IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARNOLD IKEDA,

Defendant and Appellant.

S209192

Ct. App. 2/6 B238600

Ventura County
Super. Ct. No. 2011007697

APPELLANT'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ARNOLD IKEDA, Defendant and Appellant.	)	**S209192** **APPELLANT'S REPLY BRIEF ON THE MERITS**

Summary of Mr. Ikeda's Position

The People's Answer Brief on the Merits presents a two-pronged argument designed to persuade this court that the standard for *any* protective sweep of a residence is merely reasonable suspicion. The People conclude that reasonable suspicion should be the constitutional standard whether the sweep is pursuant to a detention outside the home or whether the sweep is incident to an arrest made inside or outside the home. They also conclude the officers here had the requisite reasonable suspicion to conduct the sweep after the detention.

The government's arguments are unpersuasive. This court should hold that a mere detention of a suspect nearby a home will not normally justify a protective sweep based only on a reasonable suspicion that someone is inside the home posing a potential danger. Moreover, the officers in this case did not have reasonable suspicion for a search even if an arrest had been made prior to the sweep.

The People's first line of reasoning follows a generic policy argument that police may be subject to dangerous ambush during any detention in or near a residence and police safety is hence paramount: "Adopting

appellant's *proposed new standard* would contravene the balanced approach set by *Buie* and would subject police officers to unreasonable risk...." (A.B., at p. 12, emphasis added.) "(T)he concern for officer safety, the *raison d'etre* of protective sweeps, is not quelled by the suspect being arrested away from the suspected danger." (A.B., at p. 16.) "The rigid rule adopted by the courts in *Reid* and *Davis* [does] 'ignore the potential risk' to officers and others." (A.B., at p. 23.)

The prosecution's second line of reasoning is that the "majority of other courts" have already adopted the standard and the "weight of authority" falls clearly on the side of using reasonable suspicion to support protective sweeps. (A.B., at pp. 11-12.) However, a review of case law in this field demands the opposite conclusion. The majority of jurisdictions have *not* adopted the rule that a mere detention outside a home accompanied by reasonable suspicion that someone inside poses a danger constitutionally supports a protective sweep. The People can cite only one case - *State v. Revenaugh* (1999) 133 Idaho 774 - for that proposition, and the reasoning of the Idaho court, such as it is, should not be adopted by California.

Some courts, but by no means all, have allowed protective sweeps of a home when the officers were not already inside the house prior to the sweep. But, in these cases, the courts have overwhelmingly agreed that when a suspect is encountered outside a home, an arrest warrant or an arrest made with probable cause is an essential prerequisite to a sweep inside.

Mr. Ikeda disagrees that an arrest outside, when accompanied only by reasonable suspicion, will support a sweep. Courts have moved increasingly far afield from the original analyses and conclusions expressed in *Payton v. New York* (1980) 445 U.S. 573 (*Payton*), and in *Minnesota v. Olson* (1990) 495 U.S. 91. In *Payton*, the High Court observed that: "It is a 'basic principal of Fourth Amendment law' that searches and seizures inside a home

without a warrant are presumptively unreasonable," (*Id.*, at p. 586.) In *Minnesota v. Olson,* the Court stated:

> "The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that 'a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, *Welsh [v. Wisconsin]* [1984] 466 U.S. 740, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling.' (436 N.W.2d, at 97.) The court also apparently thought that in the absence of hot pursuit there must be at least probable cause to believe that one or more of the other factors justifying the entry were present and that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered. Applying this standard, the state court determined that exigent circumstances did not exist. ¶ "We are not inclined to disagree with this fact-specific application of the proper legal standard. The court pointed out that although a grave crime was involved, respondent 'was known not to be the murderer but thought to be the driver of the getaway car,' *ibid.*, and that the police had already recovered the murder weapon, *ibid.* 'The police knew that Louanne and Julie were with the suspect in the upstairs duplex with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The

> time was 3 p.m., Sunday. . . . It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended.' (*Ibid.*) We do not disturb the state court's judgment that these facts do not add up to exigent circumstances. (*Ibid.*)" (*Minnesota v. Olson, supra,* 495 U.S. at pp. 100-101.)

The United States Supreme Court has held that entry into a home based on exigent circumstances requires probable cause to believe that the entry is justified. (*People v. Celis* (2004) 33 Cal.4th 667, 676.) "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 750.)

Here, there was no arrest prior to the sweep. Police were not legally inside Mr. Ikeda's residence prior to the sweep. The officers are adamant that Mr. Ikeda was subject only to a detention. And even if the officers had been armed with an arrest warrant and had been inside the home legally, or if the officers had made a legal arrest outside, the officers in this case did not have a reasonable suspicion to justify a search of the home.

I.

Appellant's proposed disposition.

This court should reverse the judgment of the Court of Appeal. On remand, the trial court should be directed to vacate the defendant's guilty plea, vacate the order denying the defendant's motion to suppress evidence, and to issue a new order granting that motion.

II.

Only a probable cause standard protects the safety of officers along with the privacy rights of individuals.

Both Mr. Ikeda and the People rely heavily on the principles and reasoning of *Maryland v. Buie* (1990) 494 U.S. 325 (hereafter, *Buie*).

Mr. Ikeda recognizes the dual holdings in which the Supreme Court found that the warrantless search of a home was reasonable. The first holding addresses one scenario: a search is justified when the officers, executing an arrest warrant inside the home, look into spaces from which an attack on police officers could be immediately launched. In this first scenario, *Buie* requires neither probable cause nor reasonable suspicion because the limited search is essentially incident to the in-home arrest for which the officers already have probable cause. (*Buie,* at p. 334.) In the second scenario, a search is constitutional when the officers, already legally inside the home, have additional reasonable suspicion that a limited sweep beyond the initial cursory inspection is necessary to protect the safety of officers and others in the home. (*Buie*, at p. 334.)

The court in *Buie* reasoned that the police officers have a legitimate interest in assuring themselves that "the house in which a suspect is being or has just been arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." (*Buie,* at p. 333.) An in-home arrest puts the officer at the disadvantage of being on his adversary's turf: "An ambush in a confined setting of unknown configuration is more to be feared that it is in open, more familiar surroundings." (*Ibid.*) The lower "reasonable suspicion" standard is constitutionally tolerable in that situation because other Fourth Amendment protections are in place.

The People assert the facts in Mr. Ikeda's case fall under both scenarios because "(s)ound policy reasons support the application of the reasonable suspicion standard to protective sweeps following a detention outside the home" and because the "protective sweep extends only to a cursory inspection...and lasts no longer than is necessary to dispel the reasonable suspicion of danger." (A.B., at pp. 23-24).

This legal concept originated in *Terry v. Ohio* (1968) 392 U.S. 1 and was discussed further in *Michigan v. Long* (1983) 463 U.S.1032; both cases which were cited by the court in *Buie.*

The State of Maryland, had argued in *Buie* that, after an *in-home arrest,* whenever police reasonably suspected a risk of danger to the officers or to others in the house, the *Terry* standard of specific articulable facts based upon a reasonable suspicion that a suspect is armed and dangerous should be applied to justify a brief, cursory search to ensure officer safety. "A protective sweep...occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." (*Buie*, at p. 333.) The court found that once the officers were inside a residence in which a suspect was being or had just been arrested, the risk of danger to them was equal to, if not greater than, the danger in a *Terry*-like encounter on the street.

After a search of the closets and other spaces immediately adjoining the place of arrest, if police have additional, specific, articulable facts which would warrant a reasonable prudent officer in believing the area to be swept harbors an individual posing a danger, they can conduct an additional, brief, cursory sweep. The Supreme Court never adopted (nor had the State of Maryland ever argued for) a reduced standard of reasonable suspicion for *any* protective sweep separate and isolated from the initial legal search. *The protective sweep reasonable suspicion standard was only applicable when officers were making an in-home arrest for a violent crime.* (*Buie,* at p. 329.)

Notably in the instant case, Mr. Ikeda was never even suspected of committing a violent crime.

The People fail to note anywhere in their argument that the *Buie* court's dual holdings were so limited, and they now invite this court to transfer the reasonable suspicion standard onto the street when a suspect is detained nearby a residence. Their argument would authorize searches of homes based solely upon a pyramid of suspicion derived from poorly developed facts and without probable cause to believe anyone has been involved in any crime.

Over the years since *Buie* was decided, some lower courts have concluded that, in some circumstances, when officers have reasonable suspicion that someone inside a residence poses a danger to police after an arrest outside, that sweep is constitutional. (*United States v. Colbert* (6th Cir. 1994) 76 F.3d 773; *United States v. Cavely* (10th Cir. 2003) 318 F.3d 987; *United States v. Oguns* (2nd Cir.1990) 921 F.2d 442 (hereafter *Oguns*); *United States v. Wilson* (5th Cir. 2002) 306 F.3d 231.) As noted, and without exception, these cases involve protective sweeps occurring after an arrest.

There appears to be a lone case - *State v. Revenaugh, supra*, 133 Idaho 774 (hereafter, *Revenaugh*) - extending this warrant exception. In that case, a deputy was dispatched to a business and found four bullet holes in the building. Their trajectory led to a house about 50 yards away where Mr. Revenaugh resided. The officer approached and smelled a strong odor of marijuana and observed three men inside the home through the open front door; one was picking leaves off what appeared to be a marijuana stalk. After the deputy told the men to "Stop," the front door was slammed shut. The officer pushed it open and ordered everyone outside. (*Id.*, at p. 776.) Mr. Revenaugh came out, was placed in custody, and given *Miranda* warnings. After Mr. Revenaugh's detention outside, police conducted a warrantless protective sweep. (*Ibid.*) The court held that the protective sweep exception to

the warrant requirement applies even when a suspect is not formally arrested prior to the sweep. (*Id.*, at p. 772.) The Idaho court relied, for the most part, on two cases: *United States v. Meza-Corrales* (9th Cir. 1999) 183 F.3d. 1116, and *United States v. Hoyos* (9th Cir. 1989) 892 F.2d 1387.

United States v. Meza- Corrales involved a complicated set of facts stemming from the Drug Enforcement Administration ("DEA") surveillance of a residence in Tucson, Arizona, where the agents were investigating a large scale narcotics operation. The residence was owned by the defendant's girlfriend. Prior to the protective sweep, she gave officers consent to search. The DEA agent called the U.S. Attorney's office to ensure that they could search the residence with only one resident's (the home owner's) permission. With consent, the officers then went inside to conduct the sweep.

United States v. Hoyos involved a surveillance team trailing Mr. Hoyos in what was another large-scale narcotics investigation. The officers had developed probable cause to arrest Mr. Hoyos; he was later seen in his backyard and told to "freeze," at which point he ran towards his house and was apprehended just as he reached his screen door. The court decided he was actually arrested when the officer ordered him to "freeze" and that the deputy was in "hot pursuit" of a fleeing felon. The case was decided not on whether a simple reasonable suspicion supported a subsequent search but whether, when a felon flees and is being hotly pursued, there are exigent circumstances to support a warrantless entry:

> "We agree with our dissenting colleague that in *Payton v. New York*, 445 U.S. 573, 585, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1979) the Supreme Court reminded us that physical entry of the home is the chief evil against which the working of the Fourth Amendment is directed. (quoting *United States*

v. United States District Court, 407 U.S. 297, 313, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972)). In *Payton*, however, the narrow issue before the Supreme Court was a challenge to 'the constitutionality of New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest.' *Id.*, 445 U.S. at 574. The court was not faced with the question whether exigent circumstances would justify entry into a home without a warrant of arrest or search. In fact, the Court noted that 'it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances. . . ' *Id.*, at 583. The Court stated that this justification for an entry to make an arrest without a warrant was not before it because 'none of the New York courts relied on any such justification.' *Id.* In the matter before us, the district court did rely on exigent circumstances to justify the protective sweep. Thus, unlike the posture of the case before the Supreme Court in *Payton*, the issue is squarely before us. The court in *Payton* recognized that while 'searches and seizures inside a home without a warrant are presumptively unreasonable[,]' *Id.*, at 586, an entry to make a search or seizure within a suspect's premises is reasonable if 'the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" *Id.*, at p. 586 n. 25."

(*United States v. Hoyos*, *supra,* 892 F.2d at pp. 1397-1398.)

Revenaugh was decided based upon precedent which is not supportive of the Idaho court's conclusion. Similar to the Court of Appeal's decision in the instant case, in *Revenaugh,* the court extended the parameters of a permissible search beyond what is constitutionally reasonable.

III.

Entry into a residence requires probable cause to believe the person the police are looking for is inside, even when the police are armed with an arrest warrant for that person. By analogy, probable cause should also be required for a protective sweep when another person is merely detained nearby.

Much of our Fourth Amendment jurisprudence and analysis has benefitted by the use of analogies. A helpful analogy ties the facts of the case at bar to the facts of similar past disputes. (E.g., *Maryland v. King* (2013) ___ U.S. ___, 133 S.Ct. 1958, 1976 [analogizing DNA identification to fingerprint identification].)

An analogy might also be helpful here. Numerous courts have concluded that when the justification for the entry of a residence is to serve an arrest warrant on a person, officers need probable cause, not merely a reasonable suspicion, that the person is in the residence. (E. g., *United States v. Gorman* (9th Cir. Cal. 2002) 314 F.3d 1105, 1114-1115 (*Gorman*).)

In *Gorman*, the court relied upon, among other authorities, *Payton v. New York* (1980) 445 U.S. 573 (*Payton*). When analyzing *Payton,* the *Gorman* court observed that:

> "[t]he phrase 'reasonable grounds to believe,' however, is often synonymous with probable cause. In *Payton*, Justice White states that 'the officer entering to arrest must have

> reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of the entry.' *Payton*, 445 U.S. at 616 (White, J., dissenting) (emphasis added). Under a footnote to that statement, Justice White then discusses the 'quantum of probable cause necessary to make a valid home arrest'- clearly equating 'reasonable grounds to believe' with probable cause. *Id.,* at p. 616, n.13."
> (*Gorman*, at p. 114, emphasis omitted)

The *Gorman* court continued, "Justice White states that 'the officers apparently need an extra increment of probable cause when executing the arrest warrant, namely, grounds to believe that the suspect is within the dwelling.'" *Payton*, 445 U.S. at 616, n. 13 (White, J., dissenting). See also LaFave, Search and Seizure (in the Index, 'See Probable Cause' is listed under 'Reasonable Grounds to Believe'). (*Ibid*, see n. 10.) (Accord: *United States v. Agnew* (3rd Cir. 2005) 407 F.3d 193, 196 [police may enter a suspect's residence to make an arrest armed only with an arrest warrant if they have probable cause to believe that the suspect is in the home]; *United States v. Hardin* (6th Cir. 2008) 539 F.3d 404, 411, [the Supreme Court's tendency in other opinions to explain or define the term probable cause using grammatical analogues such as reasonable ground for belief suggests that Payton's use of the phrase "reason to believe" expressed a standard equivalent to probable cause]; see also *United States v. Barrera* (5th Cir. 2006) 464 F.3d 496, 501; and *United States v. Magluta* (11th Cir. 1995) 44 F.3d 1530, 1535.)

All of the above-cited cases involve an entry into a residence to execute an arrest warrant based upon probable cause. However, when police lack both an arrest warrant and probable cause to believe anyone has committed a

crime, they should not be allowed to enter a nearby residence without probable cause to believe that a person posing a danger is inside.

IV.

This court should decline the invitation to extend *Buie*. The Eighth and Tenth Circuits have held that protective sweeps are permissible only when incident to an arrest, and the Second Circuit has approved of protective sweeps only when officers are already in the home based upon lawful process, such as an arrest or search warrant, or a protective order.

The Eighth and Tenth Circuits have held that protective sweeps are permissible only when incident to an arrest. (*United States v. Waldner* (8th Cir. 2005) 425 F.3d 514, 517; *United States v. Freeman* (10th Cir. 2007.) 479 F.3d 743, 750; *United States v. Torres-Castro* (10th Cir. 2006) 470 F.3d 992, 997, cert. denied, (2007) 550 U.S. 949, 127 S.Ct. 2285, 167 L.Ed.2d 1116.)

The Second Circuit has approved of protective sweeps only when officers are already in the home based upon "lawful process," such as an arrest or search warrant, or a protective order. (*United States v. Miller* (2nd Cir. 2005), 430 F.3d 93, 100.)

The Ninth Circuit has refused to permit a protective sweep where the defendant was not under arrest in *United States v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027; while permitting a protective sweep after a consent entry in *United States v. Garcia* (9th Cir. 1993) 997 F.2d 1273, 1282.)

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V.

Here, the officers did not have reasonable suspicion to conduct a protective sweep.

Cases cited by the People in which courts have found reasonable suspicion to conduct a protective sweep after an arrest made outside the home recite facts intensively more compelling than those presented in this case. Even cases cited by the People in which the courts *declined* to find reasonable suspicion abound with facts intensively more compelling than the facts here.

In *United States v. Colbert* (6th Cir. 1996) 76 F.3d 773, for instance, in which the court did not find the search was justified, Mr. Colbert was wanted for murder and the subject of possible involvement in drug trafficking. The Detroit task force conducted surveillance outside his girlfriend's apartment where he had been staying. Police had a warrant for his arrest which charged him with escape in relation to previous convictions for weapons and assault. Colbert was arrested outside the home on the warrant, after which his girlfriend came screaming out of the house. One of the officers went up to the apartment door which was barred by a screen, opened it and yelled "Police!" He peered inside and observed a shotgun in plain view. He then conducted a protective sweep which was found to be unconstitutional.

The court stated:

> "Finally, we recognize that police officers have an incredibly difficult and dangerous task and are placed in life threatening situations on a regular basis. It would perhaps reduce the danger inherent in the job if we allowed the police to do whatever they felt necessary, whenever they needed to do it, in whatever manner required, in every situation in which they must act. ¶

> "However, there is a Fourth Amendment to the Constitution which necessarily forecloses this possibility. As long as it is in existence, police must carry out their often dangerous duties according to certain prescribed procedures, one of which has been transgressed here." (*Id.*, at p. 778.)

Relying on language in *People v. Mack* (1980) 27 Cal.3d 145, 150 (*Mack*), the government argues that due weight should be given to the specific reasonable inferences the officer is entitled to draw from his training and experience: "[the officer] must be able to point to specific and articulable facts from which he concluded his action was necessary." (*Ibid*; and A.B., at p. 18.)

The Court of Appeal in this case agreed, and also cited *United States v. Arvizu* (2002) 534 U.S. 266, 273 (*Arvizu*): "The United States Supreme Court has repeatedly warned that reasonable-suspicion determinations must be based on 'the totality of the circumstances'. . .This process allows officers to draw on their own experience and specialized training...." (*Ibid.*) (Opn., at p. 4.)

Mr. Ikeda agrees with that general rule but asserts that the facts known to the officers who searched his motel room were not illuminated by their training and experience, which was given undue deference or weight by the Court of Appeal. In *Mack*, the court ruled that "Officer Skiba acted properly in entering the garage to search for additional suspects. He did so out of justifiable concern for his own safety. The reasons for his concern were several. He knew Bowden had been arrested in an armed robbery in which shots had been fired and that his accomplices had escaped. He believed these dangerous fugitives might be in the garage. He knew the stolen property alleged to be in the garage included firearms." (*Mack,* at p. 151.)

Mr. Ikeda does not deny that the totality of circumstances leading up to his initial detention, including the officers' training and experience used in making their way to the motel, was sufficient to justify the initial detention. He does contend, however, there was no reasonable suspicion to go inside his residence.

Deputy Hardy and Deputy Lynch testified they had some training and some experience but none of it specifically related to the circumstances in play when they arrived at the motel. If generalized "training and experience" in the area of "narcotics' and "drug use" were acceptable in the calculus of reasonable suspicion, then police officers would be able to substitute their training (and not even necessarily their experience) for specific articulable facts pointing to danger after a detention for someone suspected of being under the influence. "Training" cannot be a proxy for specific facts.

In *Arvizu*, Justice Rehnquist noted that the police officer who stopped Mr. Arvizu was entitled to make an assessment of the situation in light of his specialized, not generalized, training and familiarity with the customs of the area's inhabitants." (*Arvizu,* at p. 276.) Those customs and habits included the fact that the minivan detained in that case was on a rustic dirt road used by smugglers; that the road could be used to avoid a border patrol checkpoint. (*Arvizu,* at pp. 269-271.) The officer saw a family in the car but also knew there were no picnicking or sightseeing areas nearby. Several weeks before, he had apprehended a minivan on the same route and witnessed the occupants throw bundles of marijuana out of the van.

In *Arvizu*, there were ample facts supporting reasonable suspicion for the detention. The officer's personal knowledge of the area and what kinds of vehicles were likely to be found on which roads was significant. Here, in contrast, the officers were speculating from generalized experience and training regarding the use of narcotics. Both Deputy Hardy and Deputy Lynch

testified at the preliminary hearing that, in their training and experience, people involved in narcotics activities are commonly armed. (C.T., at pp. 136, 141.) Deputy Hardy indicated he had 22 years as a peace officer. With regards specifically to recognition and investigation of controlled substances he "had the basic 24 hours in the academy. I've been to a couple CNOA one day classes. DRE certified with the class with the Ventura County Sheriff's narcotics unit." He spent "six and a half years as a canine handler and had exposure on a regular basis to narcotics cases." (C.T. at p. 108, ll. 11-19.) Deputy Lynch testified that he had quite a bit more training but that his only experience was "between 3 and 400 arrests for 11550 [Health and Safety Code, section 11550, under the influence]. I've evaluated literally thousands of people for drug use." (C.T. at p. 139, ll. 17-25.) It seems likely that the protective search may have been, for them, a matter of routine.

Also by comparison, in *United States v. Hoyos, supra*, 892 F.2d 1387, cited by the People as supporting their position, a Los Angeles County Sheriff deputy was assigned to assist in securing a residence while a search warrant was obtained. The deputy knew that a large cocaine seizure (over 100 kilograms) had been made and that four to eight additional suspects and evidence were expected to be found at the residence. (*Ibid.*) His previous experience included participating in the execution of search warrants or the securing of residences over 100 times. (*Ibid.*) In the same case, another deputy testified that, in searching and securing over 500 residences in his career that, on at least 25 occasions suspects attempted to or destroyed evidence, and that he had been confronted by armed suspects at least 5 or 6 times while he was securing the homes. (*Ibid.*) Noteworthy as well in *Hoyos,* the court found both exigent circumstances and probable cause, neither of which is present in the case at bar.

The prosecution also relies on *United States v. Castillo* (9th Cir. 1988) 866 F.2d 1071, for the proposition that the officers' actions after the detention were objectively reasonable given the danger involved in narcotics transactions: "(S)ee also *United States v. Castillo* (citations omitted) [protective sweep upheld on basis of officers' testimony they knew of tendency of cocaine dealers to carry weapons and resort to violence.])." (A.B., at p. 31.)

But, *Castillo* is distinguishable. *Castillo* involved an arrest warrant and the arrestee was lawfully arrested inside his home. There, the court was asked to determine whether the articulated facts demonstrated the existence of an exigency so as to justify a warrantless entry of a bedroom inside the home. The court found exigent circumstances justified the sweep and held that the existence of exigent circumstances is a requirement for entry. (*Castillo,* at p. 1082.) In determining whether there was exigency, the court considered the training and experience of the officers. The officers had "personal knowledge" that cocaine dealers carry guns and resort to violence. There was no question that the investigation involved a high level cocaine smuggling conspiracy involving Columbian nationals. The officers' knowledge was corroborated by evidence that one of the arrestee's co-conspirators had hired an assassin to kill a DEA agent involved in the case if he turned out to be working undercover. (*Castillo*, at p. 1081.)

The officers in this case had no such personal knowledge.

The government in *United States v. Davis* (10th Cir. 2002) 290 F.3d (a case in which officers were dispatched to a home after a domestic disturbance call) made the same argument as the People make here: "on the spot reasonable judgments by officers about risks and dangers are protected. Deference to those judgments may be particularly warranted in domestic disputes. In those disputes violence may be lurking and explode with little warning." (*Id.,* at 1244, citing *Fletcher v. Town of Clinton* (1st Cir. 1999) 196

F.3d 41, at 50.) The court in *Davis* disagreed with the government, and said the government was asking for a special rule for domestic calls because they are inherently violent and the police responding to those calls are automatically at greater risk. Here, too, the government is essentially asking this court to formulate a special rule for calls or investigations possibly involving narcotics because they, too, are inherently violent.

Richards v. Wisconsin (1997) 520 U.S. 385, is a case in which the court rejected a blanket exception to the knock-notice requirement in felony drug investigations after the government argued (and the lower court agreed that) they were so dangerous that police could assume that all felony drug crimes will involve an extremely high risk of serious if not deadly injury to the police, as well as the potential for the disposal of drugs by the occupants prior to entry by the police:

> "A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others. Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a per se exception were allowed for each category of criminal investigation that included a considerable--albeit hypothetical--risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless. ¶ "Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police

decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement."

(*Richards v. Wisconsin* (1997) 520 U.S. 385)

Hence, even when officers were executing the arrest warrant, they could not sidestep the knock-notice rule based only upon the potential for danger inherently present in all drug investigations.

In *United States v. Delgado* (7th Cir. 2012) 701 F.3d 1161, officers went to an apartment after being informed a shooting victim was there and the shooter might be hiding in the apartment. They observed the victim walk out with a visible wound. Officers went inside to secure the scene and to make sure the shooter was not inside presenting a danger to them or others at the scene. The lower court found that the search constituted a constitutional protective sweep but the higher court said that, "The mere fact that the shooter was generally at large is not enough for a reasonable officer to specifically believe that he was in the apartment. *Cf. United States v. Ellis* (7th Cir, 2007) 499 F.3d 686, 691 ('[I]f we affirm the district court's decision in this case, we have effectively created a situation in which the police have no reason to obtain a warrant when they want to search a home with any type of connection to drugs.')" (*Id.*, at p. 1165.)

Mr. Ikeda does not suggest that police officer safety is a secondary concern or that training and experience should be left inside the patrol car. However, he respectfully requests that this court reject the Court of Appeal's undue reliance on general training and experience which subverts the development of probable cause or the specific and articulable facts necessary to

justify a protective sweep inside the home after an arrest. Each case must be decided on its facts.

VI.

Mr. Ikeda had been detained, not arrested, outside the home.

The People also maintain police had probable cause to arrest Mr. Ikeda which justified the protective sweep: "Even though Detective Lynch told appellant that he was being detained and not arrested [citation omitted], the officers had probable cause to arrest appellant for receiving stolen property, based on the computer being tracked to appellant's motel room, that the computer's password had been changed to appellant's name, and that appellant was trying to sneak away from the motel room. These facts would have persuaded 'someone of reasonable caution' that the person to be arrested has committed a crime.' [Citations omitted.]" (A.B., at p. 33).

Police officers were adamant that Mr. Ikeda was only detained and, in fact, asked him if he understood the difference between a detention and an arrest. (C.T., at p. 144). The officers went to the motel to investigate a report of a stolen laptop; they did not have probable cause to arrest Mr. Ikeda when they arrived, nor was he under arrest prior to the sweep. Deputy Hardy testified they conducted the protective sweep specifically so that they could further the investigation of the theft. (C.T., at p. 128.) Deputy Hardy testified that Mr. Ikeda was not under arrest when they conducted the sweep and Detective Lynch informed Officer Hardy that Mr. Ikeda was only detained at the scene. (C.T., at pp.131-132.)

After requesting this Court to rely extensively on the officers' training and experience as a proxy for hard facts supporting reasonable suspicion, respondent now asks this Court to disregard the officers' own conclusions about whether or not Mr. Ikeda was under arrest. Police did not

know if someone was using Mr. Ikeda's identity; they conducted no surveillance; and they did not know whether the laptop was in the motel room. Evidence was not presented that Mr. Ikeda had a criminal history, especially one related to narcotics or theft, and the officers' knowledge was limited to the theft report and information supplied by a GPS tracking service.

Even if there were some indication that the officers had a few facts which could eventually lead to probable cause, Mr. Ikeda was not actually arrested. In the cases cited by respondent herself, the general standard is whether the search was conducted incident to an actual arrest, whether or not pursuant to a warrant. A warrantless arrest may be valid if supported by probable cause. (*United States v. Hoyos, supra,* 892 F.2d at 1392.) The fact the officers in this case may have been planning to arrest Mr. Ikeda at some point in the future, depending on the outcome of their investigation, doesn't alter the fact he was only detained prior to the sweep. By analogy, a search incident to arrest requires that there be an actual arrest. "Here we are asked to extend that 'bright-line rule' [of search incident to arrest] to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all. We decline to do so." (*Knowles v. Iowa* (1998) 525 U.S. 113, 118-119 [declining to approve the search because, although the officer had probable cause to arrest, he didn't, choosing instead to issue Knowles a citation].)

In *Leaf v. Shelnutt* (7th Cir. 2004) 400 F.3d 1070, a case the People rely upon for the proposition that protective sweeps can be made prior to a formal arrest: "Numerous courts have upheld protective sweeps conducted before the suspect is formally arrested." (A.B., at p. 21.) Deputy Sheriff Shelnutt shot and killed a man who had been sleeping in his own bedroom at home. The man was surprised when he awoke and found the deputy standing in his bedroom. This man attacked the deputy and was shot to death. The

officer was sued by the decedent's family. The court in a civil action was determining whether the deputy had qualified immunity.

The *Shelnutt* court discussed the protective sweep doctrine at some length. In a footnote, they clarified the circumstances under consideration in that case: "This court has recognized that the logic of *Buie* assumes that the police already are lawfully present in the home to arrest its occupant and that a sweep is necessary to avert any immediate danger posed by others on the premises." (Citations omitted, *Id.*, at 1088.) The case actually turned on whether the officers had a right, initially, to be inside the dwelling *after which* a sweep was conducted. The court found that the officer entered the home lawfully because he had "a reasonable basis to believe that an emergency situation justified a warrantless search of Mr. Leaf's apartment. On the record before us, we must conclude that the officer's entry was justified by exigent circumstances." (*Id.,* at p. 1081.)

Protective sweeps, in very limited circumstances, may precede formal arrest, but not when a suspect has merely been detained outside.

VII.

This case does not involve the emergency aid doctrine or exigent circumstances.

The government does not propose that there was a valid exception to the warrant requirement in this case, nor that there were exigencies supporting the search; only that reasonable suspicion should be the prevailing standard for a search of a home after a detention outside. Exigent circumstances is one well-recognized exception to the warrant requirement of the Fourth Amendment. Certain emergency circumstances justify warrantless entries, seizures and searches. The "necessity" required under the doctrine

must be an imminent and substantial threat to life, health or property and not simply "reasonable."

> "The solicitude of the police for the girl's safety and welfare was of course commendable. But the police must also be concerned with the interest of her parent in the security and privacy of her home, an interest expressly protected by constitutional command. (U.S. Const., 4th Amend.; Cal. Const., art. I, § 19.) The issue, therefore, is not simply whether the conduct of Officer Brown might have been "reasonable" under all the circumstances, but whether the People have shown that his entry into Mrs. Blinn's home falls within one of the "few specifically established and well-delineated exceptions" to the warrant requirement . . . . Among those exceptions is the emergency doctrine. (*Vale v. Louisiana* (1969) 399 U.S. at p. 35 [26 L. Ed. 2d at p. 414].) But the exception must not be permitted to swallow the rule: in the absence of a showing of true necessity - that is, an imminent and substantial threat to life, health, or property - the constitutionally guaranteed right to privacy must prevail."
>
> (*People v. Smith* (1972) 7 Cal.3d 282, 286.)

Here, of course, the subject of the investigation was a stolen laptop computer. There was no testimony presented that the crime was more than a misdemeanor petty theft. This case does not involve the emergency aid doctrine or exigent circumstances to justify the entry. Unlike circumstances in *People v. Troyer* (2011) 51 Cal.4th 599, the deputies here had no facts suggesting that entry of the residence was necessary because someone inside needed immediate,

emergency assistance. And even in emergencies, a warrantless entry into a home remains controversial. (See, e.g., *United States v. Bute* (10th Cir. 1994) 43 F.3d 531, 535 ["We agree with [the] line of authority holding the community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches."]; *United States v. Erickson* (9th Cir. 1993) 991 F.2d 529, 531 ["The fact that a police officer is performing a community caretaking function, however, cannot itself justify a warrantless search of a private residence."]

CONCLUSION

Appellant asks this court to hold that after a suspect is detained outside, a warrantless entry into a home, which is unsupported by probable cause to believe that a person therein is armed and presents a danger to someone, violates the Fourth Amendment right to be free from unreasonable search and seizure. Entry into a residence requires a higher standard than a mere reasonable suspicion. Additionally, only in-home arrests justify the weaker standard of reasonable suspicion to conduct a sweep. When police officers are involved in the serious business of arresting an individual inside his home, they are "in a confined setting on the adversary's 'turf.' 'The arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest.'" (*Buie,* at p. 334.)

"While the desire for a bright line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly-broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including

in situations that are more likely to require police officers to make difficult split-second judgments. [Citations.] As in those [other] contexts, we see no valid substitute for careful case-by-case evaluation of reasonableness here." (*Missouri v. McNeely* (2013) __U.S.___, 133 S. Ct. 1552, 1564 [dissipation of blood alcohol is not categorically an exigent circumstance].)

While a detention near a home might justify an entry and search of the home under more dangerous circumstances, the warrantless search was not reasonable on the facts presented here. Unreasonable entries of homes create their own risk of danger. The courts may facilitate and promote public safety to the extent permitted by the constraints of the Fourth Amendment, but no further. This was a constitutional policy choice made long ago by the framers.

This court should reverse the judgment of the Court of Appeal. On remand, the trial court should be directed to vacate the defendant's guilty plea, vacate the order denying the defendant's motion to suppress evidence, and to issue a new order granting that motion.

Dated: September 25, 2013

Respectfully Submitted,

STEPHEN P. LIPSON, Public Defender

By: 

Michael C. McMahon, Chief Deputy
Cynthia Ellington, Snr. Deputy Public Defender
Attorneys for Petitioner ARNOLD IKEDA

CERTIFICATE OF WORD COUNT

I, Jeane Renick, do hereby certify that by using the word count feature for MSWord, in Times New Roman #13 font, this document contains 8,057 words, excluding Declaration of Service. Executed at Ventura, California, on September 25, 2013.

STEPHEN P. LIPSON, Public Defender

By: 

Jeane Renick
Legal Mgmt. Asst. III
Public Defender's Office

DECLARATION OF SERVICE

Case Name:	***The People, Plaintiff and Respondent v. Arnold Ikeda, Defendant and Appellant.***
Case No.	**S209192 (from 2nd Dist./Div. 6 B238600; 2011007697)**

On September 25, 2013, I, Anna Twitty, declare:

I am over the age of 18 years and not a party to this action. I am employed in the Office of the Ventura County Public Defender. My business address is 800 South Victoria Avenue, Ventura, California 93009.

On this date, I personally served the following named persons at the places indicated herein, with a full, true, and correct copy of the attached document: **APPELLANT'S REPLY BRIEF ON THE MERITS**

Gregory Totten, District Attorney
Attn: Michael Schwartz, Spec. Asst DA
Office of the District Attorney
Hall of Justice, 3rd Floor
800 South Victoria Avenue
Ventura, CA 93009
(Counsel for the People)

Hon. Ronald Purnell, Judge, and
Hon. Charles Campbell, and
Ventura County Superior Court
Hall of Justice, 2nd Floor
800 South Victoria Avenue
Ventura, CA 93009
(Trial Court Judges)

On this date, I enclosed a full, true, and correct copy of the attached document: **APPELLANT'S REPLY BRIEF ON THE MERITS** in a sealed envelope or package addressed to the persons at the addresses listed below, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the County of Ventura's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am employed in the county where the mailing occurred. The envelope was placed in the mail at Ventura, California.

Clerk of the Court
Second District Appellate Court,
Division 6
200 East Santa Clara Street
Ventura, CA 93001

Kamala Harris, Attorney General
Mary Sanchez, DAG
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Arnold Ikeda
Address of Record
(Defendant-Petitioner)

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

STEPHEN P. LIPSON, Public Defender

By: _____

Anna Twitty,
Legal Processing Assistant III
Public Defender's Office