden, supra.* This exigency, like the first three, requires probable cause. *Aarness, supra.*

In his Answer Brief, the defendant discusses why he believes there was insufficient evidence to establish probable cause to believe an offense had occurred or was occurring, including drug and weapons offenses as well as the auto theft.<sup>1</sup> He then addresses the requirement of exigent circumstances, and attempts to refute any suggestion that there was evidence of hot pursuit or immediate destruction of evidence

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<sup>1</sup> The Court of Appeals correctly concluded that there was sufficient evidence of probable cause to believe that an auto theft had occurred. As the People discuss at more length in the Opening Brief, the evidence supports this conclusion: the victim told the police that his car was stolen; he identified the car in the driveway as his stolen car; and the dashboard had been stripped of the stereo and speakers. Furthermore, for the “officer safety” exigency, the circumstances supporting the exigency (i.e., officer safety concerns) need not relate directly to the offense for which there is probable cause. *Compare Aarness, supra* at 1274 (probable cause based on 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), with *People v. Grazier*, 992 P.2d 1149, 1154 (Colo. 2000) (for “emergency” exception, the exigency justifying entry in burglary cases - an ongoing crime - flows from the facts establishing probable cause to believe that a burglary is in progress or has just recently occurred).

at the time of the entry into the yard. Notably, the People have not relied on these exceptions to justify this entry.

The defendant next argues that there was no evidence to establish the “third and final type of exigent circumstance” i.e., “[t]he emergency variant of the exigent circumstances exception,” which he claims “requires a showing of an immediate crisis inside the place to be searched and the probability that police assistance will be helpful in alleviating that crisis” (Answer Brief, p13). In doing so, the defendant makes the same mistake made by the Court of Appeals in *People v. Brunsting*, 224 P.3d 259, 264 (Colo. App. 2009); he characterizes the People’s position as relying on the “emergency aid” exception.<sup>2</sup>

The People did not and do not rely on the “emergency” or “emergency aid” exceptions, as described by this Court in *Pate*. Instead, as discussed at length in the Opening Brief, the People rely on the “officer safety” exigency, as outlined in *Aarness* and *Hayden*. As such,

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<sup>2</sup> Indeed, the Court of Appeals conflated the “emergency” and “emergency aid” exceptions, and characterized the People’s position as relying on either or both.

whether there was an ongoing crime threatening the life or safety of another *inside the house*, or whether there was an immediate crisis inside the home and a probability that police assistance would be helpful in alleviating that crisis, was not at issue here. What *is* at issue is whether the officers had probable cause to believe a crime had been committed, and whether, in the course of investigating that crime, they encountered circumstances that placed their safety in jeopardy.

Here, there was probable cause to believe that a crime had been committed, i.e., auto theft. While investigating this offense, the officer who entered the curtilage had sufficient information upon which to be concerned about his safety, thereby justifying entry into the backyard:

- 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; and
- 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.

Under the circumstances here, the entry into the curtilage was justified under the officer safety exception.

Brunsting also mischaracterizes the People's argument concerning the reasonableness of the entry into the curtilage, as discussed in the Opening Brief at pages 39-44, as based on the balancing test for protective sweeps articulated in *Maryland v. Buie*, 494 U.S. 325 (1990), and applied in *Aarness*, *supra*. See Answer Brief, pp15-20. He then proceeds to distinguish the facts surrounding the entry into the curtilage in this case with the protective sweeps conducted in *Buie* and *Aarness*. The People, however, did not argue that the entry into *the curtilage* was justified as a protective sweep. That entry was justified under the officer safety exception, as discussed above.

The People, in addition to the officer safety exigency, also relied on a general reasonableness inquiry as an alternative theory justifying entry into the curtilage. This argument was based on several cases, including *Buie*, which recognize the concept that the Fourth

Amendment only prohibits “unreasonable” searches, and analyzes the reasonableness of an officer’s actions by balancing “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 Buie*, *supra* at 331.

The protective sweep exception to the warrant requirement was relied upon by the People to establish the officers’ authority to enter the home itself. *See* Opening Brief, pp46-48. Considered in this context, and as discussed in detail in the Opening Brief, both *Buie* and *Aarness* support the protective sweep that was conducted in this case.

Finally, Brunsting argues that even if there were exigent circumstances, the entry was not justified because “the exigency was occasioned by the officers themselves.” Answer Brief, pp21-22. However, he fails to explain his argument in this regard. As such, this claim should not be considered. *See People v. Diefenderfer*, 784 P.2d 741, 752 (Colo. 1989) (“It is the duty of counsel for appealing parties to inform a reviewing court both as to the specific errors relied upon and *as to the grounds, supporting facts* and authorities therefor) (emphasis

added).

In any event, considering the facts which established the exigent circumstances in this case, it cannot be said that those circumstances were caused by the police. For example, one factor supporting the concern for officer safety was the direct and indirect information that the occupants of the home were armed and involved with drugs. This was not the doing of the police; i.e., the officers did not cause the occupants to be armed or involved in drugs.

Another fact establishing the need to enter the curtilage was the security cameras, which made it impossible for the officers to cover the back of the house, which was necessary for the safety of the officers making contact at the front of the house, without being detected, thereby placing themselves and the other officers in further danger. The officers did not place the security cameras on the home, and as such, this circumstance was not caused by the police either.

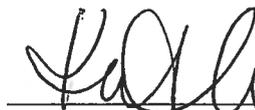
Finally, when Jefferson Newman came outside the house and observed the deputy in the backyard, he initially refused to comply, and indicated that he might flee. This reaction was not caused by the

officer. Under the totality of the circumstances, even if this argument were properly before this Court, there is nothing in the record to suggest that the police created the exigent circumstances relied upon to establish justification for their entry.

### CONCLUSION

For the above reasons set forth above and in the Opening Brief, the People respectfully request that this Court reverse the decision of the Court of Appeals and reinstate Brunsting's convictions.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITIONER'S  
REPLY 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 19<sup>th</sup> day of December, 2011.

  
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