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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. WILLIE OVIEDA, Defendant and Appellant.	Supreme Court No. 2d Crim. No. B277860 Sup. Ct. No. 1476460

PETITION FOR REVIEW

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TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Appellant respectfully petitions this Court to grant review pursuant to California Rules of Court, rule 8.500, subdivision (b)(1), following the published decision of the Court of Appeal, Second Appellate District, Division Six, filed on January 17, 2018, affirming appellant's convictions. (Cal. Rules of Court, rule 8.500, subd. (b)(1).) A copy of the opinion is attached as Exhibit A to this petition, including the dissenting opinion written by Justice Steven Z. Perren.

QUESTIONS PRESENTED

" 'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' [Citation.]" (*Kyllo v.*

United States (2001) 533 U.S. 27, 31.) "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." (*Ibid.*) In this case, the Court of Appeal answered, "yes," upholding a warrantless search of appellant's home in the absence of probable cause or emergency circumstances, relying instead on the "community caretaking exception" to the Fourth Amendment's warrant requirement.

The police officers in this case were responding to a call from appellant's sister indicating that appellant was having suicidal thoughts and had access to firearms inside his home. Upon the officers' arrival, appellant and his two friends exited the residence upon request. All who were present were cooperative. Appellant was searched and placed in handcuffs outside the home without incident. The situation was defused. It was not until after all this that the officers decided to enter appellant's home to conduct what they called a "protective sweep," which they later justified under the "community caretaking exception." At the time of entry, appellant and everyone present was outside the home. No facts indicated that anyone else was inside, or that appellant continued to pose a danger to himself. Upon searching the home, the officers found evidence of criminal activity. These facts present the following questions:

1. Is it constitutional under Fourth Amendment jurisprudence for police officers to rely on a "community caretaking exception" to the warrant requirement, which the United

States Supreme Court has only ever applied to searches of vehicles, to enter and search a home without a warrant when there is no probable cause that a crime has been committed, and no exigent circumstances unfolding that would require the immediate entry of the home?

2. If deemed constitutional, can the community caretaking exception, or its subset emergency aid exception, be properly relied upon to enter and search the home of a previously suicidal subject where all parties present have exited the home and are cooperating fully, there are no facts indicating that anyone else is inside the home or in need of aid, and where the subject of the call no longer poses a danger to himself?

3. Can the community caretaking exception, which is grounded in the assumption that it will apply only when officers are acting in a community caretaking role as opposed to investigating a crime, be properly relied upon to justify a search where facts demonstrate that the officers harbored a mixed motive and had begun to suspect criminal activity at the time they entered and searched the home?

NECESSITY FOR REVIEW

Review is necessary in this case because it involves the misapplication of an exception to the Fourth Amendment's warrant requirement that is both unclear in its legal delineation,

and constitutionally problematic under Fourth Amendment jurisprudence.

The "community caretaking exception" is set forth in the plurality opinion of this Court, *People v. Ray* (1999) 21 Cal.4th 464. The lead opinion in *Ray* provides that circumstances short of an emergency may justify the warrantless entry and search of a home where an officer reasonably perceives a need to act in the proper discharge of his or her community caretaking function, such as "where the act is prompted by the motive of preserving life or property." (*Id.* at p. 473, quotations omitted.) A version of this exception was first articulated by the United States Supreme Court in the context of searching an automobile. (See *Cady v. Dombrowski* (1973) 413 U.S. 433.) The high court has never extended this exception to searches of homes.

Because the community caretaking exception contemplates allowing warrantless entries of homes in circumstances short of an apparent emergency, its constitutionality is highly questionable. Notably, the Ninth Circuit, as well as federal and state courts in several other jurisdictions, have refused to apply this exception to warrantless searches of residences. Moreover, as demonstrated by the three concurring opinions and one dissent in *Ray*, as well as the dissenting opinion by Justice Perren in the current case, the status and delineation of this exception in California is tenuous at best.

Review is therefore necessary to reevaluate an incredibly important question under Fourth Amendment jurisprudence: Can a police officer, in the name of "community caretaking,"

enter a person's home and conduct a search without a warrant when there is neither a suspected crime occurring, nor an emergency situation unfolding? (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

In the alternative, were the Court to determine that the lead opinion in *Ray* was properly decided, the Court should still grant review to clarify that even when allegedly performing a community caretaking function, police officers are still required to provide sufficiently specific and articulable facts demonstrating that their warrantless search of a home was immediately necessary. In a case such as this one, where no such facts exist, the warrantless search of a residence cannot be justified.

The officers in this case claimed that they searched the home to ensure that no one else was inside in need of help, and to "secure" the firearms that appellant possessed. But as Justice Perren explained in his dissent, the officers "admittedly had *no* information that anyone, child or adult, was inside the house and required help. Indeed, everyone reported to be in the house was outside and completely under the officers' control, including the person they came to rescue, appellant Ovieda. The officers did not believe that appellant was a danger to himself or others." (Dissent 1, emphasis in original.) Therefore, the facts known to the officers at the time they entered the home did not support their justifications for a warrantless search, and "the officers had no objectively reasonable belief that searching the home was imperative." (*Ibid.*)

Moreover, there is evidence in this record indicating that by the time the officers entered the home, they had begun to suspect that criminal activity was afoot. *Ray* is very clear that when officers are investigating suspected criminal activity, the community caretaking exception to the warrant requirement can no longer apply, and probable cause is required. Here, the government has conceded that no probable cause existed. (Opinion 4, fn. 2.)

It is well-settled that warrantless searches of homes are *per se* unreasonable, that the unjustified physical entry of a home is the primary evil against which the Fourth Amendment protects, and that regardless of which exception to the warrant requirement might apply, officers of the law must always provide specific and articulable facts demonstrating the necessity of their decision to cross the threshold of an individual's private residence without a warrant. These legal tenets do not, and should not, change when police officers initially arrive at a person's home for reasons other than performing an investigatory function.

Review is therefore necessary to address the important legal question of the constitutionality of applying the community caretaking exception to searches of homes, and in the event such application is found to be constitutional, to fully delineate the confines of such exception to ensure that all warrantless searches of homes are properly justified by reasonably deduced, articulable facts known at the time of the search, and not left to the unparticularized hunches or unspecified whims of the officers

who choose to conduct them. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

STATEMENT OF CASE AND FACTS

For purposes of this petition only, appellant adopts the statement of factual and procedural background set forth in the appellate court's opinion. (Opinion 2-4.) Additional facts relevant to the issues presented are incorporated into the argument section where necessary.

ARGUMENT

I. REVIEW IS NECESSARY TO REASSESS THE CONSTITUTIONALITY OF APPLYING THE COMMUNITY CARETAKING EXCEPTION TO WARRANTLESS SEARCHES OF HOMES

A. The Fourth Amendment's Treatment Of Warrantless Searches Of Homes And The Community Caretaking Exception

The federal constitution's Fourth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits unreasonable searches. (U.S. Const., 4th & 14th Amends.) Our state Constitution includes a similar prohibition. (Cal. Const., art. I, § 13.) "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 748.)

For this reason, the search of a home without a warrant is *per se* unreasonable unless it falls within one of the carefully defined exceptions to the Fourth Amendment. (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 474-475.) Examples of exigent circumstances that allow for a warrantless search include

fighting a fire and investigating its cause (*Michigan v. Tyler* (1978) 436 U.S. 499, 509), preventing the imminent destruction of evidence (*Ker v. California* (1963) 374 U.S. 23, 40), or engaging in " 'hot pursuit' " of a fleeing suspect (*U.S. v. Santana* (1976) 427 U.S. 38, 42.)

The concept of a "community caretaking exception" to the Fourth Amendment's warrant requirement is set forth by a plurality opinion of this Court in *People v. Ray* (1999) 21 Cal.4th 464 ("*Ray*"). *Ray* involved the warrantless entry of a home based on a report by a neighbor that the front door had been open all day and the inside of the home was in "shambles." (*Id.* at pp. 468.) It was suspected that a burglary was in progress or had already taken place. (*Id.* at pp. 488.) In the lead opinion, three justices relied on the "community caretaking exception" to find the warrantless entry of the defendant's home to be proper.

This exception, the lead opinion explained, stems from the expanding functions of modern police officers in helping to assure the well-being of the public, in addition to performing their criminal investigatory functions. Under this exception, the lead opinion found that circumstances short of a perceived emergency may justify a warrantless entry, including the protection of property, " 'where the police reasonably believe that the premises have recently been or are being burglarized.' [Citation.]" (*Id.* at p. 473, fns. omitted.) The lead opinion went on to explain that '[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor

to be necessary for that purpose. [Citations.]'" (*Ibid.*, citing *People v. Roberts* (1956) 47 Cal.2d 374, 377.)

The lead opinion set forth the standard for this exception as follows:

> Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions? Which is not to say that every open door . . . will justify a warrantless entry to conduct further inquiry. Rather, as in other contexts, "in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or 'hunches,' but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary."

(*Id.* at p. 476-77, quoting *People v. Block* (1971) 6 Cal.3d 239, 244.)[1]

The lead opinion also addressed the "emergency aid exception," which the court found to be a subcategory of community caretaking. (*Id.* at p. 471.) Under the emergency aid exception, "police officers 'may enter a dwelling without a warrant to render emergency aid and assistance to a person

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[1] At trial, the prosecution also argued that the search of appellant's home was justified under the protective sweep doctrine. However, as the Court of Appeal noted, "[o]n appeal, the Attorney General concede[d] that the protective sweep doctrine, which is typically made in conjunction with an in-home arrest, does not apply." (Opinion 4, n. 2, citing See *Maryland v. Buie* (1990) 494 U.S. 325, 337.)

whom they reasonably believe to be in distress and in need of that assistance.' [Citation.]" (*Ray*, 21 Cal.4th at p. 470.)

Three other justices concurred in *Ray* without directly commenting on the "community caretaking" exception, holding instead that the entry was permissible under a traditional exigent circumstances analysis based on the reasonable belief that a burglary was in progress or had just been committed inside the house, and therefore there might be persons inside in need of assistance. (*Id.* at pp. 480-482.)

Justice Mosk dissented, concluding that there was no exigency, and rejecting the plurality's creation of a community caretaking exception. (*Id.* at pp. 482-488.)

Because the *Ray* decision did not garner a majority of the justices' votes, the lead opinion is not binding precedent. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 829 [" '[A]ny proposition or principle stated in an opinion is not to be taken as the opinion of the court, unless it is agreed to by at least four of the justices.' [Citations.]"]; see also *People v. Karis* (1988) 46 Cal.3d 612, 632.)

B. Review Should Be Granted To Reconsider The Propriety Of Applying The Community Caretaking Exception To Warrantless Searches Of Homes Under Fourth Amendment Jurisprudence

Because the constitutionality of applying the community caretaking exception to searches of homes is questionable, and because the various opinions of the *Ray* court demonstrate that this exception, as applied, lies on shaky ground, this Court should

grant review to reconsider the exception's application in this context.

As set forth in Justice Mosk's dissenting opinion in *Ray*, the community caretaking exception is highly problematic because it "threatens to swallow the rule that absent a showing of true necessity, the constitutionally guaranteed right to security and privacy in one's home must prevail." (*Ray, supra*, 21 Cal.4th at p. 482 (dis. opn. of Mosk, J.).) Justice Mosk also pointed out the exception's questionable "assumption that the warrantless search of a residence, under nonexigent circumstances, can be justified on the paternalistic premise that 'We're from the government and we're here to help you.'" (*Ibid.*)

Notably, the United States Supreme Court has only addressed a "community caretaking" exception in the realm of automobile searches; it has never extended this exception to searches of homes. (See *Cady v. Dombrowski* (1973) 413 U.S. 433, 441; *South Dakota v. Opperman* (1976) 428 U.S. 364 , 368; *Colorado v. Bertine* (1987) 479 U.S. 367, 381.)

Cady was the first case to use the term "community caretaking," and the facts of that case are significant in evaluating its limitations. There, an off-duty police officer became intoxicated and ran his car off the road. After arresting Cady for drunk driving, an officer searched his car for a weapon, believing that a firearm was inside. The officer discovered evidence linking Cady to a recent homicide. "The Supreme Court recognized that, by necessity, local police officers often must 'engage in what, for want of a better term, may be described as

community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.' " (*United States v. Erickson* (9th Cir. 1993) 991 F.2d 529, 531, quoting *Cady, supra,* 413 U.S. at p. 441.) The court concluded that the "search of Cady's car was incident to the caretaking function of the local police to protect 'the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle.' " (*Id.* at p. 531, quoting *Cady, supra,* 413 U.S. at p. 447.)

Importantly, the *Cady* decision expressly based its holding on the fact that the search involved a car versus a home, noting that "[t]he Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking 'search' conducted here of a vehicle that was neither in the custody nor on the premises of its owner . . . was not unreasonable solely because a warrant had not been obtained." (*Cady, supra,* 413 U.S. at pp. 447-48.)

This Court has also emphasized the particular importance of maintaining privacy of homes, noting "that man requires some sanctuary in which his freedom to escape the intrusions of society is all but absolute. Such places have been held inviolate from warrantless search except in emergencies of overriding magnitude, such as pursuit of a fleeing felon [citation] or the necessity of action for the preservation of life or property . . . ." (*People v. Dumas* (1973) 9 Cal.3d 871, 882, fn. omitted.) "Homes," this Court has held, "clearly fall within this category of maximum protection." (*Id.* at p. 882, fn. 8.)

Given this background, while there is no doubt that police officers do at times engage in community caretaking functions that might necessitate entering a person's home, it is highly questionable whether such an entry should ever be warranted absent a true emergency. In this respect, the traditional doctrines of exigency should be sufficient to provide the proper Fourth Amendment balance. Exigent circumstances are defined to include "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (*People v. Ramey* (1976) 16 Cal.3d 263, 276.) That should be the proper test for justifying a warrantless intrusion of a home.

Notably, the Ninth Circuit has rejected application of the community caretaking exception to searches of homes. (*United States v. Erickson*, *supra*, 991 F.2d at p. 531.) In *Erickson*, the Ninth Circuit concluded that absent a showing of exigent circumstances, probable cause and warrant requirements applied when a police officer pulled back a plastic sheet covering a window and looked inside the basement of the defendant's house during a burglary investigation. (*Id.* at p. 531-32.) The Ninth Circuit outright rejected the government's assertion "that such a caretaking search . . . is permissible without a warrant or probable cause as long as the officer acted reasonably under the circumstances," and held that " '[i]t is precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amendment requires be made

by a neutral and objective magistrate, not a police officer.' " (*Id.* at p. 531, 532, quoting *Mincey v. Arizona* (1978) 437 U.S. 385, 395.)

Erickson also distinguished *Cady*, noting that "[q]uite unlike the automobile search performed in *Cady*, the warrantless search of [the defendant's] home constituted a severe invasion of privacy. The fact that [the officer] may have been performing a community caretaking function at the time cannot alone justify this intrusion." (*U.S. v. Erickson*, *supra*, 991 F.2d at p. 532.)

In addition, and for similar reasons, several federal and state courts in other jurisdictions have refused to extend the application of this exception beyond searches of automobiles. (See e.g. *Ray v. Township of Warren* (3d Cir. 2010) 626 F.3d 170, 177 [holding that "[t]he community caretaking doctrine cannot be used to justify warrantless searches of a home"]; *United States v. Bute* (10th Cir. 1994) 43 F.3d 531, 535 [refusing to extend the exception to warrantless search of commercial building because "the community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches"]; *United States v. Pichany* (7th Cir. 1982) 687 F.2d 204, 208-09 [rejecting argument that the community caretaking exception justified warrantless search of unlocked warehouse and finding *Cady* only applies to searches of vehicles]; *State v. Wilson* (Ariz. 2015) 350 P.3d 800, 805 ["the exigent circumstances and emergency aid exceptions appropriately allow warrantless entry by law enforcement officers, whether or not they are engaged in community caretaking functions . . . . Extending the community

caretaker exception to homes would substantially reduce the protection of privacy afforded by the warrant requirement without significantly increasing the ability of law enforcement to make searches to protect the public."]; *State v. Vargas* (N.J. 2013) 63 A.3d 175, 189, fn. 10 [rejecting the community caretaking exception and agreeing with the dissent's conclusion in *Ray* that the lead opinion " 'obscured the firm line at the entrance to the house that the Fourth Amendment has drawn' "]; *State v. Gill* (N.D. 2008) 755 N.W.2d 454, 459-60 [declining to extend the community caretaking exception to police entry into homes]; *State v. Christenson* (Or. App. 2002) 45 P.3d 511, 514 [same].)

Based on the foregoing, it is clear that applying the community caretaking exception to searches of homes is problematic when viewed in the greater context of applicable Fourth Amendment principles. Given this background, the tenuous nature of the *Ray* decision, and the serious invasion of privacy that the application of this exception to homes represents, the Court should grant review to fully reconsider the constitutionality of such application under Fourth Amendment jurisprudence. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

II. REVIEW IS NECESSARY TO CLARIFY THAT A WARRANTLESS SEARCH CANNOT BE JUSTIFIED UNDER THE COMMUNITY CARETAKING EXCEPTION WHERE THERE ARE NO SPECIFIC AND ARTICULABLE FACTS DEMONSTRATING THAT AN OFFICER'S PHYSICAL ENTRY IS OBJECTIVELY NECESSARY FOR PRESERVING LIFE OR PROPERTY

In the event the Court decides that the "community caretaking exception" properly applies to searches of homes, the

Court should still grant review to clarify the constitutional limitations of such exception, and to make clear that where there are no specific and articulable facts demonstrating the necessity of a search, this exception cannot apply.

As noted above, this exception exists because " '[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and *reasonably* appears to the actor to be *necessary* for that purpose. [Citations.]' " (*Id.* at 473, citing *People v. Roberts*, *supra*, 47 Cal.2d at p. 377, emphasis added.) In order to justify a warrantless search pursuant to this exception, an officer " 'must be able to point to specific and articulable facts from which he concluded that his action was necessary.' " (*Id.* at p. 476-77, quoting *People v. Block*, *supra*, 6 Cal.3d at p. 244.)

A. The Officers' Asserted Justifications For Their Search Were Not Supported By Any Specific And Articulable Facts In The Record, Thereby Rendering Their Search Both Unreasonable And Unnecessary

Here, none of the facts known to the officers indicated that an immediate search of appellant's home without a warrant was required for the preservation of life or property. The officers were called to appellant's home because he had made suicidal remarks and had access to firearms. By the time the officers arrived, the firearms had been removed from appellant's vicinity. (RT 9-10, 16, 36-37, 46.) Appellant and his friends exited the home and were completely cooperative. Appellant consented to a search of his person and was handcuffed without incident. (RT 10-11, 38-

39.) Appellant informed the officers about the recent death of his friend; i.e., the cause of his behavior. (RT 42.) His suicidal ideations had nothing to do with anyone present, or anyone else who might be in trouble. Appellant's friends remained there and were clearly willing and able to assist him. All who were present told the officers that no one else was in the home, and nothing indicated anything to the contrary. (RT 22-23, 28, 42-43.)

So what were the specific and articulable facts that would render the officers' warrantless entry and search of appellant's home both reasonable and necessary? According to the officers, they entered the house to perform a "protective sweep," to be sure that no one else was present who needed help. (RT 11-12.) The officers did not, however, point to any facts in the record on which to base this justification. This is because, at the time of entry there was not one fact in the record indicating that anyone else was inside the home, much less anyone who needed aid. To the contrary, all the facts of which the officers were aware indicated that all people present were outside the house being fully cooperative, and that they were all in good health. (RT 9-10, 16, 22, 36-37, 42-43, 46.) Indeed, the officers expressly admitted that they "didn't have any specific information that led [them] to believe somebody else was inside." (RT 42-43; see also RT 28.)

Therefore, the assertion that the officers had to physically enter and search the home in order to provide assistance to persons in need was not based on facts the officers reasonably deduced, but instead was based on nothing more than "unparticularized suspicions or 'hunches,' " which undoubtedly

cannot form the basis for any kind of warrantless search. (*Ray*, *supra*, 21 Cal.4th at p. 477.) As Justice Perren pointed out in his dissent, "Officer Corbett's testimony that 'there *could be* a child' or 'there *could be* somebody injured' was pure speculation." (Dissent 8, emphasis added.)

The alternative justification the officers provided is that they were concerned about securing the firearms in the home and were not sure whether all the guns had been accounted for. This assertion also fails to justify their entry and search on multiple levels.

First, while appellant's presence in his home with firearms earlier in the day may have posed a danger to his safety justifying an officer's entry, the facts had changed greatly by the time the officers conducted their search. At the time of entry, the guns had long since been removed from appellant's presence, and appellant was *outside his house*, speaking to the officers calmly and cooperatively. Indeed, appellant had been searched, found to be unarmed, and placed in handcuffs. Nothing in the record thereafter indicates that he was acting erratically or was still in distress. This was therefore not a case where a person was in the process of attempting or threatening suicide while inside his home and an officer's entry was necessary to intervene and save that person's life. Rather, the threat that appellant previously posed to himself was over, and certainly no longer taking place *inside* his home. Therefore, the officers' alleged need to enter the home to account for the firearms is illogical and unsupported.

Indeed, it is highly noteworthy that even when the officers first arrived at the home, they did not barge into the house to run to appellant's rescue. This demonstrates that even at the outset they did not think appellant was in grave danger warranting immediate assistance.

Second, it is unclear what the officers even meant when they stated their intention was to "secure" appellant's firearms. It is legal to own firearms in this country, and there was no alleged basis on which the officers could have confiscated the weapons appellant possessed. (See *District of Columbia v. Heller* (2008) 554 U.S. 570, 635.) Indeed, the trial court stated at the suppression hearing that it "did not locate anything that was helpful regarding the right of officers and [sic] under the circumstances such as this to secure weapons." (RT 49.)[2]

This alleged justification thereby raises the question, how does an officer enter a home, "secure" the occupant's legally-owned firearms, and then leave the home with the assurance that the occupant will not access them again? It is simply not possible, and if the officers never intended to take the weapons but only to "secure" them, it becomes evident that they also must have intended to wait with appellant until they felt he was no longer experiencing suicidal thoughts – which, of course, they could have easily done from *outside* the home.

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[2] Notably, the officers had no reason to believe that appellant's guns were not legally owned, and certainly no probable cause that would have permitted a warrantless search on those grounds.

In sum, when taken through to its logical conclusion, the assertion that it was imperative for the officers to enter and search appellant's home without a warrant to "secure weapons" is irrational, and any assistance that required waiting to ensure that appellant was no longer suicidal could have easily been rendered without entering the house. As such, this justification cannot reasonably support the warrantless entry that occurred. (*Ray, supra*, 21 Cal.4th at pp. 476-77.)

The Court of Appeal's majority opinion states that "[t]here was an on-going safety concern because appellant lied about the firearms and his suicidal ideation." (Opinion 6.) The record does not support this inference. While appellant initially denied having suicidal thoughts, he subsequently admitted to them and explained why he was having them. He also allowed the officers to search and handcuff him without objection. The record demonstrates only that he was cooperating fully, and no longer posed a threat when the officers chose to enter the house. Therefore, the "on-going" safety concern the Court of Appeal infers is not supported by the record, and cannot justify the search.

Moreover, even to the extent the officers had believed appellant continued to pose an immediate risk to himself (which, notably, they did not articulate), there are legal mechanisms for addressing such dangers, none of which were resorted to here. Pursuant to section 5150, "[w]hen a person, as a result of a mental health disorder, is a danger to others, or to himself or herself . . ., a peace officer . . . may, upon probable cause, take . . .

the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention . . . ." In addition, a detention to evaluate a person's mental condition permits the issuance of a search warrant to seize firearms. (Pen. Code, § 1524, subd. (a)(10).) Therefore, if the officers had cause to believe that appellant posed a danger to himself, they could have taken him into custody under section 5150; but the officers did not invoke this justification, nor did they take this measure.

In its majority opinion, the Court of Appeal stated that "[t]he only reason that appellant was not taken to a mental health facility was because, thereafter, probable cause developed for his arrest." (Opinion 11.) This assertion is entirely speculative, and its circular reasoning unsound. Nowhere in the record did the officers state that they intended to take appellant to a mental health facility, nor did the District Attorney or Attorney General argue that such a detention was warranted. As such, the majority's inference is pure conjecture, and not supported by the record or the government's position in this case.

Indeed, the only reasonable inference to be drawn from the failure of the officers to even mention section 5150 is that they did not have probable cause to detain appellant, because appellant no longer posed a danger to himself at the time they entered his home. This demonstrates further that the officers' justification for the search on the basis of securing weapons was

unreasonable. If appellant no longer posed a danger to himself, then there was no reason to "secure" the weapons he possessed.[3]

In sum, given the officers' lack of ability to "secure" firearms, the lack of evidence that appellant continued to pose a risk to himself, and the necessary deduction that even if the officers could secure the weapons they would still have to wait there until they felt appellant had recovered, it becomes clear that the assistance the officers were rendering *outside* appellant's home was entirely sufficient. How, then, was the officers' search *reasonably* determined "to be *necessary* for [the] purpose" "of preserving life or property?" (*Ray, supra*, 21 Cal.4th at pp. 473, emphasis added.) The answer is, it was not.

B. The Court Of Appeal's Majority Opinion Relies On Highly Distinguishable Cases And Unsupported Inferences

The cases on which the majority opinion of the Court of Appeal relied to justify the search under the community

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[3] Notably, when the trial court questioned the officers' power to secure weapons, the prosecutor argued that "it's still defined within the protective sweep that they remove weapons from anybody else who might be in there . . ." (RT 49-50.) As the Attorney General conceded on appeal, however, the protective sweep doctrine does not apply here. In addition, while the trial court found the officers were credible in their desire to remove firearms, the court did not address its own previous concern that the officers had *no authority* to do so. (RT 53, 49.) And just because the officers' desires were credible does not mean that their actions were reasonable. (See *People v. Morton* (2003) 114 Cal.App.4th 1039, 1048 ["[e]ven assuming the detective's testimony was credible, the evidence supporting the application of the community caretaking exception was neither reasonable nor of solid value."].)

caretaking exception are highly distinguishable. In each case cited, the officers articulated facts clearly indicating that someone *inside* the home was in immediate need of assistance, while here there were no such facts, and no such articulation. (See e.g. *People v. Roberts*, *supra*, 47 Cal.2d at p. 380 [finding warrantless entry justified where officers were led to the home of someone known to be "sickly" and who did not work often, and then heard several moans or groans from inside the home, indicating that someone inside was in distress]; *People v. Payne* (1977) 65 Cal.App.3d 679, 682-84 [relying on "emergency doctrine" to find warrantless entry proper where police were informed by a reliable source that resident was molesting children in a garage bedroom and then officers saw a young boy enter the suspect's garage].)

Notably, this case is also entirely distinguishable from *Ray* itself. In *Ray,* the officers responded to a home where the door had been open all day and it was "all a shambles inside." (*Ray, supra*, 21 Cal.4th at p. 348.) Suspecting a robbery, the officers approached the door and saw that the home had been ransacked. They knocked but got no response, and so they entered. (*Ibid.*) *Ray* therefore involved facts indicating that a crime had occurred or was occurring *inside the home* based on the officers' direct observations. Here, on the other hand, there were no facts indicating that anything was occurring inside the house at the time of entry.

The Court of Appeal majority opinion also states, in a rather conclusory fashion, that "[s]urely a police officer may enter

a residence to protect a suicidal person and secure the premises if firearms are believed to be present." (Opinion 7.) This statement is problematic under Fourth Amendment law because it presupposes that *entering* the home is *necessary* to protect the suicidal person, which was not the case here.

Moreover, as support for this conclusory statement, the court cites another distinguishable case, *Brigham City v. Utah* (2006) 547 U.S. 398 ("*Brigham City*"). *Brigham City* held that "police may enter a home without a warrant when they have an objectively reasonable basis for believing that *an occupant* is *seriously injured or imminently threatened with such injury*." (*Id.* at p. 400, emphasis added.) This is vastly different from the current case, which did not concern an *occupant*, or any information on which a reasonable conclusion could be based that anyone was inside appellant's home, much less anyone who was seriously injured. Moreover, in *Brigham City* the court found the entry reasonable because the officers there directly witnessed "*ongoing* violence occurring *within* the home." (*Id.* at p. 405, emphasis in original.) This stands in stark contrast to the facts of this case.

To be clear, appellant is not asserting that a call regarding a suicidal person can never necessitate the warrantless emergency entrance of a home. But the key to such cases is that the circumstances indicate a *present* danger, the situation is unfolding *inside* the house, and there is no time to secure a warrant.

For example, in *Sutterfield v. City of Milwaukee* (7th Cir. 2014) 751 F.3d 542, police entered a home to detain a woman for a mental evaluation after she said to her psychiatrist, " 'I guess I'll go home and blow my brains out.' " (*Id.* at p. 545.) At the time of entry, the officers knew the woman was in her home, and reasonably believed she was currently suicidal. The court concluded that they had to act expeditiously to intercede in what objectively appeared to be an *unfolding crisis*, *inside* the home. (*Id.* at p. 566.)

Similarly, in *Fitzgerald v. Santoro* (7th Cir. 2013) 707 F.3d 725, 728-729, the officers had been informed that a woman had called the police station from her home, that she sounded intoxicated, and that she had threatened suicide. (*Id.* at p. 732.) The officers' forced warrantless entry of the home was deemed justified based on exigent circumstances, as the officers reasonably believed that the occupant was in need of immediate assistance. (*Id.* at pp. 731-732.)

The above-cited cases are clearly distinguishable from appellant's. Appellant was not inside his home and no threat of suicide was imminent when the officers entered to search. Simply put, no rational person could conclude that an immediate, warrantless entry was necessary to save appellant's life.

The Court of Appeal majority also states that appellant's argument "is premised upon the theory that a suicidal person has the Second Amendment right to possess and bear firearms and that officers responding to a 911 call that someone is threatening suicide must leave when the person comes outside and says there

is no problem." (Opinion 6.) Appellant is not aware of any case holding that a previously suicidal person forgoes his right to bear arms, and the Court of Appeal does not cite to any. But regardless, appellant has never asserted that an officer must immediately leave the premises once a suicidal subject says there is no issue, and indeed, that is not the question presented in this case. The question here is whether, under the Fourth Amendment, an officer has the right to *enter and search* the home of a reportedly suicidal subject, and appellant asserts that where, as here, the subject has exited his home and no longer poses a danger to himself, there is no justification for an entry or search.

In addition, the lower courts' finding that the officers might have been subject to criticism had they failed to conduct a search and then something bad occurred is not based on Fourth Amendment jurisprudence. A warrantless search must be well-grounded in the limited exceptions that exist, and clearly justified by the facts known *at the time of entry*. While *Ray* employs a reasonableness standard, it does so in the context of requiring specific, articulable facts justifying the officers' actions. (*Ray*, *supra*, 21 Cal.4th at pp. 476-77.) A fear of hindsight based on nothing more than a hypothetical and speculative future situation, as opposed to specific and articulable facts known at the time, cannot justify police intrusion into a person's home.

The Court of Appeal majority also states that "the premise of the exclusionary rule is that it applies only if the police are enforcing the criminal law, i.e., they are entering a residence to

search for evidence of crime." (Opinion 10.) To insinuate that the exclusionary rule should not apply here because when first called to the house the officers were acting in a community caretaking role would imply that officers could walk up to any home and search it, and so long as their initial intention was simply to make sure everything is ok, then whatever they happen to find becomes admissible evidence against the resident. Clearly this is not what the Fourth Amendment contemplates. What conceivably protects the public from this absurd result is the necessity that a search based on the community caretaking exception still be grounded in specific and articulable facts on which a reasonable person would find the search necessary, and when such facts are lacking, then evidence seized must be excluded. Otherwise there is nothing to deter officers from the hypothetical conduct posited above.

Lastly, the majority opinion also makes the broad conclusion that "when it comes to choosing between the Fourth Amendment protection against warrantless searches and the preservation of life, the preservation of life controls." (Opinion 8.) Appellant does not disagree with this sentiment, but it simply does not apply here. When all inhabitants are outside the home posing no danger, and nothing indicates that anyone else is present, the "preservation of life" cannot be used to justify an entry and search, and therefore it cannot be "chosen" over Fourth Amendment protections.

In sum, review is necessary because the community caretaking exception was misapplied in this case, and it is

imperative that the Court clarify what this exception entails. This is an especially important question of law because it concerns police entry of the home – the cornerstone of the Fourth Amendment – in situations that might not amount to an emergency. Given this departure from the traditional exigent circumstance exceptions, it is all the more vital that the standard be clear and strictly adhered to. The officers in this case failed to provide sufficient specific and articulable facts indicating that their entry and search was reasonably necessary for the purpose of preserving life or property, and review is therefore necessary to make clear that even when supposedly acting in a non-investigatory role, an officer's duty to properly justify his actions remains. (*Ray, supra*, 21 Cal.4th at p. 473.)

C. Review Should Be Granted To Clarify That A Warrantless Search Cannot Be Justified Under The Emergency Aid Doctrine Where There Are No Specific And Articulable Facts Demonstrating That Anyone Is Inside The Home Or In Need Of Assistance

To the extent the Court determines that the "emergency aid exception" to the warrant requirement, an apparent subset of the community caretaking exception, is implicated in this case, the Court should still grant review to clarify the constitutional boundaries of that exception, and to make clear that the facts of this case sit outside them.

As noted above, the "emergency aid" component of the community caretaking exception provides that "police officers 'may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in

distress and in need of that assistance.' [Citation.]" (*Ray*, 21 Cal.4th at p. 470.) Simply put, this record contains *no* facts indicating that the officers' entry of appellant's home was necessary to "render emergency aid" to anyone. (*Ibid.*) As discussed in detail above, at the time of entry there was not one fact in the record indicating that anyone else was present inside the home, much less anyone who was in need of emergency help. Because mere hunches are insufficient to justify a warrantless search, this justification fails on its face. (*Ray*, *supra*, 21 Cal.4th at p. 477.)

Indeed, the only potential distress the facts of this case suggested stemmed from the danger appellant initially posed to himself. However, at the time of the search, appellant was not only safely outside the home and cooperating, he had also been searched and placed in handcuffs without issue. (RT 38-39.) In other words, nothing in the record indicated that the officers' *entry* of the home was necessary to provide "assistance to a person whom they reasonably believe[d] to be in distress." (*Ray, supra*, 21 Cal.4th at pp. 472-473.) Moreover, as noted above, the officers did not even force their way into the home when they first arrived, indicating that at no time did they think appellant's situation was so severe that he needed assistance on an "emergency" basis.

The distinguishing nature of cases that have approved reliance on this exception demonstrate further that it does not apply here. (See e.g. *Tamborino v. Superior Court* (1986) 41 Cal.3d 919, 921-922, 924-925 [report that a person is injured and

bleeding, coupled with blood stains outside the home and a neighbor's confirmation that an injured person is within, justified police entry to provide emergency aid to the injured person]; *People v. Troyer* (2011) 51 Cal.4th 599, 607-609 [where police responded to a report of shots fired and found badly injured people on the porch of a home and blood on the front door, emergency entry of the home to look for additional victims or a suspect was objectively reasonable].)

In sum, because this record did not contain *any* specific facts indicating that emergency aid was required by someone inside appellant's home, the emergency aid exception cannot justify the officers' warrantless entry and search. (*Ray, supra*, 21 Cal.4th at pp. 472-473.)

III. REVIEW IS NECESSARY TO CLARIFY THAT WHEN OFFICERS ARE INVESTIGATING SUSPECTED CRIMINAL ACTIVITY, EVEN IN PART, THEY CANNOT RELY ON THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT

Review is also necessary to clarify that where officers conducting a search for community caretaking purposes are also acting in an investigatory role, reliance on the community caretaking exception is precluded. Here, the record demonstrated that the officers' motive was mixed, and yet the lower courts failed to recognize and apply this important limitation to the exception.

Pursuant to *Ray*, " 'the defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of the police.' " [Citation.]"

(*Ray*, *supra*, 21 Cal.4th at p. 471.) The court explained that when evaluating the use of this exception, "the trial courts play a vital gatekeeper role, judging not only the credibility of the officers' testimony but of their motivations," and the court emphasized that "[a]ny intention of engaging in crime-solving activities will defeat the community caretaking exception even in cases of mixed motives." (*Ray*, *supra*, 21 Cal.4th at p. 477.)

Notably, the Attorney General conceded in this case that a warrant based on probable cause could not issue. (Opinion 4, fn. 2.) Yet, the presence of a dual motive on behalf of the officers is demonstrated by several aspects of the record. First, one of the officers testified that they performed the search "to make sure no one else was inside or hurt *or involved in any illegal possession or use of weapons or firearms*." (RT 43.) This testimony alone demonstrates that the officers were motivated at least in part by a criminal investigatory purpose.

Moreover, the officers made consistent references to the possibility of domestic violence and their need to see if anyone had "been injured by the suicidal subject." (RT 12.) It is contradictory that the officers deemed their entry necessary because of these unsupported fears, while simultaneously claiming that they believed nothing criminal was occurring.[4] (*Ray*, *supra*, 21 Cal.4th at p. 471 ["Upon entering a dwelling,

[4] Notably, there is absolutely nothing in the record, and the officers did not point to any facts, indicating that any form of domestic violence was taking place. The officers' statements in this regard were entirely speculative.

officers view the occupant as a potential victim, not as a potential suspect."].)

It is also notable that the officers conducted their search with their guns drawn. (RT 12-23.) Such conduct seems incongruous with the assertion that the officers were only there to help, and did not suspect any criminal activity.

The presence of a dual motive is further bolstered by the officers' own description of their actions as a "protective sweep." (RT 12, see also RT 39-40.) Protective sweeps are conducted only in conjunction with in-home arrests. (*Maryland v. Buie*, *supra*, 494 U.S. at p. 337.) Thus, the officers' own classification of their actions indicated they were performing an investigatory function.

Lastly, the officers also referenced their suspicion that appellant's friend was not being truthful when he stated that no one else was in the house. This, too, indicates that the officers believed something criminal was afoot. If the subjects were being treated as innocent parties, there would be no reason to suspect they were lying. Yet, the officers did not take them at their word, which demonstrates that they believed wrongdoing was occurring.

The foregoing facts demonstrate that the officers were not solely playing a community caretaking role, but were also investigating whether something criminal was taking place. And when that is the case, the community caretaking exception does not apply. (*Ray, supra*, 21 Cal.4th at p. 477.) As such, the court's implied finding that there was no dual motive, as required by *Ray*, is not supported by the record. (*Ibid.*)

The Court of Appeal's majority opinion states that "no one claims the 911 call was a ruse or subterfuge to gain entry and search for evidence of a crime." (Opinion 5.) But the motivations of the 911 call are irrelevant. It is the officers' motivations that matter, and even if their initial purpose was merely to provide assistance, that does not mean their motivations prior to the search did not change. After their initial arrival, the officers' own words and actions indicated that they began to suspect criminal conduct, and when that is the case, they cannot rely on the community caretaking exception, and instead need probable cause, which the government concedes did not exist here.

In sum, when looking at the facts of this case and properly considering applicable Fourth Amendment standards, it is clear that no exception to the warrant requirement applies. The justifications asserted under the community caretaking exception were unreasonable and not supported by the record, and the officers failed to point to any specific or articulable facts that could have rendered the physical entry of appellant's home necessary. In addition, the evidence demonstrates that the officers had a mixed motive when they searched appellant's home, which should preclude application of the community caretaking exception in any event. (*Id.* at pp. 476-77.)

Review is therefore necessary to properly delineate the Fourth Amendment standards that apply when officers assert that they are acting in a community caretaking function, or providing emergency aid assistance. Because this case involves an important issue of Fourth Amendment law that is grounded in

a plurality opinion of this Court and is not clearly defined, review should be granted. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

CONCLUSION

For the reasons set forth above, appellant respectfully asks this court to grant review in his case.

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, appellant's Petition for Review contains 8,341 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed February 24, 2018, at Tulsa, Oklahoma.

_____

Elizabeth K. Horowitz
State Bar No. 298326

PROOF OF SERVICE

Law Office of Elizabeth K. Horowitz
5272 S. Lewis Ave, Suite 256
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Court of Appeal Case No: B277860

I, the undersigned, declare: I am over 18 years of age, employed in the County of Tulsa, Oklahoma, and not a party to the subject cause. My business address is 5272 S. Lewis Ave, Suite 256, Tulsa, OK 74105. I served the within appellant's Petition for Review by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Joyce E. Dudley, District Attorney
1112 Santa Barbara Street
Santa Barbara, CA. 93101

Clerk, Santa Barbara County
Superior Court
1100 Anacapa Street
P.O. Box 21107
Santa Barbara, CA 93121-1107

Mindi Lynn Boulet
Office of the Public Defender
1100 Anacapa St
Santa Barbara, CA 93101

Mr. Willie M. Ovieda
1231 Garden Street
Santa Barbara, CA 93101

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Tulsa, Oklahoma on February 24, 2018. I also served a copy of this petition electronically on the California Attorney General at the following email address: docketingLAawt@doj.ca.gov. Pursuant to an understanding with the Clerk of the Court of the Second Appellate District, appellant served the Court of Appeal by filing this petition with the Supreme Court through TrueFiling.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 24, 2018, at Tulsa, Oklahoma.

_____

Elizabeth K. Horowitz

EXHIBIT A

Filed 1/17/2018

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE OVIEDA,

Defendant and Appellant.

2d Crim. No. B277860
(Super. Ct. No. 1476460)
(Santa Barbara County)

Over 50 years ago, wise and prescient Chief Justice Phil Gibson planted the judicial seed for what we now call the "community caretaking" exception to the Fourth Amendment. We apply it here. (*People v. Roberts* (1956) 47 Cal.2d 374, 379-380 (*Roberts*); see also *People v. Ray* (1999) 21 Cal.4th 464, 471 (*Ray*).)

Willie Ovieda appeals his conviction by plea to manufacturing concentrated cannabis (Health & Saf. Code, § 11379.6, subd. (a)) and possession of an assault weapon (Pen. Code, § 30605, subd. (a)), entered after the trial court denied his motion to suppress evidence (Pen. Code, § 1538.5). Pursuant to a negotiated plea, probation was granted with 180 days county jail and outpatient mental health treatment.

Appellant contends his Fourth Amendment rights were violated when officers, in responding to a 911 call that he was about to shoot himself, made a "cursory search" of appellant's

residence to make sure no one was hurt and no firearms were lying about.[1] The trial court factually found that the search was a reasonable exercise of the officers' community caretaking duty. We affirm because there is no reason to apply to the exclusionary rule. As we shall explain, the instant entry and "cursory search" had nothing to do with the gathering of evidence to support a criminal prosecution. This is, of course, the lynchpin for application of the exclusionary rule. When a person unsuccessfully attempts suicide in his residence with a firearm, and thereafter comes outside, the police may enter the residence to perform a "cursory search" pursuant to their "community caretaking" duty.

Facts and Procedural History

On the evening of June 17, 2015, appellant's sister told a 911 operator that appellant was threatening to kill himself and had attempted suicide before. Santa Barbara Police Officer Mark Corbett responded to the 911 call. A second officer telephoned Trevor Case inside the house. Case was appellant's friend. Case went outside and reported that appellant had threatened to commit suicide and tried to grab several firearms in his bedroom. Case and his wife had to physically restrain appellant to keep him from using a handgun and a rifle to kill himself. Case's wife pinned appellant down as Case searched the bedroom for other firearms. Case moved a handgun, two rifles, and ammunition to the garage but did not know whether appellant had additional firearms or weapons in the house.

Appellant agreed to come outside, was detained, and falsely denied having made suicidal comments or that he had any

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[1] This phrase, "cursory search," is coined by Chief Justice Gibson. (See *infra*, p. 8.)

firearms. Appellant said he was depressed because a friend committed suicide the week before. Officer Corbett described the situation as "emotional and dynamic." He believed a cursory search was necessary because it was unknown how many more weapons were in the house, whether the weapons were secure, and whether anyone inside the house needed help. It was a concern because the person who made the 911 call, appellant's sister, was not at the scene and the officers did not know anything for sure. Officer Corbett believed he was "duty bound" to make a safety sweep to make sure no one inside was injured or needed medical attention. A second officer, Officer Daniel Garcia, agreed a safety sweep was necessary to confirm that; 1. there were no other people in the house; 2. nobody else was hurt; and 3. there were no dangerous weapons or firearms left out in the open.

Officer Corbett and a second officer made a cursory sweep of the house and saw, in plain view, a rifle case, ammunition, magazines, and equipment to cultivate and produce concentrated cannabis.

There was a large, industrial drying oven with tubes, wires, and ventilation ducts that led to the garage, as well as marijuana and concentrated cannabis in plain view. Based on 15 years in narcotics-related investigations, Officer Corbett believed the marijuana lab posed an immediate danger because manufacturing concentrated cannabis is "a volatile process that involves heat and when mistakes are made explosions and fires can occur."

Inside the garage, officers saw three rifles and a revolver in a tub. Two rifles were automatic or semi-automatic assault rifles that Officer Corbett believed were illegal. The officers also found four high capacity magazines for an assault

style weapon, a firearm silencer, a long range rifle with a scope, more than 100 rounds of ammunition, equipment for a hash oil laboratory, butane canisters, miscellaneous lighters and burners, a marijuana grow, and a bucket filled with marijuana shake. The firearms included a .50 caliber rifle, an Uzi sub-machine gun, a .357 caliber revolver, a pistol-grip 12 gauge shotgun, and a .223 caliber sub-machine gun.

Appellant brought a motion to suppress evidence. The prosecution argued that the entry into appellant's residence was justified under the community caretaking exception and the protective sweep doctrine.[2] The trial court ruled that the community caretaking exception is "what guides the Court's decision" and denied the motion to suppress evidence. The trial court found the officers' testimony credible as to "what they were concerned about and what they didn't know. And so I [find] it credible that they wanted to remove firearms, they didn't know if there were others in the residence, either victims or other people who might cause a harm." It expressly found that the officers were "not required to accept Mr. Case's word that he removed the firearm that Mr. Ovieda had reached for. . . . And I believe under these circumstances that the officers would be subject to criticism, in fact, if anything had occurred that they would be judged neglectful in not entering the residence and doing what was described as quick search, . . . looking in closets, looking for other people, and looking for other weapons."

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[2] On appeal, the Attorney General concedes that the protective sweep doctrine, which is typically made in conjunction with an in-home arrest, does not apply. (See *Maryland v. Buie* (1990) 494 U.S. 325, 337.) The Attorney General also conceded at oral argument that under the circumstances here, a search warrant could not issue.

Community Caretaking Exception

Appellant argues that the entry into his residence violated the Fourth Amendment. On review, we defer to the trial court's express and implied factual findings which are supported by substantial evidence and determine whether, on the facts so found, the search was reasonable under the Fourth Amendment. (E.g., *People v. Glaser* (1995) 11 Cal.4th 354, 362.) The trial court's express factual findings are fatal to this appeal.

In *Ray*, *supra*, 21 Cal.4th 464, our Supreme Court stated that the community caretaking exception to the Fourth Amendment permits police to make a warrantless search of a home if the search is unrelated to the criminal investigation duties of the police. (*Id.* at p. 471.) "Upon entering a dwelling, officers view the occupant as a potential victim, not as a potential suspect." (*Ibid.*) "Under the community caretaking exception, circumstances short of a perceived emergency may justify a warrantless entry" to preserve life or protect property. (*Id.* at p. 473.) Officers are expected to "'"aid individuals who are in danger of physical harm," "assist those who cannot care for themselves," "resolve conflict," . . . and "provide other services on an emergency basis." . . .' [Citation.]" (*Id.* at p. 471.)

Such is the case here. Officer Corbett responded to the 911 call to help a suicidal person. The cursory search had nothing to do with a criminal investigation and no one claims the 911 call was a ruse or subterfuge to gain entry and search for evidence of a crime. "'[C]ommunity caretaking' . . . , [is] 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.' [Citation.]" (*Colorado v. Bertine* (1987) 479 U.S. 367, 381.)

Appellant argues that *Ray* has no binding precedential value because it is only a plurality opinion. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 632.) He contends the officers were required to leave when appellant denied that he was suicidal. The argument is premised upon the theory that a suicidal person has the Second Amendment right to possess and bear firearms and that officers responding to a 911 call that someone is threatening suicide must leave when the person comes outside and says there is no problem. We assess the reasonableness of the officer's actions at the time they undertook them.

Officer Corbett responded to a 911 call from a concerned family member that appellant was about to take his life and had attempted suicide before. Appellant's friend, Trevor Case, confirmed that appellant tried to reach for a firearm and shoot himself. Case feared that appellant would try to hurt himself and that there were other weapons or firearms in the house. There was an on-going safety concern because appellant lied about the firearms and his suicidal ideation. Appellant was detained and handcuffed. By his actions, appellant put himself at risk, his friends at risk, and the responding officers at risk. (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 271 [Police officers providing assistance at the scene of a threatened suicide must concern themselves with more than simply the safety of the suicidal person. Protection of the physical safety of the police officers and other third parties is paramount]; see also *Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1089, fn. 8.)

As discussed in *Ray*, "'[o]ne is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to . . . the other

or a third person, or the land or chattels of either . . . .' [Citations.]" (*Ray*, *supra*, 21 Cal.4th at p. 474.) It matters not whether a police officer, a fireman, an ambulance driver, or a social worker responds to the suicide call. As a matter of common sense, it would be anomalous to deny a police officer charged with protecting the citizenry the privilege accorded every other individual who intercedes to aid another or protect another's property. (*Ibid*.) "'A warrantless entry of a dwelling is constitutionally permissible where the officers' conduct is prompted by the motive of preserving life and reasonably appears to be necessary for that purpose. [Citations.]'" (*Ibid*.)

Pursuant to the community caretaking exception, police officers are expected to check on the welfare of people who cannot care for themselves or need emergency services. (*Ray*, *supra*, 21 Cal.4th at pp. 471-472.) "The policeman, as a jack-of-all-emergencies, has 'complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offences'; by default or design he is also expected to 'aid individuals who are in danger of physical harm,' 'assist those who cannot care for themselves,' and 'provide other services on an emergency basis.' If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime discovered thereby is admissible in court." (3 LaFave, Search and Seizure (5th ed. 2012) § 5.4(c), pp. 263-264, fns. omitted.)

Appellant contends that the community caretaking rule does not apply to residential searches. Surely a police officer may enter a residence to protect a suicidal person and secure the premises if firearms are believed to be present. (See, e.g., *Brigham City v. Utah* (2006) 547 U.S. 398, 400, 403 [officer may

enter home without a warrant to render emergency assistance to an injured occupant or to protect occupant from imminent injury].) The officers had a duty to prevent the possibility that the firearms "would fall into untrained or . . . malicious hands." (*Cady v. Dombrowski* (1973) 413 U.S. 433, 443.)

When it comes to choosing between the Fourth Amendment protection against warrantless searches and the preservation of life, the preservation of life controls. That was decided more than 50 years ago in *Roberts*, *supra*, 47 Cal.2d 374. There, officers were told that a suspect living in an apartment had missed work and was sickly. (*Id.* at p. 378.) After knocking on the door and receiving no response, the officers heard moans and groans that sounded like a person in distress. (*Ibid.*) The officers believed someone needed emergency assistance, made a warrantless entry, and saw a stolen radio on the kitchen table that resulted in defendant's arrest for second degree burglary. Defendant argued that his Fourth Amendment rights were violated. The officers, however, believed a person in distress was inside the apartment and needed help. (*Id.* at pp. 378-379.) When asked about the moaning sounds, the officers said "'it could be pigeons, pigeons moan. There are pigeons in the area.'" (*Id.* at p. 378.)

Chief Justice Gibson wrote: "Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose. [Citations.]" (*Roberts*, *supra*, 47 Cal.2d at p. 377.) In the course of conducting a cursory search, officers do "not have to blind themselves to what was in plain sight simply because it

was disconnected with the purpose for which they entered. [Citations.]" (*Id.* at p. 379.)

Similarly, in *People v. Payne* (1977) 65 Cal.App.3d 679, a reliable informant reported that appellant was molesting children in a garage bedroom. (*Id.* at p. 681.) Officers saw a 10 to 12 year old boy enter the garage, were concerned that appellant would harm the boy, forced their way into the garage bedroom, and found a partially dressed boy on a bed in the garage. (*Id.* at p. 682.) Citing *Roberts*, the Court of Appeal held that the victim's "'right to physical and mental integrity [simply] [outweighed] the right of [appellant] to remain secure in his domestic sanctuary . . . .' [Citation.]" (*Id.* at p. 684.)

The rules and rationale of *Ray*, *Roberts* and *Payne* dictate affirmance here. There, the officers were conducting criminal investigations. Here, they were not. This entry was a pure community caretaking entry and a fortiori, the community caretaking rule applies with more persuasive force.

The community caretaking rule is alive and well. So is appellant because he was saved by the intervention of friends and the police who confiscated his firearms. Principles of stare decisis require that we follow *Ray* and *Roberts*. (*Auto Equity Sales*, *Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) To say that the officers were required to get a warrant before entering the house and garage would be at variance with common sense and violative of the letter and spirit the "community caretaking" rule. "There is no war between the Constitution and common sense." (*Mapp v. Ohio* (1961) 367 U.S. 643, 657.)

Response to Dissent

The dissent's bright line rule unreasonably stifles a police officer's duty to proactively keep the peace for everyone in

the community. The presenting situation posed an extreme danger for appellant, his friends, the police, and the neighbors. A literal and mechanical application of the letter of the Fourth Amendment would require the officers to walk away from appellant's doorstep. But the courts must consider the reason for the exclusionary rule. Traditionally, the premise of the exclusionary rule is that it applies only if the police are enforcing the criminal law, i.e., they are entering a residence to search for evidence of crime. That did not happen here.

Here, the officers did not fully comprehend what was confronting them when they entered appellant's residence. Police officers have a healthy skepticism about what they are told in a volatile situation preferring to conduct their own investigation. Here, they wanted to safeguard everyone and they wanted to separate appellant from his firearms. As factually found by the trial court, they were not required to believe that there was no one in the house and that the firearms were secured. Should they be allowed to enter a residence and defuse a "powder keg" waiting to explode when appellant would return to his residence? The answer is "yes." Loaded firearms are inherently dangerous as a matter of law and even though it is constitutionally permissible to possess them in a residence, it is quite another thing to allow them to remain in the possession of a suicidal person. Our holding does not give the police carte blanche to indiscriminately enter a residence on whim or caprice. Where, as here, a defendant threatens to kill himself with a firearm in his house, he is in a poor posture to claim that the police may not enter it to safeguard everyone even if he is coaxed out of the house prior to entry.

The dissent acknowledges that "had" the officers believed appellant was a danger to himself, they could have confiscated his firearms. (Dissent at p. 6) The record does not expressly show that the officers believed this to be the case because no one asked the question. But the inference that they entertained this belief is a reasonable inference. Suicidal persons are a danger to themselves. Every peace officer knows this. The only reason that appellant was not taken to a mental health facility was because, thereafter, probable cause developed for his arrest.

As Justice Gilbert said in his dissent in *Unzueta v Ocean View School Dist.* (l992) 6 Cal.App.4th 1689, 1705: "A mechanical, literal interpretation of the statute [or here, the Fourth Amendment] in the lifeless atmosphere of a vacuum creates a result contrary to public policy, contrary to legislative intent [or Constitutional intent], contrary to common sense, and contrary to our shared notions of justice." We agree with the trial court that the officers would have been subject to criticism if they had not separated appellant from his firearms.

Disposition

The judgment (order denying motion to suppress) is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

I concur:

GILBERT, P. J.

PERREN, J., Dissenting.

I respectfully dissent.

Chief Justice Gibson's "judicial seed" will not blossom in this fallow field.

Freedom from unreasonable government intrusion is at the core of the Fourth Amendment, which "draws 'a firm line at the entrance to the house.'" (*Kyllo v. United States* (2001) 533 U.S. 27, 31, 40.) "'[P]hysical entry of the home is the chief evil against which . . . the Fourth Amendment is directed.' [Citation.] And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 748.) "[S]earches and seizures inside a home without a warrant are presumptively unreasonable." (*Payton v. New York* (1980) 445 U.S. 573, 586.)

Relying on a "community caretaking" theory, the majority approves a warrantless intrusion into a home based solely upon police speculation about what they "could" find inside. The officers admittedly had *no* information that anyone, child or adult, was inside the house and required help. Indeed, everyone reported to be in the house was outside and completely under the officers' control, including the person they came to rescue, appellant Ovieda. The officers did not believe that appellant was a danger to himself or others. Because the officers had no objectively reasonable belief that searching the home was imperative, I conclude that the trial court should have granted appellant's motion to suppress evidence seized during the search.

The facts of this case are undisputed. A caller informed police that appellant was at home and suicidal, but had been disarmed by two friends who were with him. Officers

surrounded the home. At their request, and accompanied by his friends, appellant voluntarily came outside, was frisked and promptly handcuffed. He was unarmed. He denied suicidal thoughts or having guns. The officers were told that one of the friends had moved guns into the garage. Although the officers had no reason to believe that anyone was in the house, two of them entered the home with guns drawn to conduct, in their words, a "protective sweep to secure the premises." Inside, they found illegal weapons and a cannabis oil lab.[1]

On these facts, the search was unreasonable under any theory, whether it be "community caretaking," "emergency aid" or "exigent circumstances." At the time of the search, the situation was stabilized, appellant was restrained, and everyone reported to have been in the house was outside and unharmed. The officers had no information that anyone was in the house nor did they suspect that a crime had been committed. Therefore, the police could not lawfully enter and search the premises absent consent or a search warrant.

Supreme Court cases authorizing police entry into a house without a warrant in an emergency are circumscribed by their facts. As I explain below, this case does not resemble the type of emergency or exigency that would justify a warrantless entry.

First, an emergency justifying the entry and search of a home may arise when objective evidence leads police to believe that they must render immediate aid because a person inside is injured or in distress.

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[1] The majority's statement of facts focuses on what the officers found. The officers should not have been inside of appellant's house in the first place.

In a factually distinguishable case relied upon by the majority, *People v. Roberts* (1956) 47 Cal.2d 374, 376, 378, police entered the home of someone reported to be "sickly" when they "heard several moans or groans that sounded as if a person in the apartment were in distress." The warrantless entry "was lawful for the purpose of rendering aid." (*Id.* at p. 380.) A report that a person is injured and bleeding, coupled with blood stains outside the home and a neighbor's confirmation that an injured person is within, justify police kicking in the door to help the person. (*Tamborino v. Superior Court* (1986) 41 Cal.3d 919, 921-922, 924-925.)

The emergency aid theory applies when the police see shooting victims outside of a house, and believe that injured persons inside the house require immediate intervention. In *People v. Troyer* (2011) 51 Cal.4th 599, 607-609, 612, police responding to a report of shots fired found badly injured people on the porch of a home and blood on the front door, a clear emergency that justified immediate entry into the home to look for additional victims or a suspect. The court recognized the right of the police to enter without a warrant, given their objectively reasonable belief that an occupant was seriously injured. After a shooting victim was brought to a hospital, as described in *People v. Hill* (1974) 12 Cal.3d 731, 754-755, officers found fresh bloodstains on the porch, fence and auto outside a house and saw blood on the floor inside the house, an exigency justifying an entry to locate wounded persons, because waiting for a warrant could have resulted in the loss of life.

Here there was no such evidence. At the time of this search, no one was in appellant's house moaning and groaning, no gunshots were reported, and no bloodstains were seen.

Instead, appellant was outside of his house, unarmed and unharmed. There was no justification for the officers to enter appellant's house to render aid.

Second, an emergency may arise if police believe that a crime is in progress in a house. In *People v. Ray* (1999) 21 Cal.4th 464, police responded to a report that Ray's front door was open and the inside was in shambles. On arrival, officers found the scene as described; believing that a burglary was in progress or just took place, they entered to look for possible victims. Using a "community caretaking" theory, the state Supreme Court emphasized that police authority to enter is narrowly limited by the need to ascertain whether someone in the house is in need of assistance and to provide that assistance. (*Id.* at p. 477.) No such facts were present in this matter.

In *Brigham City v. Stuart* (2006) 547 U.S. 398, 406, the U.S. Supreme Court allowed a warrantless entry when police saw a violent fracas inside a house; officers could enter to rescue a bleeding occupant and stop the violence. In *Michigan v. Fisher* (2009) 558 U.S. 45, police responding to reports of a domestic dispute saw the defendant inside his house with a cut on his hand, screaming and throwing things, and blood on his front door and his car; in the Court's view, the police had an objectively reasonable belief that the defendant might be harming a child or spouse, or would hurt himself in his rage. This danger justified an immediate entry without a warrant and did not bar use of evidence obtained during the entry. (*Id.* at pp. 48-49.)

Here, the police did not see a crime or altercation unfolding inside the house before entering, nor did they believe that a crime had just taken place. Instead, they telephoned appellant inside the house and asked him to walk outside. He

complied. Afterward, they searched the house. No immediate warrantless entry was justified once appellant was outside.

Third, the police may enter a house in an emergency to detain a suicidal person inside the house for a mental evaluation. The key to cases involving a potential suicide at a home is a pressing need for police to act *but no time for them to secure a warrant*. For example, in *Sutterfield v. City of Milwaukee* (7th Cir. 2014) 751 F.3d 542, police entered a home to detain a woman for a mental evaluation after she remarked to her psychiatrist, "'I guess I'll go home and blow my brains out.'" (*Id.* at p. 545.) The court concluded that the officers had to act expeditiously by forcing entry during the unfolding crisis. (*Id.* at p. 566.)

In *Fitzgerald v. Santoro* (7th Cir. 2013) 707 F.3d 725, 728-729, officers forced a warrantless entry into the home of an apparently suicidal person to seize her for a mental evaluation. The entry was deemed justified based on exigent circumstances, because the officers objectively and reasonably believed when they entered the home that the occupant was in need of immediate assistance. (*Id.* at pp. 731-732.) A person with a gun who is threatening suicide may be frisked in the doorway of his home, to preserve the safety of everyone present. (*United States v. Wallace* (5th Cir. 1989) 889 F.2d 580, 582, citing *Terry v. Ohio* (1968) 392 U.S. 1, 23.)

Here, the officers—who had no reason to believe that an injured, endangered or suicidal person was in the house—entered to conduct a "protective sweep."[2] The People's post-search rationale of "community caretaking" is entirely unsupported by this record. Appellant was standing on the

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[2] An inapt theory that the People abandoned on appeal.

sidewalk in handcuffs. The others known to be in the house were also outside. The emergency was over: the police were not justified in their search of appellant's home—whether cursory or detailed—without his consent or a search warrant. (See *State v. Hyde* (N.D. 2017) 899 N.W.2d 671, 677 [police alerted to a possibly suicidal person by his relatives could not enter his house without a warrant because they lacked a reasonable basis to believe there was an ongoing emergency or immediate need to protect his life].)

Had police believed that appellant was a danger to himself or others they would have been justified to take him into custody. (Welf. & Inst. Code, §§ 5150 et seq. [police may take into custody someone who is gravely disabled or a danger to himself or others, for an assessment, evaluation and crisis intervention].) State law provides a detailed mechanism for seizing weapons *if* the police believed that someone is "5150." The police may confiscate weapons belonging to persons detained for a mental health evaluation. (Welf. & Inst. Code, § 8102; *City of San Diego v. Boggess* (2013) 216 Cal.App.4th 1494, 1500 ["Section 8102 authorizes the seizure and possible forfeiture of weapons belonging to persons detained for examination under section 5150 because of their mental condition"].) A detention to evaluate a person's mental condition permits the issuance of a search warrant to seize firearms. (Pen. Code, § 1524, subd. (a)(10).)

The police did not invoke these justifications to search appellant's home or seize his guns. The majority infers that the officers believed appellant to be a danger to himself. (Maj. opn. ante, at p. 11.) Tellingly, however, neither the prosecutor nor the Attorney General argued that the police detained appellant because they felt he was a danger to himself

or others and intended to transport him to a mental health facility pursuant to the Welfare and Institutions Code. The inference drawn by the majority is not supported by the record or by arguments offered in the trial court or on appeal.

Mere possession of guns is not a valid reason to search a home, unless the police determine that the gun owner must be detained for a mental health evaluation. Citizens may possess guns in their homes. (*District of Columbia v. Heller* (2008) 554 U.S. 570, 635.) The Attorney General argues that officers entered the home to merely "secure" appellant's guns, although it is not clear how they could achieve that without "seizing" the guns. The trial court "found it credible that they wanted to remove firearms." But the officers did not believe that appellant posed a danger to himself or others; it follows that their seizure of his guns was unauthorized.

The majority adopts the Attorney General's reasoning, asking rhetorically, "Surely a police officer may enter a residence to protect a suicidal person and secure the premises if firearms are believed to be present." (Maj. opn. ante, at p. 7.) The answer is "Yes" if the armed person is inside the residence and the police must enter to take the person into custody for a mental health evaluation. This strawman analysis fails, however, because appellant was outside of his house and not believed to be a danger to himself or others.

The sole justification offered by police for the entry was to check for people who might be present or injured. But everyone reported to be in the house was outside and accounted for. While officers could have sought appellant's permission to enter, they did not. While they could have detained appellant for evaluation at a mental health facility and sought a search

warrant to seize his weapons, they did not. (Pen. Code, § 1524, subd. (a)(10).) Nonetheless, they entered to search. Based on the facts known to them at the time, they could not.

Under an objective standard of reasonableness, the police could not lawfully search appellant's home. At the time of the search, appellant was standing outside the house in handcuffs, being interviewed by the police. The exigency that brought the police to appellant's home—his threatened suicide—was fully controlled before the search took place.

There is no showing that anyone was in imminent danger in the house so as justify an immediate, warrantless entry. The police had no information that an injured spouse or hidden child required aid. The occupants came outside before the search, in direct response to the police request that they do so. Officer Garcia testified that "we didn't have any specific information at the time that . . . there was someone in there." Officer Corbett's testimony that "there could be a child" or "there could be somebody injured" was pure speculation. Police action cannot be justified by what they did not know, or on a hunch or unparticularized suspicion. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 27; *People v. Block* (1971) 6 Cal.3d 239, 244.)

The totality of the circumstances in the present matter did not present an emergency justifying a warrantless entry. The officers were not faced with a tense, uncertain or evolving situation at the time of the search. No gunshots were reported before their arrival. They knew that appellant had been armed with a gun and were entitled to handcuff and frisk him when he walked outside and approached them, to preserve their safety and that of third parties. At that point, the need for the police to render emergency aid ceased.

Theories of "community caretaking," "emergency aid," or "exigent circumstances," are inapposite on this record. The police had *no* information that anyone was in the home let alone someone who needed immediate assistance or protection, *no* weapons were accessible to the handcuffed Ovieda, and *no* crime was committed or in progress. Any emergency that might mandate swift action—without a search warrant to prevent imminent danger to life—ended when appellant voluntarily came out of the house, along with the friends who were assisting him.

The majority speculates that the police entered appellant's home to seize his guns and save his life, because he might have shot himself once they left. The officers did not articulate any such fear for appellant's safety during the suppression hearing.

I do not question the officers' motives, honesty or sincerity. Their conduct, however, is circumscribed. In this situation, where a crisis has been averted, the officers have options: (1) they can seek consent to search; (2) they can seek a search warrant if the person's mental health is so deteriorated that he presents a danger to himself or others; or (3) they can wait to see how or if the situation evolves. If the person's ensuing conduct causes concern for his safety or the safety of others, they could seek a search warrant. The burden is on the State to demonstrate justification for the search. It has failed to do so.

The theme of the majority is that the police had to act. The officers' collective lack of information that anyone was in jeopardy, that anyone was upon the premises or that anyone was injured or in peril belies the state's theory. Ignorance of a fact, without more, does not raise a suspicion of its existence. The protection afforded by the Constitution would be sorely

compromised if what is not known or reasonably suspected would suffice for probable cause. I conclude the police could not lawfully enter and search the premises absent consent or a search warrant. The search was unlawful under both the State and Federal Constitutions. Appellant's motion to suppress evidence should have been granted. (Pen. Code, § 1538.5.)

CERTIFIED FOR PUBLICATION

PERREN, J.

Jean M. Dandona, Judge

Superior Court County of Santa Barbara

Law Offices of Elizabeth K. Horowitz, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Andrew S. Pruitt, Deputy Attorney General, for Plaintiff and Respondent.

STATE OF CALIFORNIA
Supreme Court of California

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