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.

Case No. S247235
2d Crim. No. B277860
Sup. Ct. No. 1476460

Second Appellate District, Division Six, Case No. B277860
Santa Barbara County Superior Court, Case No. 1476460
The Honorable Jean Dandona, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. WILLIE OVIEDA, Defendant and Appellant.	Case No. S247235 2d Crim. No. B277860 Sup. Ct. No. 1476460

APPELLANT'S REPLY BRIEF ON THE MERITS

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

INTRODUCTION

Respondent does not dispute that there is no United States Supreme Court authority applying a broad community caretaking exception to searches of homes. Mainly, respondent argues that the exception set forth in *People v. Ray* (1999) 21 Cal.4th 464 should be upheld because police sometimes provide services that extend beyond their criminal investigatory functions, and application of the warrant/probable cause analysis is inappropriate when officers are not investigating a crime. These assertions, however, do not explain why the broad and nebulous exception that *Ray* articulates is proper when addressing the

Fourth Amendment's protections against presumptively unreasonable government intrusions of the home.

Respondent asserts that community caretaking searches should be evaluated with a case-by-case balancing test for reasonableness, even when the location searched is a private dwelling. Fourth Amendment jurisprudence, however, prohibits such an ad hoc analysis when the home is at issue. In addition, the case law on which respondent relies for this position, mainly involving "special needs" and "administrative search" cases, is inapposite. Such cases address the assessment of standards for routine and highly regulated categories of searches conducted in furtherance of specific governmental needs, and in situations involving greatly diminished privacy rights, none of which have any bearing on the search at issue here.

When contemplating police entry of a home for which no neutral magistrate has weighed in, and where such entry is therefore left to the discretion of the officer, a clear standard must apply by which that officer is required to justify his actions not just by a general finding of reasonableness, but by a showing that the exigencies of the situation required his entry in order to avoid immediate danger to life, health, or property. This is why *Ray*'s plurality must be rejected.

In the event the Court elects to uphold *Ray,* the search in this case should still be found improper. Respondent has not demonstrated that the officers provided specific and articulable facts justifying their search, but rather concedes that the officers' intentions were unclear. In addition, respondent has not refuted

the substantial evidence showing that the officers harbored a mixed motive, which, under *Ray*, must defeat application of the exception altogether.

ARGUMENT

I. APPLICATION OF THE COMMUNITY CARETAKING EXCEPTION TO SEARCHES OF HOMES VIOLATES THE FOURTH AMENDMENT TO THE CONSTITUTION

A. That Police Officers Serve Community Caretaking Functions Does Not Render The Amorphous Test Set Forth In *People v. Ray* Constitutional

Respondent argues that "[t]he purpose of community caretaking is to assist the public, not to investigate crime," and "[f]or this reason, the warrant requirement and the probable cause standard are not appropriate for evaluating the reasonableness of community caretaking activities." (ABM 19, see generally ABM 18-21.) However, just because the probable cause standard might not neatly apply in this context does not mean that the broad and nebulous reasonableness standard set forth in *Ray* is proper, or that something less than an exigency/emergency can justify a warrantless search of a home.

Appellant does not dispute that the police serve functions beyond their criminal investigatory roles. It is also true, however, that a person's privacy interest in her home receives the greatest protection under the Fourth Amendment. Indeed, the mere fact that officers may initially be called to a home for purposes other than criminal investigation does not negate the presumption of unreasonableness that applies when an officer decides to enter a private residence without a warrant. This is

why case law consistently holds that warrantless entries of private dwellings cannot be justified absent exigent or emergency situations.

B. Application Of A Case-By-Case Balancing Test Is Inappropriate And Does Not Have Support Under Fourth Amendment Jurisprudence In This Context

Respondent argues that "[t]he reasonableness of community caretaking searches must be evaluated on a case-by-case basis, whether the intrusion involves an automobile or a home," and because the probable cause standard does not apply, the Court may assess the reasonableness of the search by "balancing the governmental interest justifying the search and the invasion which the search entails." (ABM 17, 18-19, 23.) The cases respondent relies on to support a generic, case-by-case balancing test in this context, however, are inapposite.

Importantly, there is not one authority cited where an ad hoc balancing test for reasonableness was applied to justify a warrantless search of a *law-abiding citizen's home,* making the relevance of these cases at the outset highly questionable.[1] Moreover, the cases respondent cites in support of its position generally fall into two categories: (1) "special needs" cases, and/or (2) "administrative search" cases, neither of which provide

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[1] Only one of the cases addresses the search of a home at all, and it concerned the search of a probationer's home, which, as discussed herein, is highly distinguishable due to the particular governmental interest and clearly diminished privacy rights at stake. (See *Griffin v. Wisconsin* (1987) 483 U.S. 868 [107 S.Ct. 3164, 97 L.Ed.2d 709].)

support for application of a catch-all community caretaking exception to searches of private dwellings. (*Ibid.*)

As discussed in greater detail below, "special needs" and "administrative search" cases do not involve situations where an officer is called to a home for one of a variety of reasons and then must make a judgment call about whether to perform a search based on the situation presented. Instead, these cases address *categories* of searches, being performed in a *neutral and/or regulated manner*, and in furtherance of a *particular governmental interest*, which is deemed important enough to justify a search either without probable cause, or based on some lesser standard, such as reasonable grounds. (See ABM 23.)

Indeed, the case-by-case reasonableness test is generally used to determine what *type of standard* should apply to each *category* of search, as opposed to determining the constitutionality of each *individual* search. (See *O'Connor v. Ortega* (1987) 480 U.S. 709, 719 [107 S.Ct. 149, 294 L.Ed.2d 714] (plur. opn.) [it is the "*determination of the standard of reasonableness applicable to a particular class of searches*" that "requires 'balanc[ing] the . . . intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged' "], emphasis added.)

For example, in *Skinner v. Railway Labor Executives' Ass'n* (1989) 489 U.S. 602, 620-1, 627, 634 [109 S.Ct. 1402, 103 L.Ed.2d 639], the court upheld drug testing of railroad employees without any individual suspicion pursuant to a regulatory scheme, finding that: the specific government interest in regulating

railroad employees' conduct for safety constituted a "special need"; the intrusions on privacy under the regulations were limited; there was limited discretion exercised by employers; and the privacy expectations of employees were diminished by their participation in a highly-regulated industry. These factors led the court to find that testing done without probable cause was acceptable under the Fourth Amendment.

Similarly, in *Griffin, supra*, 483 U.S. 869, the court considered a regulatory scheme allowing probation officers to search a probationer's residence with supervisor approval if there were "reasonable grounds" to believe there was contraband in the home. After finding that the state had a "special need" in assuring that its probation program resulted in rehabilitation while also protecting the public, and relying on the clearly diminished privacy rights held by probationers, the court upheld the regulation's standard of "reasonable grounds" (rather than "probable cause"). (*Id.* at pp. 870-76.)

The distinguishing nature of the "administrative search" cases is similar. In *People v. Hyde* (1974) 12 Cal.3d 158, this Court upheld the constitutionality of airport security screenings, finding that: they constituted a "central phase of a comprehensive regulatory program"; they were administrative in character; "[t]he government interest in the prevention of airplane hijackings [was] substantial"; and, because all passengers undergo the screening, there was no danger that decisions to search would be subject to the discretion of officials in the field. (*Id.* at pp. 165, 169.)

In *Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, this Court upheld the constitutionality of sobriety checkpoints, finding that: deterring drunk driving was a highly important governmental interest; the programs resulted in minimal interference with individual liberties; and the detailed and neutral regulations safeguarded against unbridled discretion of officers, thereby reducing "the potential for arbitrary and capricious enforcement." (*Id.* at pp. 1325-26, 1338, 1341, 1343.)

Accordingly, in the foregoing cases, the courts applied a balancing test only to determine whether specific categories of searches could properly be conducted either without probable cause or individual suspicion, and they only upheld such searches because they were conducted under standardized/regulatory schemes that were tailored to particular government needs, and which were only applicable to individuals possessing diminished privacy rights. These cases therefore do not lend support for applying a broad balancing test to individual searches of homes under *Ray,* where the government's goal is not specific, but instead involves only the ambiguous interest in "assist[ing] the public" (ABM 19); where searches are not administrative or regulated, but instead depend only on an officer's determination of what is reasonably necessary; and where the privacy right at issue is not clearly diminished, but instead is the one receiving the greatest level of protection under the Fourth Amendment.

Notably, some of the case law underlying these administrative and special needs cases expressly distinguish searches of homes, based on the differing privacy rights at issue.

(See e.g. *New York v. Burger* (1987) 482 U.S. 691, 699-703 [107 S.Ct. 2636, 96 L.Ed.2d 601] ["expectation of privacy in commercial premises is different from, and indeed less than, a similar expectation in an individual's home"]; see also *Donovan v. Dewey* (1981) 452 U.S. 594, 598-599 [101 S.Ct. 2534, 69 L.Ed.2d 262] ["greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys . . . differs significantly from the sanctity accorded an individual's home"].)

In addition, the federal Supreme Court "repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." (*Oliver v. U.S.* (1984) 466 U.S. 170, 181 [104 S.Ct. 1735, 80 L.Ed.2d 214].) This is why when assessing searches of homes, where our privacy rights are most protected, there must be a clear standard for police to follow. As set forth in the regulatory/administrative cases, their routine and standardized nature provides inherent protection against abuse – but nothing about the community caretaking exception is standardized or neutral. Rather, as discussed in detail below, the standard in *Ray* is dangerously vague.

C. The Community Caretaking Exception Should Not Be Extended To Homes Because Fourth Amendment Jurisprudence Does Not Permit Warrantless Searches Of Dwellings In Circumstances Short Of A Perceived Emergency

Respondent does not dispute that the federal Supreme Court has only applied the community caretaking exception to searches of vehicles. Rather, respondent attempts to downplay the differing treatment of automobiles and homes, even though the high court has repeatedly relied on this distinction in upholding searches of vehicles, and finding searches of homes unconstitutional. (See e.g. *Cady v. Dombrowski* (1973) 413 U.S. 433, 447-48 [93 S.Ct. 2523, 37 L.Ed.2d 706]; *Collins v. Virginia* (2018) __ U.S. __ [138 S.Ct. 1663, 1672, 201 L.Ed.2d 9].)

Specifically, respondent asserts that "[w]hile *Cady* and other inventory cases did not involve a search of a home, they do inform the appropriate standard for evaluating searches performed for a purpose other than investigating crime." (ABM 23.) Here respondent again asserts that when police are not investigating crime, the warrant framework is inapplicable, a case-by-case assessment of reasonableness is proper, and these principles are "not limited to police practices involving automobiles." (*Ibid.*)

As discussed in the preceding section, while some cases employ a balancing test, it is only applied in very limited circumstances. And, while some cases apply it to situations not involving automobiles, *none* of them do so with respect to individual searches of everyday citizens' homes.

Respondent asserts that the Third, Seventh, Ninth, and Tenth Circuits, all of which have refused to extend the community caretaking exception to dwellings, "place too much emphasis on *Cady*'s distinction between cars and homes," and "largely ignore *Cady*'s broader teaching" that the probable cause framework is "inapposite" when an officer is not investigating crime. (ABM 23, 24.) Respondent asserts further that "[t]here is no logical basis for distinguishing homes from automobiles" when evaluating "noncriminal searches." (ABM 24.)

To the contrary, however, the courts that have refused to extend this exception to homes are placing the exact emphasis that the federal high court has always placed on the difference between vehicles and residences; and, as always, the logical basis for doing so is the far greater privacy interest people possess in their homes when compared with virtually any other locale. (See e.g. *Collins, supra*, 138 S.Ct. at p. 1672; *New York v. Burger*, *supra*, 482 U.S. at pp. 699-703.)

Respondent asserts that the distinction between automobiles and homes cannot fully explain *Cady*, and that it "must rest at least in part on the principle that the justifications for requiring a warrant and individualized suspicion lose force when the purpose of a search is not to investigate crime." (ABM 25.) Appellant has never asserted that the decision in *Cady* rested *solely* on the distinction between cars and homes; it is clear, however, that its holding was *dependent* on that distinction. (*Cady, supra*, at pp. 447-48 [the "distinction between motor vehicles and dwelling places *leads us* to" find the search

constitutional].) The court's language indicates that had it been considering a search of a home, the non-investigatory intention of the officers would not have been sufficient, in and of itself, to uphold the search.

Respondent asserts that the nature of community caretaking searches favor a case-by-case assessment of reasonableness because "the public interests underlying these intrusions will frequently align with the interests of the individuals whose homes are searched." (ABM 25.) Here respondent relies on cases addressing inventory searches and probationers' homes, which, as noted previously, are highly distinguishable. (ABM 25-26; see OBM 24-25, 33-36.) In addition, it is often the case that when everyone's interests do align, consent to enter will be given. At issue here, however, are instances when consent cannot be or is not given, which means not everyone's interests are necessarily aligned.

To assert that community caretaking searches impose "a different sort of privacy intrusion from a criminal investigatory search" (ABM 26), respondent cites *Camara v. Municipal Court of City & County of San Francisco* (1967) 387 U.S. 523 [87 S.Ct. 1727, 18 L.Ed.2d 930], where the court stated that home safety inspections involve a limited privacy invasion because they are "neither personal in nature nor aimed at the discovery of evidence of crime." (*Id.* at p. 537.) Searches under *Ray*, however, can be quite personal. Respondent acknowledges this, but argues that the noncriminal nature of the exception "diminishes the stigma typically associated with being the target of criminal

suspicion." (ABM 26-27.) But to assert that no stigma results from the application of this exception would be to ignore the facts of this case, where officers searched appellant's entire home with their guns drawn.

In addition, the searches and reasoning at issue in *Camara* were very different from those contemplated here. In *Camara*, the court held that warrants *were* required for entry, and probable cause would exist where there was a properly enacted statutory scheme governing the same. Entry was therefore not left up to the discretion of officers, but instead was governed by an explicit and neutral standard. (*Camara*, *supra*, at pp. 534-36.)

The presumption of unreasonableness that applies to warrantless searches of dwellings is well-settled, as is the requirement that any exceptions that will overcome it must be carefully delineated. This is why extending the community caretaking exception to searches of homes is improper. It must be the government's burden to show that such a severe intrusion was not simply reasonably necessary, but instead required by an unfolding exigency and the prevention of significant harm. It is this threshold that will protect the sanctity of the home, while still allowing officers to protect the public by responding to exigent circumstances when needed.

D. Respondent Misconstrues The Emergency/Exigency Standards Applicable To Warrantless Searches Of Homes, And Incorrectly Implies That Certain Exigencies Would Not Be Covered Thereby

Respondent repeatedly states that appellant has argued that only the "need to prevent death or imminent injury" can

justify entry of a home for community caretaking purposes. (See ABM 17, 28, 29.) This is not a precise characterization of appellant's position, or California law.

In the opening brief, appellant cited *People v. Ramey* (1976) 16 Cal.3d 263, 276, which defined an exigent circumstance as "an emergency situation *requiring swift action to prevent imminent danger to life or serious damage to property* . . . ." (See OBM 39, emphasis added.) The exception is therefore not limited to preventing impending death or injury, but includes preventing an *imminent danger* to the same, as well as damage to property. In addition, an "imminent and substantial threat to life, health, or property" is included in other iterations of California law. (*People v. Sutton* (1976) 65 Cal.App.3d 341, 350.)

This may seem like a parsing of words, but respondent's interpretation of appellant's position is too narrow. "Preventing death or immediate injury" indicates that the officer must believe someone is on death's door, or an injury is seconds away, while an imminent "danger" or "threat" to life, health, or property is more broad. Accordingly, respondent's assertion that these standards would cause first responders to either "risk violating the constitution or tell residents 'sorry, we can't help you,' " is an inaccurate overstatement (and also ignores the many cases where consent to enter will be given).[2] (ABM 28, 29.)

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[2] In the opening brief, appellant at one point listed in summary fashion a few of the exigencies that can justify entries, and included "the prevention of death or imminent injury to human life" (OBM 32); in that instance appellant was using shorthand,

Respondent's assertion that these standards would prohibit an officer from entering a home in order to "aid someone outside the home" is also inaccurate. (ABM 28.) It is possible an emergency requiring swift action to prevent imminent danger to life may involve entering a home even though a potential victim is outside.[3] Here respondent cites to the "emergency aid exception," which is a more specific doctrine focusing on emergencies unfolding inside the residence, but the other exceptions are not as narrow. Of course, under any doctrine, it would be the government's burden to show that entry was in fact necessary to prevent the harm threatened.

Respondent also argues that although federal Supreme Court cases repeatedly hold that warrantless searches of homes are only justified when an exigency or emergency exists, "none cabins the range of protective entries to circumstances where . . . someone inside the home faces 'death or imminent injury.' " (ABM 29.) Respondent again misconstrues appellant's position on the standards, but appellant agrees that the federal high court has only permitted warrantless entries of homes in the face of exigencies or emergencies.

Respondent next asserts that courts "reveal discomfort with a standard that would limit protective entries to situations where an occupant faces 'death or imminent injury.' " (ABM 30.) As

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not asserting that the standard should be different from that set forth in California law.

[3] For example, if someone is having a seizure on the front step and there is medication inside the house that can help, an officer's entry may be warranted.

noted, this is a too-narrow reading of appellant's position, but in any event, the case law cited does not support the discomfort asserted. Rather, these cases simply demonstrate how various jurisdictions have applied emergency doctrines in varying circumstances. Some of these applications are proper, while others are more questionable; but as a whole, they demonstrate why these doctrines strike the proper balance under the Fourth Amendment.

For example, respondent points out that courts have permitted officers to enter a home when they " 'reasonably believe[] an animal on the property is in immediate need of aid due to injury or mistreatment,' " inferring that the doctrines appellant favors do not cover these types of cases. (ABM 30, quoting *People v. Chung* (2010) 185 Cal.App.4th 247, 732.) To the contrary, however, California courts have already found that the protection of animal life is covered by the emergency doctrines, and rejecting *Ray* would not change this. (*Ibid.*)

Respondent also asserts that a California court has permitted law enforcement to enter a commercial establishment found open at night in order to secure it, which, respondent indicates, would not be covered under an emergency exception. (ABM 30, citing *People v. Parra* (1973) 30 Cal.App.3d 729, 733.) Notably, *Parra* did not involve the search of a home. Indeed, the *Parra* court distinguished cases the defendant relied on based on that distinction, finding they were "inapposite since both involved police intrusions into locked residential premises which were

unlawful in their inception." (*Ibid.*) *Parra*'s relevance to the question presented is therefore questionable.[4]

Respondent also notes that several courts have held "that when effectuating an arrest outside the arrestee's home, officers may enter to 'retrieve clothes reasonably calculated to lessen the risk of injury to the defendant' while the arrestee is in police custody,' " and argues that these entries would also not be covered. (ABM 30-31.) These decisions refer to what is called the "clothing exigency exception to the warrant requirement." (*U.S. v. Gwinn* (4th Cir. 2000) 219 F.3d 326, 333 ("*Gwinn*").) Notably, other circuits have rejected this exception, demonstrating that this issue is not clear-cut. (See *U.S. v. Kinney* (6th Cir. 1981) 638 F.2d 941; *U.S. v. Whitten* (9th Cir.1983) 706 F.2d 1000.)

Respondent has not cited a case in California addressing this exception, nor has appellant located one. But respondent's assertion that the standards favored by appellant would not allow for these entries is unsupported. The courts in these cases found the prevention of immediate injury warranted the entries, and also emphasized that this exception applies only incident to an arrest, based in part on a specific duty owed by the state to protect those whom it detains. (*U.S. v. Wilson* (5th Cir. 2002) 306

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[4] *Parra* also included a dissent, in which Justice Tamura argued that while necessity may have justified entry "to determine whether a burglary was in progress," once nothing was found "there no longer existed an immediate threat to life, health or property" justifying further intrusion. (*Id.* at p. 736.) Appellant finds the dissent in *Parra* persuasive, but since the case did not involve the search of a home, there is no need to further evaluate it here.

F.3d 231, 238, 241.) These cases therefore do not arise when officers are acting in a purely community caretaking capacity, and any application of this hybrid exigency/incident to arrest exception would not be dependent on *Ray*'s survival.[5]

The reasoning from one of the clothing-exigency cases, however, is highly relevant to the current inquiry. In *Gwinn*, the Fourth Circuit outright rejected "a general reasonableness test to justify a warrantless search of a home," noting that such searches are per se unreasonable, "unless the police can show . . . the presence of 'exigent circumstances.' " (*Gwinn, supra*, 219 F.3d at p. 332, citations omitted.) The court held further that "[t]he core protection of the Fourth Amendment would be eroded if, in order to enter a home, an officer were required only to have a reasonable law-enforcement purpose that a court could later find outweighed a person's privacy interest." (*Id.* at pp. 332-33.)

Respondent next notes that "courts have permitted warrantless entries into homes to search for a child whose guardian has been arrested, or to locate the parents of children found wandering the streets," indicating that such scenarios would not allow for entry if *Ray* is rejected. (See ABM 31.) Respondent's fear, however, is misplaced.

There are many circumstances where children being left unattended will amount to an emergency justifying a warrantless entry of a home. As noted in *U.S. v. Bradley* (9th Cir. 2003) 321

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[5] To clarify, appellant is not arguing that a California court would necessarily uphold these types of entries, but rather is merely asserting that rejecting *Ray* would not automatically render them improper.

F.3d 1212, "[t]he possibility of a nine-year-old child in a house in the middle of the night without the supervision of any responsible adult is a situation requiring immediate police assistance." (*Id.* at p. 1215.) The same goes for a two-year-old child wandering the streets while the front door of his home is ajar and no one is answering the officer's calls, as occurred in *People v. Miller* (1999) 69 Cal.App.4th 190.

These cases are properly treated as exigencies because all young children left unattended face an imminent and significant danger to their health, due directly to their inability to care for themselves. As such, if there are objective facts indicating that entry of a home can rectify the emergency, either by finding the child's parent or removing an unattended child from the home, then the terms of California's emergency doctrine are met. Entry was proper in the cases cited not just because it was reasonable, but because the officers were facing emergency situations, and their entries were justified thereby.

Moreover, as the court in *U.S. v. Taylor* (4th Cir. 2010) 624 F.3d 626 explained, "[t]hat a warrant was not necessary here does not mean that anything goes," and "not just any claimed justification will suffice to excuse a warrantless home entry." (*Id.* at p. 631, citations omitted.) The court explained further that, "*[e]specially outside of criminal justice matters*, . . . there is an objective basis that makes police entry reasonable: *the presence of exigent circumstances.*" (*Ibid.*, emphasis added.)

In addition, as respondent points out, this Court has applied the exigency exception to invalidate a home entry where

it was not necessary for the welfare of the child. (ABM 31, n. 13.) In *People v. Smith* (1972) 7 Cal.3d 282, where a child was left alone and ended up with a neighbor, this Court held the officer's entry of her home was improper, explaining that:

> [t]he 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. 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 [the] home falls within one of the "few specifically established and well-delineated exceptions" to the warrant requirement. Among those exceptions is the emergency doctrine. 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.

(*Id.* at pp. 285-86, citations omitted.) This shows that California courts are very comfortable assessing searches of homes in the context of unattended children using the exigency exceptions.[6]

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[6] Respondent also cites *U.S. v. Rohrig* (6th Cir. 1996) 98 F.3d 1506, arguing that at least one court has held that "police may enter a home to abate a severe and ongoing nuisance." (ABM 30.) *Rohrig*'s holding, however, is questionable; as noted in the opening brief, the Sixth Circuit subsequently limited its application, stating that "we doubt that community caretaking will generally justify warrantless entries into private homes." (*U.S. v. Williams* (6th Cir. 2003) 354 F.3d 497, 508.) Respondent notes the Sixth Circuit has referred to *Rohrig* as fact-specific, but argues that this is "true of all cases holding that an exigency,

Respondent asserts that none of the cases cited above involved exigencies, and they are better explained under the standard set forth in *Ray*. (ABM 31.) Appellant disagrees, as do the courts that have issued these decisions. What these cases actually show is that the emergency doctrines already strike the right balance when addressing wandering, defenseless children, the prevention of animal abuse, and, when considered in conjunction with an arrest, the avoidance of injury to a person who is under the state's care. In each case, the officers were properly required to justify their entries based on exigent circumstances that required swift action to avoid immediate dangers. What these cases do not do is provide support for only requiring officers to show that entry of a dwelling was reasonably necessary in light of the circumstances.

Respondent notes that in some of the cases, the "courts expressly acknowledge that a community caretaking rationale informed their decision," and "that courts widely apply a community caretaking doctrine in practice, if not always in name." (ABM 32.) This conclusion is not supported. While some of the cases refer to the community caretaking functions of officers, they were still assessing whether an exigency was unfolding. Indeed, it is not disputed that in many cases officers

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emergency, or need for community caretaking justifies an entry into a home." (ABM 30, n. 12.) It is true that to some extent every Fourth Amendment case is fact-specific, but that is not what the Sixth Circuit meant; rather, it was limiting *Rohrig*'s application, stating that it would not be applied going forward in circumstances not amounting to a "risk of danger" exigency. (*Id.* at pp. 503-507.)

will be serving what might be called a "community caretaking" role, but that does not detract from the requirement that their entries be justified by an immediate danger to life, health, or property. Contrary to respondent's assertions, none of the cases cited applied a general reasonableness test, and in fact some of them outright rejected such an analysis. (See *Gwinn*, *supra*, 219 F.3d at p. 332.)

Respondent asserts that "*Ray* was well within the mainstream" in concluding that alleged caretaking searches of the home can be proper even where police "lack a basis to conclude that someone inside the home faces death or imminent injury." (AMB 33.) Respondent again addresses the emergency doctrines too narrowly, but regardless, what is quite clear from applicable law is that the conclusion of *Ray*'s plurality – that a warrantless search of a home can be proper even when no exigent circumstances exist – is not mainstream. (See e.g. *Mincey v. Arizona* (1978) 437 U.S. 385, 393-394 [98 S.Ct. 2408, 57 L.Ed.2d 290]; *Michigan v. Tyler* (1978) 436 U.S. 499, 509 [98 S.Ct. 1942, 56 L.Ed.2d 486].)

E. *Ray*'s Community Caretaking Exception Does Not Offer Advantages Over The Emergency/Exigency Doctrines, But Rather Is A Far Too Ambiguous Standard Without Support Under The Fourth Amendment

Respondent argues that applying *Ray*'s community caretaking exception to searches of homes is advantageous because the emergency doctrines overlook certain factors, such as "societal expectations about assistance activities, the extent and gravity of the privacy intrusion, and the likelihood that the

intrusion will accomplish the purpose behind it." (ABM 33.) This assertion is unfounded for multiple reasons.

First, regarding the extent of the intrusion and likelihood that it will accomplish its purpose, respondent appears to be addressing the scope of the search, which is always part of a Fourth Amendment analysis. (See e.g. *Terry v. Ohio* (1968) 392 U.S. 1, 17 [88 S.Ct. 1868, 20 L.Ed.2d 889] ["a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope"]; *Warden, Md. Penitentiary v. Hayden* (1967) 387 U.S. 294, 310 [87 S.Ct. 1642, 18 L.Ed.2d 782] [scope of search must be "strictly tied to and justified by the exigencies which excused the warrantless search"] (conc. opn. of Fortas J.).)

As to consideration of the "societal expectations about assistance activities," respondent's argument is unclear. This is not an express aspect of the standard in *Ray*, so it is not clear how it is an advantage of the same. In addition, it is yet another vague consideration that will be left to the officer's discretion, even though "societal expectations" can vary widely among situations and individuals.

Respondent only lists the foregoing factors as examples, arguing that reliance on the emergency doctrines would also hinder the development of other criteria for judging the reasonableness of searches. (ABM 34.) But this is just the problem. The more varied and indistinct considerations there are, the less of a standard it becomes.

The issue here is not just about how courts will evaluate searches after the fact. It is also vital to consider how officers will assess the propriety of their entries. If the factors they are to consider are endless and all tie back to an amorphous question of reasonableness, it runs the risk that "any claimed justification will suffice to excuse a warrantless home entry" (*U.S. v. Taylor, supra,* 624 F.3d at p. 631), and that "[t]he core protection of the Fourth Amendment [will] be eroded" when, "in order to enter a home, an officer [is] required only to have a reasonable law-enforcement purpose that a court could later find outweighed a person's privacy interest." (*Gwinn, supra*, 219 F.3d at pp. 332-33.) As the federal Supreme Court has noted, such an "ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority," but it "also creates a danger that constitutional rights will be arbitrarily and inequitably enforced." (*Oliver, supra*, 466 U.S. at pp. 181, 181-82, citing *New York v. Belton* (1981) 453 U.S. 454, 460 [101 S.Ct. 2860, 69 L.Ed.2d 768]; *Smith v. Goguen* (1974) 415 U.S. 566, 572-573 [94 S.Ct. 1242, 39 L.Ed.2d 605].)

F. The Intricacies of *Ray*'s Standard Do Not Save It From Its Constitutional Defects

Respondent asserts that *Ray*'s exception is not actually so broad, and it will be applied differently to homes than it is to vehicles, because *Ray* requires an officer to cite specific and articulable facts justifying his entry, and any search must be limited to achieving its objective. (ABM 34-35, see also ABM 22.) But it is the conclusion respondent ultimately draws from the

standard that is problematic: "In short," respondent argues, "the search must be objectively reasonable under the totality of circumstances." (ABM 35.) In other words, an officer need only point to some facts indicating that his entry of a private home was reasonably necessary, as opposed to having to meet a clear and carefully-delineated standard.

Indeed, specific and articulable facts generally must support a decision to conduct a search or seizure. (See e.g., *Maryland v. Buie* (1990) 494 U.S. 325, 327 [110 S.Ct. 1093, 108 L.Ed.2d 276]; *In re Justin B.* (1999) 69 Cal.App.4th 879, 886.) But the meat of any exception under the Fourth Amendment is *what* those facts must tell the officer in order to justify the intrusion. Does an officer need to articulate facts indicating that an exigency required her entry in order to avoid an immediate danger to life, health, or property, or does she need only iterate facts indicating that her entry was reasonably necessary? The former is a clear standard with support in Fourth Amendment jurisprudence; the latter is not.

Respondent notes that in *People v. Morton* (2003) 114 Cal.App.4th 1039 the court applied the community caretaking exception and found the officers' justifications for their search unsupported. (ABM 35.) That one court found the exception inapplicable, however, does not render the standard constitutional.

Respondent asserts there is no need to worry about officers using this exception as a pretext because "[a]ny intention of engaging in crime-solving activities will defeat the community

caretaking exception even in cases of mixed motives." (ABM 35-36, citing *Ray, supra*, 21 Cal.4th at p. 477.) Here respondent relies mainly on inventory search cases to argue that courts are well-equipped to detect pretextual entries. (ABM 36.) But evaluating whether an inventory search was based on pretext differs greatly from doing so under the community caretaking exception. The former must be conducted pursuant to a standardized practice based on specific criteria, with specific purposes. (*People v. Torres* (2010) 188 Cal.App.4th 775, 787.) The community caretaking exception, however, involves no such routine procedure, and the interests at stake are far less-defined.

In addition, in the cases respondent cites where courts found inventory searches were pretextual, the officers blatantly admitted as much. These are therefore not great examples of courts' ability to "detect" pretext, as much as they are instances of courts recognizing clear admissions of it. (*Id.* at p. 789 [deputy testified he used " 'the inventory search as the means to go look for whatever narcotics-related evidence might be in the [truck].' "]; *People v. Aguilar* (1991) 228 Cal.App.3d 1049, 1054 [officer testified that "one . . . purpose of the impound was to conduct an investigatory search"].)[7]

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[7] Respondent asserts that *Brigham City v. Utah* (2006) 547 U.S. 398, 403 [126 S.Ct. 1943,164 L.Ed.2d 650] does not require this Court to reassess *Ray*'s evaluation of pretext because the high court has held that courts can inquire about officers' subjective motivations in the inventory search context. (ABM, 36, n. 17, citing *Whren v. U.S.* (1996) 517 U.S. 806 [116 S.Ct. 1769135 L.Ed.2d 89].) *Whren*, however, noted that inventory searches are the *only* context in which the court has ever found an officer's

In sum, respondent has not demonstrated that the details of the standard in *Ray* save it from its constitutional problems. Respondent would have each officer make a case-by-case judgment call about entering a person's home with his only guidance being that he reasonably believes his actions were necessary, but this untethered test is not supported by the case law respondent cites, and is not proper under the Fourth Amendment.

II. IF *RAY*'S PLURALITY IS FOUND CONSTITUTIONAL, THE SEARCH CONDUCTED IN THIS CASE SHOULD BE FOUND IMPROPER THEREUNDER

Respondent asserts that it was reasonable for the officers to search appellant's home because "releasing Ovieda back into his home, without at least accounting for all of his firearms, would have been irresponsible." (ABM 36.) As discussed in the opening brief, it is unclear what is meant by a desire to "account[] for" the firearms. As respondent concedes, "[t]he officers did not specify what they intended to do with any guns found inside Ovieda's

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motive to be relevant. (*Whren, supra*, 517 U.S. at p. 812.) In addition, *Brigham* expressly abrogated the portion of the Ninth Circuit's emergency doctrine that had required that searches "must not be primarily motivated by intent to arrest and seize evidence." (*U.S. v. Cervantes* (9th Cir. 2000) 219 F.3d 882, 890.) Appellant agrees that *Ray*'s inquiry into pretext is meant to "safeguard[] the general rule that police must generally obtain a warrant" when investigating crime, and also believes that such inquiry would be indispensable if the exception is upheld. (ABM, 36, n. 17.) However, given the reasoning and effect of *Brigham*, appellant is not sure the propriety of assessing pretext is as clear cut as respondent suggests.

home," and this is just the problem. There was no crisis currently unfolding. Appellant was safely outside his home, with no guns in reach. The extent and purpose of an "accounting" is unclear, and by failing to explain what their intention was, the officers failed to provide specific facts justifying their search.

Respondent next asserts that "a prudent police officer would not have taken Ovieda's word that he no longer posed a threat to himself." (ABM 38.) The facts, however, show that neither officer ever expressed an intention to detain appellant for an evaluation, despite their ability to do so if they had cause to believe he was a threat to himself. Indeed, the officers never even commented on appellant's behavior, nor did they indicate that he was still in distress. Their statements indicated only that they intended to leave the premises after the weapons were accounted for, which undermines the assertion that they believed appellant continued to pose a danger to himself.[8]

Moreover, if the officers truly believed appellant was a danger to himself, they still could have taken him for a mental health evaluation, even after discovering evidence of criminal

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[8] Respondent asserts that Case "continued to fear" for appellant's safety, but the officers only asked Case if he was concerned when they first arrived, and it is not clear from the testimony whether Case was describing previous or present fear. (ABM 37, 38, citing RT 38.) In addition, it was not until much later, after everyone had exited the home, including appellant who was cooperating fully, that the officers entered and searched the home without even seeking consent. (RT 38.) This contradicts respondent's position that a search was justified because Case "continued" to feel fear.

activity. For if appellant was still suicidal, placing him in a jail cell would seem questionable.

Respondent asserts that *Sutterfield v. City of Milwaukee* (7th Cir. 2014) 751 F.3d 542 undermines appellant's position, because in that case several hours passed between the report of suicidal ideations and the warrantless entry, but it does no such thing. In *Sutterfield*, a psychiatrist informed the police that he was concerned his patient might take her own life after a therapy session. This clearly holds a special kind of weight, and when he spoke with the officers again hours later, he did not express that his concern had lessened.

More importantly, in *Sutterfield* the court was working on the assumption that the officers had cause to detain the suicidal subject. (*Id.* at pp. 552-53.) Appellant's reliance on *Sutterfield* is focused on whether *the entry* of the subject's home was necessary; there, where it was presumed the officers had a right to detain her, and where she was *inside her home* and refusing to exit, a warrantless entry was justified. None of those factors were present here.

Respondent asserts that "[i]f the officers intended only to locate any remaining firearms and place them together in the garage, the officers could have reasonably concluded that Ovieda's friends would continue to take reasonable steps to prevent him from accessing them." (ABM 39.) This hypothetical justification cannot support a warrantless entry, and in fact demonstrates why the entry was improper. First, it bears repeating that respondent is speculating, and the record does not

show that this was the officers' intention. Second, considering the officers searched the home with guns drawn and never sought consent, it is doubtful this was their objective.[9] Third, even if this was their intention, it can hardly be shown to have been "necessary." Appellant's friends, who in this hypothetical are deemed capable of preventing appellant from accessing the guns, would also have been capable of locating them, especially now that appellant was outside. As such, an entry for this purpose would not have been necessary at all.

Respondent also asserts that if the officers' intention was to temporarily seize the weapons, they would have had the power to do so. (ABM 39.) This assertion is also problematic for multiple reasons. First, respondent is once again guessing about what the officers intended to do, which demonstrates the lack of *specific facts* justifying their search. Second, the authority respondent cites does not support the officers' ability to temporarily seize weapons under these circumstances.

In *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, the court upheld the seizure of weapons in the context of a potential mass shooting, where a hotline operator reported that Mora had told her he was suicidal, had weapons in his apartment, could understand shooting people at work, and said, "I might as well die at work." (*Id.* at p. 226.) One of Mora's co-workers confirmed that these threats should be taken seriously.

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[9] Respondent asserts that the officers were "unable to obtain the consent" of appellant to enter. (ABM 34, n. 16.) This is untrue. The officers were speaking directly with appellant and easily could have asked for his consent, yet never did.

Mora therefore presented an entirely different and far more imminently dangerous scenario than that present here.

In *U.S. v. Antwine* (1989 8th Cir.) 873 F.2d 1144, the Eighth Circuit relied on the exigent circumstances exception to justify entry of a home to seize a weapon following the arrest of the occupant because the officer knew that two small children would otherwise be left alone in the home with the firearm. (*Id.* at p. 1147.) Again, the exigency in that situation was apparent, especially considering the inherent dangers that exist in the context of unattended children.

In *U.S. v. Harris* (8th Cir. 2014) 747 F.3d 1014, a man was sleeping on a bench at a Greyhound bus station with a gun falling out of his pocket. The court upheld the officers' decision to retrieve the gun from the pocket, explaining that the "limited intrusion" was justified because "Harris was carelessly handling a firearm in a dangerous and public location that had forbidden firearms." (*Id.* at p. 1018.) The right of an officer to intervene in such an immediate, dangerous handling of a weapon in a public place with a very "limited intrusion" addresses a far different scenario from that present here.

State v. Brecunier (Iowa 1997) 564 N.W.2d 365 is even more distinguishable. There the court found that a warrantless entry to seize a firearm was justified by the emergency exception where the defendant was involved in a dangerous neighborhood brawl. The defendant and another man named Weiss were armed and had retreated to Weiss's yard. The court explained that entry was justified by escalating tensions, troops "mustered"

at the home, and reports that Weiss had pointed a shotgun at youngsters in the neighborhood. (*Id.* at p. 368.)

These cases represent circumstances where the exigency requiring the removal or seizure of weapons was evident and currently unfolding. The facts of this case are not analogous. Respondent asserts that "[o]n the facts facing the officers – a suicidal person with at least three firearms inside his home – it would have been reasonable to conclude that a temporary seizure of the weapons was appropriate." (ABM 39-40.) But what respondent leaves out is that when the officers entered, appellant was outside his home nowhere near the firearms, it had been hours since his suicidal ideations, and the officers never stated that he was in distress or expressed any intention of detaining him. What a "temporary seizure" would have accomplished in these circumstances is entirely unclear.

Respondent argues that even if the officers acted contrary to state law by failing to invoke Welfare and Institutions Code section 5150, "that would not affect whether the seizure complied with the federal constitution." (ABM 40.) But appellant is not asserting that his Fourth Amendment rights were violated because the officers violated state law. Rather, appellant is pointing out that by not invoking section 5150 or expressing any intention to detain appellant, the officers' purported reason for their search is undermined. For if the officers had no grounds or intention to detain appellant, then temporarily securing his weapons would serve no purpose, since they would eventually have left him in his home with the firearms. And, as discussed in

the opening brief, if the officers were not yet sure whether they intended to detain him, then the search was certainly not justified, because appellant was safely outside the reach of any firearm, and any further assessment of his condition should have been made from outside his home.

Respondent only addresses the officers' other justification for their search – "to ensure there was nobody inside who was injured or who needed assistance" – in a footnote. (ABM 38, n. 18.) There respondent asserts that "[a]lthough Ovieda argues that the officers had no articulable basis to conclude that anyone else was inside (OBM 70), the trial court reasonably concluded that the officers were not required to accept everything they were told at face value." (*Ibid.*)

A finding that the officers did not have to accept everything that was said, however, is *not* a specific and articulable fact indicating that entry was necessary to assist someone inside the home. Notably, respondent does not point to any such facts, because there are none to be found. (See *McInerney v. King* (10th Cir. 2015) 791 F.3d 1224, 1235 [" '[t]he sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid – such a "possibility" is ever-present.' "], citations omitted.) Moreover, this was the primary justification given for the search, as the officers repeated it several times, and yet it has no support whatsoever. (RT 11-12, 40-41, 43.)

In sum, the officers did not point to sufficient facts indicating that their search was reasonably necessary. This is evident from the indefinite and/or unsupported justifications

provided, as well as respondent's own guessing about what the officers intended to do once inside. Because constitutionally-required specific and articulable facts justifying the warrantless search of appellant's home were lacking, the community caretaking exception has not been satisfied.

III. THE COMMUNITY CARETAKING EXCEPTION IS INAPPLICABLE BECAUSE THE OFFICERS HARBORED A DUAL MOTIVE

In response to appellant's recitation of the evidence demonstrating that the officers were acting with a mixed motive, respondent merely reiterates the trial court's conclusion that there was no evidence "of any suspicion that there was anything illegal going on in the home," and then states in a conclusory fashion that this finding was supported by substantial evidence. (ABM 40-41.)

To the contrary, however, the trial court's conclusion is belied by the record. Respondent does not dispute that the officers conducted their search with guns drawn, and testified that they performed it based, at least in part, on their suspicions of illegal possession of weapons, their speculation of potential domestic violence, and the unsupported possibility that appellant had injured someone. (RT 12, 43.) These facts, coupled with the officers' characterization of the search as a protective sweep, their suspicions that Case was being untruthful, and their failure to ever seek appellant's consent to enter his home, all demonstrate clearly that these officers were treating appellant not just as a victim, but as a suspect. By finding otherwise, the trial court failed at its "vital gatekeeper role" under *Ray*, and the

community caretaking exception should be found inapplicable. (*Ray, supra*, 21 Cal.4th at p. 477.)

CONCLUSION

As the saying goes, "a man's home is his castle," and that is why "the home is shielded by the highest level of Fourth Amendment protection." (*Matalon v. Hynnes* (1st Cir. 2015) 806 F.3d 627, 633.) Appellant respectfully asks the Court to preserve this fundamental protection by rejecting *People v. Ray*, or, in the alternative, finding the search conducted here unconstitutional thereunder.

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, Appellant's Reply Brief on the Merits contains 8,397 words.

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

Executed January 12, 2019, at Tulsa, Oklahoma.

Elizabeth K. Horowitz
State Bar No. 298326

PROOF OF SERVICE

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Case No: S247235

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 Reply Brief on the Merits by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Tulsa, Oklahoma, on January 12, 2019. I also served a copy of this petition electronically on the following parties:

- California Attorney General, at docketingLAawt@doj.ca.gov
- California Court of Appeal for the Second District, Division Six, at 2d6.clerk6@jud.ca.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 12, 2019, at Tulsa, Oklahoma.

Elizabeth K. Horowitz