No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

CONRAD KRUSE JR.,
Respondent.

On Petition for a Writ of Certiorari
To the Missouri Court of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Fourth Amendment, is it reasonable for police officers to make a limited entry onto an individual's curtilage for the purpose of covering the rear exit of the home, while other officers conduct a "knock and talk" at the front door to investigate their probable-cause belief that the subject of an active arrest warrant is inside the home?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the appellant below; respondent, Conrad Kruse Jr., was the respondent.

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The Missouri Court of Appeals opinion affirming the trial court's judgment, issued January 19, 2010, and reported at 306 S.W.3d 603 (Mo.App.W.D. 2010), is reprinted in the Appendix ("App.") at A2-A17.

The Missouri Supreme Court's order denying petitioner's application for transfer, issued April 20, 2010, is reprinted in the Appendix at A1.

JURISDICTION

The Missouri Court of Appeals, Western District, entered its judgment on January 19, 2010. The Missouri Supreme Court denied petitioner's application for transfer on April 20, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> 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.

Constitution of the United States, Amendment XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In *Steagald v. United States*, 451 U.S. 204 (1981), the Court held that, in the absence of consent or exigent circumstances, an arrest warrant, alone, is insufficient to allow police officers to enter the home of a person not named in the warrant to search for the named party. If officers wish to search the residence of a person not named in the arrest warrant, they must first obtain a search warrant for the residence unless they have consent or exigent circumstances justifying a warrantless entry.

This petition asks the Court to clarify whether the holding in *Steagald* extends beyond the boundaries of the home to preclude law enforcement officers from making a limited entry onto a defendant's curtilage to cover the rear exit of the residence and prevent the possible flight of a person named in an arrest warrant when officers have probable cause to believe the person named is within the defendant's residence.

After receiving information that Jeremy Beel had just been seen stealing anhydrous ammonia, law enforcement officers discovered that Mr. Beel had an active warrant out for his arrest. App. at A3. The warrant contained "caution indicators," meaning Mr. Beel was a potentially violent individual. App. at A3.

Officers were advised that Mr. Beel planned to use the anhydrous ammonia to manufacture methamphetamine at Ben Young's residence. App. at A3, A34, A38-A39. When officers were unable to locate anyone at Mr. Young's residence, they drove around to various locations known to be associated with the manufacture of methamphetamine in search of Mr.

Beel. App. at A4. One of these locations was respondent's home. App. at A4. When they arrived at the home, they observed Mr. Beel's van in the driveway, which was the same van he was seen driving in the theft of anhydrous ammonia earlier that evening. App. at A3-A4. They contacted other officers and formulated a plan whereby two uniformed officers would approach the front of respondent's residence, knock on the door, and seek consent to search the residence for Mr. Beel, while two other officers would cover the rear exit in the event that Mr. Beel was present and decided to flee. App. at A5.

The officers simultaneously proceeded to their assigned locations. App. at A5. But as the two officers approached the rear of respondent's residence via a well-worn path between the residence and a nearby storage shed, the shed door came "flying open," and respondent "came bolting out the door." App. at A5, A14. The officers immediately ordered respondent to the ground. App. at A5. When respondent burst forth, he left the door to the storage shed wide open. App. at A5. Inside the well-lit shed, officers observed various items associated with the manufacture of methamphetamine, as well as three other individuals – one of whom was Mr. Beel. App. at A5, A37.

The officers ordered everyone out of the shed and placed them under arrest. App. at A5. The officers conducted a protective sweep of the shed to ensure that all occupants were accounted for, and while doing so, observed more items involved in the manufacture of methamphetamine. App. at A5. The officers kept the individuals restrained while obtaining a search warrant for the storage shed and residence based upon the items viewed. App. at A5-

A6. Respondent was subsequently prosecuted for unlawful use of drug paraphernalia, first-degree trafficking, possession of methamphetamine, and possession of a methamphetamine precursor with the intent to manufacture methamphetamine. App. at A2-A3.

At trial, respondent, relying on the Court's holding in *Steagald*, sought suppression of all items seized on the basis that the officers had violated his Fourth Amendment rights when they entered his backyard without a search warrant. App. at A6, A41. Petitioner acknowledged that the officers did not have a search warrant or consent, and that the area they entered constituted curtilage, but petitioner further argued that the officers' entry was reasonable and that the intrusion on respondent's privacy was limited, such that his Fourth Amendment rights were not violated. App. at A41-A43. The trial court granted the suppression motion, finding that the officers covering the rear exit conducted an illegal, warrantless search that was not justified by consent or exigent circumstances. App. at A6, A8-A9. Petitioner appealed the trial court's ruling. App. at A6.

On appeal, the Missouri Court of Appeals affirmed, also relying on *Steagald*, and held that the officers violated respondent's Fourth Amendment rights when they entered his curtilage without a search warrant, consent, or exigent circumstances. App. at A9, A16. Petitioner filed an application for transfer to the Missouri Supreme Court, arguing that the Missouri Court of Appeals failed to conduct the proper balancing tests in determining both the reasonableness of the officers' conduct and the applicability of the exclusionary rule to these circum-

stances. App. at A20. The Supreme Court of Missouri denied petitioner's application for transfer. App. at A1.

Petitioner, State of Missouri, seeks review of the Missouri Court of Appeals decision because its opinion represents an unwarranted extension of the Court's holding in *Steagald*. The Missouri Court of Appeals, relying on *Steagald*, effectively precluded law enforcement officers' entry onto a person's curtilage for a legitimate law enforcement purpose, even though the entry involved only a minimal intrusion on respondent's privacy interest and was unconnected with a search of the property. But the Court's opinion in *Steagald* was based on the very specific privacy interests in the home itself and the violation of those interests by a warrantless search. Unlike the officers in *Steagald*, the officers in respondent's case did not enter the confines of respondent's home and were not conducting a search under the Fourth Amendment. Thus, *Steagald* should not be extended to these circumstances.

REASONS FOR GRANTING THE PETITION

I. The Missouri Court of Appeals has adopted an unwarranted expansion of the rule in *Steagald* to limit law enforcement officers' ability to enter onto the curtilage of a person's home while engaged in legitimate law enforcement activities.

In *Steagald*, the Court was called upon to answer the question of whether "a law enforcement officer may legally search for the subject of an arrest warrant *in the home* of a third party without first obtaining a search warrant." *Steagald*, 451 U.S. at 205 (emphasis added). In that case, officers – armed solely with an arrest warrant for a third party – forcefully entered the defendant's home and searched for the subject of the arrest warrant. *Id.* at 206. In reversing the denial of the defendant's suppression motion, the Court noted, "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 212 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). In requiring law enforcement officers to obtain a search warrant in addition to the arrest warrant, the Court focused on the sanctity of the home and the need for a warrant to justify entry in the absence of exigent circumstances:

> In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home

> to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant.

Id. at 213.

Relying primarily upon *Steagald*, the Missouri Court of Appeals upheld the trial court's suppression of evidence discovered on respondent's property because the law enforcement officers that entered onto respondent's curtilage to cover a rear exit and prevent the possible flight of the subject of the arrest warrant had no search warrant for respondent's property. App. at A16. But the Missouri Court of Appeals decision is an unwarranted expansion of *Steagald*'s holding for two reasons. First, while curtilage is entitled to protection under the Fourth Amendment as part of the home, it remains distinct from the home itself and is not always treated as harboring the same expectations of privacy as the actual residential unit. Second, the Court's concern in *Steagald* was the potential that law enforcement officers might justify a warrantless search of a property where they had reason – but not probable cause – to believe that criminal activity was afoot under the authority of a third party arrest warrant. But that concern is not present where law enforcement officers enter the curtilage for a reason unconnected with a search of the property, as was done in respondent's case.

A. The Missouri Court of Appeals should not have extended *Steagald*'s reach beyond the boundaries of the home itself.

In *United States v. Dunn*, 480 U.S. 294 (1987), the Court reaffirmed its earlier holding from *Oliver v.*

United States, 466 U.S. 170 (1984), that "the Fourth Amendment protects the curtilage of a house[.]" *Id.* at 300. But "[t]he protection of the Fourth Amendment, by necessity, exists in degrees." *United States v. Haqq*, 278 F.3d 44, 54 (2nd Cir. 2002) (Meskill, J., concurring). And to that end, the Fifth Circuit noted that "[c]ourts have long recognized that individuals possess differing degrees of privacy depending upon the nature of the area examined." *United States v. Amuny*, 767 F.2d 1113, 1127 (5th Cir. 1985). "Of course, the Fourth Amendment provides individuals with the greatest protection in their homes." *Id.* And while curtilage is given Fourth Amendment protection, that protection is distinguishable from the protection afforded the sanctity of the home. "[P]rivacy and security *in the home* are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginnings of the Republic." *Hudson v. Michigan*, 547 U.S. 586, 603 (2006)(emphasis added). "[I]t is a serious matter if law enforcement officers violate the *sanctity of the home* by ignoring the requisites of lawful entry." *Id.* (emphasis added). "[T]he physical entry *of the home* is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585 (emphasis added).

It was the focus on the sanctity of the home that led the Court to conclude in *Steagald* that a search warrant was required to search the home of a person not named in an arrest warrant. *Steagald*, 451 U.S. at 212-213. The Court identified the two separate but related interests protected by arrest warrants and search warrants. *Id.* at 213. While an arrest warrant "primarily serves to protect an individual from an unreasonable seizure," a search warrant "safeguards an individual's interest in the privacy of his home

and possessions against the unjustified intrusion of the police." *Id.*

And, in *Steagald*, the arrest warrant authorized officers only to seize the person named in that warrant; yet the officers sought to expand that authority to also permit entry into the home of a person not named in the warrant. *Id.* "[W]hile the warrant in this case may have protected [the subject of the arrest warrant] from an unreasonable seizure, it did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home." *Id.*

Here, unlike *Steagald*, the officers never entered the home, or even breached the threshold. Instead, they entered onto respondent's curtilage – an area neither discussed nor implicated in *Steagald*. While the boundaries of a residential dwelling are easily defined by the four walls, curtilage is not so easily defined and depends largely upon the steps a person has taken to assert a subjective privacy interest therein. *Dunn*, 480 U.S. at 301. Thus, courts have recognized that "[t]he mere intonation of curtilage ... does not end the inquiry." *United States v. Hedrick*, 922 F.2d 396, 399 (7th Cir. 1991). And "[t]erming a particular area curtilage expresses a conclusion; it does not advance Fourth Amendment analysis." *United States v. Titemore*, 437 F.3d 251, 258 (2nd Cir. 2006). Rather, the curtilage inquiry goes beyond merely the subjective assertions of a privacy interest; the asserted privacy interest must also be one society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Therefore, it is "possible that an area might fall within the curtilage of the home, as that concept was defined at common law, but the owner or

resident may fail to manifest a subjective expectation of privacy in the area." *United States v. Hayes*, 551 F.3d 138, 146 (2nd Cir. 2008).

The Court has repeatedly held that certain subjective assertions of privacy in the curtilage are not assertions society is prepared to recognize as reasonable. *See e.g. Florida v. Riley*, 488 U.S. 445, 450 (1989) (warrantless aerial observation of curtilage from an altitude of a mere 400 feet not unreasonable under Fourth Amendment despite partially enclosed greenhouse, surrounding wire fence, and a posted "Do Not Enter" sign); and *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (warrantless aerial observation of curtilage not unreasonable under the Fourth Amendment despite the existence of both 6-foot and 10-foot privacy fences erected around the property). This stands in contrast to the privacy interest in the home itself, which is always treated as objectively reasonable. "[A]bsent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant." *Steagald*, 451 U.S. at 214 n.7. Thus, because the Court's focus in *Steagald* was on the actual dwelling unit, as opposed to the appurtenant curtilage, the Court in *Steagald* did not address the question raised here. It is "searches and seizures *inside a home* without a warrant [that] are presumptively unreasonable[.]" *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (emphasis added). But, in situations like respondent's, where officers entered the curtilage and not the home, it is the reasonableness of the officers' actions that determines whether the Fourth Amendment has been violated. *See Illinois v. McArthur*, 531 U.S. 326 (2001). In short, because *Steagald* was directed to protecting the sanctity of the home, the Missouri

Court of Appeals reliance upon, and extension of, *Steagald* to find a violation of the Fourth Amendment based upon an intrusion onto the curtilage was unwarranted.

B. The Missouri Court of Appeals should not have expanded *Steagald*'s holding to cover law enforcement actions independent of searches.

In addition, the rule of *Steagald* should be applied only if the officers' entry onto respondent's curtilage can properly be considered a "search" under the Fourth Amendment. *Steagald*, 451 U.S. at 212; *United States v. Cavely*, 318 F.3d 987, 993 (10th Cir. 2003). The Court has held that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz*, 389 U.S. at 353. Here, because the mere entry onto respondent's curtilage did not constitute a "search," *Steagald* should not have been applied, and the Missouri Court of Appeals extension of *Steagald*'s reach to prohibit the officers' actions was unwarranted.

In other contexts, the Court has determined that when a law enforcement officer observes contraband in plain view where he has a "legitimate reason for being present unconnected with a search directed against the accused[,]" there is no Fourth Amendment violation. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971); *Horton v. California*, 496 U.S. 128, 135-136 (1990). Here, the officers were not attempting to locate the subject of the arrest warrant when they entered respondent's curtilage; rather, that purpose belonged to the officers conducting the

"knock and talk" at the front door of the residence.[1] App. at A37-A38. The officers' purpose in entering the curtilage was to cover the rear exit of the residence and prevent the possible flight of the subject based upon their experience that subjects with outstanding arrest warrants tend to flee upon discovering the presence of law enforcement officers. App. at A35-A36, A39-A40. The Court has already indicated that actions designed to prevent flight of suspects and minimize the risk of harm to officers constitute legitimate law enforcement activities. *See Michigan v. Summers*, 452 U.S. 692, 702 (1981). And, in accordance with *Coolidge* and *Horton*, lower courts have held that "[w]here a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the Fourth Amendment, provided that the intrusion upon one's privacy is limited." *United States v. Weston*, 443 F.3d 661, 667 (8th Cir. 2006).

Because the officers who entered the respondent's curtilage were not conducting a search, but instead were preventing flight and maintaining officer safety, the relevant question to be answered was whether their actions were reasonable. But the Missouri Court of Appeals wholly dismissed this question and instead extended the holding of

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[1] Many courts have held that the "knock and talk" exception will extend to justify minimal intrusions onto areas of the curtilage not normally accessible by the public because the law enforcement action is in pursuit of legitimate law enforcement objectives. *See United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990); *Hardesty v. Hamburg Township*, 461 F.3d 646, 654 (6th Cir. 2006); *United States v. Anderson*, 552 F.2d 1296, 1300 (8th Cir. 1977); *United States v. Raines*, 243 F.3d 419, 421 (8th Cir. 2001); and *United States v. Garcia*, 997 F.2d 1273, 1279-1280 (9th Cir. 1993).

Steagald by finding that the officers lacked exigent circumstances to justify their warrantless entry onto the curtilage. But the Missouri Court of Appeals *per se* rule is not consistent with the Court's Fourth Amendment jurisprudence.

The "central requirement" of the Fourth Amendment "is one of reasonableness." *McArthur*, 531 U.S. at 330. In examining alleged Fourth Amendment violations, a reviewing court, "rather than employing a *per se* rule of unreasonableness," is to "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *Id.* at 331. From the Fourth Amendment's perspective, it is the reasonableness of law enforcement conduct that matters. *Id.* at 335. "When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Id.* at 330.

In *McArthur*, the Court identified four factors leading to its determination that the conduct of law enforcement officers in preventing the defendant from entering his home unaccompanied by an officer while a search warrant was obtained for the home was reasonable. *McArthur*, 531 U.S. at 331-332. Those factors were: (1) the police had probable cause to believe that contraband was located inside the defendant's residence; (2) the police had good reason to believe that, in the absence of their restraint of the defendant, that contraband would be destroyed before a warrant could be obtained; (3) the officers "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" by neither searching nor arresting the

defendant prior to obtaining a warrant; and (4) the restraint employed was limited in time and scope. *Id.* The Court held, "[g]iven the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible." *Id.* at 333. The Court additionally noted that it could find "no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time." *Id.* at 334.

The same rationale applies to respondent's case. Here, like the officers in *McArthur*, the officers in respondent's case had probable cause to believe that the item sought (here, the third party) was present in respondent's home. App. at A16. Also like the officers in *McArthur*, the officers in respondent's case had "good reason to fear" (based upon their prior experience) that, absent their entry into respondent's backyard, the item would be lost or destroyed (i.e. the third party might escape by fleeing out the back door) upon notification that law enforcement was present. App. at A36. And, as in *McArthur*, the officers in respondent's case "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" by walking into respondent's open back yard for the sole purpose of covering the rear exit while other officers sought consent to search from the residents. App. at A35-A36, A38, A40. As in *McArthur*, the officers did not conduct a search of either the shed or the home until a search warrant was obtained. App. at A6. Finally, like the restraint in *McArthur*, the officers' intrusion onto respondent's property was limited in both time and scope. The officers intended only to cover the back door to prevent the third party from fleeing

from the residence. App. at A36, A38-A40. In arriving at their location, the officers crossed no barriers, broke no locks, and opened no gates or doors. App. at A14, A43-A44. They simply walked a well-worn path, and, in the event that the third party was not present, they would have left the back yard without incident. App. at A37. Thus, under the Court's holdings in *Coolidge*, *Horton*, and *McArthur*, the officers' conduct in respondent's case was reasonable.

And, contrary to the Missouri Court of Appeals opinion in this case, *Steagald* should not be extended to prevent this kind of law enforcement activity. In requiring a search warrant in addition to an arrest warrant, in *Steagald*, the Court feared that "[a] contrary conclusion – that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant – would create a significant potential for abuse." *Steagald*, 451 U.S. at 215. "Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances." *Id.* "Moreover, an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Id.*

But the officers' actions in respondent's case do not demonstrate the type of abusive conduct *Steagald* sought to prevent. On the contrary, the officers were attempting to comply with *Steagald* by conducting a "knock and talk" and obtaining consent to search respondent's home for the subject of the arrest warrant. The officers' action in covering the

rear exit of the home was for the purpose of preventing flight, which in turn served the dual purposes of protecting both officers and society at large from the escape of a known violent felon that the officers had probable cause to believe was present. These were all legitimate law enforcement concerns, and the officers were acting within the scope of their duties in entering the backyard. Thus, because their actions were unconnected with a search for evidence of criminal activity by respondent (or anyone else), there was no Fourth Amendment violation.

C. Contrary to the Missouri Court of Appeals opinion, all of the federal circuit courts have held that warrantless entries onto curtilage for a legitimate law enforcement objective unconnected with a search are reasonable under the Fourth Amendment.

Further, by applying a *per se* rule of unreasonableness to an entry onto the curtilage of a home without first examining the purpose of the breach, the Missouri Court of Appeals has created a conflict between Missouri and all of the federal circuits.

In similar situations, where officers entered onto the curtilage of a home for a legitimate law enforcement purpose apart from conducting a search of the property, all of the federal circuits have determined that the law enforcement conduct was reasonable and, thus, did not violate the Fourth Amendment. *See Daoust*, 916 F.2d at 758 (to interview an occupant); *United States v. Reyes*, 283 F.3d 446, 465 (2nd Cir. 2002) (probation officers executing a home visit); *Estate of Smith v. Marasco*, 318 F.3d 497, 520 (3d Cir. 2003) (identifying possibly reasonable justifications as seeking to interview an occupant or

locate a third party); *Alvarez v. Montgomery County*, 147 F.3d 354, 358 (4th Cir. 1998) (investigating report of underage drinking party); *United States v. Knight*, 451 F.2d 275, 278 (5th Cir. 1971) (officers making general inquiry to substantiate informant's tip); *Hardesty*, 461 F.3d at 654 (investigating tip that minors were being served alcohol on the premises); *United States v. French*, 291 F.3d 945, 954 (7th Cir. 2002) (probation officer seeking to locate errant probationer at defendant's home); *Weston*, 443 F.3d at 667 (officers investigating reports of stolen vehicles on defendant's property); *Anderson*, 552 F.2d at 1300 (officers looking for an individual to question him about a recent theft); *Raines*, 243 F.3d at 421 (officer attempting to serve civil process on a third party); *United States v. Hammett*, 236 F.3d 1054, 1060 (9th Cir. 2001) (seeking to contact and interview occupants); *Cavely*, 318 F.3d at 994 n.1 (officers seeking to execute arrest warrant for third party); *United States v. Taylor*, 458 F.3d 1201, 1205 (11th Cir. 2006) (officers investigating suspicious 911 hang-up calls from that location); and *United States v. Johnson*, 561 F.2d 832, 850 (D.C. Cir. 1977) (investigating tip from informant of narcotic activity). But contrary to these decisions, the Missouri Court of Appeals simply applied a *per se* rule of unreasonableness, based upon *Steagald*, and upheld the trial court's exclusion of evidence.[2]

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[2] The Missouri Court of Appeals dismissed petitioner's reliance on cases like these when it purported to distinguish *Raines* by noting that the officer in that case "was merely serving civil process." App. at A13. But this alleged distinction does not compel a different legal conclusion, as serving civil process is simply another legitimate law enforcement activity unconnected with a search – like preventing flight – that justifies a warrantless entry onto an individual's curtilage.

While the Missouri Court of Appeals decision conflicts generally with several circuits, it conflicts specifically with the Eighth Circuit's holding in *Weston*, and the Tenth Circuit's holding in *Cavely*. In *Weston*, law enforcement officers went to the defendant's rurally located mobile home to investigate reports of stolen vehicles. *Weston*, 443 F.3d at 664. The defendant's property was fenced, and a gate blocked the driveway entrance near the highway; the home itself was not visible from the highway. *Id.* At the end of the driveway, there was a split-rail fence separating the driveway from the mobile home. *Id.* The mobile home was situated perpendicularly to the fence, shielding the front door and articles nearby from the view of a person at the end of the driveway. *Id.*

Upon their arrival, the officers entered the gate to the driveway, proceeded to the end of the driveway, and then walked past the split-rail fence to the home's front door. *Id.* The officers planned to conduct a "knock and talk" to question the defendant about the stolen vehicles and seek consent to search his detached garage. *Id.* at 664, 667. But on their way to the front door, the officers noticed some items believed to contain anhydrous ammonia. *Id.* at 664. This evidence, coupled with reports that the defendant's home had been involved in the manufacture of methamphetamine, led the officers to depart and seek a search warrant. *Id.* When searching pursuant to the warrant, officers discovered and seized evidence consistent with the manufacture and distribution of methamphetamine. *Id.* at 664-665.

The defendant sought to have the evidence suppressed based upon the officers' warrantless entry onto his curtilage when they entered the

driveway and proceeded to the front door of the residence, passing two fences along the way. *Id.* at 666. The government conceded that the property at issue was curtilage of the defendant's home. *Id.* at 666. Nevertheless, the trial court denied the defendant's motion, and the Eighth Circuit affirmed the denial. *Id.* at 666-667. Consistent with this Court's holding in *McArthur*, the Eighth Circuit declared that "[t]he issue, then, is whether the officers' entry was reasonable." *Id.* Finding that the intrusion was limited and reasonably necessary to further a legitimate law enforcement purpose, the Eighth Circuit held that the law enforcement action was reasonable and did not violate the defendant's Fourth Amendment rights. *Id.*

In *Cavely*, law enforcement officers, armed with an arrest warrant for a third party, went to the defendant's residence to search for the subject of the warrant. *Cavely*, 318 F.3d at 992. The officers' belief that the subject of the warrant would be at the defendant's residence was based upon their knowledge that the subject was the former girlfriend of one of the defendant's associates, that she was a methamphetamine user, and that the defendant's residence had recently been searched for methamphetamine-related items. *Id.* When they arrived at the defendant's residence, two officers went to the front of the house, while a third officer went around toward the back. *Id.* Although no one answered the front door, the officer in back observed a man standing near the open door of a detached garage who then went into the house through the back door. *Id.* at 992-993. The officer observed through the open door of the garage various items associated with the manufacture of methamphetamine. *Id.* at 993. Based upon these observations, officers obtained a search

warrant and later seized evidence of methamphetamine manufacture. *Id.*

The defendant moved to suppress the evidence, arguing that his Fourth Amendment rights had been violated because officers had no reasonable grounds to believe that the subject of the arrest warrant would be present at his home. *Id.* at 992. The trial court denied the motion, and the Tenth Circuit affirmed the denial. *Id.* at 992-994. In affirming, the Tenth Circuit first noted the Court's holding in *Steagald* and held that "[t]he same rule would apply to a search of the curtilage of the home." *Id.* at 993.[3] But the Court indicated that "the material issue is not whether the officers had reason to believe that the woman might be at appellant's house; it is whether their entry upon appellant's property and their observations thereon constituted a 'search' within the meaning of the Fourth Amendment." *Id.* Finding that the burden was upon the defendant to establish a legitimate expectation of privacy in the area entered, the Tenth Circuit determined that the defendant failed to meet this burden. *Id.* at 993-994. The court held, "Absent a showing that the officers' entry on the property violated a reasonable expectation of privacy, their actions did not amount to a 'search' under the Fourth Amendment and their observations were a proper basis for a search warrant." *Id.* at 994. The court specifically noted that "[t]he mere fact that officers went to the front and around towards the back of appellant's house,

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[3] Although the Tenth Circuit indicated that *Steagald* applied equally to invasions of the curtilage, the court still employed the *McArthur* balancing test and found no Fourth Amendment violation. As discussed above, this petition questions whether the rule in *Steagald* should be extended to the curtilage of the home.

standing alone, does not establish an invasion of the curtilage." *Id.* at 994 n.1.

Here, by affirming the trial court's suppression of evidence inadvertently discovered by the officers in the respondent's back yard, the Missouri Court of Appeals created a conflict with the federal circuit courts regarding the analysis of warrantless entries onto curtilage.

II. The exclusionary rule is not intended to prevent the common police practice of covering the exits of a building, and by applying the rule in this case, the Missouri Court of Appeals has diminished a police officer's ability to protect both officer and public safety when executing arrest warrants on dangerous individuals.

In applying the exclusionary rule in this case, the Missouri Court of Appeals has placed police officers in a precarious position that effectively prevents them, in the common factual scenario present in this case, from exercising their legitimate authority to protect themselves and the public at large from dangerous individuals.

After finding the officers violated respondent's Fourth Amendment rights, the Missouri Court of Appeals applied the exclusionary rule to uphold the trial court's suppression of evidence. App. at A16-A17. But the Missouri Court of Appeals application of the rule was contrary to the Court's decision in *Herring v. United States*, 129 S.Ct. 695 (2009).

"[S]uppression is not an automatic consequence of a Fourth Amendment violation." *Herring*, 129 S.Ct. at 698. "Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id.* "[E]xclusion has always been our last resort, not our first impulse." *Id.* at 700.

Although the Missouri Court of Appeals acknowledged petitioner's argument that the exclusionary rule was inapplicable under the facts of this case, the Missouri court wholly failed to apply any of the underlying principles of the exclusionary rule. App. at A16-A17. Rather, the opinion merely noted that "the police . . . enter[ed] onto property as to which there was a privacy interest protected by the Fourth Amendment," and it then upheld the trial court's exclusion of the evidence.[4] App. at A16-A17.

In *Herring*, the Court outlined several "important principles that constrain application of the exclusionary rule." *Herring*, 129 S.Ct. at 700-701. "First, the exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." *Id.* at 700. "In addition, the benefits of deterrence must outweigh the costs." *Id.* The Missouri Court of Appeals addressed neither the deterrent factor, nor the costs from application of the exclusionary rule as compared to any benefits from

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[4] The opinion also indicated that "the intention of the officers was a factual inference drawn by the trial court based on observing the testimony." App. at A17. The trial court had found that the officers' intent was "to prevent Mr. Beels from escaping if he was there." But in a conflicting finding, the trial court also determined that "the purpose of the officers that went to the back was to affect [sic] an arrest."

deterrence. And here, the exclusionary rule should not have been applied.

Historically, "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional." *Id.* at 702. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* The officers' actions in this case simply did not rise to that level. To the contrary, in conducting the common practice of covering the exits, the officers sought merely to protect themselves and the public.

There was no reason for the officers in respondent's case to believe that they were infringing on respondent's Fourth Amendment rights by covering the rear exit of his home. And certainly they harbored no intent to do so. Rather, their actions were meant to serve "the legitimate law enforcement interest in preventing flight," as well as "the interest in minimizing the risk of harm to the officers." *Summers*, 452 U.S. at 702. "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703. Deterring such conduct does not promote the Fourth Amendment's interests in protecting privacy from unwarranted invasion. Rather, applying the exclusionary rule in this case has the undesired effect of deterring officers from taking the necessary steps to ensure swift apprehen-

sion of violent felons and protect both officer and public safety.

The officers' conduct in this case of covering a rear exit while other officers approached the front entrance is common practice. *See e.g. United States v. Cisneros-Gutierrez*, 598 F.3d 997, 1002 (8th Cir. 2010); *United States v. McMullin*, 576 F.3d 810, 812-813 (8th Cir. 2009); *Cavely*, 318 F.3d at 992, 994; and *United States v. Acosta*, 965 F.2d 1248, 1250 (3d Cir. 1992). Thus, the question presented in this petition is likely to arise again, and, in Missouri, the Court of Appeals decision will have an immediate widespread effect upon legitimate law enforcement activities.

Under *Herring*, the exclusionary rule is inapplicable in this context because there are no benefits to its application, but the costs are great. It not only results in letting a guilty defendant go free, "something that offends basic concepts of the criminal justice system," *Herring*, 129 S.Ct. at 701, but also serves to deter police conduct that should be encouraged and promoted.

Additionally, the discovery of the methamphetamine evidence in respondent's case was the result – not of the officers' entry into his backyard – but of respondent's action of charging out of his shed. While it is certainly true that respondent would not likely have done so but for the officers' presence, it is equally true that the officers would never have discovered the methamphetamine evidence had respondent not "bolted" out the door. And "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson v. Michigan*, 547 U.S.at 592. The Court has "never held that evidence is 'fruit

of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Id.* "[T]he more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.*

Here, the discovery of the contraband was the direct result of respondent's actions. The officers testified that if they had discovered that the subject of the warrant was not present, they would have simply left the property. Their inadvertent discovery of the methamphetamine lab was not the product of the officers' exploitation of their entry onto respondent's property. "This is not a case where an overzealous law enforcement officer, without a warrant, intending to search for illegal activity ransacked every nook and cranny of [the defendant's] yard." *French*, 291 F.3d at 954. "Nor is it a case where a government agent snooped into areas that he reasonably believed to be private in hopes of uncovering evidence of a crime." *Id.* In short, "[n]othing in the officers' conduct when they entered the property can be considered a search." *Knight*, 451 F.2d at 278. Consequently, application of the exclusionary rule in this case was inappropriate.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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