# State of Alaska v. Robert Duane Gibson, III, Case No. S-13509

# Petitioner's reply brief

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IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,

Petitioner,

vs.

ROBERT DUANE GIBSON, III,

Respondent.

Supreme Court No. S-13509

Court of Appeals No. A-9720
Superior Court No. 3AN-02-6007 Cr.

ON PETITION FOR HEARING
FROM THE COURT OF APPEALS

# REPLY BRIEF OF PETITIONER

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### I. THE DECISIONS OF THE COURT OF APPEALS IN *GIBSON* AND *GALLMEYER* CONFLICT WITH THIS COURT'S DECISION IN *STEVENS*

#### A. Introduction

A warrantless entry must fit within an established exception to the Fourth Amendment and to the parallel provision in the Alaska Constitution, article I, section 14. *See, e.g., Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967); *Erickson v. State*, 507 P.2d 508, 514 (Alaska 1973). (The privacy amendment to the Alaska Constitution – article I, section 22 – does not create an independent ground for suppression of evidence. *Municipality of Anchorage v. Ray*, 854 P.2d 740, 750-51 (Alaska App. 1993); *accord Bessette v. State*, 145 P.2d 592, 594-95 (Alaska App. 2006).) It was the state's burden to prove in the trial court that the police conduct at issue came within such an exception. *Schraff v. State*, 544 P.2d 834, 838 (Alaska 1975).

In *Stevens v. State*, 443 P.2d 600, 602 (Alaska 1969), this court said the right of the police to enter and investigate in an emergency without intent to search or arrest is "inherent in the very nature of their duties as police officers, and derives from the common law." "[T]he criterion is the reasonableness of the belief of the police as to the existence of an emergency,

*not* the existence of an emergency in fact.'" (emphasis supplied; quoting *Patrick v. State*, 227 A.2d 486, 489 (Del. 1967)).

In its opening brief, the state argued that the decision in the case at bar and *Gallmeyer v. State*, 640 P.2d 837 (Alaska App. 1982), the case the *Gibson* court relied upon, conflict not only with with this court's decision in *Stevens*, but also with *Schraff v. State*, 544 P.2d 834 (Alaska 1975), and *City of Nome v. Ailak*, 570 P.2d 162 (Alaska 1977). [Pet.Br. 20-22]

Gibson mistakenly argues *Gallmeyer* and *Stevens* do not conflict. [Rsp.Br. 16-21] Gibson also claims that *Gallmeyer* is in accord with decisions from other jurisdictions. The latter is of course similar to the rule that pertains in a few jurisdictions, but it is dissimilar to the mainstream rule.

B. The *Gibson* and *Gallmeyer* decisions conflict with the *Stevens* decision and its progeny

In *Gallmeyer*, the court of appeals established three prerequisites for emergency entry: (1) the police must have reasonable grounds to believe that there is an emergency and an immediate need for their assistance, (2) the search must not be primarily motivated by an intent to arrest and to seize evidence, and (3) there must be some reasonable basis, approaching probable cause, to associate the emergency with the area to be searched. 640 P.2d at 842.

*Gibson* and *Gallmeyer* additionally provide that the term emergency "ordinarily requires [proof of] true necessity – that is, an imminent and substantial threat to life, health, or property." *Gibson v. State*, 205 P.3d 352, 356 (Alaska 2009); *Gallmeyer*, 640 P.2d at 843-44 (quoting Moscolo, *The Emergency Doctrine Exception to the Warrant Requirement Under The Fourth Amendment*, 22 Buff. L. Rev. 419, 434 (1973)). Although *Gibson* and *Gallmeyer* both also state that "true necessity" does not require "absolute proof that injury would necessarily have occurred," these two decisions have increased the showing required to justify an emergency entry beyond the objectively reasonable belief required by *Stevens*. 443 P.2d at 602; *Gibson*, 205 P.3d at 356; *Gallmeyer*, 640 P.2d at 844.

Gibson also argues that "a reasonable belief in an emergency is in accord with the condition that the emergency be a true necessity." [Rsp.Br. 20] He argues that the "true necessity" requirement merely defines the term emergency. [Rsp.Br. 18] The latter statement is true but ignores that the definition used by the court of appeals changes the meaning of the term "emergency" – it requires proof of a greater emergency than this court required in *Stevens* and its progeny. *Stevens* and its progeny specifically provide the applicable "criterion is the reasonableness of the belief of the police as to the existence of an emergency, *not the existence of an emergency*

*in fact*." 443 P.2d at 602 (emphasis supplied; quoting *Patrick*, 227 A.2d at 489).

In *Schraff v. State*, 544 P.2d 843, 841-42 (Alaska 1975), the lead opinion states that this court had upheld the emergency entry in *Stevens* based on the report of children that a shooting had occurred because "the officer's belief in the existence of an emergency [in *Stevens*] was reasonable." And the lead opinion is *Schraff* tellingly sets forth, with apparent approval, Chief Justice Burger's statement in *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963): "When policemen . . . are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life[,] they are authorized to act . . . on that information, even if ultimately found erroneous." *Schraff*, 544 P.2d at 842 n.10. A "need to act" is not the equivalent of "true necessity."

Gibson points out that Justices Boochever and Rabinowitz, concurring in part, equated emergency with "true necessity" in *Schraff*, 544 P.2d at 848 n.1 (Boochever, J., and Rabinowitz, Ch. J., concurring). [Rsp.Br. 20] But in a later case, *Schultz v. State*, 593 P.2d 640 (Alaska 1979), this court unanimously upheld under the emergency exception the entry of a fire inspector for the purpose of determining the cause of a fire (after the fire was under control) – in other words when there obviously was no "true necessity"

for the entry. The fire inspector could have readily obtained a warrant before entering the premises to determine the cause of the fire. This is significant because Justices Rabinowitz and Boochever, despite their concurrence in *Schraff*, joined the court's opinion in *Schultz*.

And, in *City of Nome v. Ailak*, 570 P.2d 162, 165-66 (Alaska 1977), one issue before the court was whether the police trespassed when they entered a home without a warrant to investigate the statement of a person that a murder had occurred and that the body was in the defendant's home. This court said it had recognized in *Stevens* that police have a right to enter buildings without a warrant "in an emergency as an inherent part of their common law duties." *Id.* at 166. This court pointed out it had held in *Stevens* that the reasonableness of the belief concerning the existence of an emergency was controlling, not "the existence of an emergency in fact." *Id.* at 167 (quoting *Stevens*, 413 P.2d at 602). This court unanimously rejected the trespass claim as a matter of law. Justices Boochever and Rabinowitz joined the *Ailak* opinion without expressing concern that the state had failed to show "true necessity."[1]

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[1] A footnote cites *Schraff*, 544 P.2d at 841-44, and states that the court was not deciding whether "similar conduct by police officers would justify a search without a warrant in a criminal case." *Ailak*, 570 P.2d at 167 n.8. But the opinion does not cite to the concurring opinion in *Schraff*.

The court of appeals has created its own definition of the term emergency, "true necessity," in violation of *Stevens*, *Nilak*, and *Schultz*. The new definition modifies the rule that entry is permissible when an officer has a reasonable belief that an emergency exists irrespective of the existence of an emergency in fact. An emergency is normally understood as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." WEBSTER'S NEW COLLEGIATE DICTIONARY at 372 (1973).

And, the addition of a requirement of proof of "true necessity" is in derogation of the common law duty of police officers to save and protect lives and property. *See, e.g., Lee v. State*, 490 P.2d 1206, 1209-10 (Alaska 1971). Police who fail to respond in the absence of "true necessity" face at least potential civil consequences. *Id. See also Michigan v. Fisher*, ___ U.S. ___, ___, 130 S.Ct. 546, 549 (2009) (hindsight determination that there was no emergency and that requires police to walk away from apparent threat fails to meet needs of law enforcement or the demands of public safety).

The *Stevens* test appropriately balances society's need to protect and treat persons who may be injured and against the privacy of a home.

C. The requirement of *Gallmeyer* and *Gibson* that the state show "true necessity" to justify an emergency entry conflicts with the mainstream of judicial opinion

The state argued the requirement of that the state prove "true necessity" is "out of step with mainstream judicial opinion." [Pet.Br. 20] Gibson has responded by stating that *Gallmeyer*, in agreement with Professor LaFave, imposes an objective standard (to determine whether a police officer's decision to make an emergency entry is reasonable). [Rsp.Br. 22-23 (citing 3 Wayne R. LaFave, *Search and Seizure*, § 6.6(a) at 452 (4th ed. 2004))] But the issue here is not that *Gallmeyer* requires, among other things, an objective belief on the part of the officer; the issue is that *Gallmeyer* also requires proof of "true necessity."

Gibson mistakenly claims that the United States Supreme Court requires proof of "true necessity" in order to justify an emergency entry. [Rsp.Br. at 23 (citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 400, 126 S.Ct. 1943, 1946 (2006))] In *Stuart*, the Court upheld the entry because "the officers had an objectively reasonable basis for believing that the injured adult might need help." *Id.* at 406, 126 S.Ct. at 1949. The Court did not require a showing of "true necessity." More, in *Michigan v. Fisher*, 130 S.Ct. at 549, the Court reaffirmed this aspect of *Stuart* and stated an entry to determine whether Fisher, who was on a rampage, had possibly injured a

third person was proper when there was no specific information indicating a third person was on the premises, much less injured.

Gibson next cites and quotes the California Supreme Court for the proposition that the emergency aid exception requires a showing of true necessity. [Rsp.Br. at 24 (citing *People v. Smith*, 496 P.2d 1261, 1263 (Cal. 1973))] But California has effectively overruled *Smith*, and in the course of doing so upheld police actions very similar to the walk-through conducted by the officers in the case at bar. In *Tamborino v. Superior Court*, 719 P.2d 242 (Cal. 1986), a police officer was dispatched to a reported robbery in a certain apartment: a victim was reported to be injured. *Id.* at 243-44. The officer saw apparent blood drops on the sidewalk outside the apartment and a neighbor confirmed an injured person was inside. *Id.* at 243. Knocking produced no response, so the officer kicked the door in and then observed Tamborino, who was bloody and bleeding from the head, walking towards him. *Id.* The officer, not knowing if Tamborino was a victim or suspect, removed him from the apartment and handcuffed him. *Id.* The officer then re-entered the apartment to determine if there were additional injured persons inside. *Id.* During the re-entry, the officer observed narcotics that Tamborino then sought to suppress, contending that the officer should not have re-entered the apartment after handcuffing him because he had no

articulable reason to believe additional injured persons were inside. *Tamborino*, 719 P.2d at 243-44.

The Supreme Court of California upheld the re-entry on the ground that Tamborino's injuries and the earlier report of the robbery constituted "articulable facts" that reasonably led the officer to decide an immediate brief search for additional victims was warranted. *Tamborino*, 719 P.2d at 244-45. The California court relied upon *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 (1978), where the Court said that when the police come upon the scene of a homicide, they may conduct a prompt warrantless search of the area "to see if there are other victims." *Tamborino*, 719 P.2d at 245 (citing *Mincey*, 437 U.S. at 392, 98 S.Ct. at 2413). *Accord People v. Hill*, 528 P.2d 1, 20 (Cal. 1974) (shooting; one victim had been reported and was at hospital; search of residence where shooting occurred for additional wounded persons approved, despite absence of specific evidence of additional victims), *overruled on other grounds*, *People v. Devaughn*, 558 P.2d 872, 896 n.5 (Cal. 1977); *People v. Thompson*, 770 P.2d 1282, 1285 (Colo. 1989) (search for additional victims approved in similar case of domestic violence).

Gibson next discusses decisions from New Mexico and Nevada that require proof of "true necessity" as a prerequisite to an emergency entry. [Rsp.Br. at 24-25 (citing *Howe v. State*, 916 P.2d 153, 159 (Nev. 1996); *State*

*v. Ryon*, 108 P.3d 1032, 1044-46 (N.M. 2005))] But, as reflected by the absence of any mention of "true necessity" in Professor LaFave's discussion of the emergency entry exception and Gibson's failure to discuss additional cases, such a requirement clearly represents a minority view and, in the state's view, strikes an inappropriate balance between privacy and human life. 3 LaFave, *Search and Seizure*, § 6.6(a) at 452-69. Recent decisions by equally respected courts have upheld entries in circumstances comparable to the entry here under the rubric of the community caretaking exception to the warrant requirement. *See State v. Deneui*, ___ N.W.2d ___, 2009 WL 3774087 *10-14 (S.D., November 10, 2009) (approving entry to determine if incapacitated persons were possibly in residence from which odor of ammonia was emanating) (citing and discussing *United States v. Cervantes*, 219 F.3d 882, 890-91 (9th Cir. 2000) (entry to investigate strong chemical odor associated with manufacture of methamphetamine)); *People v. Ray*, 981 P.2d 928, 937 (Cal. 2000) (upholding search of residence that was in shambles when door had been open all day where officers were concerned injured person might be inside).

At the conclusion of his brief, Gibson discusses *Wood v. Commonwealth*, 497 S.E.2d 484 (Va. App. 1998). [Rsp.Br. at 42-43] *Wood* does not aid Gibson. In *Wood*, the court rejected police testimony offered to

support an emergency entry to secure a residence, as it was impeached by the fact that the officers left the residence unsecured when they later went to obtain a search warrant, because they did not did not ask cooperating witnesses if anyone was upstairs (where they claimed to be searching for a missing person), and because they did not call out before going upstairs to see if someone was there. 497 S.E.2d at 485-88.

*State v. Will*, 885 P.2d 715 (Or. App. 1994), another case cited by Gibson, is dissimilar and of no assistance to him. [Rsp.Br. 43] In *Will*, the court rejected the claim that a reentry was justified under the emergency doctrine to seize a bong after an initial entry disclosed no injured persons on the premises. *Id.* at 719.

In *United States v. Custer*, 281 F.Supp.2d 1003 (D. Neb. 2003), another case cited by Gibson, the government attempted to justify an entry as a valid protective sweep to protect officers outside a residence despite the absence of any hint that anyone was in the residence. 281 F. Supp. 2d at 1006-07. [Rsp.Br. 46-47] There was no discussion of whether an entry to look for additional victims of a crime would have been appropriate. *Id.* In sum, neither *Custer* not any other decision cited by Gibson at pages 40-46 of his brief bolsters his position.

## II. THE COURT OF APPEALS SHOULD HAVE AFFIRMED JUDGE WOLVERTON

Gibson argues the circumstances did not satisfy the requirements of the emergency entry exception. [Rsp.Br. 25-29] But Gibson views the evidence in the light most favorable to his case and ignores Judge Wolverton's factual findings. The state relies on Judge Wolverton's factual findings, which Gibson has not attempted to impeach, and the arguments in its opening brief. [Pet.Br. 14-15, 23-29]

Gibson makes specific claims that (1) the fact that the knife was not recovered prior to the search and (2) the dispatcher's report that she could hear a disturbance in the background during the 911 call did not justify the entry. [Rsp.Br. 32] Gibson states there is no reason to assume the dispatcher's use of the word "disturbance" meant that there were more than two people in the residence. [*Id.*]

Gibson errs in viewing the fact that the knife was not recovered and the dispatcher's use of the word disturbance out of context. The fact the knife had not been found at the time of the entry was a relatively minor fact supporting the entry in the totality of the circumstances. Gibson errs in viewing the dispatcher's statement that she heard a disturbance in the background in the light most favorable to his argument. As the state has explained, a "disturbance" in the background implies the presence of more

persons than the two the police were aware of when they entered the trailer. [Pet.Br. 23-25]

Pandemonium prevailed when the officers arrived at the trailer. [Tr. 59] As the state has pointed out, someone was inside the trailer screaming, and came out of the trailer wearing only a tank top and saying "help me, help me." [Tr. 68, 197; Pet.Br. at 24] was uncooperative, argumentative, hysterical, screaming, crying, upset, and "carrying on." [Tr. 60-61, 98] She had a swollen eye and was cut on the back of her head and was unable or unwilling to communicate with the officers. [Tr. 60-61, 98] injuries and her extremely upset condition – her screaming, her stumbling half-naked exit from the trailer, her hysteria, her uncooperativeness, her injuries, and her argumentativeness – were all factors which indicated that violent events had occurred in the trailer.

The events were highly stressful and the information available to the officers was somewhat ambiguous. It is unreasonable to expect the police to piece together a perfectly coherent picture in the short time available to deal with constantly changing scenarios. *See Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872 (1989) (cautioning against second-guessing police officers who are "often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly-evolving"); *accord State*

*v. Johnson*, 16 P.3d 680, 686 (Wash. App. 2001) (actions of police officers in emergency entry cases should be tested by whether they were "objectively reasonable" in circumstances as they appeared to officer, not as circumstances may seem to scholar after the event with benefit of "leisured retrospective analysis").

Gibson also argues Officer Doll testified that it is standard practice to enter a residence without a warrant "even if there was absolutely no reason to believe someone was inside" so as to belie the police belief there was cause to enter the Gibson trailer. [Rsp. Br. 28] Gibson takes Officer Doll's testimony out of context. Officer Doll testified that it is his department's practice "in *this kind of situation* to routinely go into a residence" because "if you don't go inside and somebody later turns out to have bled to death while you waited outside, it's obviously not good." [Tr. 226]

Gibson goes to great lengths to distinguish the case at bar from *Gallmeyer*. [Rsp.Br. 29-31] In fact, the circumstances in *Gallmeyer* are analogous to the circumstances here. Accordingly, the entry should be upheld even if this court overrules *Stevens* and follows *Gallmeyer*. In *Gallmeyer*, the defendant's wife called the police because the defendant had pointed a gun at her, struck her, and pushed her out of the family home. 640

P.2d at 839. When the responding officers were delayed due to road construction, the wife called a second time. *Id.* While the police were responding, Mrs. Gallmeyer told the defendant, who was intoxicated, that she would ask the police not to enter the house if he would put their baby on the front porch, and he did so. *Id.* When the officers arrived, they observed dried blood on Mrs. Gallmeyer's face. *Gallmeyer*, 640 P.2d at 840. She was almost hysterical and asked the police to rescue the baby, who was at this point only near the porch. *Id.* A police officer, concerned that an intoxicated Gallmeyer would shoot him and a fellow officer who was covering him, chose to enter the house and to subdue Gallmeyer rather than to simply (and easily) rescue the baby. *Id.*

On appeal Gallmeyer argued the entry was unwarranted because there was no imminent threat to life and limb. He pointed out that Gallmeyer had made no threats, fired no shots, was alone in the house, that the baby was outside, that his wife was also safe, and that there was no reason to suspect Gallmeyer would harm the baby. *Gallmeyer*, 640 P.2d at 843.

The court of appeals, relying in part on Mrs. Gallmeyer's extremely upset emotional condition to show the potential seriousness of the harm that Gallmeyer posed, rejected Gallmeyer's arguments and upheld the

entry. 640 P.2d at 843-40. In the case at bar, the evidence disclosed that that was substantially more upset than Mrs. Gallmeyer. was hysterical, had run out of the trailer half-naked, and was argumentative and uncooperative. Mrs. Gallmeyer had dried blood on her face and reported her husband had harmed her. *Gallmeyer*, 640 P.2d at 843. Here, was similarly injured; her eye was swollen and she was bleeding from a cut on the back of her head. Mrs. Gallmeyer told the police there were numerous firearms in the house. *Id.* Here, a female had told the 911 operator that she had been threatened with a knife that had not been recovered. In short, the circumstances that justified the entry in *Gallmeyer* were not significantly more egregious than those presented here.

## III. IT WAS APPROPRIATE FOR THE POLICE TO DISREGARD BEVIN'S CLAIM NO OTHER PERSONS WERE PRESENT IN THE TRAILER

The police did not accept claim that no other persons were present in the trailer. [Tr. 65-67, 165, 199] Gibson argues the officers should have accepted her claims. [Rsp.Br. 33-40] The state relies upon its analysis of the cases discussed in its opening brief which demonstrates that it was appropriate for the police not to accept statement at face value. [Pet.Br. 25-28]

## CONCLUSION

This court should reverse the decision of the court of appeals and remand to that court for resolution of Gibson's remaining arguments.

DATED this 14th day of December, 2009.

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