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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellant,

9 v.

**NO. 28,738**

10 **JOSE LUIS ROSAS,**

11 Defendant-Appellee.

12 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

13 **Michael E. Vigil, District Judge**

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1 **MEMORANDUM OPINION**

2 **ROBLES, Judge.**

3 The State appeals an order granting Defendant’s motion to suppress evidence.  
4 The district court listened to the officers’ belt tapes and ruled that the officers failed  
5 to comply with the knock-and-announce rule. It found that there was no knocking  
6 prior to entry, that the announcement and forcible entry into Defendant’s home  
7 appeared to be simultaneous, and it suppressed the evidence. The State appeals,  
8 contending that the court’s findings are inadequately supported and, if there was  
9 partial compliance with the knock-and-announce rule, it was justified by exigent  
10 circumstances. We conclude that the belt tapes provide substantial evidence  
11 supporting the court’s findings, agree with the court’s conclusion that the entry was  
12 illegal, and affirm the order suppressing evidence.

13 I. **BACKGROUND**

14 On May 1, 2007, officers executed a search warrant at Defendant’s residence.  
15 They expected Defendant, his wife, and two small children between the ages of five  
16 and ten years old to be there. The operation plan called for teams of officers at both  
17 the front and back doors. The plan was for the back door to be breached as close to  
18 the breaching of the front door as possible.

1 We have reviewed the belt tapes of six officers. On some of the tapes, the order  
2 of “breacher up, breacher up” can be heard. One second later, police began to yell,  
3 “State Police! Search warrant!” over and over. Although it is not entirely clear, on  
4 some of the tapes, some sort of bang can be heard approximately three to four seconds  
5 after the yelling begins. The tapes consistently indicate that the door was breached  
6 almost immediately after the police began announcing, and at no point did the officers  
7 knock or wait before forcibly entering the home.

## 8 **II. DISCUSSION**

### 9 **A. Standard of Review**

10 “The standard of review for suppression rulings is whether the law was  
11 correctly applied to the facts, viewing them in a manner most favorable to the  
12 prevailing party.” *State v. Hand*, 2008-NMSC-014, ¶ 6, 143 N.M. 530, 178 P.3d 165  
13 (internal quotation marks and citation omitted). “We review the district court’s purely  
14 factual assessments to determine if [they are] supported . . . by substantial evidence.”  
15 *Id.* (internal quotation marks and citation omitted). Substantial evidence is “such  
16 relevant evidence as a reasonable mind might accept as adequate to support a  
17 conclusion.” *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661  
18 (internal quotation marks) (quoting *State v. Baca*, 1997-NMSC-059, ¶ 14, 124 N.M.  
19 333, 950 P.2d 776). After deferring to the court’s factual findings, we review the

1 constitutional question whether the search and seizure was reasonable de novo. *See*  
2 *Hand*, 2008-NMSC-014, ¶ 6.

3 **B. Knock-and-Announce Rule**

4 The knock-and-announce rule requires that officers entering a residence to  
5 execute a search or arrest warrant, knock and announce their identity and purpose, and  
6 then wait a reasonable time to determine whether consent to enter will be given. *See*  
7 *State v. Vargas*, 2008-NMSC-019, ¶ 9, 143 N.M. 692, 181 P.3d 684; *State v. Johnson*,  
8 2006-NMSC-049, ¶ 10, 140 N.M. 653, 146 P.3d 298; *State v. Attaway*, 117 N.M. 141,  
9 149-50, 870 P.2d 103, 111-12 (1994), *modified on other grounds by State v. Lopez*,  
10 2005-NMSC-018, ¶¶ 13-20, 138 N.M. 9, 116 P.3d 80. “There are no bright line rules  
11 establishing how long . . . officers must reasonably wait,” and “we consider the  
12 totality of the circumstances to determine whether the officers’ wait was reasonably  
13 long enough.” *Hand*, 2008-NMSC-014, ¶ 7 (citations omitted).

14 The district court found that “[the belt tapes] indicate that there was no knock  
15 prior to entry into the home. There is clearly an announcement of the search, but it  
16 appears to be simultaneous with entry into the home.” The State disagrees with the  
17 court’s findings, contending that the officers began announcing, and six seconds  
18 elapsed until a banging sound can be heard. The State equates this sound with the first  
19 strike of the battering ram and concludes that officers waited six seconds. It argues

1 that a six-second wait is sufficient to demonstrate compliance with the knock-and-  
2 announce rule. There is, however, no citation to a specific belt tape, and we did not  
3 hear anything on the belt tapes indicating a six-second period between announcement  
4 and forcible entry.

5 We defer to the district court's factual determinations. *See State v. Jason L.*,  
6 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (observing that the reviewing court  
7 must “defer to the district court with respect to findings of historical fact,” and all  
8 “reasonable inferences in support of the [district] court’s decision will be indulged in,  
9 and all inferences or evidence to the contrary will be disregarded.” (alteration in  
10 original) (internal quotation marks and citation omitted)). We have listened to the belt  
11 tapes and do not hear a banging sound. On a number of the belt tapes, we do hear  
12 some sort of bang, but it is not clear that the banging sound is the first strike of a  
13 battering ram. Accepting *arguendo* that this banging sound was the first strike of the  
14 battering ram, it occurs three to four seconds after the police began yelling, “State  
15 Police! Search warrant!”

16 The district court did not find that the officers announced and waited six  
17 seconds, and we are not persuaded to accept the State’s version of events. Even if we  
18 were to give the State the benefit of the doubt and were to conclude that the bang is  
19 the first strike of a battering ram, we reject the State’s argument. Given the extremely

1 short period of time between the beginning of yelling and the sound of a bang three  
2 to four seconds later, we conclude that the court’s finding that the announcement of  
3 the search “appears to be simultaneous with entry into the home” accurately reflects  
4 the historical facts and is supported by substantial evidence. The belt tapes clearly  
5 establish that the officers did not knock and wait and, instead, announced while  
6 forcibly breaching the door.

7       After deferring to the court’s factual findings, we review de novo whether the  
8 search and seizure was reasonable. *See Hand*, 2008-NMSC-014, ¶ 6. Building on its  
9 premise that the officers waited six seconds, the State contends that the officers fully  
10 complied with the knock-and-announce rule. However, we accept the findings made  
11 by the district court. Additionally, even if we were to accept the State’s six-second  
12 waiting period, we would still conclude it is insufficient. *See State v. Gonzales*, 2009-  
13 NMCA-\_\_\_, ¶¶ 18, 22, \_\_\_ N.M. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 28,411, Dec. 21, 2009)  
14 (holding that an eight-second waiting period was insufficient).

15       Considering the findings made by the court, “[t]he ultimate question . . . is  
16 whether the [officers’ course of conduct] was reasonable.” *Johnson*, 2006-NMSC-  
17 049, ¶ 10. The district court concluded that it was not, and we agree. Unless there is  
18 exigency, our cases require knocking, announcing, and waiting a reasonable period  
19 of time. These are discrete and necessary requirements. *See id.* ¶ 12 (“Absent exigent

1 circumstances, officers must knock *and* announce their purpose and identity, *then wait*  
2 *a reasonable period of time* to determine if consent to enter will be given before  
3 forcefully entering.” (emphasis added); *Hand*, 2008-NMSC-014, ¶ 11 (“We accept  
4 the reasoning that an officer’s perception of movement within the place to be  
5 searched, *after knocking and announcing*, is a significant component of the  
6 constructive refusal analysis.” (emphasis added)). In this case, two of these  
7 requirements—knocking and waiting a reasonable period of time—are missing.

8         The State argues that the court misunderstood the law, claiming that the time  
9 the officers were announcing should be included in the relevant calculation, and there  
10 was no need for a “silent pause.” We reject this argument. The appropriate  
11 measurement is the time period between knocking and announcing and when forcible  
12 entry begins. *See Johnson*, 2006-NMSC-049, ¶ 11 (relying on case law stating that  
13 the relevant time period is from announcement to when the officers hit the door with  
14 the battering ram). The time when the officers are using the battering ram does not  
15 count as waiting. *See id.* (“When the officers began hitting the door with the battering  
16 ram, they ceased ‘knocking’ and began ‘entering.’”). The court applied precisely this  
17 analysis, found no appreciable time between announcement and forcible entry, and  
18 concluded that the officers’ failure to knock and wait any time at all was unreasonable.

1           The State suggests that the small size of the house justified the officers’  
2 conduct. The State has not indicated how this argument was raised below, and we  
3 have not found it being made on the transcript of the suppression hearing or in the  
4 record. Consequently, it does not appear this argument was presented below. Even  
5 if it had been presented, we would reject it. In *Johnson*, the small nature of the hotel  
6 room justified a relatively short wait before the police forcibly entered. *Id.* ¶¶ 5, 15,  
7 17 (holding that a ten-second knock-and-announce period was sufficient in light of the  
8 fact that the hotel room was so small it could be walked through in only a few steps).  
9 Attempting to bring this case within the holding in *Johnson*, the State characterizes  
10 this house as a “relatively small single story residence.” However, this case is not like  
11 *Johnson*. The house is approximately 1640 square feet, and photographs indicate that  
12 it is a common residence. We disagree that it should be considered to be like the hotel  
13 room in *Johnson*.

#### 14 **C. Exigent Circumstances**

15           Exigent circumstances will excuse compliance with the knock-and-announce  
16 requirement. *See id.* ¶ 10. “Whether exigent circumstances exist[] . . . is a mixed  
17 question of law and fact.” *Lopez*, 2005-NMSC-018, ¶ 11. After deferring to the lower  
18 court’s factual findings, we review the determination of exigent circumstances de  
19 novo. *Id.* We apply an objective test to determine whether “a reasonable, well-

1 trained, and prudent police officer would believe that full or partial compliance with  
2 the rule of announcement would create or enhance the danger to the . . . officers.” *Id.*  
3 ¶ 12 (internal quotation marks and citation omitted). We consider the totality of the  
4 circumstances. *Id.* ¶ 16.

5       The State argues that exigent circumstances existed and, therefore, partial  
6 compliance would be sufficient. We disagree. The State’s argument that it partially  
7 complied with the rule is premised on its interpretation that there was a six-second  
8 wait. We have rejected that premise. Additionally, we reject the State’s argument that  
9 exigency existed. There is evidence that the officers had information that Defendant  
10 “possesse[d] firearms” and had “[p]ossible weapons in the residence.” The officers’  
11 testimony at the suppression hearing clarified that these references were to a  
12 “handgun,” and there is no evidence that the officers believed Defendant to have  
13 access to anything other than a handgun. At the time of the operation, the officers  
14 expected Defendant to be at home along with his wife and two young daughters.  
15 Defendant had no criminal record, and there was no evidence that he had a propensity  
16 toward violence.

17       With these facts in mind, we turn to the relevant analysis contained in *Attaway*  
18 and *Lopez*. *Attaway* found exigency where the defendant was a drug “dealer of  
19 substantial quantity,” had a significant, violent criminal history, “had threatened

1 officers” in the past, and had a “large arsenal of weapons[,] including an automatic  
2 weapon, two sawed-off shotguns, a couple of rifles, and numerous handguns.” 117  
3 N.M. at 153, 870 P.2d at 115.

4 *Lopez*, on which the State relies, modified *Attaway*, stating that *Attaway* may  
5 have overstated the requirements for exigency. *Lopez* adopted a more flexible  
6 approach under which weapons combined with drug dealing can establish exigency.  
7 However, *Lopez* found exigency where the defendant was engaged in criminality other  
8 than drug dealing, selling stolen firearms, and had weapons consisting of “fully  
9 automatic Mini-14’s and sawed-off shotguns.” 2005-NMSC-018, ¶ 25 (internal  
10 quotation marks omitted). In addition, there were two to four people at the residence  
11 with access to these weapons. *Id.*

12 We recognize that *Lopez* modified the threshold to establish exigency set by  
13 *Attaway*, but we do not interpret it to hold that general allegations of drug dealing and  
14 possession of a handgun are sufficient to establish exigency. On the contrary, we read  
15 *Lopez* as requiring specific facts showing heightened danger. Here, the State referred  
16 to “weapons,” but the officers’ testimony clarified that, based on information from the  
17 informant, they believed Defendant had a handgun. There is no showing of a large  
18 number of weapons or that they were the unusually dangerous weapons like those in  
19 *Lopez*. Unlike *Lopez*, there is no showing that Defendant was engaged in criminality

1 other than drug dealing. In *Lopez*, there were two to four people in the residence with  
2 apparent access to the automatic weapons and sawed-off shotguns. *Id.* ¶ 25. By  
3 contrast, in this case, the occupants in the residence with Defendant were known to  
4 be his wife and two young daughters.

5 Nor are we persuaded by the State’s argument that the possibility that drugs  
6 could be destroyed constitutes exigency. That concern is present in every case  
7 involving the execution of a search warrant in a drug investigation.

8 We cannot equate the State’s showing in this case with that considered  
9 sufficient to establish exigency in *Lopez*. If we were to consider general allegations  
10 of a handgun and drug dealing sufficient to establish exigency, the exigency exception  
11 would swallow the knock-and-announce rule, and we would essentially read the rule  
12 out of existence. We do not mean to denigrate the danger to the officers when  
13 executing a search warrant, but we interpret exigency to require something more than  
14 a generic reference to drugs and a handgun, circumstances that will be present in  
15 virtually every case. *Attaway*, 117 N.M. at 149, 870 P.2d at 111 (noting that the  
16 officers’ general knowledge about drug dealers “cannot constitutionally be a substitute  
17 for . . . whether circumstances exist in the *particular* case which allow an  
18 unannounced police entry.” (internal quotation marks and citation omitted)).  
19 “Exceptions to the entry requirement must be founded on particularity and not on

1 generality.” *Id.* at 152, 870 P.2d at 114 (internal quotation marks and citation  
2 omitted).

3 Finally, the State argues that exigency is supported by the fact that Defendant  
4 was a former correctional officer who had been trained in “official tactics.” We are  
5 not persuaded. It is the State’s burden to prove exigency. *See State v. Vargas*, 1996-  
6 NMCA-016, ¶6, 121 N.M. 316, 910 P.2d 950 (stating that in the knock-and-announce  
7 context, it is the state’s burden to establish exigency). The State’s reference to  
8 “official tactics” is vague and could cover a wide variety of law enforcement tactics.  
9 The only detail we are given is that Defendant was trained in hand-to-hand combat.  
10 It is not clear that this information was argued below, or whether this training is the  
11 same as the “official tactics” to which the State refers. In any event, we fail to see  
12 how hand-to-hand training, matched against a full compliment of heavily armed and  
13 trained officers entering through front and back doors, would make Defendant  
14 sufficiently dangerous to justify dispensing with the requirements of the knock-and-  
15 announce rule. The State argues that he had more knowledge in “official tactics than  
16 the average citizen,” but it has not explained what this knowledge is, or how it actually  
17 presented an increased danger. The State mentions that he was team captain of the  
18 “(inaudible) team,” but this unclear reference does not demonstrate exigency.

1           The concerns expressed by the State—the potential danger to officers, and the  
2 possibility that a suspect will try to dispose of drugs when he becomes aware that  
3 officers are at the door—are valid concerns. There are also countervailing  
4 considerations, such as “preventing needless destruction of private property,  
5 eliminating unnecessary intrusions upon privacy, and reducing the risk of violence to  
6 both police and occupants.” *Attaway*, 117 N.M. at 150, 870 P.2d at 112. The knock-  
7 and-announce rule reflects an attempt to balance competing interests, *id.* at 151, 870  
8 P.2d at 113, and “is no mere procedural nicety or formality.” *Id.* at 148, 870 P.2d  
9 at 110 (quoting *Ker v. California*, 374 U.S. 23, 49 (1963)). Our case law protects  
10 officers by requiring only a short time between announcing and forcible entry and, if  
11 sufficient danger can be demonstrated, that time may be reduced or eliminated. Still,  
12 we interpret our cases to require something more than generic concerns before non-  
13 compliance or partial compliance is excused. For the reasons we have discussed, we  
14 conclude the State has not met its burden to prove exigency.

### 15 **III. CONCLUSION**

16           We therefore conclude that the factual findings are adequately supported, and  
17 the failure to comply with the knock-and-announce rule requires suppression.  
18 Accordingly, we affirm.

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**IT IS SO ORDERED.**

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**ROBERT E. ROBLES, Judge**

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**WE CONCUR:**

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**JONATHAN B. SUTIN, Judge**

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**CELIA FOY CASTILLO, Judge**