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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Under the California Appellate Project
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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.