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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALBERT TROYER,

Defendant and Appellant.

NO. S180759

SUPREME COURT
FILED

JUL 2 7 2010

Frederick K. Ohlrich Clerk

Deputy

Court of Appeal, Third District, Case No. C059889

Sacramento County Superior Court, Case No. 07F06029

The Honorable Laurie Earl, Judge Presiding

APPELLANT'S ANSWERING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	NO. S180759
Plaintiff and Respondent, v.	Court of Appeal, Third District, Case No. C059889
ALBERT TROYER, Defendant and Appellant _____________________/	Sacramento County Superior Court Case No. 07F06029

APPELLANT'S ANSWERING BRIEF ON THE MERITS

INTRODUCTION

This Court granted respondent's petition for review that raised the issue of whether the Court of Appeal correctly reversed the denial of Troyer's motion to suppress based on a violation of Troyer's Fourth Amendment rights. In the petition for review, respondent argued that the warrantless search of the home was justified under the emergency aid exception to the warrant requirement and as a protective sweep for suspects. Neither theory proffered by respondent supports the search.

Troyer argues that the emergency aid exception to the warrant requirement allows entry only if the police have probable cause to believe

an injured person is within. The United States Supreme Court has not recognized an exception that allows entry into a private home based on a standard of proof that is less than probable cause, even though lower courts are divided on this issue. On the facts below, where police responded to a crime scene outside of a house, they lacked sufficient facts that there was an injured person within the house to justify the entry into the home as well as the locked, second-floor bedroom where evidence was observed.

Troyer further argues that the search could not be justified as a protective sweep of the home based on the theoretical possibility that suspects in the shooting were inside. The United States Supreme Court has not delineated an exception to the probable cause requirement when the entry into the home was a protective sweep for suspects. No lower court has expanded the reach of the protective sweep doctrine to the factual situation presented in this case. Troyer argues that probable cause to believe the suspects were within was necessary to support entry into the home. Probable cause was lacking because, based on the information known to police, all known suspects had fled.

STATEMENT OF THE CASE

An information alleged that, on June 6, 2007, Albert Troyer and Albert Abeyta, his co-defendant, were alleged to have possessed marijuana for sale in violation of Health and Safety Code section 11359 (count 1) and to have cultivated marijuana in violation of Health and Safety Code section 11358 (count 2). Both charges were enhanced with an allegation pursuant to Penal Code section 12022, subdivision (a)(1), that Troyer was armed with a .40 caliber handgun.[1] (CT 4, 61-62.)

On February 15, 2008, Troyer filed a motion to suppress evidence pursuant to Penal Code section 1538.5. (CT 72.) After a hearing on April 16, 2008, the trial court denied that motion. (CT 92; RT 81.)

Troyer then pled no contest to all charges and admitted the enhancement in exchange for a sentence of probation with a year in county jail. (RT 92-98.) (RT 107-109.)

A notice of appeal was filed in a timely fashion on September 3, 2008. (CT 124.) A second notice of appeal was filed on September 19, 2008. (CT 129.)

1

Co-defendant Abeyta was also charged with possession of hydrocodone pills for sale in violation of Health and Safety Code section 11351 (count 3) and, as to all counts, with an enhancement pursuant to Penal Code section 12022, subdivision (a)(1).

In an opinion filed on January 27, 2010, a divided panel of the Court of Appeal, Third District, reversed the judgment and directed that Troyer's motion to suppress be granted. (Ct. of Appeal, Third Dist., Case No. C059889, slip opn., p. 11.) Respondent filed a petition for rehearing that was denied.

Respondent's petition for review was granted on April 28, 2010. Respondent argued in the petition for review that the search was justified under the emergency aid exception to the warrant requirement of the Fourth Amendment or, alternatively, under the protective sweep exception.

STATEMENT OF THE FACTS

1. Facts from the Hearing on the Motion to Suppress

On June 6, 2007, Sergeant Tim Albright of the Elk Grove Police Department went to 9253 Gem Crest Way in response to a report of a shooting. Over his radio, Albright heard that a male had "possibly been shot twice" and that the suspects were driving a two-door, blue Chevrolet Tahoe. (RT 4, 15.) Because he was in plain clothes and without protective gear, Albright first observed the scene from a distance. (RT 5, 15.) He saw two males running about in the middle of the street, trying to flag down responding officers. (RT 5, 15.) After it appeared that the suspect's vehicle was not on the scene, Sergeant Albright approached. (RT 5.)

The situation was "very chaotic." (RT 42.) Two persons had been injured. (RT 42.) Mia Zapata, who had been shot multiple times, was bleeding on the front porch of 9253 Gem Crest Way. (RT 5, 6, 36, 40, 44.) Ms. Zapata was "screaming during the entire encounter." (RT 42.) She was constantly asking for water. (RT 40.) A white male was attending to Ms. Zapata. (RT 5.)

Adrain Abeyta, appellant's co-defendant, was also on the porch in front of the house. (RT 44.) He had a wound at the "top of his head, rear of

his head, with blood covering the majority of his face."[2] (RT 6-7.) "His T-shirt and such was covered in blood as well, and blood was streaming down the back of his head." (RT 7.) Mr. Abeyta was highly "agitated." (RT 6, 42.) He was "yelling and screaming for medical personnel." (RT 42.)

There was blood on the door, blood surrounding the scene. (RT 19.) On the door there were both smudges and droplets of blood.[3] (RT 19, 41.)

2

Respondent errs in its statement of fact by claiming that "[i]t appears that the parties below knew that [Abeyta] had been pistol-whipped." (Resp. Brief, p. 2, fn. 3.) The record does not so indicate. Instead, during argument, the prosecutor twice claimed the Abeyta had been pistol-whipped. (RT 64, 75.) The argument of facts not in evidence does not make such facts known or established. Moreover, although not introduced into evidence at the hearing on the motion to suppress, Abeyta had been both shot and pistol-whipped. (CT 96 [probation report states that a bullet grazed Abeyta's head].)

Respondent further errs by claiming that the record demonstrates that "[t]here was no sign of the male victim who reportedly had been shot twice." (Resp. Brief, p. 2.) Albright, the only witness to testify to this portion of the incident, never indicated that Abeyta did not fit the description of the male who had possibly been shot. Respondent's claim that there was no sign of the male victim is contradicted by Albright's testimony that he was concerned about Abeyta because of "the report that a male had been shot, combined with a head injury and the amount of blood." (RT 8.) The record indicates that Abeyta *was* the male victim reported. (RT 8, 10.)

3

Respondent states that there were blood "smudges near the handle ..." (Resp. Brief, p. 2.) The record does not indicate that there were smudges "near the handle." The pages in the record to which respondent cites do not indicate that there were smudges near the door handle. (RT 19, 41.) Albright did testify that there was blood "more near the handle side of the door on the exterior" but that alleged blood was not in the photographs of

Both Zapata and Abeyta were on the small concrete front porch that was approximately ten feet by four feet. (RT 5, 8.)

Fire personnel arrived shortly, bringing "a lot of equipment ... a lot of bodies into the scene." (RT 42-43.) Six to seven police officers, some in plain clothes, arrived. (RT 17.) In the midst of all this chaos, Albright questioned Abeyta. (RT 7.) "[I]t was very difficult to get information from him due to his excitable nature." (RT 21.) Albright, however, got Abeyta to describe two suspects – a white male and a black male –, the vehicle they were driving – a blue, two-door Chevy Tahoe –, and the direction in which they fled. (RT 7, 15, 20.)

Albright asked Abeyta if anyone was inside the house. (RT 8-9.) Abeyta did not respond. Albright asked again. Abeyta said he did not believe anyone was in the house. Albright, dissatisfied with this answer, asked for a third time if anyone was in the house. Abeyta paused before answering no. (RT 9.) Abeyta's answers did not reassure Albright. (RT 9.)

At the time of this questioning, Albright

> was unsure as to, number one, whose house it was; number two, where any suspects may have been located, whether there were more than the initial two reported; and additionally, if there were further victims located within the residence that were unknown. ... ¶ My, primary concern was two-fold: One, of course, for the victims and,

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the door taken by the police. (RT 45.)

> two, for my safety, as well as responding officers' safety and not knowing what threat, if any, existed beyond the doorway.
>
> (RT 10.)

At the time that he made the decision to enter the house, Albright was concerned with "[a]dditionally not knowing what, if any, potentially other victims could be beyond that doorway." (RT 10.)

Albright told Abeyta that he wanted to go into the house. Abeyta had a set of keys in his hand. (RT 11.) When Albright asked if those keys were to the house, Abeyta said yes. Albright asked for the keys so he could open the door. (RT 12.) Abeyta declined to give him the keys, stating that he did not want the police to go inside the house. (RT 12, 57.) Albright told Abeyta that if he didn't hand over the keys, the police would kick in the door. (RT 22.) Only then did Abeyta hand over the keys. (RT 23.)

Uniformed officers entered the house. (RT 12-13.) One of those officers was Samuel Seo. (RT 47.) As he went through the house, he was "looking for suspects, looking for victims, and looking for evidence of perhaps illegal activity." (RT 58.) Seo specifically looked for any signs of a struggle or blood. (RT 56.) He looked to see if there was a trail of blood on the floor leading to a bedroom or bathroom. (RT 58-59.) On the first floor of the home, Seo did not see anything that attracted his attention. (RT 50-51.) It did not appear as if there had been a struggle inside the house. (RT

54-55.) Seo did not see any blood inside the home. (RT 55.)

Upstairs in the house, Seo found a locked door. (RT 51.) He kicked it open. (RT 51.) Inside the room was the strong odor of marijuana. (RT 52.) In the corner of the room, on a small desk, was an electronic scale and a glass jar filled with marijuana. (RT 52.) Seo told detectives what he had seen. (RT 53.)

The prosecutor stipulated that appellant had standing to contest the search. (RT 60.)

2. Additional Facts from the Preliminary Hearing Transcript[4]

Based upon the marijuana observed in the house, and to investigate the attempted homicide, the officers who had first responded to the scene obtained a search warrant. (CT 25.) In the search based upon the warrant, police found, in the master bedroom of the house, indicia in the names of Adrien Abeyta and Anthony Abeyta, mason jars of marijuana, a loaded shotgun, a 9 mm magazine, $2,500, 163 hydrocodone pills, and a scale. (CT

4

Although these facts were not before the court at the hearing on the motion to suppress, Troyer includes them to provide a full explanation of the facts leading to conviction and to provide context to the remedy that Troyer requests should this Court find entry into the home violated the Fourth Amendment.

27-33.) In a second bedroom, police found Troyer's driver's license, a .40 caliber handgun, mason jars of marijuana that weighed approximately twelve ounces, $6,615, and two scales. (CT 34-36.) In the trunk of a Volvo outside the house, police found a loaded 9 mm handgun with a round jammed in the slide. (CT 27.) In the side yard of the house, not visible from the street, was an eighteen-inch-tall marijuana plant. (CT 36, 58.)

ARGUMENT

I. The Warrantless Entry and Search of the House by the Police Violated Troyer's Fourth Amendment Rights

The federal and state Constitutions prohibit unreasonable searches of private homes.[5] (U.S. Const., 4th & 14th Amends.; Cal. Const., art. I, § 13.) "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 748 [104 S. Ct. 2091; 80 L. Ed. 2d 732], citations omitted.) A warrantless entry into the home is "presumptively unreasonable." (*Payton v. New York* (1980) 445 U.S. 573, 586 [100 S. Ct. 1371; 63 L. Ed. 2d 639].) Below, the prosecution failed to overcome that presumption.

The United States Supreme Court has recognized a small number of "narrow and specifically delineated exceptions to the warrant requirement." (*Thompson v. Louisiana* (1984) 469 U.S. 17, 21 [105 S. Ct. 409; 83 L. Ed.

5

The Fourth Amendment provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2d 246] [rejecting a murder-scene-exception to the warrant requirement]; see also *Mincey v. Arizona* (1978) 437 U.S. 385 [98 S. Ct. 2408; 57 L. Ed. 2d 290] [warrant requirement is "'subject only to a few specifically established and well-delineated exceptions'" (citations omitted)].) Dispensing with the warrant requirement does not lessen the need for probable cause before a search can be conducted. "[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home." (*Kirk v. Louisiana* (2002) 536 U.S. 635, 638 [122 S. Ct. 2458; 153 L. Ed. 2d 599] [per curiam opinion].) "[P]robable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized." (*Maryland v. Pringle* (2003) 540 U.S. 366, 371 [124 S. Ct. 795; 157 L. Ed. 2d 769], internal quotation marks and citations omitted)

"One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." (*Brigham City, Utah v. Stuart* (2006) 547 U.S. 398, 403 [126 S. Ct. 1943; 164 L. Ed. 2d 650].) "Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." (*Ibid.*) Such a

warrantless entry is justified when police have "an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. " (*Id.* at p. 400.)

A. The United States Supreme Court Cases Addressing the Emergency Aid Exception

The Supreme Court's jurisprudence on the "emergency aid" exception to the warrant requirement arose in *Mincey v. Arizona*, *supra*, 437 U.S. 385. In *Mincey*, police conducting an undercover narcotics sting operation entered an apartment where an officer had earlier made arrangements to buy heroin. (*Id.* at p. 387.) A policeman was shot who, later, died from his wounds. (*Ibid.*) After a protective sweep for other persons, the narcotics officers refrained from further investigation pursuant to a police policy that officers not investigate an incident in which they were involved. Within ten minutes, homicide investigators arrived and, without obtaining a warrant, conducted a four-day-long, "exhaustive and intrusive search." (*Id.* at pp. 388-389.) Mincey was subsequently convicted of murder and narcotic violations. The Arizona Supreme Court reversed the murder and assault convictions on state-law grounds but affirmed the narcotics convictions on the grounds that the warrantless search of a homicide scene was permissible. (*Id.* at p. 388.)

The United States Supreme Court rejected the contention that the four-day-long search was permissible as a "murder scene exception" to the Fourth Amendment's warrant requirement. (*Id.* at p. 391.) In making that determination, the Court opined that

> the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.

(*Id.* at p. 392.)

Since *Mincey*, the United States Supreme Court has twice returned to the "emergency aid doctrine," in *Brigham City, supra,* 547 U.S. 389 and in *Michigan v. Fisher*, (2009) 558 U.S. __, [130 S. Ct. 546, 175 L.Ed.2d 410]. In *Brigham City*, the Court upheld the warrantless entry into a kitchen when the officers had seen, through a screen door and windows, a juvenile punch an adult in the face and several adults struggle to restrain that juvenile. (*Brigham City, supra*, 547 U.S. at p. 401.) The Court found that the subjective motivation of the officers was irrelevant. (*Id.* at p. 404.) It upheld that entry into the kitchen because

> the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait ...

(*Id.* at p. 406.)

In *Michigan v. Fisher, supra*, 130 S. Ct. at pp. 547-458, the Court issued a per curiam opinion finding a search reasonable under the "emergency aid exception" to the warrant requirement. Police, responding to a report of a disturbance, were directed to a house were "a man was 'going crazy.'" (*Id.* at p. 547.) Police saw in the driveway a pickup truck with its front smashed, damaged fence posts along the side of the property, and three windows in the house broken with the glass still on the ground outside. (*Ibid.*) There was blood on the pickup's hood, on clothes inside it, and on a door to the house. (*Ibid.*) Through a window to the house, the officers could see a man, Fisher, "inside the house, screaming and throwing things. He had a cut on his hand. He did not answer the officers' knocks nor did he respond to questions about whether he needed medical attention. The back door to the house was locked and the front door was blocked by a couch. An officer pushed the front door partially open before seeing the man pointing a rifle at him. Fisher was subsequent charged with assault for pointing the rifle at the officer. (*Ibid.*)

The Court held that the "tumultuous situation in the house" provided "'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger." (*Fisher,* 130 S.Ct. at p. 548-549, citing

Brigham City, supra, 547 U.S. at p. 406 and *Mincey, supra*, 437 U.S. at p. 392.) It is against the backdrop of these case that the current state of the emergency aid exception has developed.

B. The Government Must Meet the Probable Cause Standard to Justify the Search Under the Emergency Aid Doctrine

Although the United States Supreme Court has not directly addressed whether the phrase "an objectively reasonable basis" encompasses a standard equivalent to probable cause or a lesser standard like that of reasonable suspicion (*Terry v. Ohio* (1968) 392 U.S. 1, 27 [88 S. Ct. 1868; 20 L. Ed. 2d 889]), its jurisprudence indicates that it has not stated an exception to the general probable cause requirement found in the Fourth Amendment. The Court has continually held the exceptions to the probable cause requirement must be narrowly drawn. (*Ybarra v. Illinois* (1979) 444 U.S. 85, 93-93 [100 S. Ct. 338; 62 L. Ed. 2d 238].)

Respondent states that "a 'reasonable belief that an emergency exists' is 'a less exacting standard than probable cause.'" (Resp. Brief on the Merits, p. 8, citations omitted.) Respondent fails to note the split of authority on this point. While some courts have found the "reasonable

belief" standard to require less proof than probable cause[6], other courts have found it to be the equivalent of probable cause. (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 528 [reading *Brigham City* to require probable cause for entry into a dwelling]; *People v. Ormonde* (2006) 143 Cal.App.4th 282, 292 [finding probable cause required for entry into home to "prevent imminent danger to life"]; *United States v. Martins* (1st Cir. 2005) 413 F.3d 139, 147, cert. denied, (2005) 546 U.S. 1011 [126 S. Ct. 644; 163 L. Ed. 2d 520] ["the government must show a reasonable basis, approximating probable cause, both for the officers' belief that an emergency exists and for linking the perceived emergency with the area or place into which they propose to intrude."]; *United States v. Venters* (7th Cir. 2008) 539 F.3d 801, 806-807; *United States v. Holloway*, *supra*, 290 F.3d at pp. 1337-1338;

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See *United States v. Quezada* (8th Cir. 2006) 448 F.3d 1005, 1007; *United States v. Najar* (10th Cir. 2006) 451 F.3d 710, 718. Although respondent cites *United States v. Holloway* (11th Cir. 2002) 290 F.3d 1331 as being in "accord" with *Quezada*, it is not. (Resp. Brief on the Merits, p. 7.) The *Holloway* court found that

> In validating a warrantless search based on the existence of an emergency, as with any other situation falling within the exigent circumstances exception, the Government must demonstrate both exigency and probable cause. ... ¶ Thus, in an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger.

(*United States v. Holloway, supra,* 290 F.3d at pp. 1337-1338.)

State v. Eberly (2006) 271 Neb. 893, 902, 716 N.W.2d 671, 679 ["the emergency doctrine analysis here is similar to probable cause"]; *Steinmetz v. State* (Ark. 2006) 234 S.W.3d 302, 305 [finding probable cause based on emergency aid doctrine] .)

The Supreme Court has used phrases such as "reasonable belief" or "reason to believe" to describe both probable cause and the lower standard of reasonable suspicion. (Compare *Safford Unified School Dist. #1 v. Redding* (2009) 557 U.S. __ [129 S. Ct. 2633, 2639; 174 L. Ed. 2d 354] [probable cause requires "reasonably trustworthy information" that is sufficient to "warrant a man of reasonable caution in the belief that an offense has been or is being committed [Citations]"] to *Maryland v. Buie* (1990) 494 U.S. 325, 337 [110 S. Ct. 1093; 108 L. Ed. 2d 276] [reasonable suspicion is "a reasonable belief based on specific and articulable facts"].) Because the Fourth Amendment protects against unreasonable searches, any search, regardless of the standard employed, must be reasonable. Therefore, the use of phrases such as "reasonable basis" or "reasonable belief" does no more than inform us that the Court is undertaking a Fourth Amendment analysis. Because the Supreme Court has not articulated a specific exception to the probable cause standard, courts should not presume an exception to the general rule that probable cause applies.

In terms of the emergency aid exception, the phrases a "reasonable basis" or a "reasonable belief" may simply be a way to recite the probable cause standard without reference to any belief that a crime is being committed. Because the term "probable cause" traditionally has been related to the probability that a crime has occurred, the Court's use of the term "reasonable belief" may have simply been a statement of the same level of proof tailored for a broader application than just crime-solving. There are a number of reasons, other than the lack of a clearly-articulated exception, to believe that the phrase "a reasonable belief" refers to a level of proof equivalent to probable cause.

Prior to *Brigham City*, the most widely accepted standard for applying the emergency aid doctrine was that set forth in *People v. Mitchell*, (N.Y. 1976) 39 N.Y.2d 173, 347 N.E.2d 607, 609, 383 N.Y.S.2d 246, cert. denied, (1976) 426 U.S. 953 [96 S. Ct. 3178, 49 L. Ed. 2d 1191], which required that:

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

This three-part test enjoyed wide-spread application.[7]

The *Mitchell* test apparently linked the emergency aid doctrine to the "community caretaking" exception to the warrant requirement first expressed in *Cady v. Dombrowski* (1973) 413 U.S. 433, 441 [93 S. Ct. 2523; 37 L. Ed. 2d 706], which upheld a warrantless vehicle search undertaken without probable cause, as a "community caretaking function[], totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." In *Cady v. Dombrowski*, the

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United States v. Cervantes (9th Cir. 2000) 219 F.3d 882, 888; *Gallmeyer v. State* (Alaska Ct. App. 1982) 640 P.2d 837, 842; *State v. Fisher* (Ariz. 1984) 141 Ariz. 227; 686 P.2d 750; *People v. Bondi* (Ill. App. Ct. 5th Dist. 1984) 130 Ill. App. 3d 536, 474 N.E.2d 733; *People v. Davis* (Mich. 1993) 442 Mich. 1, 19, 497 N.W.2d 910; *Smith v. State* (Miss. 1982) 419 So. 2d 563, 570; *State v. Resler* (Neb. 1981) 209 Neb. 249, 255, 306 N.W.2d 918, 923; *State v. MacElman* (N.H. 2003) 149 N.H. 795, 798, 834 A.2d 322, 326; *State v. Scott* (N.J. App.Div. 1989) 231 N.J. Super. 258, 275, 555 A.2d 667, 676; *State v. Ryon* (N.M. 2005) 137 N.M. 174, 180, 2005 NMSC 5, 9, 108 P.3d 1032, 1038; *State v. Follett* (Ore. App. 1992) 115 Ore. App. 672, 840 P.2d 1298, 1302; *State v. Matthews* (N.D. 2003) 2003 ND 108, 665 N.W.2d 28, 39; *State v. Cheers* (Ohio Ct. App., Lucas County 1992) 79 Ohio App. 3d 322, 325, 607 N.E.2d 115; *Salt Lake City v. Davidson* (Utah Ct. App. 2000) 2000 UT App 12, 994 P.2d 1283, 1287; *State v. Mountford* (Vt. 2000) 171 Vt. 487, 490, 769 A.2d 639; *State v. Nichols* (Wash. Ct. App. 1978) 20 Wn. App. 462, 581 P.2d 1371, 1373; *State v. Ferguson* (Wis. Ct. App. 2001) 2001 WI App 102, 244 Wis. 2d 17, 629 N.W.2d 788. It was also cited with approval by commentators. (See 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.6(a), at 392-93 (3d ed. 1996). See generally J. Decker, Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions, 89 J. Crim. L. & Criminology 433, 440-41 (1999) (explaining three-pronged test similar to that in *Mitchell*).)

police searched the wrecked car of an off-duty police officer to make sure that his service revolver was secured. In the course of that search, they found bloody items that linked the off-duty officer to a murder. (*Id.* at pp. 435-438.) The Court found that the searching officer, who "was ignorant of the fact that a murder, or any other crime, had been committed," acted reasonably to protect both the owner's property and the public.[8] (*Id.* at pp. 447-448.) The requirement that, under the community caretaking exception, a search based on less than probable cause must be "totally divorced" from detection or investigation of crime was incorporated into the second prong of the *Mitchell* test.

In *Brigham City* the Court granted certiorari specifically to address, and reject, the second prong of the *Mitchell* test – that the subjective

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[8] The United States Supreme Court has not extended its use of the community caretaking exception to the warrant requirement beyond automobile searches. (See *South Dakota v. Opperman* (1976) 428 U.S. 364 [96 S. Ct. 3092; 49 L. Ed. 2d 1000].) Some lower courts have likewise limited the community caretaking exception to automobile searches. (See *United States v. Pichany* (7th Cir. 1982) 687 F.2d 204, 209 (declining to extend the community caretaking exception to the warrantless search of a warehouse); *United States v. Erickson* (9th Cir. 1993) 991 F.2d 529, 532 (restricting the community caretaking exception to searches not involving homes or offices); *United States v. Bute* (10th Cir. 1995) 43 F.3d 531, 535 (community caretaking exception does not apply to search of commercial building); *State v. Gill* (N.D. 2008) 2008 ND 152; 755 N.W.2d 454, 459-460; but see *United States v. Rohrig* (6th Cir. 1996) 98 F.3d 1506 (warrantless entry into home was justified by a community caretaking interest in quelling loud noise).

motivation of the police not be investigation of crime – in the context of the emergency aid exception. (*Brigham City, supra*, 547 U.S. at p. 402.) The Court did not directly address the other two prongs of the *Mitchell* test.[9] The Court did, however, equate the emergency aid exception with other exigent circumstances that do require probable cause: "[o]ne exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." (*Brigham City, supra*, 547 U.S. at p. 403.) The Court found that the entry into the kitchen would have been justified even if based only on the officer's intent to arrest the brawlers. (*Id.* at p. 405.) Although given ample opportunity to decide whether to articulate an exception to the probable cause standard for the emergency aid exception, the Court declined to do so. Therefore, the Court seems to equate the emergency aid exception with the other exigencies that allow warrantless entry only if probable cause exists.[10] Under such circumstances, the general rule expressed in *Kirk v. Louisiana, supra*, 536 U.S. at p. 638 – that a warrantless entry requires probable cause plus

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Some courts have held that the other two prongs of the *Mitchell* test are still valid. (See *State v. Ford* (2010) 2010 VT 39.)

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Fisher, which closely follows the reasoning of *Brigham City*, does not address whether a lesser standard than one approximating probable cause will justify a warrantless entry.

exigent circumstances – should apply. (See also *Hunsberger v. Wood* (4th Cir. 2009) 570 F.3d 546, 554 (distinguishing community-caretaking searches from the emergency aid doctrine and finding that the exigent circumstances analysis applies to the latter.)

In *People v. Ray,* (1999) 21 Cal.4th 464, a plurality of the California Supreme Court found that a standard less than probable cause could support a warrantless search under the emergency aid exception.[11] The emergency aid exception was characterized as a "component" of the community caretaking exception to the warrant requirement. (*Id.* at p. 472.) That plurality found that a lesser standard than probable cause was appropriate because the police were not engaged in crime investigation: "[a]ny intention of engaging in crime-solving activities will defeat the community caretaking exception even in cases of mixed motives." (*Id.* at p. 477.)

The plurality's rational – that a lesser standard than probable cause is justified only when the police have no intention of engaging in crime solving activities – does not survive the rejection of a subjective intent element in determining the reasonableness of searches by the United States

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The lead opinion in *Ray* was by Justice Brown with Justices Kennard and Baxter concurring. Chief Justice George wrote a concurring opinion, joined by Justices Werdegar and Chin, that upheld the search based on "reasonable cause" that an exigent circumstance existed. Justice Mosk dissented.

Supreme Court in *Brigham City*.[12] If the reasons underpinning this Court's adoption of a lesser standard have been undermined, then this Court should reconsider whether the use of a lesser standard remains justified. As explained above, the use of a standard lower than one approximating probable cause for the emergency aid exception has never been adopted by the United States Supreme Court. Here, when this Court's basis for adopting a lesser standard has been abrogated and no other justification offered, then a standard equivalent to probable cause should apply.

C. A Home Is Entitled to Greater Protection Under the Fourth Amendment

The fact that the search at issue here was of a home provides further grounds for applying the more stringent probable cause standard. "It is a bedrock principle that the prophylaxis of the Fourth Amendment is at its zenith with respect to an individual's home." (*United States v. Martins, supra*, 413 F.3d at p. 146.) An "overriding respect for the sanctity of the home ... has been embedded in our traditions since the origins of the

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The United States Supreme Court has not addressed how the holding of *Brigham City* should be reconciled with that of *Cady v. Dombrowski*, *supra*, 413 U.S. at p. 441, in which the Court upheld a warrantless vehicle search, as a "community caretaking function[], totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

Republic." (*Payton v. New York, supra*, 445 U.S. at p. 601.) "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (*United States v. United States District Court* (1972) 407 U.S. 297, 313 [92 S. Ct. 2125; 32 L. Ed. 2d 752].) "[A] private home [is] where privacy expectations are most heightened." (*Kyllo v. United States* (2001) 533 U.S. 27, 33 [121 S. Ct. 2038; 150 L. Ed. 2d 94].)

In *Cady v. Dombrowski, supra*, 413 U.S. at p. 442, the Court, in finding that the search of a wrecked car was reasonable, specifically noted there was a "constitutional difference between searches of and seizures from houses and similar structures and from vehicles …" One cannot assume that a standard equivalent to reasonable suspicion that applies to searches outside a home can also be applied to search of a home. The standard of probable cause ensures that the home receives the "heightened" protection from unwarranted government intrusion that was intended under the Fourth Amendment.

D. Under the Facts of this Case, The Search of the Residence Was Not Justified Under the Emergency Aid Exception

While there was an emergency outside the home, there was no evidence that the emergency extended inside the home. Neither the probable cause standard or a lesser standard support the search. As a result, the initial entry into the home violated Troyer's Fourth Amendment rights.

Albright responded to a call of a shooting. (RT 15.) When he arrived at the scene, he found, a person who had been shot and another with a head wound. (RT 5, 36.) Although respondent claims that Abeyta did not match the description of the reported male victim who had possibly been shot (resp. brief, p. 2), the record indicates that Albright did, in fact, believe Abeyta to be the reported male victim. (RT 8; see also Statement of Facts, *supra*, p. 6, fn. 2.) He had no information that anyone else had been injured in any way. He did not know who lived at 9253 Gem Crest Way. (RT 7, 10, 22.) There was no evidence that the shooting actually occurred at that address. There was blood on the outside of the front door, but that, in and of itself, could not be particularly significant given that there was "blood surrounding the scene" and Abeyta, highly agitated and excited, was covered in blood and was "moving around" on the four by ten foot front porch. (RT 6-7, 8, 44.)

Albright had no knowledge of what or who was in the house other

than Abeyta's statement that no one was inside. The blinds on the window were drawn, and the front door was locked; he saw nothing inside the house. (RT 12, 19-20.) Albright was not satisfied with Abeyta's answers because he had a head injury and gave different replies. (RT 9.)

Albright admitted to "not knowing what, if any, potentially other victims could be beyond the doorway." (RT 10.) These things that Sergeant Albright did not know are not articulable facts that give rise to a reasonable suspicion but rather hunches, or facts that he would like to know but does not know. The facts known to Albright were that all known suspects had fled and all known victims were outside the home. "The police cannot use the 'possibility' of an emergency to avoid the warrant requirement." (*People v. Allison* (Colo. S. Ct. 2004) 86 P.3d 421, 427.) Here, there was no more than a possibility that the emergency extended into the home.

Respondent relies upon the cases of *Tamborino v. Superior Court* (1986) 41 Cal.3d 919, and *People v. Hill* (1974) 12 Cal.3d 731 (overruled on separate grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889), for the proposition that an emergency outside a home justifies entry into the home. On their facts, both cases are inapposite.

In *Tamborino*, police responded to a reported robbery at a particular address where a victim was believed to be inside, injured and bleeding.

(*Tamborino v. Superior Court, supra*, 41 Cal.3d at pp. 921-922.) "No description was given of either the robber or his victim/victims." (*Id.* at p. 922.) There were spots of blood outside the apartment and a neighbor confirmed that an injured person was inside. (*Ibid.*) When the police knocked on the door, they heard the sound of movement inside the apartment but no one responded. (*Ibid.*) They kicked in the door. (*Ibid.*) Tamborino was standing in the living room bleeding from the right side of his face, "although not profusely," with "quite a bit of blood on his head, neck and hands." (*Ibid.*) Not knowing if Tamborino was a suspect or a victim, the officers brought Tamborino outside the apartment and immediately re-entered to determine whether there were any other injured persons inside the apartment. (*Ibid.*) At that point, police observed cocaine and drug paraphernalia in plain view on the coffee table. (*Ibid.*)

The facts of *Tamborino* distinguish it from Troyer's case. In *Tamborino*, the police had reports of an emergency occurring *inside* the home that were confirmed by a neighbor. The police had no report about the number of victims. The amount of blood on Tamborino was inconsistent with the size of his observable wound.

In *People v. Hill, supra*, 12 Cal.3d 731, police investigating a shooting "knew only that a shooting had very recently occurred and that one

person suffering from serious wounds had been brought to a hospital." (*Id.* at p. 755.) At the scene, they observed fresh bloodstains on a fence and porch outside the house and, through a window, saw fresh blood on the floor inside the house. (*Ibid.*) After entering the residence, police seized items in plain sight. (*Id.* at p. 756.) Here, the police saw blood *inside* the house which, coupled with the lack of information about the number of victims, justified entry.

In contrast to both *Tamborino* and *Hill*, in Troyer's case, the emergency found by the police was *outside* the home. Albright testified that before the search he had understood Abeyta to be the injured victim identified in the dispatch call. (RT 8.) The police observed nothing inside the home that indicated an additional victim – or anyone else – was inside. Thus, in *Hill* and *Tamborino* there was a direct nexus between the emergency and the area searched that is not present in Troyer's case.

Respondent further cites, briefly, *United States v. Mason,* (D.C. Cir. 1992) 966 F.2d 1488. (Resp. Brief, p. 12.) A fuller recitation of the facts in that case than proffered by respondent demonstrates that it is factually distinguishable. In *Mason*, police knew that the shooters had been inside that apartment when the shooting occurred. The shooting victim had sought refuge in a neighboring apartment. The door to the victim's apartment was

ajar and noises emanated from within. (*Id.* at 1490.) Moreover, during the sweep of the apartment, no evidence of a crime was found. (*Id.* at p. 1493, fn. 4.) The issue in *Mason* was whether a subsequent consent to search was tainted (it was not). (*Id.* at p. 1491.)

In claiming that Abeyta's "odd and evasive" answers justified entry into the house, respondent cites to *United States v. Russell* (9th Cir. 2006) 436 F.3d 1086, for a proposition for which the case does not stand. (Resp. Brief, p. 13.) In *Russell*, the police responded to calls indicating that two men had been shot inside a house. At the scene, two officers immediately entered the residence, while a third officer talked to the reticent male shooting victim who was outside the house. (*Id.* at p. 1089.) That victim's refusal to answer questions was not used by the Court in its evaluation of whether entry into the home was justified. (*Id.* at p. 1090.) Respondent errs by claiming otherwise. Moreover, unlike the uncooperative shooting victim in *Russell*, Abeyta cooperated with the police (aside from refusing consent to enter) and answered their questions. That Abeyta may not have heard questions or rephrased his answers when Albright asked the same question again is understandable given his wounds and the chaos on the porch.

More germaine to the application of the emergency aid exception in Troyer's case are the holdings of *Hannon v. State*, (Nev. 2009) 207 P.3d

344, and *People v. Allison, supra*, 86 P.3d 421. In *Allison*, police responded to a residence "after a 911 hang-up call." (*Id.* at p. 423.) A woman with a bloody nose answered the door and said that she and her husband had been in a dispute. She eventually consented to the entry. (*Ibid.*) The downstairs of the two-story house was in disarray – there was broken furniture, broken glass on the floor, and smashed dishes. The police met the woman's husband coming down the stairs. Both the woman and her husband were taken outside the home by the police. Both told the police that no one else was injured. The husband stated that another man lived in the house but he did not know whether that man was home. The police officers did not believe the woman or her husband. A police officer then re-entered the home without consent to see if there was "possibly somebody upstairs injured." Upstairs, the officer saw a bag of marijuana. (*Id.* at p. 424.) The Colorado Supreme Court found that the emergency aid exception did not apply because "no evidence existed demonstrating the involvement of a third party who might be involved and require assistance." (*Id.* at p. 429.)

In *Hannon, supra*, 207 P.3d 344, police responded to a call that a domestic disturbance had occurred at a home. (*Id.* at p. 345.) A "red-faced, crying" woman opened the door. In the background, police saw her husband

who looked "flushed and 'angry.'" The woman admitted there had been a verbal argument but insisted that nobody was injured and nobody else was in the home. The officer, demanding entrance, literally pushed his way into the home where he saw marijuana. (*Ibid.*) Holding that the emergency aid exception did not apply, the Nevada Supreme Court overruled the lower court's denial of the suppression motion and found that "there was no objectively reasonable basis to believe that a third party was injured inside." (*Id.* at p. 347.)

Both these case found that the theoretical possibility that a third party might be injured could not support entry into a home under the emergency aid exception. (See *Hannon v. State, supra*, 207 P.3d at pp. 347-348; *People v. Allison, supra*, 86 P.3d at p. 428.) "[A] 'true emergency' exists if there are reliable, objective indicia of a potential victim of a dangerous circumstance or a potential perpetrator of a dangerous act. Suspicious circumstances or 'gut instinct' are insufficient." (*State v. Burdick* (Ore. Ct. App. 2006) 209 Ore. App. 575, 581, 149 P.3d 190, 194.)

At the hearing below, Albright testified that he responded to the scene of a shooting and found two victims outside the house. There was no indication that a third party had been injured.[13] As Albright testified, he did

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Respondent's theory that Abeyta did not fit the description of the reported

not know "what, if any, potentially other victims could be beyond that doorway" and sought entry "[t]o find a suspect or a victim, if that truly existed." (RT 10, 25.) Albright does not identify any evidence that points to the existence of an injured third party. He sought entry on the theoretical possibility that an injured third party might exist. Albright did not testify that there was an identifiable third party who might be injured. Without such an identifiable potential victim, the entry into Troyer's home was not reasonable.

E. Even If the Initial Entry into Troyer's Home Was Justified, The Entry into the Locked Upstairs Bedroom Was Not Reasonable

"[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. [citations omitted]" (*Terry v. Ohio, supra*, 392 U. S. at p. 18.) "[T]he greater the intrusion, the greater must be the reason for conducting a search that results in such invasion." (*United States v. Afanador* (5th Cir. 1978) 567 F.2d 1325, 1328 citing *United States v. Love* (S.D. Tex. 1976) 413 F. Supp. 1122, 1127.) Just as "the investigative methods employed [during a

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male who had been shot is not supported by the evidence adduced and was not argued by the prosecutor at the hearing.

detention] should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time" so should the methods employed during search under the emergency aid doctrine. (*Florida v. Royer* (1983) 460 U.S. 491, 500 [103 S. Ct. 1319; 75 L. Ed. 2d 229] (plurality opn.).)

Below, the Court of Appeal determined that, at the time the officers kicked open the locked upstairs bedroom door, the suspicion that an injured person was inside the home had been dispelled. The Court of Appeal found the entry into Troyer's home reasonable based upon the blood on the exterior of the door. (Slip opn., p. 9.) Once inside, the lack of blood or signs of a struggle dispelled the suspicion that an injured person was within. (Slip opn., p. 10.)

Respondent proffers the argument that the reasonableness of a search is static, depending only upon the circumstances known at the initiation of the search. (Resp. Brief, p. 14.) In support of this proposition, respondent cites to *Mincey v. Arizona, supra*, 437 U.S. at p. 393. Respondent misconstrues *Mincey*. In *Mincey*, the Court stated that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" (*Ibid*., quoting *Terry v. Ohio, supra*, 392 U.S., at 25-26.) The Court found that, even if the initial entry into Mincey's apartment was

reasonable, the ensuing four-day-long search was not. (*Id.* at pp. 394-395.)

Mincey does not stand for the proposition that a search cannot be expanded or limited depending upon the circumstances found during the search itself. Clearly searches can be expanded based on facts gathered during the search. (E.g., *Arizona v. Hicks* (1987) 480 U.S. 321, 325-326 [107 S. Ct. 1149; 94 L. Ed. 2d 347] [commenting that the "plain view" doctrine can justify expanded search].) Likewise, the scope of a search can be limited as the situation develops. (E.g., *Arizona v. Gant* (2009)__ U.S. __ [129 S. Ct. 1710, 173 L. Ed. 2d 485] [limiting searches incident to arrest to area within arrestee's reach at time of arrest]; *Maryland v. Buie, supra*, 494 U.S. at p. 330 [arrest warrant allows search of house until the point of arrest].) The Court of Appeal correctly found that the reasonableness of the entry into the locked, upstairs bedroom had to be determined by the totality of the circumstances known at that time. (Slip opn., p. 9-10.)

Respondent's reliance on *Hunsberger v. Wood, supra*, 570 F.3d 546, is misplaced. The facts of *Hunsberger* are distinguishable. There, the police were told that the homeowners were out of town, had observed persons inside the house who avoided police contact, and knew that a missing teenage girl might be inside. (*Id.* at pp. 549-551.) Those concrete facts of unauthorized persons inside the house contrasts with the fact in

Troyer's case that the police did not know whether anyone was inside the house. The Court of Appeal correctly found that the theoretical possibility of an injured person inside the bedroom did not justify the search.

II. The Warrantless Entry into Appellant's Home Was Not Justifiable as a Protective Sweep

Respondent argues that the warrantless entry was justified as a "protective sweep." (Resp. Brief, pp. 15-18.) Neither the Court of Appeal nor the Superior Court were persuaded by this argument. (RT 74-75; slip opn., pp. 6-8.) At the hearing, Albright did not testify to any facts that supported a reasonable belief that suspects were inside the house. Because there were no facts that support even a reasonable suspicion that an individual who posed a danger to those on the scene was inside the house, the search of Troyer's house cannot be justified even if the protective sweep doctrine applied to the situation.

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." (*Maryland v. Buie*, *supra*, 494 U.S. at p. 327.) "The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest

scene."[14] (*Id.* at p. 337.) Since *Buie*, the United States Supreme Court has not expanded the situations under which a protective sweep is justified.

In *Buie*, the police executed an arrest warrant following an armed robbery allegedly committed by Buie and an accomplice. (*Buie*, *supra*, 494 U.S. at p. 328.) To determine whether Buie was home, a police secretary called his home and spoke with Buie himself. Police officers then went to Buie's home. After several police officers entered the home, an officer shouted down the basement stairs, "ordering anyone down there to come out." (*Ibid.*) Buie subsequently came up the stairs and was apprehended emerging from the basement. An officer then entered the basement "in case there was someone else" in it. (*Ibid.*) In the basement, he spotted, in plain view, a red running suit that matched the description of one worn by a suspect during the robbery. (*Ibid.*)

The *Buie* Court noted that "until the point of Buie's arrest the police

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Buie recognized two kinds of protective sweeps. The first may be conducted incident to arrest "as a precautionary matter" and without probable cause or reasonable suspicion, but it must be limited to "spaces immediately adjoining the place of arrest from which an attack could be immediately launched." (*Id.* at p. 334.) The second may extend beyond immediately adjoining spaces but must be based upon "articulable facts which ... would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Ibid.*) Because there was no arrest at the time of the search of Troyer's home, this case is only concerned with the second kind of protective sweep.

had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found, including the basement." (*Buie*, *supra*, 494 U.S. at p. 330.) The Court recognized that there are dangers particular to in-home arrests: "unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.'" (*Id.* at p. 333.) Based on these dangers, "[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." (*Ibid.*) In light of the officers' disadvantage of being in the arrestee's home, the Court adopted a standard of reasonable suspicion rather than the traditional probable cause standard. (*Id.* at pp. 333-334.)

Once Buie was apprehended, the police could only search beyond the immediate area of arrest if they possessed "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Id.* at p. 334.) Such a search had to be based on a "reasonable, individualized suspicion" of danger. (*Id.* at p. 334, fn. 2.) Moreover, the protective sweep could extend "only to a cursory inspection of those spaces where a person may be found" and "last[] no longer than is necessary to dispel the reasonable

suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." (*Id.* at p. 336, footnote omitted.)

A. The Protective Sweep Was Not Supported by Articulable Facts Giving Rise to a Reasonable Suspicion that Troyer's House Harbors an Individual Posing a Danger to Those on the Arrest Scene

The California Supreme Court has considered, but not decided, whether the "protective sweep" doctrine allows sweeps of a house when the defendant is detained outside the house. (*People v. Celis* (2004) 33 Cal.4th 667, 679 [finding no reasonable suspicion justified entry so no need to determine whether mere detention justified entry].) In *Celis*, the police had put Celis under surveillance during a narcotics investigation. (*Id.* at p. 672.) The police knew he lived with his wife and, possibly, a male juvenile. (*Ibid.*) A few days later, while watching Celis' house, the police saw him come out of his house rolling a truck tire that, based on prior investigation, may have contained money or narcotics hidden inside. (*Ibid.*) Outside the house, Celis was ordered to stop at gunpoint, handcuffed, and told to sit beside a wall. (*Ibid.*) The officers then made a protective sweep of the house "to determine if there was anyone inside who might endanger their safety." (*Ibid.*) The officers found no person inside but did find sixteen kilograms of cocaine. (*Id.* at p. 672-673.)

Based on these facts the Court held that the police did not have reasonable suspicion to justify the protective sweep. (*Id.* at p. 679.) The *Celis* Court noted that, although the police knew Celis' wife and possibly a juvenile lived at the house, they had not kept track of who, if anyone, was inside the house and, therefore, entered without any information as to whether anyone was inside. (*Ibid.*) The Court held that the facts known to the officers did not support a reasonable suspicion that the area to be searched harbored a dangerous person. (*Id.* at pp. 679-680.) Because the Court found that the police had neither reasonable suspicion nor probable cause to enter the home, the *Celis* court declined to decide whether the rational of *Buie* would "also apply when officers enter a home to conduct a protective sweep after lawfully detaining a suspect outside the residence?" (*Id.* at p. 679.)

Celis is dispositive. Like the police in *Celis*, Albright observed a crime scene that was outside of the residence. (RT 5, 44.) Unlike *Celis*, in which the police had knowledge that Celis lived in the nearby home and observed him just come out the door, Albright did not know who lived at 9253 Gem Crest Way. As in *Celis*, Albright did not know "what threat, if any, existed beyond the doorway." (RT 10.) And contrary to *Celis*, Albright knew that the reported two suspects had fled the scene in a vehicle. (RT 5,

7, 20-21.) All-in-all, Albright had less information about whether a dangerous person was inside the house than the did police in *Celis*. If the articulable facts here do not rise to the level of those in Celis and if the facts in *Celis* do not rise to the level of a reasonable, individualized suspicion, then the protective sweep of Troyer's home violated his Fourth Amendment rights.

Factually similar to the case at hand is that of *State v. Ledford* (La. Ct. App. 2005) 914 So.2d 1168. There, police responded to a call of a fight between a man and a woman in the yard a residence. (*Id.* at p. 1170.) Upon arrival, police found a woman with blood on her face. The woman said that the man had run into the woods when he saw police approaching. The woman denied police permission to enter the residence. (*Id.* at pp. 1170-1171.) The police thought that the man might be in the house and that the woman might be covering for him. (*Id.* at p. 1170.) The police entered the house to ensure that the man was not inside waiting to do harm to them or the woman. (*Ibid.*) While inside the house, they saw marijuana in plain view. (*Ibid.*) Drug charges followed. The Louisiana Court of Appeal found that "the facts of this case do not show the entry into the defendant's residence ... to conduct a "protective sweep" was justified by any reasonable articulable suspicion that the defendant was or would be

inside…" (*Id.* at p. 1177.)

Likewise, a protective sweep cannot be justified when the police have no information that a dangerous person is inside the residence. (*United States v. Colbert* (6th Cir. 1996) 76 F.3d 773, 777-778 ["Lack of information cannot provide an articulable basis upon which to justify a protective sweep"]; *United States v. Chaves* (11th Cir. 1999) 169 F.3d 687, 692 ["officer's lack of information cannot justify the warrantless sweep in this case. [Citations.]"]; *State v. Spencer* (2004) 268 Conn. 575, 597, 848 A.2d 1183 ["The generalized possibility that an unknown, armed person may be lurking is not, however, an articulable fact sufficient to justify a protective sweep"].) Here, the information available to Albright was that the suspects had fled the scene in a two-door Chevrolet Tahoe. (RT 4-5, 20.) Albright himself did not approach the scene until it appeared no such vehicle was present. (RT 5.) There was no report or sign of additional suspects. Albright had no information that a dangerous suspect was inside Troyer's home.

B. The Protective Sweep Doctrine Cannot Be Expanded So as to Allow for the Entry Into Troyer's Home on These Facts

An expansion of the protective sweep doctrine to allow entry into Troyer's home on these facts would stretch the doctrine beyond its intellectual underpinnings and create an exception to the probable cause requirement that would swallow the rule. In *Buie*, the facts upon which the Court found the protective sweep permissible provided three separate layers of protection under the Fourth Amendment: (1) the police had an arrest warrant based on probable cause for Buie's arrest (*Buie*, *supra*, 494 U.S. at p. 330); (2) there was "probable cause to believe Buie was in his home."[15]

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In *Payton v. New York*, *supra*, 445 U.S. at p. 602-603, the Court held that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." When, however, the residence which police seek to enter is not that of the arrestee but that of a third party, the Fourth Amendment requires a search warrant or probable cause plus exigent circumstances. (*Steagald v. United States* (1981) 451 U.S. 204, 213-214 [101 S. Ct. 1642; 68 L. Ed. 2d 38].) Courts have disagreed whether the "reason to believe" a suspect is in his home standard is the equivalent of probable cause or incorporates a lower standard. (Compare *United States v. Gorman* (9th Cir. 2002) 314 F.3d 1105, 1111 [same as probable cause]; *United States v. Hardin* (6th Cir. 2008) 539 F.3d 404, 416 n.6 [probable cause]; *United States v. Barrera* (5th Cir. 2006) 464 F.3d 496, 501 [probable cause] with *United States v. Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286, 368 U.S. App. D.C. 285 [lesser degree of knowledge than probable cause]; *Valdez v. McPheters* (10th Cir. 1999) 172 F.3d 1220, 1227 n.5 [lesser standard than probable cause]; *United States v. Lauter* (2d Cir. 1995) 57 F.3d 212, 215 [lesser standard].) California courts do not appear to have considered this issue. Neither standard is met here. Police had no

(*Id.* at p. 332); and (3) the police had "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Id.* at p. 334.) Applying the holding of *Buie* to the facts of Troyer's case strips him of all three levels of constitutional protection. There was no arrest warrant based upon probable cause. There was no reasonable belief of a connection between the home and the suspects. And, there were no articulable facts that a person within was a danger to the police or others outside the house.

There is no consensus among lower courts over the limitations of a protective sweep. Some courts have strictly limited the use of protective sweeps to situations involving an arrest. (*United States v. Torres-Castro* (10th Cir. 2006) 470 F.3d 992, 996-997 [protective sweep may take place only incident to an arrest]; *United States v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027 [protective sweep improper, in part, because at the time of the search the defendant, "was *not* under arrest" (emphasis in original)]; *State v. Valdez* (N.M. Ct. App. 1990) 111 N.M. 438, 806 P.2d 578, 580 ["A protective sweep is only allowed incident to a lawful arrest"]; *State v. Boyer*

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reason to believe that the shooting suspects lived at 9253 Gem Crest Way or were inside the home at the time of the search.

(2004) 124 Wn. App. 593, 601, 102 P.3d 833 ["In Washington, ... the protective sweep has not been extended to the execution of search warrants"].) Other courts have extended the use of protective sweeps under a myriad of different factual settings. (*United States v. Martins*, *supra*, 413 F.3d at p. 150 ["police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry"]; *United States v. Miller* (2nd Cir. 2005) 430 F.3d 93, 98 [protective sweep permissible when officer is "present in a home under lawful process"]; *United States v. Johnson* (7th Cir. 1999) 170 F.3d 708, 716 [noting that absence of either search or arrest warrant was critical flaw in government's case]; *United States v. Arch* (7th Cir. 1993) 7 F.3d 1300, 1303 [*Buie* assumes police are lawfully in home before sweep]; *United States v. Gould* (5th Cir.) 364 F.3d 578, 587 ["when undertaken from within the home, the police must not have entered (or remained in) the home illegally']; *United States v. Garcia* (9th Cir. 1993) 997 F.2d 1273, 1282; *In re Sealed Case 96-3167*, (D.C. Cir. 1998) 153 F.3d 759.)

Several courts have held that

> A protective sweep may only occur when (1) police officers are lawfully within private premises for a legitimate purpose, which may include consent to enter; and (2) the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an

individual posing a danger.

(*State v. Davila* (N.J. Supreme Ct. No. A-20-09, July 14, 2010) __ N.J. __; see also *United States v. Martins, supra*, 413 F.3d 139, 150 ["We hold, therefore, that police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry"]; *United States v. Pruneda* (8th Cir. 2008) 518 F.3d 597, 603 [commenting that "[u]pon legally entering a residence, officers have the authority to conduct a protective sweep of the residence if the officers reasonably believe, based on specific and articulable facts, that the residence harbors an individual who could be dangerous"] .) Under such a test, the entry into Troyer's home cannot be justified as a protective sweep because they were not "lawfully" within the home before the sweep began.

Other courts have extended protective searches to areas within the home when the arrest occurs outside the home. (*United States v. Lawlor* (1st Cir. 2005) 406 F.3d 37, 41; *Sharrar v. Felsing* (3rd Cir. 1997) 128 F.3d 810, 824; *United States v. Maldonado* (5th Cir. 2006) 472 F.3d 388, 394; *United States v. Colbert, supra*, 76 F.3d at pp. 776-777; *United States v. Cavely* (10th Cir. 2003) 318 F.3d 987, 995-996; *United States v. Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284.) These cases share common characteristics: the

courts allowed entry when (1) there was probable cause to arrest; (2) there was a reasonable belief that the home search was that of the arrestee; and (3) articulable facts that a person posing a danger was in the area swept. For example, in *United States v. Colbert, supra*, 76 F.3d at p. 775, the police had a warrant for Colbert's arrest and were conducting surveillance outside the apartment where he was staying. Police saw Colbert leave the apartment and walk toward his car, forty or fifty feet away. He was arrested standing beside his car. Colbert's girlfriend came running out the apartment, very irrate and screaming at the officers. An officer then entered the apartment where he found a shotgun in plain view. (*Ibid.*)

None of these sweep-incident-to-arrest-outside-the-home cases reconcile their finding that a standard less than probable cause allowed entry into the apartment with the United States Supreme Court's holding in *Minnesota v. Olson* (1990) 495 U.S. 91 [110 S. Ct. 1684; 109 L. Ed. 2d 85], that a warrantless entry may be justified "by ... the risk of danger to the police or to other persons inside or outside the dwelling" only when the probable cause standard is met. (*Id.* at p. 100, citations omitted.) In *Celis*, this Court did note that *Olson* required probable cause to justify warrantless entry to prevent the risk of danger to police or others. (*People v. Celis, supra*, 33 Cal.4th at p. 676.)

It is also difficult to reconcile these cases finding that *Buie* allows entry into the home of less than probable cause when a valid arrest occurs outside the home without a warrant (e.g., *Sharrar v. Felsing*, *supra*, 128 F.3d at p. 824) with the holding of *Payton* that entry into the home is not permitted without an arrest warrant, even if there is probable cause to arrest. (*Payton v. New York, supra*, 445 U.S. at p. 590.) Thus, cases that hold a valid warrantless arrest outside the home can justify entry based upon less than probable cause create the anomalous situation in which police cannot enter the home to arrest without a warrant but, if they can persuade the arrestee to come outside, they can then enter the home incident-to-a-warrantless-arrest in order to search for dangerous persons.[16] It is difficult to imagine that the United States Supreme Court intended its jurisprudence to lead to such a result.

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In Troyer's case, there is another level of confusion based upon the fact that the shooting suspects, ostensibly the focus of the protective sweep, did not live at 9253 Gem Crest Way (or, at least, there was no evidence to support such an inference) nor was there a reasonable belief that they were inside. When the residence which police seek to enter is not that of the arrestee but that of a third party, the Fourth Amendment requires, in addition to an arrest warrant, a search warrant or probable cause plus exigent circumstances. (*Steagald v. United States*, *supra*, 451 U.S. at pp. 213-214.) So, even if the police had arrest warrants for the shooting suspects, they could not have entered without, additionally, a search warrant or probable cause plus exigent circumstances.

Troyer submits that any entry into the home that is based on a less than probable cause standard must be severely limited. The correct view of a protective sweep when the sweep alone provides the reason to enter the home is that it must be inextricably attached to probable cause to arrest. (See, e.g., *United States v. Lawlor*, *supra*, 406 F.3d at p. 41; *United States v. Maldonado*, *supra*, 472 F.3d at p. 394; *United States v. Colbert*, *supra*, 76 F.3d at p. 776-777.) Furthermore, the premises swept must have some reasonable nexus with the person arrested or place searched.[17] Thus, when police have probable cause to arrest plus a reasonable connection between the arrestee and the home to be searched, then they also can perform a protective sweep based upon articulable facts that a person posing a danger is in the area to be swept. Adopting such a standard would allow police the flexibility they need to deal with dangerous arrests occurring just outside the arrestee's home without allowing the exception to subsume the rule. Under such a standard, the sweep of Troyer's home would not be permitted

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Otherwise, the protective sweep incident to an arrest outside the home would be too easily abused. Without such a connection, police could simply wait until the potential arrestee was walking past a building that they wanted to sweep for other reasons. Furthermore, a protective sweep would, in some dangerous neighborhoods and apartment buildings, become the equivalent of a general warrant to sweep all the different homes located therein. Whether that reasonable nexus requires probable cause or a lesser standard depends upon the interpretation of *Payton*. (See, *supra*, Argument II.B., fn. 14.)

because there was no arrest and there was no reasonable belief connecting Troyer's house with the shooting suspects.

Even if the initial entry into Troyer's home was justified as a protective sweep, it does not necessarily follow that the entry into the locked upstairs bedroom was permissible. A sweep is only a "cursory inspection" that is "limited to that which is necessary to protect the safety of officers and others." (*Buie, supra*, 494 U.S. at pp. 335.) Breaking into a locked area can exceed the scope of a protective sweep. (*United States v. Davis* (8th Cir. 2006) 471 F.3d 938, 945 ["breaking into the locked closet exceeded the scope of a lawful protective sweep"].) As respondent notes, the prosecutor did not elicit testimony regarding the type of lock on the bedroom door. (Resp. Brief, p. 4, fn. 6.) The prosecution failed to carry its burden in proving that the entry into the locked bedroom was constitutionally permissible.

CONCLUSION

This Court should overturn the Court of Appeal decision by finding that the initial entry into the home was a violation of the Fourth Amendment and that the fruits thereof must be suppressed. Alternatively, this Court should uphold the Court of Appeal opinion finding that the entry into the upstairs bedroom violated the Fourth Amendment. The matter should be remanded to the trial court so that appellant can have the opportunity to withdraw his plea and, additionally, move to quash the search warrant which was based on the officers illegally obtained observations during the initial warrantless entry into the home.

Dated: July 26, 2010

Respectfully submitted,

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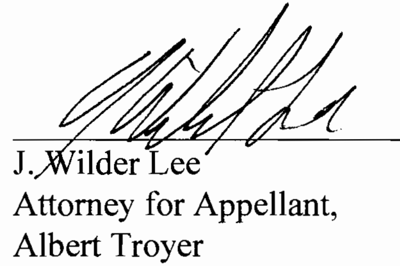
Certification of Word Count

I hereby certify that the number of words in this Opening Brief is 11,886 according to the word count function of the computer program used to prepare the document.

Dated: July 26, 2010



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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 360 Ritch Street, Suite 201, San Francisco, CA 94107. On the date shown below, I served the within **Appellant's Brief on the Merits** to the following parties hereinafter named by:

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I declare under penalty of perjury the foregoing is true and correct. Executed this ___ day of ______________, _________ at Berkeley, California.

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