SUMMARY
August 29, 2024

**2024COA98**

**No. 22CA0897, *People v. Gillespie* — Crimes — Cruelty to Animals — Torture — Needlessly Kill; Constitutional Law — Fourth Amendment — Searches and Seizures**

Interpreting the terms "tortures" and "needlessly kills" in section 18-9-202(1.5)(b), C.R.S. 2024, a division of the court of appeals holds that the evidence presented at trial was sufficient to support the defendant's conviction for aggravated animal cruelty under the theory that she "[k]nowingly torture[d]" her dog, but it was insufficient to support the defendant's conviction under the theory that she "[k]nowingly . . . needlessly kill[ed]" it. The division also holds that an animal control officer's discovery of the deceased dog's body was not the result of an unconstitutional search, but that the officer's warrantless re-entry onto the property to collect the dog's body and document the scene violated the Fourth

Amendment. Because the admission of the evidence collected during the unconstitutional search of the defendant's property was not harmless beyond a reasonable doubt, the division reverses the defendant's convictions and remands the case for a new trial.

COLORADO COURT OF APPEALS **2024COA98**

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Court of Appeals No. 22CA0897
Mesa County District Court No. 20CR1535
Honorable Valerie J. Robison, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Mackenzie Anne Gillespie,

Defendant-Appellant.

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JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE GROVE
Fox and Sullivan, JJ., concur

Announced August 29, 2024

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¶ 1 Defendant, Mackenzie Anne Gillespie, appeals her convictions for one count of aggravated animal cruelty (a felony) and one count of animal cruelty (a misdemeanor). Among other things, Gillespie contends that her felony conviction is not supported by sufficient evidence and that the trial court reversibly erred by failing to suppress evidence discovered during an allegedly unconstitutional intrusion onto the curtilage of her home. We partially agree with Gillespie on both points.

¶ 2 Specifically, we hold that, while the prosecution presented sufficient evidence to support a finding that Gillespie "knowingly torture[d]" her dog, it did not present sufficient evidence to support a finding that she "knowingly . . . needlessly kill[ed]" it. § 18-9-202(1.5)(b), C.R.S. 2023.[1] Regarding Gillespie's Fourth Amendment argument, we conclude that the responding officer's discovery of the deceased dog occurred during a proper "knock and talk" at

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[1] The General Assembly amended section 18-9-202(1.5)(b) in 2024 by adding a subparagraph specific to law enforcement animals. *See* Ch. 69, sec. 2, § 18-9-202, 2024 Colo. Sess. Laws 226-27. The provision applicable to the charges against Gillespie was unchanged but is now codified at section 18-9-202(1.5)(b)(I). We refer to the earlier version of the statute throughout this opinion.

Gillespie's property, but that his re-entry onto the property to collect evidence was an unconstitutional search in the absence of a warrant. Because the trial court erred by denying Gillespie's motion to suppress the results of the officer's unconstitutional search, and because the error was not harmless beyond a reasonable doubt, we reverse Gillespie's convictions and remand the case for a new trial.

## I. Background

¶ 3 When Gillespie adopted a dog named Henri from the Humane Society, shelter staff told her that he was not very energetic and did not have a history of running away. That turned out to be wrong. Henri did well when Gillespie was home, but he had severe anxiety, and whenever she left the house for errands or work, he would attempt to escape. The first time Gillespie left Henri alone, he destroyed several pieces of furniture, damaged woodwork throughout the house, and tore down curtains. The next time, Gillespie left the dog in the backyard. He jumped the fence and escaped.

¶ 4 Gillespie tried to manage Henri's destructive behavior in a variety of ways:

- A veterinarian prescribed two different types of anxiety medication, but neither proved effective so, after two months, Gillespie stopped medicating Henri.
- Gillespie left Henri in the backyard, but he jumped the chain-link fence and ran away.
- She tried kennel training, but he broke out of two different crates.
- She tethered him in the front yard, but Henri struggled and barked all day, prompting the neighbors to complain and eventually bring him water or untangle his tether. Gillespie responded by placing a "no trespassing" sign near her front door, but then Henri began jumping the fence with his tether still on, leaving him stranded near the street. After an officer from Mesa County Animal Services (MCAS) warned her that Henri could strangle himself if he got outside of the fence while still on the tether, Gillespie shortened it.

¶ 5 Despite these efforts, Henri continued to suffer from intense panic and anxiety attacks whenever Gillespie left for work. During these attacks, Henri would regularly knock over his water bowl.

After further complaints from neighbors, an MCAS officer notified Gillespie that she must provide Henri with adequate shade and water. In response, Gillespie filled a kiddie pool with water and put it within Henri's reach, but the dog destroyed the pool. To solve the water issue, Gillespie settled on filling a cooler with water and tying it down so Henri could not knock it over.

¶ 6 By this time, Gillespie had moved Henri to the backyard. That did not fix the problems: a neighbor complained that Henri was getting his tether tangled in debris and could still jump over the fence. Responding to the complaint, an MCAS officer warned Gillespie that the single tie-out system she was using could strangle Henri if it got tangled. Gillespie responded by rigging a two-point tie-out, but that arrangement allowed Henri to jump the fence once again. Another MCAS officer suggested that Gillespie install a post in her backyard, but Gillespie could not afford to do so. Instead, she once again attempted to crate Henri. He broke out and, this time, cracked a window in the house and cut his paw.

¶ 7 At this point, Gillespie contacted the Humane Society and asked if she could return Henri. The Humane Society told her that

she would need to pay a $100 rehoming fee. Gillespie could not afford to pay the fee at that time and decided to keep the dog.

¶ 8 Gillespie finally resorted to tying Henri up in the backyard with a one-point tie-out attached to his choke collar and harness. Additionally, she constructed a small, makeshift shelter for him. A neighbor notified her that Henri was getting tangled in the weeds and that he was crying and barking constantly while she was gone, so Gillespie contacted a friend to come over and check on the dog a couple of times a day.

¶ 9 One summer afternoon, while Gillespie was at work, a neighbor noticed Henri was tangled and struggling. The neighbor drove to MCAS and told Officer Jason LeMaster that she was concerned for Henri's well-being. LeMaster drove to Gillespie's house and parked on the street. He looked for a no trespassing sign, and after seeing none, he knocked on the front door. No one answered, so he left a note on the door. Then, after returning to his truck, LeMaster noticed that the driveway went beyond the house into the backyard. It looked "very obvious" to him "that whoever lives there drives down the driveway, parks in the back," and "most likely enters through the back door." He then wrote up "a smaller

posting" that he intended to place on the back door and walked up the driveway toward the back of the house. As he rounded the corner, he saw Henri inside the chain-link fence lying on his side with his tether tangled in a root cluster. LeMaster whistled at Henri and shook the backyard gate; when Henri did not move or bark, LeMaster entered the backyard and checked for a pulse. Finding none and noting that the dog "was already stiffening up with rigor mortis," LeMaster left the backyard, returned to his truck, and called his supervisor. The supervisor told LeMaster "to take a lot of pictures to document where things are and to bag up the dog and bring it to MCAS." LeMaster did so, but he never obtained a warrant.

¶ 10 Gillespie was later charged with animal cruelty and aggravated animal cruelty. She moved to suppress evidence obtained by LeMaster during his two incursions onto her property. The trial court denied the motion to suppress after a hearing on the issue, reasoning that the plain view doctrine justified the warrantless searches and the seizure of Henri's body.

¶ 11 The jury convicted Gillespie on both counts. She was sentenced to four years of probation and 200 hours of community service.

## II. Analysis

### A. Sufficiency of the Evidence

¶ 12 Gillespie contends that her aggravated animal cruelty conviction was not supported by sufficient evidence. We agree in part.

#### 1. Standard of Review and Principles of Law

¶ 13 When considering a sufficiency challenge, we review the record de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, was both substantial and sufficient to support the conclusion by a reasonable mind that the defendant was guilty beyond a reasonable doubt of the offense in question. *People v. Griego*, 2018 CO 5, ¶ 24. In doing so, we look at all "relevant evidence, both direct and circumstantial." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010) (citation omitted). We do not, however, "act as a thirteenth juror and set aside a verdict because [we] might have drawn a different conclusion." *People v. McIntier*, 134 P.3d 467, 471-72 (Colo. App. 2005).

¶ 14 A jury must unanimously find that the prosecution has proved all elements of a charged offense beyond a reasonable doubt to support a conviction for that offense. *People v. Mosely*, 2021 CO 41, ¶ 1. In the context of aggravated animal cruelty, the prosecution must prove that the defendant "[k]nowingly torture[d], needlessly mutilate[d], or needlessly kill[ed] an animal." § 18-9-202(1.5)(b).

¶ 15 "When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears." § 18-1-503(4), C.R.S. 2024. Thus, regardless of the conduct theory pursued, the prosecution must prove that Gillespie acted knowingly. A defendant acts knowingly with respect to a result if she is aware of circumstances that render the prohibited result a practical certainty. § 18-1-501(6), C.R.S. 2024. Practical certainty requires that the proscribed outcome "must have been more than merely a probable result of the defendant's actions." *People v. Dist. Ct.*, 652 P.2d 582, 586 (Colo. 1982). Thus, there is both a subjective element — that the defendant is aware of the circumstances — and an objective

element — that the result is a practical certainty — to whether a defendant acts knowingly. *Id.*

¶ 16 The People did not argue to the jury and do not contend on appeal that Henri was mutilated, so we will focus our analysis on whether the evidence was sufficient to conclude that Gillespie either knowingly tortured or knowingly needlessly killed Henri.

2. Torture

¶ 17 We first consider whether the prosecution presented evidence sufficient to support a conclusion beyond a reasonable doubt that Gillespie knowingly tortured Henri. We conclude that it did.

¶ 18 "Torture" is not defined by statute, but in an 1896 opinion, our supreme court described torture as encompassing "every act whereby unnecessary or unjustifiable pain or suffering is caused." *Waters v. People*, 46 P. 112, 115 (Colo. 1896) (affirming animal cruelty conviction where "the defendant and his associates" shot and killed doves "merely for . . . sport and amusement").

¶ 19 The prosecution presented the following evidence that Gillespie knowingly tortured Henri:

- The veterinary expert testified that Henri's cause of death was strangulation due to the choke collar, his skin was

reddened from potential overheating, and he had some bruising from thrashing while tangled.

- Neighbors testified that Henri was regularly tangled with his tether, would bark and cry for hours even when not tangled, and was left regularly without access to water, food, or adequate shelter.
- An MCAS officer testified that Gillespie was notified that Henri's living situation was inadequate.
- Another MCAS officer testified that Gillespie was informed that the single tie-out system could strangle Henri.
- LeMaster testified that Henri did not have food or water available when he discovered Henri and there was very limited shelter available.

¶ 20 Considering these facts in the light most favorable to the prosecution, we conclude that there was substantial evidence that Gillespie was practically certain that her treatment of Henri would cause him unnecessary pain and suffering. *See id.*; *see also People in Interest of J.M.N.*, 39 P.3d 1261, 1265 (Colo. App. 2001) (holding testimony that animal had swelling and was in pain was sufficient

to support a finding of torture under the animal cruelty statute). At least some evidence showed that Gillespie failed to provide Henri adequate shelter and water in the height of a Mesa County summer and tethered him in a way that required him to be rescued from being tangled on numerous occasions. That is sufficient to support a conclusion that Gillespie knowingly tortured Henri under the definition set forth in *Waters*.

¶ 21 Nonetheless, in her reply brief, Gillespie argues that her felony conviction cannot stand because the evidence of her mistreatment of Henri all related to his living conditions and thus could not have supported any more than a misdemeanor animal cruelty conviction. *See* § 18-9-202(1)(a) (enumerating elements of misdemeanor statute, including conditions related to housing, shelter, and sustenance). Thus, she asserts, applying the definition of "torture" that our supreme court adopted in *Waters* would violate her right to equal protection of the laws. *See People v. Jauch*, 2013 COA 127, ¶ 9 ("Under the Colorado Constitution, equal protection is violated if different statutes prohibit the same criminal conduct but impose different penalties."). We decline to consider Gillespie's constitutional argument for two reasons. First, Gillespie did not

raise it in the trial court or in her opening brief on appeal. *See People v. Grant*, 174 P.3d 798, 803 (Colo. App. 2007) (declining to consider issue raised for the first time in a reply brief). Rather, in her opening brief, Gillespie merely argued that the prosecution's evidence better fit the statutory definition of "neglect" than it did the *Waters* definition of "torture" — without raising constitutional concerns at all.

¶ 22 Second, because we determine that Gillespie's felony conviction must be reversed for other reasons, it would be premature to decide whether it would violate equal protection for her aggravated animal cruelty conviction to stand. While Gillespie is free to raise her constitutional argument in the event of a retrial, we decline to consider it further.

3. Needlessly Killed

¶ 23 We conclude that the prosecution failed to present sufficient evidence to support the conclusion by a reasonable mind that Gillespie knowingly needlessly killed Henri.[2]

¶ 24 We focus our analysis on whether there was sufficient evidence that Gillespie acted knowingly. As discussed above, a person acts knowingly as it relates to a result when she is aware that her conduct is practically certain to cause the result and the result is practically certain to occur as a consequence of her actions. § 18-1-501(6); *see also People v. Mingo*, 584 P.2d 632, 633 (Colo. 1978).

¶ 25 Henri died due to strangulation, and the undisputed evidence showed that Gillespie was aware that the methods that she was using to keep him in the yard posed at least some risk of that outcome. For example, for several weeks Gillespie tied Henri up

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[2] Gillespie moved for a directed verdict, arguing that the People failed to prove the aggravated animal cruelty count. In his response to that motion, the prosecutor appeared to concede that he did not believe Gillespie knowingly killed Henri. Gillespie argues that this concession amounted to a waiver and that the People should not be permitted to argue on appeal that there was sufficient evidence to support a conclusion that Gillespie knowingly killed Henri. We disagree but ultimately conclude that the evidence was insufficient to support this theory in any event.

using a single tie-out point. She was told by both neighbors and MCAS officers that Henri was regularly becoming tangled in his tether. And one of the officers testified that he notified Gillespie that Henri could become tangled in the weeds and debris in the yard, and that he could possibly die as a result.

¶ 26 The "knowingly" standard, however, requires more. None of the prosecution's evidence supported a reasonable inference that Gillespie knew her use of a single tie-out system was *practically certain* to lead to Henri's death. At most, one officer told her that it was *possible* that the system Gillespie was using would kill Henri. That was not enough. *See Mata-Medina v. People*, 71 P.3d 973, 978 (Colo. 2003) (construing similar language in the second degree murder statute, which requires the defendant to "knowingly cause[] the death of a person," § 18-3-103(1), C.R.S. 2024, and holding that "the death must have been more than merely a probable result of the defendant's actions" (quoting *People v. Dist. Ct.*, 652 P.2d 582, 586 (Colo. 1982))). And even if the officer's warning had been more explicit, it was undisputed that Gillespie had tied Henri up with a single tie-out system dozens of times without causing him serious harm. Even viewing the evidence in the light most favorable to the

prosecution, it simply does not follow that Gillespie would have any reason to believe that continuing to use that system would be practically certain to cause Henri's death.

¶ 27 We conclude that the prosecution presented sufficient evidence to support a finding that Gillespie knowingly tortured Henri. But the prosecution failed to present sufficient evidence to support a finding that Gillespie knowingly needlessly killed Henri. Moreover, as we explain below, we reverse Gillespie's convictions on other grounds. Thus, in the event of a retrial, the prosecution may not proceed on a theory that Gillespie knowingly needlessly killed Henri. *See People v. Coahran*, 2019 COA 6, ¶ 39 (conviction not based on sufficient evidence may not be retried).

### B. Motion to Suppress

¶ 28 Gillespie contends that the trial court reversibly erred by denying her motion to suppress evidence seized from two allegedly illegal searches of her backyard. We conclude that while the trial court correctly determined the first incursion onto her driveway and backyard did not run afoul of the Fourth Amendment, it erred by not suppressing evidence gathered from the second incursion.

Because the failure to suppress that evidence was not harmless beyond a reasonable doubt, we must reverse Gillespie's convictions.

1. Additional Background

¶ 29 Before trial, Gillespie moved to suppress the evidence gathered during LeMaster's two entries into her driveway and backyard. She argued that (1) she had a reasonable expectation of privacy in her driveway and backyard because she had a no trespassing sign on the front door; (2) LeMaster did not have a warrant to search her property; (3) she never received casual visitors in her backyard; and (4) even if the officer's discovery of Henri was justified by an exception to the Fourth Amendment, his second entry into the backyard and his seizure of Henri's body was not.

¶ 30 The court held a hearing on the motion. LeMaster testified that

- other officers had told him that Gillespie had previously posted a no trespassing sign, so when he arrived at Gillespie's home, he looked "really hard" for the sign but did not see one;
- after knocking and posting a notice on the front door, he realized that, based on the physical layout of the

property, it was likely that Gillespie primarily used the back entrance to enter and exit the house;

- he walked up the driveway toward the back of the house so that he could post a second notice on the back door;
- as he walked up the driveway, he saw Henri lying still on the ground in the backyard, behind the chain-link fence;
- he first entered the fenced backyard for the sole purpose of checking on Henri's health, and did so only after Henri did not respond to his calls, whistles, and fence-shaking;
- once he determined Henri was dead, he returned to his truck, which was parked on the public street;
- his supervisor told him to return to the backyard and recover the body, take photographs, and collect other evidence; and
- he did so without a warrant because he was concerned that the warm temperatures would speed up the body's decomposition and therefore prevent the discovery of the cause of death.

¶ 31 Photographs of Gillespie's home show that the driveway was entirely visible from the street. Likewise, the backyard, which was

enclosed by a low chain-link fence, was entirely visible from a public alley running behind the house.

¶ 32 The trial court denied the motion to suppress. Importantly for our analysis, the court found that LeMaster's "discovery of Henri was not a result of an attempt to search the property." To the contrary, "Henri was discovered as Officer LeMaster attempted to make a posting at the back door where it appeared the occupant regularly entered the residence." (Footnote omitted.) In other words, although it did not use the phrase, the court found that LeMaster's approaches to both the front and back doors of the property constituted a "knock and talk," and not a search. *See Kentucky v. King*, 563 U.S. 452, 469 (2011) ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."). And after LeMaster walked up the driveway to leave a notice on the back door, he crossed the fence line to render emergency aid when he saw Henri's body, entwined in the tether, lying in plain view.

¶ 33 However, the court did not distinguish between LeMaster's two separate entries into the backyard; it simply ruled that because Henri's body was in plain view, LeMaster first had "probable cause

to believe that Henri was in danger of dying" and then had "probable cause to take photographs and to seize Henri's body." In a footnote, the court also suggested that, even if LeMaster's entries into the backyard were not justified, Henri's body would have been inevitably discovered in any event.

2. Standard of Review

¶ 34 In reviewing a trial court's ruling on a motion to suppress, we defer to the court's factual findings so long as they are not clearly erroneous. *People v. Cunningham*, 2013 CO 71, ¶ 9. We review legal conclusions de novo. *Id.* If the court erroneously denies a motion to suppress, we will reverse unless the People can demonstrate that the error was harmless beyond a reasonable doubt. *Pettigrew v. People*, 2022 CO 2, ¶ 50.

3. Legal Principles

¶ 35 As noted, the trial court found that LeMaster's entry onto Gillespie's driveway was not a search and thus did not implicate the

Fourth Amendment.[3] The court did not, however, distinguish between LeMaster's first entry onto the driveway and his subsequent entry to collect Henri's body and document the scene. LeMaster's second incursion was clearly a search, and because LeMaster did not have a warrant, it was presumptively unconstitutional unless justified by an established Fourth Amendment exception. *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006). LeMaster's two entries onto Gillespie's property are thus governed by different but overlapping legal frameworks. We will outline both before applying them to the facts at hand.

¶ 36 The Fourth Amendment of the United States Constitution and article II, section 7 of the Colorado Constitution protect the right of persons against unreasonable searches and seizures. *People v.*

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[3] LeMaster's first entry into the *backyard*, which was triggered by his observation of Henri's lifeless body, was a search, but no one disputes that Henri's condition was an emergency. *See People v. Pate*, 71 P.3d 1005, 1011 (Colo. 2003) ("The emergency aid exception also requires a 'colorable claim of an emergency threatening the life or safety of another.'" (quoting *People v. Hebert*, 46 P.3d 473, 479 (Colo. 2002))). Thus, so long as LeMaster's act of walking up the driveway toward the back door was not an unconstitutional search, the emergency aid exception justified his decision to immediately enter the backyard and attempt to render aid once he saw Henri in plain view and in obvious distress. *Id.*

*Oates*, 698 P.2d 811, 814 (Colo. 1985). A search of a home without a warrant is presumptively unreasonable unless justified by an exception to the warrant requirement. *United States v. Karo*, 468 U.S. 705, 717 (1984); *People v. McKnight*, 2019 CO 36, ¶ 23. The same goes for the area immediately surrounding a private residence — the curtilage — which is also an area deserving "special protection from unwarranted government intrusion." *Hoffman v. People*, 780 P.2d 471, 475 (Colo. 1989).[4]

¶ 37 The Fourth Amendment, however, applies only to searches. A "'knock and talk,' when performed within its proper scope, is not a search at all." *People v. Frederick*, 895 N.W.2d 541, 544 (Mich. 2017) (citing *Florida v. Jardines*, 569 U.S. 1, 8 (2013)). And whether a knock and talk is within the "proper scope" is dictated by the "implied license" to enter property that is granted to "solicitors, hawkers, and peddlers of all kinds," *Jardines*, 569 U.S. at 8, 10 (citation omitted). "Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no

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[4] The parties do not dispute that Gillespie's driveway and backyard constitute curtilage for Fourth Amendment purposes.

more than any private citizen might do.'" *Id.* at 8 (quoting *King*, 563 U.S. at 469).

¶ 38 The location of a law enforcement officer's approach to a house is important, but it is not determinative of whether a knock and talk amounts to a search. Rather, whether an officer has an implied license to approach and knock at a particular entrance "depends upon the purpose for which they entered." *Id.* at 10. If the officer's behavior "objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do," then the Fourth Amendment is implicated. *Id.* But a knock and talk remains outside the scope of the Fourth Amendment if it does not involve an attempt to gather information — even if the officer intrudes onto a part of the curtilage other than the front door of the residence. *See United States v. Jones*, 565 U.S. 400, 408 n.5 (2012) ("Trespass alone does not qualify [as a search], but there must be conjoined with that what was present here: an attempt to find something or to obtain information."). Thus, it is only when an

officer trespasses onto a protected area[5] with the purpose of gathering information that Fourth Amendment concerns arise. *See id.*; *see also Frederick*, 895 N.W.2d at 546 ("[I]nformation-gathering that is not a search nevertheless becomes a search when it is combined with a trespass on Fourth-Amendment-protected property.").

¶ 39 As discussed above, a search of the home (or its curtilage) without a warrant is presumptively unconstitutional. However, the presumption is subject to a number of exceptions. *People v. Brunsting*, 2013 CO 55, ¶ 19. Among the recognized exceptions, two are relevant to our analysis.

¶ 40 First, a warrantless search may be justified under the plain view exception. The plain view exception applies when (1) the seized evidence was plainly visible; (2) the initial intrusion was legitimate; (3) the government had a reasonable belief that the evidence was incriminating; and (4) the government had a lawful

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[5] Information gathering in an "open field" does not constitute a Fourth Amendment search even if it involves a trespass because "an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment." *United States v. Jones*, 565 U.S. 400, 411 (2012) (citation omitted).

right of access to the evidence. *People v. Alameno*, 193 P.3d 830, 834 (Colo. 2008).

¶ 41 Second, a warrantless search and seizure may be justified by exigent circumstances. This exception applies when "the public's interest in a timely police response to emergent and fast-developing situations outweighs the individual's privacy interests." *Brunsting*, ¶ 25. The exigent circumstances exception applies in three situations: the government is in hot pursuit of a suspect, there is a real risk of immediate destruction of evidence, or an emergency is threatening the life or safety of another. *Kluhsman*, 980 P.2d at 534. When exigent circumstances justify a warrantless entry, "[t]he scope of the permissible intrusion is determined by the exigency justifying the initiation of the warrantless entry." *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006). Exigent circumstances coupled with probable cause may either render the initial intrusion legitimate or grant a lawful right of access to the evidence. *People v. Kluhsman*, 980 P.2d 529, 535 (Colo. 1999).

4. First Entry

¶ 42 Gillespie contends that the trial court should have suppressed evidence associated with LeMaster's discovery of Henri's body

because LeMaster was not entitled to use the driveway to reach the back door of the house. We are not persuaded.

¶ 43 As discussed above, the Fourth Amendment is only implicated when a representative of the government commits a trespass with the purpose of gathering information or evidence. *See Jones*, 565 U.S. at 408 n.5. Here, Gillespie's driveway, which connected to the street and was not blocked by a gate, extended along the side of the house through to the backyard. The front yard and front door were enclosed by a fence and a screened porch. LeMaster could reasonably conclude from this arrangement, as he testified he did, that Gillespie commonly used the back door to enter and exit the house. And because he was concerned that Gillespie might not see the notice if he left it at the front door, he walked up the driveway toward the back of the house in order to post a second notice at the back entrance. The record supports the trial court's conclusion that LeMaster walked toward the back of the house to post the second notice rather than to gather information or collect evidence against Gillespie. Indeed, the trial court's findings that LeMaster entered the driveway to "make a posting" rather than to "search the

property" or evade the warrant requirement fully aligned with the evidence presented to it.

¶ 44 Accordingly, even if LeMaster trespassed by walking up the driveway after failing to contact Gillespie at the front door, he did not conduct a Fourth Amendment search while doing so because he made no attempt to gather information from Gillespie's property. And once Henri came into view, LeMaster reasonably concluded that exigent circumstances required him to enter the backyard to assess Henri's condition and render aid. We therefore conclude that LeMaster's first entry onto the driveway, his discovery of Henri, and his entry into the backyard to assess Henri's condition did not violate the Fourth Amendment.

5. Second Entry

¶ 45 Gillespie contends that even if LeMaster's first entry into the backyard was justified, his second entry into the backyard to collect evidence violated the Fourth Amendment. We agree.

¶ 46 After determining that Henri was dead, LeMaster returned to his truck, which was parked on the street. He called his supervisor, who told LeMaster to return to the backyard, collect the dog's body and related evidence, and photograph the scene. LeMaster followed

his directions. At the hearing, LeMaster testified that he returned to ensure that Henri's body would not spoil in the warm summer temperatures.

¶ 47 In ruling on the motion to dismiss, the trial court did not distinguish between LeMaster's separate entries into the backyard. Instead, it ruled generally that "there was probable cause to take photographs and to seize Henri's body."

¶ 48 While we agree that probable cause existed, that was not enough to justify LeMaster's warrantless entry. Rather, the probable cause needed to be accompanied by exigent circumstances. *See Aarness*, 150 P.3d at 1277 (requiring both probable cause and exigent circumstances for warrantless search).

¶ 49 A warrantless search justified by exigent circumstances "must be strictly circumscribed by the exigency justifying the initiation of the warrantless intrusion." *People v. Winpigler*, 8 P.3d 439, 444 (Colo. 1999). Thus, after LeMaster determined that Henri was dead and left the property, the exigent circumstance of Henri's welfare could not justify another entry into the backyard.

¶ 50 Nonetheless, on appeal, the People argue that LeMaster's second entry was justified by a different exigent circumstance — the

imminent risk of the destruction of evidence. Under this exception to the warrant requirement, the government must have an articulable basis to justify a reasonable belief that the destruction of evidence is imminent. *Mendez v. People*, 986 P.2d 275, 282 (Colo. 1999). "In essence, 'the question is whether there is a real or substantial likelihood that the contraband or known evidence on the premises might be removed or destroyed before a warrant could be obtained.'" *Id.* (citation omitted). The "perceived danger must be real and immediate." *Id.* (citing *People v. Crawford*, 891 P.2d 255, 258 (Colo. 1995)). But "[t]he mere fact that evidence is of a type that can be easily destroyed does not, in itself, constitute an exigent circumstance." *Id.*

¶ 51 For example, in *Mendez*, the supreme court concluded that the smell of marijuana burning constituted exigent circumstances because the odor was a clear indication that evidence was being actively destroyed. *Id.* at 282-83. Likewise, in *People v. Clark*, 547 P.2d 267, 270-71 (Colo. App. 1975), an officer's warrantless entry and search for snow boots was justified by exigent circumstances where fresh snow prints leading to a suspect's home were found and it would be relevant whether the boots were still wet. That

said, "[i]f doubt exists as to whether the officer reasonably concluded that the search was justified, such doubt must be resolved in favor of the defendant whose property was searched." *People v. Jansen*, 713 P.2d 907, 912 (Colo. 1986).

¶ 52 Here, LeMaster's fear that Henri's body would decompose so quickly that it would be impossible to determine the cause of death is insufficient to constitute an exigent circumstance. LeMaster testified, "I was worried about the condition of the body and what had happened to that dog . . . any organic object that would degrade in that time possibly." He continued, "I'm not a doctor or a vet, but as a body heats up after death, bacteria grows, especially in the internal organs. They start to get more liquified and gooey and nasty. It can . . . make it more difficult to determine if there was something going on internally."

¶ 53 This explanation was not sufficient to establish a reasonable basis for believing that the rapid decomposition of Henri's body was imminent. The prosecution bears the burden of demonstrating exigent circumstances, and there must be some evidence "substantiating the officer's fear of . . . destruction of evidence." *Id.* at 911-12. Otherwise, the search is illegal. *Id.* But the prosecution

provided no evidence of the effect of heat on a recently deceased body, and potential hyper-accelerated decomposition is not an obvious exigency like those in *Clark* or *Mendez*. Moreover, the prosecution failed to provide any evidence indicating how long it would have taken to get a warrant. *People v. Bustam*, 641 P.2d 968, 973 (Colo. 1982) (time to acquire warrant relevant factor); *cf. Missouri v. McNeely*, 569 U.S. 141, 153-56 (2013) (rejecting argument that dissipation of alcohol from a drunk driving suspect's blood requires a per se exception to the warrant requirement, in part because "technology-based developments" allow for "more expeditious processing of warrant applications"). As a result, the prosecution failed to meet its burden of showing that, in the time that it would have taken to procure a warrant, there was a real and immediate threat that Henri's body would decay to the point that a cause of death could not be determined.

¶ 54 To the extent the People assert that the trial court could have denied the motion to suppress the evidence collected during LeMaster's second entry into the backyard based on the inevitable discovery doctrine, we reject their argument because neither LeMaster nor any other member of MCAS was pursuing a warrant

or other lawful means of discovery at the time that the second entry occurred. *See People v. Burola*, 848 P.2d 958, 963 (Colo. 1993) ("[I]f evidence is obtained by illegal conduct, the illegality can be cured only if the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred." (quoting *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984))).

¶ 55 Consequently, the trial court erred by failing to suppress all evidence collected during the second intrusion onto Gillespie's property.[6]

## III. Remaining Contentions

¶ 56 Gillespie also contends that the prosecutor committed reversible misconduct and that the trial court erroneously imposed the cost of the necropsy as restitution. We do not address these arguments because we cannot be certain that they will arise again in the event of a retrial.

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[6] The People do not argue that the error was harmless beyond a reasonable doubt, and for good reason. The evidence that LeMaster collected during his second foray into the backyard, which included Henri's body and photographs of the scene, was central to the prosecution's case.

## IV. Disposition

¶ 57 We reverse the judgment of conviction and remand the case for further proceedings consistent with this opinion.

JUDGE FOX and JUDGE SULLIVAN concur.