No. 21-5539

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES TAKCHUAN WOO — PETITIONER
(Your Name)

vs.

THE PEOPLE OF THE STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COLORADO COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Woo, DOC # 179463, pro se
(Your Name)
Centennial Correctional Facility
P.O. Box 600
(Address)

Canon City, CO 81215-0600
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. Whether the Colorado Court of Appeals erred in concluding that Woo's constitutional rights to effective assistance of counsel and a fair trial were not violated by the trial court's denial of his continuance requests based on the prosecution's discovery violations.

II. Whether the Court of Appeals erred in concluding that the improper admission of testimony narrating video-surveillance footage as well as a timeline summary of events allegedly depicted in the video was harmless and did not deprive Woo of his right to a fair trial.

III. Whether the Court of Appeals erred in concluding that Woo's constitutional right against unlawful search was not violated by the trial court's denial of his motion to suppress evidence seized after the unlawful entry of his storage unit.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- The People of the State of Colorado v. James Takchvan Woo, No. 2016CR2069, District Court of El Paso County, Colorado. Judgment entered February 6, 2018.
- The People of the State of Colorado v. James Takchvan Woo, No. 2018CA584, Colorado Court of Appeals. Judgment entered November 25, 2020.
- The People of the State of Colorado v. James Takchvan Woo, No. 2021SC8, Colorado Supreme Court. Judgment entered March 29, 2021.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts:**

The date on which the highest state court decided my case was March 29, 2021. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[✓] An extension of time to file the petition for a writ of certiorari was granted to and including August 26, 2021 (date) on March 19, 2020 (date) in ~~Application No. ___A_____~~. ORDER LIST: 589 U.S.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. 4 (cited in Issue III, page 22)
Unreasonable Searches and Seizures

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. Amend. 6 (cited in Issue I, page 8)
Rights of the Accused

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

Fed. R. Evid. 1006 (cited in Issue II, page 16)
Summaries to Prove Content

"The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court."

STATEMENT OF THE CASE

Woo and J.T. had been dating for three years and were both married to others when they met. (TR 1/24/18, pp 52-53; 2/1/18, p 36) J.T.'s 14 year old son, J.D., called the police when J.T. was not home the morning of April 22, 2016. (TR 1/24/18, pp 54-56, 61-62; 1/25/18, pp 71-74) Police tracked one of J.T.'s two phones within 46 meters of a Public Storage, where they learned Woo had leased a unit. (TR 1/25/18, pp 76-77; 7/14/17, p 58:7) Police made a warrantless entry into Woo's unit and found J.T. deceased from gunshot wounds inside her vehicle. (TR 1/25/18, pp 121-122, 15-16, 103:11-20, 123:5-7)

Woo was arrested, charged with first degree murder, found guilty at trial, and sentenced to life in prison without parole on February 6, 2018. (CF, pp 40, 815) Woo appealed on March 27, 2018. (CF, p 855) On November 25, 2020, the Colorado Court of Appeals affirmed Woo's conviction. Case No. 2018CA584, People v. James Takchvan Woo, ¶1. See Appendix A. The Colorado Supreme Court denied review on March 29, 2021. See Appendix B.

The three issues raised in this petition were raised in the same order on appeal. Woo, Supra, at ¶7. Woo's defense attorneys ("counsel") preserved the first issue implicating the violation of the Sixth Amendment in six written motions, a reply, and oral arguments in which counsel consistently asserted he could not provide effective assistance absent a continuance. (TR 1/16/18, pp 9-12; 1/22/18, pp 2-3; CF, pp 262, 440, 462, 477, 483, 509, 527) Counsel preserved the second issue concerning the admission of a written summary and investigator's testimony by objection to both. (TR 1/31/18, pp 60-62) Counsel preserved the third issue concerning warrantless entry in violation of the Fourth Amendment by filing a motion to suppress and oral arguments at the motions hearing. (CF, p 267; TR 7/14/17, pp 65-69)

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals erred in concluding that Woo's constitutional rights to effective assistance of counsel and a fair trial were not violated by the trial court's denial of his continuance requests based on the prosecution's discovery violations.

A. Facts

Woo was charged on June 15, 2016 and was represented by a public defender. On February 10, 2017, Woo dismissed the public defender and retained a Miami attorney. (TR 2/24/17, p 5:4-5) Local counsel entered on March 6, 2017 and requested a continuance. (CF, pp 91-96) The court reset the trial from May 15th to August 14th. (TR 3/17/17, pp 4-8)

On June 30, 2017, counsel moved for a second continuance based on the extensive discovery and missing DNA raw data. (CF, pp 262-263) The court reset trial for January 16, 2018. (TR 7/14/17, pp 15-19)

On November 30, 2017, counsel filed a third motion to continue, citing large volumes of missing discovery, unextracted electronic devices of J.T.'s, and the lack of response to subpoenas. (CF, pp 440-442) At a hearing on December 1, 2017, counsel indicated that the sheriff's office would not finish downloading data from seized computers until the end of the week, and the information was necessary for defense experts to submit reports and be prepared to testify. (TR 12/1/17, p 16:3-19) The court responded, "let me preface it, this is the third trial setting, and I had told the decedent victim's family that we were not continuing this case again. It's been ongoing for a year and a half." (TR 12/1/17, p 16:22-25) The prosecutor conceded the defense

~~had not received all electronic evidence. (TR 12/1/17, p 18: 7-25)~~ Counsel indicated that defense had no data from any of J.T.'s devices, and that "there's a plethora of things that need to be done in preparation for trial outside of examining this physical evidence." (TR 12/1/17, p 25: 1-7)

The court denied the request, stating, "I told counsel the last time (on July 14, 2017) that this would be the final trial setting, and I would not continue it." (TR 12/1/17, p 30: 20-21)

Counsel filed a motion to continue on December 6, 2017 based on scheduling conflict with a federal trial that would overlap with Woo's trial. (CF, p 462) The court denied the motion as follows:

> "I believe the court was very firm that this third trial setting was going to be the final one and that we were proceeding on January 16th, so I was a little bit amazed that (counsel) is then giving the court a number of other trial dates where he apparently would have a conflict, including this federal case that he claims was a sua sponte changed by the judge without conferring with counsel."

(TR 12/8/17, p 6: 2-9; CF, p 467)

On December 14, 2017, counsel filed two renewed and amended motions to continue based on the prosecution's discovery violations. (CF, pp 477-483) At a hearing on December 22, 2017, counsel indicated that the prosecution did not provide the data from J.T.'s devices until December 19, seven days past the discovery deadline. (TR 12/22/17, p 6: 11-16) Further, the prosecution provided new DNA and fingerprint test results concerning evidence that had been in its possession for a year and a half on December 13, one day past the discovery deadline. (TR 12/22/17, pp 6: 17-7: 3, 9: 16-19) Counsel argued that there

was not enough time for experts to review the voluminous data given the discovery violation. (TR 12/22/17, p 7: 15-19)

The Court again denied the motions, stating, "[t]his court has been very firm that we were keeping this third trial setting." (TR 12/22/17, p 13: 5-12) The only concession the court was willing to make was to start the trial six days later on January 22, 2018. (TR 12/22/17, p 13: 13-17) Counsel accepted without waiving the continuance argument. (TR 12/22/17, pp 13-15)

In January, Counsel filed renewed and emergency motions to continue based on missing DNA raw data that the prosecution agreed to but failed to provide by January 19. (CF, pp 509, 527) On January 19, 2018, Counsel emphasized the importance of the raw data and indicated that he would be unprepared for trial and ineffective without a continuance. (TR 1/19/18, p 11: 14-17; 1/16/18, p 11: 5-7) The court again denied these motions, noting that the case was "going on two years old." (TR 1/16/18, p 12: 15-18; 1/19/18, pp 13-14)

Just before jury selection, counsel renewed the motion to continue, indicating that the prosecution still had not provided the DNA raw data critical to Woo's defense. (TR 1/22/18, pp 2: 24-3: 4) Counsel indicated that the current DNA expert's backlog precluded her from reviewing the yet to be provided DNA discovery, making it necessary to hire a new DNA expert. (TR 1/22/18, p 3: 19-25) The court denied the request but granted a day between jury selection and opening statements. (TR 1/22/18, p 6: 6-12) The prosecution provided the data after jury selection. (TR 1/22/18, p 159: 9-14)

B. Law & Analysis

Where the denial of a motion for continuance leads to ineffective assistance of counsel, a constitutional error analysis is applied, under which the state must demonstrate, beyond a reasonable doubt, that the error was harmless. United States v. Cronic, 466 U.S. 648, 658 (1984).

The Sixth Amendment affords criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI. The right to counsel is the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970) Right to counsel encompasses a guarantee that defense counsel shall have sufficient time to prepare for scheduled proceedings and to protect his client's constitutional rights. People v. Meyers, 617 P.2d 808 (Colo. 1980)

A court abuses its discretion when it appears, "above all to be determined not to disturb [its] trial schedule." United States v. Moore, 159 F.3d 1154, 1160 (9th Cir. 1998). An "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." Morris v. Slappy, 461 U.S. 1, 11-12 (1983) When considering a motion to continue, a court must look at the totality of the circumstances, including any resulting prejudice. People v. Roberts, 146 P.3d 589, 593 (Colo. 2006).

The court prefaced the December 1, 2017 hearing by stating that it had told the family of J.T. that there would be no further continuances since the case had been ongoing a year and a half. (TR 12/1/17, p 16:22-25) This admission, given at only counsel's third

motion to continue, after only nine months of representation, and before any discovery violation occurred, reveals the primary basis for all subsequent denials. Despite counsel's conflicting trial dates and the prosecution's discovery violations, the court would repeatedly maintain its position that it was firm in keeping the trial setting. (TR 12/8/17, p 6:2-9; 12/22/17, p 13:5-12) The court repeatedly attributed the 18 months to two year age of the case to retained counsel, even though counsel had only represented Woo half that time and received only eight months in continuances. (TR 12/1/17, p 16:22-25; 1/19/18, pp 13-14)

The court's decisions to deny continuance were not in accord with the Colorado Supreme Court's holding in Meyers, and were in conflict with this Court's holding in Morris at 11-12. They were based on an unreasoning and arbitrary insistence upon expeditiousness in the face of counsel's detailed justifiable requests. The court did not consider any prejudicial effect upon Woo in light of counsel's repeated assertion that he would be ineffective without sufficient time to prepare, but only considered the prejudicial effect upon the prosecution and J.T.'s family, despite the lack of any assertion of prejudice from the prosecution. (TR 12/22/17, p 13: 7-12; 12/1/17, pp 28-30)

The court considered, above all, its determination to not disturb its trial schedule, thus abusing its discretion pursuant to Moore at 1160. The court was clear it would not have granted the requested continuance under any circumstance, thus failing to apply the totality of circumstances analysis with consideration for resulting prejudice in accordance with Roberts at 593.

The Court of Appeals found no abuse of discretion because the trial court had already granted eight months in continuance. Woo, ¶16. It opined that the trial court "considered the burden of another continuance on J.T.'s family and found that the

evidence that defense counsel claimed he needed additional time to review had been available to Defense for a substantial period of time.'" Id.

This analysis is erroneous as it disregards the facts and extensive record made by counsel and ignores the resulting prejudice to Woo. The discovery violations concerned large volumes of J.T.'s electronic data and new DNA and fingerprint test results provided to Defense less than 35 days before trial in violation of Colo. Crim. P. Rule 16, so these were certainly not available to Defense for a substantial period of time. The raw data for the late DNA test results was not made available to Defense until after jury selection, thus precluding any Defense expert analysis until trial.

The totality of the circumstances demonstrate that the trial court's ruling was in error, and the Court of Appeals merely echoed the trial court's finding and completely disregarded the facts. Counsel provided numerous detailed explanations of the necessity for each request for continuance and an extensive record regarding the inability to effectively represent Woo without a continuance. The prosecution never argued any prejudice or inconvenience to its witnesses.

Further, the Colorado Supreme Court articulated factors courts must consider and make a record of when determining whether to grant a motion to continue in which counsel of choice is implicated in People v. Brown, 322 P.3d 214 (Colo. 2014). Woo argued on appeal that the trial court should have considered the Brown factors. Citing to People v. Travis, 2019 CO 15, the Court of Appeals disagreed because Woo's continuance request did not implicate counsel of choice. Woo, ¶ 11. However, what constitutes the implication of counsel of choice was not addressed in Travis. People v. Sifuentes, 2019 COA 106 (Travis decision did not

delineate the particular circumstances necessary to invoke the right to Counsel of choice). The Sifuentes Court indicated, however, that Travis makes clear that Brown applies when Counsel of choice has "entered an appearance, filed a motion for a continuance, and appeared before the court..." Id.

The fact that counsel represented Woo for several months did not divest the trial court of its duty to determine whether Woo was entitled to a continuance under the Brown factors. In addressing the propriety of a court's refusal to allow a defendant time for preparation, this Court has noted that the right to effective assistance of counsel "is recognized.... because of the effect it has on the ability of the accused to receive a fair trial." Cronic, 466 U.S. 648. For that reason, a judge's discretion to deny a continuance must be balanced against a defendant's Sixth Amendment rights.

The denial of the continuances resulted in counsel being unprepared during and prior to trial. Counsel repeatedly informed the court on the first day of trial that they were playing catch-up to explain numerous instances of lack of preparation. (TR 1/22/18, pp 2-4, 11-13) Most significantly, counsel attempted to present an alternate suspect defense, but was precluded from doing so for failing to provide notice of this defense at least 35 days before trial pursuant to Colo. Crim. P. Rule 16(II)(c). This is not surprising since counsel first received data from J.T.'s electronic devices less than 35 days before trial, on December 19, 2017. (TR 12/22/17, p 6: 11-16) Counsel raised suspicion upon J.T.'s ex-husband, D.T. (TR 1/24/18, pp 37-38), but failed to investigate his whereabouts at the time of the murder as the prosecution's investigator testified over defense's hearsay objection that D.T. was out-of-state from what he heard. (TR 2/1/18, pp 81-82) Counsel called the prosecution's lead detective as Defense's only witness to testify that nobody had verified that D.T. was

out-of-state at the time of J.T.'s death. (TR 2/5/18, p 61:3-12)

As a result of the numerous delays in obtaining DNA discovery and only receiving the necessary DNA raw data after jury selection, counsel was ultimately unable to present a DNA expert, despite the crux of counsel's case being male DNA found on J.T. that did not match Woo. (TR 1/24/18, p 36:12-25) Counsel promised the jury in opening an expert to provide context for some of the prosecution's evidence and to rebut the prosecution's theory using J.T.'s internet searches and computer documents. (TR 1/24/18, pp 25:16-25, 32-35) However, having just received discovery from J.T.'s electronics on December 19, late and with the holidays preventing timely forensic analysis by expert, counsel did not obtain pretrial rulings on the admissibility of the evidence. All of the rebuttal evidence was precluded or severely limited at trial, and counsel did not call any expert promised to the jury at opening. (TR 2/5/18, pp 35-40, 47-49, 82-84)

Various other portions of the record show counsel's lack of preparedness and failure to adequately review discovery, such as cross-examination regarding testing items of evidence and sloppy police work, followed by the court's admonition: "if you keep raising the retesting issue, that's something that should have been handled before trial... not in the middle of trial." (CF, p 280; TR 1/26/18, pp 51-53)

The court's denial of the requests for continuance, without affording any weight to Woo's Sixth Amendment right, denied Woo the effective assistance of counsel, his right to present a defense, and his right to confront witnesses against him, requiring the reversal of his conviction.

II. The Court of Appeals erred in concluding that the improper admission of testimony narrating video-surveillance footage as well as a timeline summary of events allegedly depicted in the video was harmless and did not deprive Woo of his right to a fair trial.

A. Facts

The prosecution called investigator Walker as a lay witness to narrate the video-surveillance obtained, but introduced him in a manner a party would introduce an expert witness, highlighting Walker's 42 years as a police officer, 25 years of which he spent as an investigator, and 15 years investigating homicides. (TR 1/31/18, pp 53-54)

The prosecution then moved to admit Exhibit 489, a written timeline of Walker's opinions of the events on the video shown to the jury. (TR 1/31/18, p 60:2-17) Counsel objected, arguing that under Colo. R. Evid. 1006, the Colorado equivalent of Fed. R. Evid. 1006, summaries are only allowed for voluminous records, cannot be argumentative, and it was not appropriate to emphasize an opinion of a member of the prosecution's team. (TR 1/31/18, pp 60-61) Counsel also argued Walker was not an expert in video-surveillance-watching and as such, his opinion was irrelevant and the jury had the ability to watch the videos and make those decisions for themselves. (TR 1/31/18, pp 61-62) Counsel added that a lay witness cannot testify to an ultimate issue of fact. (TR 1/31/18, p 62:15-18) The court ruled: "It's a compilation summary. You're entitled to cross." (TR 1/31/18, p 62:23-24)

Thereafter, the prosecution published Exhibit 489 and provided copies to each juror to "follow along" while the prosecution played the video-surveillance.

(TR 1/31/18, p 63: 9-13) Walker opined that the person seen in the surveillance footage of the storage unit was Woo and the vehicle seen was J.T.'s, and gave the same opinion in the summary that he authored. (TR 1/31/18, pp 63-64; People's Exhibit 489) He explained that he knew Woo was in the storage unit from his review of video-surveillance from a Walgreens nearby. (TR 1/31/18, pp 64-66)

B. Law & Analysis

A court abuses its discretion if its decision is manifestly unreasonable, arbitrary, or unfair or if its decision "is based on a misunderstanding or misapplication of the law." People v. Thompson, 2017 COA 56, ¶87. A reviewing court must reverse if the error was not harmless, in that it had "substantially influenced the verdict or affected the fairness of the trial proceedings." People v. Robles, 302 P.3d 269, 274 (Colo. App. 2011)

1. The Court of Appeals erred in concluding that Exhibit 489 was properly admitted.

The proponent of the summary evidence must (1) identify the underlying documents as voluminous, (2) establish that they are otherwise admissible, (3) provide opposing counsel an advance copy of the summary, and a reasonable time and place for examination of the underlying documents. People v. McDonald, 15 P.3d 788, 790 (Colo. App. 2000).

The asserted voluminous evidence admitted was conveniently examined in court and consisted of three exhibits: (1) a five and a half minute long video-

surveillance clip from Cliff's Upholstery (People's Exhibit 241); (2) a 23-minutes long clip from Cliff's Upholstery, of which a few minutes were shown to the jury (People's Exhibit 242); and (3) five clips from Walgreens, four of which were only seconds long and one approximately 14 minutes long (People's Exhibit 316).

The two clips from Cliff's Upholstery show mostly its parking lot, beyond it two double-lane streets divided by a parkway, another parking lot, and beyond that at the top of the screen a long distance away, the Public Storage. One can barely see the car as it pulls in front of the storage unit, and a moving black dot of a figure less than a millimeter high appears to open a unit and pull the car inside. (People's Exhibit 241) The second video shows the black figure come out of the unit and disappear to the right of the screen. (People's Exhibit 242) Although it is impossible to ascertain any feature of the vehicle or person, such as the type of vehicle or gender, the summary identifies the vehicle as that of J.T.'s and the person as male. (People's Exhibit 489)

The Walgreens is several blocks from the storage and its video clips do not show the storage facility but the Walgreens parking lot, a two-way street, and a shopping complex across the street. (People's Exhibit 316) One clip shows the back of an unidentifiable person walking through the parking lot wearing a jacket. Id. Another clip shows a small unidentifiable figure at the shopping complex, and one shows a person wearing a white T-shirt walking toward the Walgreens. Id. Walker's summary identifies this person as Woo and suggests that Woo is the person depicted in all

the other videos. (People's Exhibit 489)

Despite defense counsel's CRE 1006 objection, the court made no finding regarding the propriety of admitting the summary exhibit when the summary contained improper opinion about what Walker thought the videos showed, and the evidence summarized clearly could be conveniently examined in court in under 45 minutes. See CRE 1006 ("The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."); FRE 1006 ("The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.")

Citing to Murray v. Just In Case Bus. Lighthouse, LLC, 374 P.3d 443 (Colo. 2016), the Court of Appeals found that the CRE 1006 factors "are not the only factors to consider ... [i]nstead it is the case's complexity and the jury's need of an aid to understand the evidence that warrant introducing summary exhibits ... [and] the written timeline was warranted and did just that." Woo, ¶¶ 19, 21.

As an initial matter, Murray involved a summary analysis of over 200 exhibits, whereas the summary here involved three exhibits. See also, United States v. Stephens, 779 F.2d 232, 239 (5th Cir. 1985) (where evidence "involved hundreds of exhibits ... [e]xamination of the underlying materials would have been inconvenient without the [summary] charts"); United States v. Scales, 594 F.2d 558, 562 (6th Cir. 1979) ("With 161 exhibits ... comprehension of the exhibits would have been difficult, and certainly would have been inconvenient, without the [summary] charts.").

Moreover, Murray did not dispense with the consideration of CRE 1006 factors so long as the case was complicated. Murray at 457. While Murray emphasized the need to consider complexity and the jury's need to understand evidence, there is nothing in the opinion indicating that courts may skip over the first prong of the three-prong analysis requiring that the summarized evidence be voluminous merely because the case is complex.

The Court of Appeals indicated that a summary exhibit should organize the summarized evidence in a manner helpful to the jury and free from arguments or conclusions. Woo, ¶ 20 (quoting Murray at ¶ 54) It opined that the summary here provided "neutral descriptions of what was seen in each clip" and "helped the jury understand what the clips as a whole showed without arguing their significance." Woo, ¶ 21. This is erroneous, as the summary provided Walker's conclusion that the person in the videos was Woo, that the vehicle was J.T.'s, and told the jury what the prosecution wanted the jury to see, even opining that Woo threw a white bag into the trash, when it is impossible to see any of this in the videos. The summary was not necessary to aid the jury in understanding the small amount of video-surveillance. Exhibit 489 was essentially the prosecution's theory of the murder storyline, went directly to the verdict reached by the jury, and was thus not harmless.

2. The Court of Appeals erroneously concluded that Walker's narration was harmless.

The Court of Appeals found that Walker's testimony was improper because he was in no better position to identify Woo on the surveillance videos, but concluded

that the error was harmless because it was consistent with Woo's theory of defense. Woo, ¶¶ 24-25. As an initial matter, the Court of Appeal's finding that Walker's testimony identifying Woo was improper contradicts its finding that the written summary given to each juror was properly admitted, since Walker likewise identified Woo in his summary. (People's Exhibit 489) Moreover, the error was not harmless as there was no evidence placing Woo in the storage unit at the time shown in the videos except Walker's testimony. Despite the fact that the surveillance video footage was extremely poor and it was impossible to identify the tiny speck depicted, Walker, after being introduced as a highly experienced homicide investigator, testified as though it was a forgone conclusion that the tiny speck was Woo, going so far as to claim the tiny speck could be seen leaving the storage unit carrying something in his left hand that he eventually deposited in the Walgreens trash can. (TR 1/31/18, pp 64-66; People's Exhibit 489) If the jurors had any reasonable doubt as to Woo being in the storage unit at the time of J.T.'s death, Walker's testimony that it was clearly Woo relieved the jury from making that critical determination.

Walker's testimony improperly usurped the province of the jury and directly affected the verdict, requiring reversal of Woo's conviction.

III The Court of Appeals erred in concluding that Woo's constitutional right against unlawful search was not violated by the trial court's denial of his motion to suppress evidence seized after the unlawful entry of his storage unit.

A. Facts

On June 30, 2017, counsel filed a motion to suppress evidence seized from

Woo's storage unit, arguing that no immediate crisis existed to justify warrantless entry based on exigent circumstances. (CF, pp 267-273) The prosecution argued that the entry was justified by exigent circumstances or the emergency exception. (CF, pp 303-307)

At the July 14, 2017 hearing on the motion, Detective Bethel testified that J.T.'s son J.D. told her: (1) he last saw J.T. the previous night at 9:00; (2) he could not reach J.T. by phone or text in the morning; (3) J.T. would leave him in charge of the younger children while J.T. went out on dates; (4) J.T. and Woo recently broke up; and (5) J.T. was concerned about Woo stalking her and believed Woo posted inappropriate photos of her on FaceBook. (TR 7/14/17, pp 26-30, 33:20-22)

Bethel confirmed the FaceBook photo incident from a service call to police by J.T.'s out-of-state relative to check the welfare of J.T.'s children after seeing the FaceBook photos, and learned that the photos depicted J.T. doing drugs. (TR 7/14/17, pp 29-30, 33:14-24; CF, pp 190-191) Bethel learned of a second service call the next day, April 18, 2016, by J.T., and testified that Woo was outside J.T.'s home "banging on the door". Id. Officer Kelemen's incident report for this April 18 incident indicates an "unfounded" status and that J.T. "stated the sheriff's office was at her residence the day prior on a check the welfare which had been called in by an out of state relative." (CF, p 191) Kelemen indicated that J.T. "stated the (FaceBook) photograph is no longer available and she has no proof that Mr. Woo had in fact posted the image." Id. Further, "when (Woo) showed up at the door knocking, (J.T.) called the sheriff's office because she did not want to 'deal' with him." Id. Lastly, Kelemen wrote, "I asked (J.T.) if Mr. Woo made any threat to her or if she was afraid of him. (J.T.) stated Mr. Woo had not made any threats and that she was not afraid of him she just did not want to 'deal' with him." Id.

Bethel requested dispatch to ping J.T.'s two phones for location. (TR 7/14/17, p 30:6-11)

She testified that she found no sign of struggle at J.T.'s home or any indication that J.T. had been taken against her will. (TR 7/14/17, pp 32-33)

Officer Miller testified that he responded to the storage facility on a missing person case, and was informed that J.T. might be at the location based upon a cell phone ping. (TR 7/14/17, pp 37-38) He testified that he thought there were some tire tracks in front of Woo's unit, but could not tell how long they had been there and did not hear or observe anything unusual. (TR 7/14/17, pp 39:11-25, 40:15-17, 41:10-12, 46-47, 50:5-8) He sniffed for exhaust fumes, but smelled nothing. (TR 7/14/17, pp 40:11-20, 39:11-14, 46:3-14) Despite the lack of disturbance or sign that anyone was in the unit, he testified that the police needed to determine if they "needed to provide any type of medical attention." (TR 7/14/17, p 41:13-14) Miller testified that he was unaware that Woo had been the subject of a prior call for service involving J.T. when making the decision about whether to go into the unit. (TR 7/14/17, p 50:16-20) He entered the unit after the police broke the door down with a sledgehammer. (TR 7/14/17, pp 41-42)

Detective Watts testified that when he responded to the storage facility, he learned that Woo had leased a unit there and that J.T.'s phone was located within 46 meters of the facility. (TR 7/14/17, pp 52-53, 58:7) He believed Woo rented the unit on April 10 for vehicle storage, and noticed tire tracks in front of the unit. (TR 7/14/17, pp 54:3-7, 55:13-16, 59:9-17, 61:7-23) Despite other officers claiming they smelled a sweet odor from the unit, Watts testified that he did not smell any odor. (TR 7/14/17, pp 54:17-20, 56:14-20, 57:14-17) He called out to inquire if

anyone was inside the unit, but heard no response. (TR 7/14/17, p 57:14-22) Watts did not testify that he was aware of any prior service call involving Woo and J.T before entering the unit.

The prosecution argued that the warrantless entry was made to ascertain whether the police could potentially render assistance to a victim in need of medical attention. (TR 7/14/17, pp 64:13-16, 65:5-8)

The court found that the prosecution met its burden of not having a formal warrant executed by a court, but operating under the exigent circumstance exception to the warrant requirement. (7/14/17, p 70:13-16) In support, the court found that law enforcement was "appraised of the fact that Mr. Woo had been dating the decedent; that she was fearful of him; that there had been previous calls for service to law enforcement about Mr. Woo stalking her, and they took the necessary step to be able to determine if she was in immediate danger or in a life-threatening situation." (TR 7/14/17, pp 69:25-70:5) Further, the court found that "[t]he ping located was in exact proximaty of the storage unit, and that is the exception to the warrant requirement; if there is an emergency threatening the life or safety of another. And clearly we had that in this situation." (TR 7/14/17, p 70:6-8) In response to counsel's question as to whether the court was basing its decision on any indication or report of past violence, the court responded, "[n]o, I'm basing it upon the testimony today, that (J.T.) was fearful of (Woo) because of the stalking that was going on and the call for service attributable to that." (TR 7/14/17, p 71:1-3)

B. Law & Analysis

An ultimate conclusion of constitutional law that is inconsistent with or

unsupported by evidentiary findings, as well as the court's erroneous legal standard to the facts of the case, are subject to de novo review and correction by a reviewing court. People v. Pappan, 425 P.3d 273, 276 (Colo. 2018).

The Fourth Amendment of the United States Constitution and article II, section 7 of the Colorado Constitution proscribe all unreasonable searches and seizures. A warrantless search is prima facia unconstitutional unless it is justified by an established exception to the warrant requirement. People v. Harper, 902 P.2d 842, 855 (Colo. 1995). The prosecution has the burden of overcoming this presumption by establishing that the warrantless search is supported by probable cause and is justified under one of the exceptions to the warrant requirement. People v. Garcia, 752 P.2d 570, 581 (Colo. 1988) One of these exceptions is the exigent circumstance exception. People v. Kluhsman, 980 P.2d 529, 534 (Colo. 1999). Exigent circumstances exist when there is probable cause for the search and "there is a colorable claim of emergency threatening the life or safety of another." Id. Any evidence obtained pursuant to an unconstitutional search or seizure, as well as the fruits of the illegally seized evidence, is subject to the exclusionary rule. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963); People v. Lewis, 975 P.2d 160, 170 (Colo. 1999).

As an initial matter, the court's basis for denying Woo's motion to suppress relies on the clearly erroneous fact that J.T. was fearful of Woo. (TR 7/14/17, PP 70:1-2, 71:1-3) Nowhere in the prosecution's responsive pleading, testimonies from all three witnesses (Bethel, Miller, and Watts) at the hearing, prior proceedings, or the entire record does the prosecution or any other person allege that J.T. was fearful

of Woo. This was entirely the court's erroneous assumption and is in direct contradiction to the only other reference to J.T.'s fear factor in the entire record: Kelemen's April 18, 2016 incident report indicating that J.T. told him "she was not afraid of (Woo)". (CF, p 191)

The court also erroneously attributed the April 17 and April 18, 2016 service calls to Woo stalking J.T. (TR 7/14/17, pp 69:25-70:5) The April 17 service call was made by J.T.'s out-of-state relative against J.T., not Woo. (CF, p 191) Officer Kelemen's report indicates that the totality of what occurred on April 18 was that Woo knocked on J.T.'s door and walked away when J.T. did not respond. Id. Kelemen's report indicates that J.T. did not report stalking, and that J.T.'s belief that Woo posted inappropriate photos of her on FaceBook was unfounded. Id. There is no record that Bethel passed any of the information she gathered, such as the service calls, to the officers who made the illegal entry, other than that J.T.'s phone pinged to the storage vicinity and Woo was a person of interest.

The court's finding that the location of J.T.'s phone in "exact proximaty of the storage unit" (TR 7/14/17, p 70:6-8) provided the exception to the warrant requirement was erroneous since the phone was merely located within a 46-meter radius of the storage facility (TR 7/14/17, p 58:7), extending beyond the facility to nearby businesses and parking lots. Further, the location of a phone does not necessarily mean the owner is with the phone, and certainly does not mean the owner is in danger or in need of medical aid.

The Court of Appeals found that exigent circumstances existed because "J.T. was missing and her oldest son feared for her safety. Woo had been stalking her,

she was afraid of Woo, and police had located her cell phone at Woo's storage unit." Woo, ¶ 30. This conclusion again merely echoed the Trial Court's errors, as only the first of the four factors relied upon is fully accurate. The calls for service and resulting reports did not indicate stalking, the claim that J.T. was afraid of Woo is entirely false and unsubstantiated, and the police never pinpointed J.T.'s phone to Woo's unit prior to entry. Watts' testimony that the phone was located within 46 meters of the storage facility (TR 7/14/17, p 58:7) implied a radius half the length of a football field.

To determine whether the prosecution has established exigent circumstance, 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. People v. Hebert, 46 P.3d 473, 480 (Colo. 2002) The exception to the warrant requirement does not give officers carte blanch to make warrantless entry whenever there is theoretical possibility another's life or safety is in danger. People v. Smith, 40 P.3d 1287, 1290 (Colo. 2002) The totality of the circumstances analysis places particular importance on the fact that suspicion alone, even if reasonable, does not provide a legal basis upon which an officer may enter a residence and condvct searches and seizure therein. Lewis at 169.

The totality of the circumstances at the time of entry indicates that there was no exigency so immediate as to render obtaining a warrant problematic. The testimonies of Miller and Watts indicate that they observed nothing at the storage unit prior to entry to suggest an emergency in progress. They heard, smelled, and

saw nothing other than tire tracks, which was not unusual for a unit rented for the purpose of vehicle storage. (TR 7/14/17, p 59:14-16) They were unaware of any prior service call at the time of entry; calls that, even if known, indicated nothing more than that Woo knocked on J.T.'s door on April 18 and left when she did not respond, and that J.T. suspected but offered no proof that Woo posted inappropriate photos of her on FaceBook. (CF, pp 190-191) All that officers knew at the Time of entry was that J.T. had been missing for about three hours, Woo was a person of interest according to J.T.'s son, and one of J.T.'s two phones - not her official iPhone but a recently purchased TracFone used to avoid detection (TR 7/14/17, p 68:12-20) - was located within 46 meters of a storage facility where Woo had recently rented a unit. The totality of the circumstances demonstrates that the police had no reasonable basis to believe that an immediate crisis existed requiring the rendering of aid.

The police cannot use the possibility of an emergency to avoid the warrant requirement. People v. Allison, 86 P.3d 421 (Colo. 2004) (finding there was a mere possibility that the third party may have been in the residence, but the circumstances did not rise to the level of an immediate crisis.) There was merely a theoretical possibility and suspicion that J.T.'s phone, and therefore J.T., might be in the storage unit.

Nothing indicated that J.T. was in need of medical aid, as Miller and the prosecution provided as the basis for the forced entry. (TR 7/14/17, pp 41:13-14, 64:13-16) Officers clearly forced entry to conduct an investigation of a missing person, not in response to distress or to render medical aid. Any claim as to the rendering of

medical assistance was merely an after-thought to circumvent the warrant requirement. Officers' subjective motivation is irrelevant in evaluating if their actions were reasonable. Brigham City v. Stuart, 547 U.S. 398, 404 (2000). "Any doubt whether officers reasonably concluded that a warrantless search was justified must be resolved in favor of the defendant whose property was searched." People v. Jansen, 713 P.2d 907, 912 (Colo. 1982) Moreover, "[i]f the original entry was not lawful, a subsequent search under a warrant based on evidence seen during the illegal search was also unconstitutional." Id. See also People v. Hogan, 649 P.2d 326 (Colo. 1982)(The exclusionary rule not only bars the admission of evidence illegally acquired but also prohibits the government from utilizing evidence which is the direct fruit or product of the initial illegality.)

Since the circumstances immediately prior to entry do not demonstrate a colorable claim of an emergency threatening the safety of another or an imminent crisis, the prosecution did not meet its burden and the trial court and Court of Appeals erred in finding that an emergency situation existed. As such, Woo's conviction and the denial of Woo's motion to suppress should be reversed, and any evidence unconstitutionally seized as a result of the illegal entry should be suppressed under the exclusionary rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Woo

Date: August 15, 2021