SUPREME COURT NO. S209192

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

ARNOLD IKEDA,

Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX
CASE NO. B238600
ON APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
HON. RONALD PURNELL, PRESIDING
CASE NO. 2011007697

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. When a person is detained by law enforcement outside a home, is reasonable suspicion sufficient under the Fourth Amendment to justify entry into the residence to conduct a protective sweep?
2. Did the officers here have "reasonable suspicion" prior to entering the residence?
3. Was any consent to search vitiated by the illegal sweep?

STATEMENT OF THE CASE

In a felony complaint, the Ventura County District Attorney charged petitioner with violations of Penal Code section 496[1] (receiving stolen property; count 1); Health and Safety Code section 11378 (possession for sale of a controlled substance; count 2), and Health and Safety Code section 11550, subdivision (a) (being under the influence of a controlled substance; count 3). (CT p. 1.)

[1] Unless otherwise indicated, all future statutory references will be to the California Penal Code.

Petitioner filed a motion to suppress evidence pursuant to section 1538.5 (CT p. 13) and the prosecution filed an opposition. (CT p. 25.) The motion was heard at the preliminary hearing, and denied by the magistrate. (CT p. 14.)

Both petitioner's motion to suppress and his subsequent motion to set aside the information rested upon his contention that the items underlying the prosecution were seized during an unreasonable protective sweep of the inside of his hotel room, made after his detention outside the dwelling.

The prosecution filed an information charging petitioner as originally charged in the complaint (CT p. 42) and petitioner pleaded not guilty to all counts. (CT p. 45.) Petitioner filed his motion to set aside the information pursuant to section 995 (CT p. 48) and the prosecution filed an opposition. (CT p. 59.) On October 25, 2011, the 995 motion was heard and denied. (CT p. 77.)

Later, petitioner withdrew his not guilty plea as to count 2, and pleaded guilty to possession for sale of a controlled substance in violation of Health and Safety Code section 11378. (CT p. 78.) Petitioner was sentenced to 300 days in the Ventura County Jail, and was released on formal probation for 36 months. (CT p. 99-100.) The court dismissed counts 1 and 3. (CT p. 101.)

Petitioner filed a timely notice of appeal. (CT p. 103.) On January 30, 2013, the Court of Appeal filed its opinion (Appendix) concluding that there was no error in the denial of either petitioner's motion to suppress, or petitioner's motion to set aside the information. Petitioner sought rehearing before the Court of Appeal, which was denied. On May 2, 2013, this Court ssued an Order Granting Review.

STATEMENT OF FACTS

The transcript of the preliminary hearing reveals that in February 2011, Scott Hardy, a Detective with the Ventura County Sheriff's Department, was investigating an allegation that one laptop computer had been stolen from Elias Vasquez. (CT pp. 108-109.) During the course of his investigation, Detective Hardy discovered that the computer was equipped with a GPS tracking device, and that an investigator with the tracking company was able to monitor key strokes and IP (internet protocol) addresses to detect the location of the computer. (CT p. 110.) The investigator gave Detective Hardy the IP address and the internet protocol address for the computer, and informed Hardy that the IP address belonged to AT&T. (CT pp. 110-111.) Detective Hardy contacted AT&T, who confirmed that the IP address was AT&T's, but requested a search warrant to release any further information. (CT p. 111.) Detective Hardy obtained a search warrant, and received information showing that the laptop had been used on February 21, 2011, at 181 Santa Clara Avenue in Ventura, California, and that the password on the computer had been changed to "Arnold Ikeda." (CT pp. 111-112.)

On Tuesday, March 1, 2011, Detective Hardy contacted the investigator at the company monitoring the computer's GPS location. (CT pp. 111-112.) The investigator informed Detective Hardy that the computer was logged in at a location on Schooner Drive. (CT pp. 111-112.)

Detective Hardy then conducted a records check on the name of Arnold Ikeda and located a booking photograph, a DMV photograph, and an address for petitioner. (CT p. 113.) He and his partner, Detective Kevin Lynch, then drove to the Schooner Drive address.[2] (CT p. 115.) They arrived at around 2:00 p.m. (CT p. 132.) They did not secure, nor did they attempt to

[2] Two separate hotels share the address of 1050 Schooner Drive in Ventura: the Holiday Inn Express, and the Four Points Sheraton.

secure, either a search warrant for the room or an arrest warrant for Mr. Ikeda. (CT p. 132.) They did not arrange any surveillance of the property prior to, or after, driving directly to the address. None of the officers had ever met Mr. Ikeda, nor did they determine if Mr. Ikeda had any criminal convictions or involvement in any criminal related activity. No other suspects were known to be connected with the motel room or with Mr. Ikeda.

Upon Detective Hardy's arrival at the Schooner Drive address, he entered the lobby of the Holiday Inn Express and spoke to the manager. (CT p. 114.) Hardy provided the manager the name of Arnold Ikeda, and she confirmed that someone by that name was checked in at the Four Points Sheraton.[3] (CT p. 114.) Hardy showed her the DMV photograph of Ikeda, and she confirmed that she thought it was the same person. (CT p. 114.) The manager informed Detective Hardy that petitioner was currently checked into room 104, that he had been staying there for several days, and that he had been changing ground floor rooms every day. (CT p. 114.) She also told Hardy there was a female who was associated with the room, and that there was a key card currently at the desk for that female. (CT p. 114.) Again, Detective Hardy chose not to secure either a search warrant or an arrest warrant (despite it being the middle of the afternoon on a Tuesday) and despite the less than 5 mile proximity to the courthouse. (CT p. 132.) The magistrate interjected that judges are available 24 hours a day to review and sign warrants. (CT p. 133, ll. 2-4.) Detective Hardy and Detective Lynch discussed the information they had and requested a uniformed patrol officer come to the location. (CT p. 115.) Based on Detective Hardy's "training and experience relating to narcotics," the fact the resident had been changing rooms, and that the room was "associated with a female," "made (Detective Hardy) wonder if Mr. Ikeda was dealing

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[3] The Holiday Inn Express and the Four Points Sheraton at the Schooner Drive location use the same computer system. The manager at the Holiday Inn Express confirmed that Mr. Ikeda was checked into the Four Points Sheraton.

narcotics." (CT 114, ll. 18-27.)

Deputy Johnson arrived on the scene. The three officers then located room 104. (CT p. 115.) Detective Hardy and Deputy Johnson approached the front door of the hotel room, and Detective Lynch went around the building to the rear sliding door of the room. (CT p. 115.)

Detective Hardy listened at the door and thought he heard "two male subjects" having a conversation inside the room. (CT p. 115.) Deputy Johnson did not hear two voices. Detective Hardy then knocked on the door, and announced he was with the Sheriff's Department. (CT p. 116.) A male responded with "hold on a moment," but then exited the hotel room through the back sliding door. (CT p. 116.) Detective Lynch informed Deputy Johnson of the resident's exit, and Deputy Johnson went around the building to assist Detective Lynch. (CT p. 116.) Detective Lynch told Ikeda he was being detained, not arrested, and directed him to put his hands behind his back, at which time Ikeda was handcuffed. (CT p. 117.) Ikeda told Detective Lynch there was a BB gun inside the hotel room. (CT p.117.)

Detective Hardy remained at the front door. (CT p. 116.) After several minutes, Hardy went around to the back of the building to see what was going on. (CT p. 117.) There Hardy saw Deputy Johnson standing with Ikeda, who was still in handcuffs, off the patio area and away from the room. (CT p. 130, l. 13.) Detective Hardy concluded it was necessary to engage in a "protective sweep" of the room accompanied by Detective Lynch: "Based on all the information that we had, the voices that I thought I heard when we were at the front door, the fact that there was possibly a female also inside, the possible drug transactions that were going on." (CT p. 118, ll. 13-16.)

Detectives Hardy and Lynch then entered the room in order to conduct the sweep. (CT p. 118.) Detective Hardy remained inside the one-bedroom, one-bathroom hotel room for 45 minutes to an hour. (CT pp. 119, 136.)

While inside, the detectives observed in plain view a computer that matched the description of the stolen laptop, a crystal substance which appeared to be methamphetamine, and related drug paraphernalia. (CT pp. 118-119.) Detective Hardy "believed" they found a BB gun inside the room, but the record is silent with regard to where it was found.

Detective Hardy then asked Deputy Johnson to trade places with him so that there would always be someone in the room and then went to ask Ikeda for consent to search of the dwelling. (CT p. 121.) Petitioner agreed. (CT p. 122.) Hardy then returned to the hotel room and collected the items he had previously observed during the protective sweep. (CT p. 122.) Ikeda was then placed under arrest. (CT p. 123.) While the protective sweep was ongoing, Detective Lynch began to conduct a drug evaluation assessment to determine if Ikeda was under the influence of a controlled substance.

At the conclusion of the testimony presented at the preliminary hearing, petitioner's attorney argued the following points in support of his motion to suppress under the Fourth Amendment:

1) The motel room was the equivalent of the petitioner's home, and that absent a search warrant, consent, or exigent circumstances, the entry was unconstitutional.
2) A "protective sweep" is an exception to the warrant requirement if the police have made an *arrest* inside the home. Petitioner was only detained outside his home, not arrested within.
3) *Arrests* outside the home may lead to a valid protective sweep if the police have probable cause to believe someone is armed and dangerous inside the home. However, reasonable suspicion is insufficient to overcome the need for a warrant, consent, or exigent circumstances.
4) Petitioner's consent to the second search was tainted by the prior unreasonable search.

Based on the argument and the evidence presented, the magistrate said that he agreed with the arguments of the prosecutor (CT p. 171, l. 23), who asserted that "In *Celis* the holding of the Court is reasonable suspicion is sufficient for a protective sweep as long as it's just limited sweep looking for individuals." (CT p. 170, ll. 21-24; citing *People v. Celis* (2004) 33 Cal.4th 667 (hereafter, *Celis*).) Some of the inferences the deputy district attorney believed led to reasonable suspicion were catalogued: "The people had seen another female coming and going from the room. Also the indication that the type of activity involved here by the defendant, moving around to the different hotel rooms in a frequent basis was indicative of narcotic activity, which means other people are involved and also heightens security risk because we know when narcotics are involved so are weapons." (CT p. 171, ll. 7-14.)

The People misstated the law, and there had been no testimony at the hearing that anyone had ever seen a female at the motel or in the Ikeda's room - much less "coming and going" in the room - only that there was a card left at the desk for a woman possibly named Desiree. (CT p. 114, ll.18-21.) The officers had no information that Ikeda was ever involved in drug crimes. The officers had no information that there might be drugs involved in the theft of the laptop other than Deputy Hardy's "wonder" if Ikeda was dealing narcotics. (CT p. 114, l. 27.) The officers conducted their protective sweep well before any one of them thought to examine Ikeda for signs of being under the influence. The deputy who conducted the drug evaluation test did not "feel" Ikeda was possibly under the influence until Detective Hardy had already gone into the room to conduct their protective sweep. (CT p. 162, ll. 20-22.) Whether Ikeda, himself, had used drugs did not enter into the calculus of whether to conduct the protective sweep. Finally, petitioner was neither armed nor dangerous.

The magistrate denied petitioner's suppression motion, commenting that the laptop and contraband were in plain view during the initial search which rendered petitioner's subsequent consent unnecessary. (CT p. 172, l. 1-5.)

On appeal, petitioner contended that the trial court had unlawfully expanded the protective sweep doctrine and carved out a new exception to the warrant requirement by allowing a warrantless protective sweep *after a detention outside petitioner's home* based only on reasonable suspicion, and that, in any case, there were no articulable facts supporting reasonable suspicion.

The Court of Appeal rejected Mr. Ikeda's claim that the magistrate had denied his suppression motion in error. The Court of Appeal held that when a suspect is merely detained outside his residence, the police may conduct a "protective sweep" inside the residence merely with a reasonable suspicion that a person inside poses a danger to officer safety.

In seeking rehearing after the Court of Appeal affirmed the denial of the suppression motion, petitioner pointed out that a mere investigative detention does not carry with it the right to conduct a warrantless sweep of a detainee's residence based solely upon a reasonable suspicion that someone inside may present a danger to the police. Petitioner once again raised his argument that there was no such reasonable suspicion from the evidence presented. The Court of Appeal rejected the request for rehearing. (Appendix).

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ARGUMENT

I.

The Court of Appeal erred in concluding that reasonable suspicion is the constitutional standard justifying a protective sweep after a suspect is *detained outside his residence.*

The circumstances under which a protective sweep may be conducted are not yet completely settled.

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides: "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated ... ." (U.S. Const., 4th Amend.) The California Constitution provides at least the same minimal protection. (Cal. Const., art. I, § 13.) Warrantless searches inside a home are presumptively unreasonable. (*Payton v. New York* (1980) 445 U.S. 573, 586 (hereafter, *Payton*).)

This presumption of unreasonableness may be overcome by a showing that one of the "specifically established and well-delineated exceptions" to the warrant requirement is present. (*People v. Celis* (2004) 33 Cal.4th 667, 676 [quoting *Katz v. United States* (1967) 389 U.S. 347].) A "protective sweep" of a residence, conducted in order to protect the safety of police officers or others on scene, is one such exception that *may* support a search inside a home. (*Celis*, *supra*, 33 Cal.4th at pp. 676-77.) A protective sweep after law enforcement is *already legally justified for being inside the home by means of having secured an arrest warrant* may be based on reasonable suspicion that the area to be swept harbors a dangerous person. (*Maryland v. Buie* (1990) 494 U.S. 325, 337 (hereafter, at times, *Maryland v. Buie*, or *Buie.*) (Emphasis added.) In other circumstances, police must have

probable cause that a person inside the home poses a danger of ambush, or exigent circumstances.

A. Only protective sweeps incident to *an arrest inside the home* may be based on reasonable suspicion.

The Court of Appeal assumed that mere reasonable suspicion was sufficient to justify a warrantless entry into Mr. Ikeda's home after he was detained outside.

It appears that the Court of Appeal centered its holding partially on its misinterpretation of the seminal "protective sweep" case *Maryland v. Buie* (1990) 494 U.S. 325, 335-336. The Court of Appeal stated: "It is settled officers may conduct a protective sweep of a house when a suspect is *arrested* outside the house and the officers have a reasonable, articulable suspicion that the house harbors a person who poses a threat to officer safety." (Opinion, p. 3.) The Court of Appeal assumed that Mr. Buie was arrested *outside* his home and officers subsequently went inside his home to conduct a search of the basement. The Maryland Court of Appeals appears to have made a similar error: "The Maryland court was under the impression that the search took place after 'Buie was safely outside the house, handcuffed and unarmed.' [*Appeals of Maryland v. Buie* (1988) 314 Md. 151, 166, 550 A.2d 79, 86.] All of this suggests that no reasonable suspicion of danger justified the entry into the basement." (*Maryland v. Buie, supra,* 494 U.S. 325, 338.) Of course, Mr. Ikeda was simply detained outside his home, which is a critical distinction.

In *Maryland v. Buie,* and in subsequent federal cases, including *United States v. Burrows* (7th Cir. 1995) 48 F.3d 1011 (*Burrows*), the general rule is that a limited protective sweep may be based on reasonable suspicion only after an in-home arrest. In *Burrows*, the court stated:

> "Justice White made clear in *Buie* that the same considerations that justify the exceptions in *Terry* and

Long animate the exception for the 'protective sweep.' *Law enforcement officers have an interest in ensuring their safety when they lawfully enter a house to affect an arrest.* That interest justifies their ensuring that the dwelling does not harbor another person who is dangerous and who unexpectedly could launch an attack. In that context, the Justice noted that the officer is in at least as much danger as the officer in the *Terry* or *Long* situation. The officers are involved in the serious business of arresting an individual; they are in a confined setting on the adversary's 'turf.' 'The arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest.' [*Buie*, 494 U.S. at 334.] The operation, however, is a sweep, not a 'full search of the premises.' [*Id.*, at 335.]' "

(*Burrows*, *supra,* 48 F.3d at p. 1016, emphasis added.)

In extending the reach of the general rule, the Court of Appeal also proclaimed that "In *People v. Celis* (2004) 33 Cal.4th 667 (*Celis*) our Supreme Court assumed, without deciding, that the *Buie* reasonable suspicion standard applied to a detention where an officer detained defendant outside his house and conducted a protective sweep. (*Id.*, at pp. 679.)" (Opinion, p. 3.) On the contrary, the *Celis* court found it unnecessary to decide whether probable cause or reasonable suspicion would be required because the officers in *Celis* failed to meet either standard, and the Court noted that because "the lower standard was not satisfied here, it follows that the higher standard requiring probable cause was not met either." (*Celis*, *supra*, 33 Cal.4th at p. 680.)

Celis expressly acknowledged that it was not deciding the standard necessary to conduct an in-home protective sweep after an out-of-home detention:

> "Would that rationale [that in some circumstances, a detention taking place just outside a home may pose an equally serious threat to the arresting officers as one conducted inside the house] also apply when officers enter a home to conduct a protective sweep after lawfully detaining a suspect outside the residence? [Citation.] That is an issue we need not resolve here because the facts known to the officers when they entered defendant's house fell short of the reasonable suspicion standard necessary to justify a protective sweep under *Buie* [citation]." (*People v. Celis, supra,* 33 Cal.4th at p. 679.)

Petitioner urges this Court to now resolve the issue in favor of his contention that, after a detention outside the home, entry into the home requires the higher standard of probable cause or exigency, not mere reasonable suspicion.

The Court of Appeal's opinion also relies on *People v. Werner* (2012) 207 Cal.App.4th 1195, 1206 (hereafter, *Werner*). They summarized *Werner* thusly: "[R]ule allowing protective sweep in conjunction with suspect's detention recognized but suppression motion should have been granted because no reasonable suspicion that dangerous person was inside the residence." (Opinion, p. 3.)

The court deciding *People v. Werner, supra,* 207 Cal.App.4th at 1206, did suggest that an entry into a house for a protective sweep conducted after a detention could be based on reasonable suspicion. (*Id.,* at 277.) However, the *Werner* court misconstrued the holdings of both *Celis*

and *Buie*: " 'A protective sweep is not limited to situations immediately following an arrest; it may occur in conjunction with a suspect's detention . . . The facts known to the officers before they perform a protective sweep must still satisfy *Buie*; there must be 'articulable facts,' that would warrant a reasonably prudent officer to entertain a reasonable suspicion that the area to be swept harbors a person posing danger to officer safety. [Citation.]' (*Celis*, at pp. 679–680, citing *Buie, supra*, 494 U.S. at pp. 327, 334.)" (*People v. Werner*, *supra*, 207 Cal.App.4th at p. 1206.)

In *Buie*, the High Court specifically noted that "A protective sweep occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." (*Buie, supra* at p. 333.) And in *Celis,* the standard remained unsettled.

The Court of Appeal erred in relying on the *Werner* analysis; only protective sweeps incident to an arrest inside the home may be based on reasonable suspicion.

B. Protective sweeps incident to a detention outside the home are unconstitutional without probable cause or exigency.

A detention of a citizen does not require probable cause, but rather "'some objective manifestation' that criminal activity is afoot and that the person to be stopped is engaged in that activity." (*Celis*, *supra*, 33 Cal.4th. at p. 674.) The function of an investigative detention is to permit the officers to diligently pursue a means of "investigation designed to confirm or dispel their suspicions quickly." (*People v. Russell* (2000) 81 Cal.App.4th 96, 102.) Extending the authority to conduct a warrantless sweep after a detention based on suspicion extends the government's authority to invade a home before there is any probable cause that a crime has been committed. As the United States Supreme Court held in *Florida v. Royer* (1983) 460 U.S. 491, "in the name of investigating a person who is no more than suspected of criminal activity, the

police may not carry out a full search of the person or of his automobile or other effects. Nor may police seek to verify their suspicions by means that approach the conditions of arrest." (*Id.,* at 499.) The Court reiterated the law that when a police confinement goes beyond the limited restraint of a *Terry* investigation, any subsequent search is constitutionally justified only by probable cause. (*Id.*, at 496.)

A detention of an individual outside his home should not authorize police to cross the firm line drawn by the United States Supreme Court in *Payton* and other cases cited above to conduct a sweep based only on reasonable suspicion.[4] Surely the Fourth Amendment provides stronger protection than here afforded by the Court of Appeal. A warrantless entry into a home is the most extreme invasion of the privacy rights of all citizens.

Although it goes without saying that officers must be protected during the performance of their duties, "[s]ociety's interest in protecting police officers must . . . be balanced against the constitutionally protected interest of citizens to be free of unreasonable searches and seizures." (*Celis*, *supra*, at p. 680.) Here, the initial entry into Mr. Ikeda's hotel room was unlawful, as there was neither probable cause to justify a protective sweep or exigency supporting the intrusion.

In *People v. Ormonde* (2006) 143 Cal.App.4th 282, the superior court dismissed defendant's motion to suppress evidence under Penal Code section 1538.5. The defendant had been arrested outside and the Attorney General contended that the initial entry into defendant's home was justified by exigent circumstances. The appellate court disagreed: "As our Supreme Court has recently summarized: 'It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is

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[4] *Payton v. New York* (1980) 445 U.S. 573 [stating "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant."]

directed." ' (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 748 [80 L. Ed. 2d 732, 104 S. Ct. 2091].) A warrantless entry is 'presumptively unreasonable.' (*Payton v. New York* (1980) 445 U.S. 573, 586 [63 L. Ed. 2d 639, 100 S. Ct. 1371].) This presumption can be overcome by a showing of one of the few 'specifically established and well-delineated exceptions' to the warrant requirement (*Katz v. United States* (1967) 389 U.S. 347, 357 [19 L. Ed. 2d 576, 88 S. Ct. 507]), such as 'hot pursuit of a fleeing felon, or imminent destruction of evidence, ... or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling' (*Minnesota v. Olson* (1990) 495 U.S. 91, 100 [109 L. Ed. 2d 85, 110 S. Ct. 1684]). The United States Supreme Court has indicated that entry into a home based on exigent circumstances requires probable cause to believe that the entry is justified by one of these factors .... (*Ibid.*)" (*People v. Celis* (2004) 33 Cal.4th 667, 676.) (*Id.*, at p. 291.)[5]

Hence, one of the circumstances justifying a warrantless entry into a home is the risk of danger to the police or to other persons inside or outside the dwelling. This belief that a dangerous person is inside the home, however, must be based on probable cause, unless the police are already inside the home, in which case reasonable suspicion may prevail in some circumstances as noted above. The Court of Appeal's decision here effectively lowers the standard for entry into a home from probable cause to the much reduced standard of reasonable suspicion when police have no other lawful reason for being inside.

In *United States v. Spentz* (9th Cir. Cal. 1983) 721 F.2d 1457, 1465-1466, a protective sweep was conducted after several individuals were

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[5] "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome4 the presumption of unreasonableness that attaches to all warrantless home entries." (*Welsh v. Wis.* (1984) 466 U.S. 740, 750.)

arrested outside in their driveway. The district court upheld the warrantless intrusion and stated:

> "Here there were five men and five automobiles at a house that was away from the beaten path, up by itself. None of these agents knew how many people were there, but with five cars there, they could assume that there were several. The doors were open. If I were one of those agents, I'd jolly well want to know who else is in that house, if anybody, and under the circumstances I think the agents were justified in making sure that there was nobody else in that house that might be disposed to draw a bead on them. More heinous things have happened to drug agents in the past.'"

The Court of Appeal was unpersuaded and ruled that when a person is arrested outside the police must have exigent circumstances to subsequently go inside:

> "The exigent circumstances exception to the warrant requirement applies in some instances when law enforcement officers arrest an individual in or near a residence. When officers have arrested a person inside his residence, the exigent circumstances exception permits a protective search of part or all of the residence when the officers reasonably believe that there might be other persons on the premises who could pose some danger to them. *United States v. Gardner*, 627 F.2d 906, 909-10 (9th Cir.1980) (footnote omitted). The government bears a heavy burden of demonstrating that exceptional

> circumstances justified the departure from the normal procedure of obtaining a warrant. *Vale v. Louisiana*, 399 U.S. 30, 34, 90 S. Ct. 1969, 1971, 26 L. Ed. 2d 409 (1970); *Gardner*, 627 F.2d at 909. In carrying that burden, the government must "point to specific and articulable facts which, taken together with rational inferences from those facts, [would] reasonably warrant [the warrantless] intrusion." *United States v. Dugger*, 603 F.2d 97, 99 (9th Cir.1979) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968)). "The Government does not satisfy [its] burden by leading a court to speculate about what 'may' or 'might' have been the circumstances surrounding the warrantless search." *United States v. Hoffman*, 607 F.2d 280, 284 (9th Cir.1979). See *Dugger*, 603 F.2d at 100 n.5.
>
> "Our review of the record leads us to conclude that the government clearly failed to carry its burden of demonstrating specific and articulable facts that justify the finding of exigent circumstances." (*Id.,* at 1465-1466.)

The Court reiterated the rule that reasonable suspicion is the constitutional standard only with arrests inside the home. (*Id.*, at 1465.)

The police who detained Mr. Ikeda did not articulate exigent circumstances other than their rank speculation that someone might be inside the hotel room posing a danger of ambush. Whether someone was inside Mr. Ikeda's motel room was an "unknown." (CT p. 31, l. 21.) The Court of Appeal's opinion here sanctions the circumvention of the Fourth Amendment's

warrant requirement and would allow law enforcement to watch a citizen's residence waiting for him to exit, detain him based on reasonable suspicion, then freely make a warrantless entry into the suspect's home so long as speculation that another person was inside posing a potential, if hypothetical, danger could be articulated.

Other courts have recognized that "[l]ack of information cannot provide an articulable basis upon which to justify a protective sweep." *United States v. Colbert,* 76 F.3d 773, 778 (6th Cir. 1996); accord, *United States v. Moran Vargas,* 376 F.3d 112, 117 (2d Cir. 2004); *United States v. Chaves*, 169 F.3d 687, 692 (11th Cir. 1999). Otherwise, "allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep. *Colbert,* 76 F.3d at 778." *United States v. Jones* (4th Cir. 2012) 667 F.3d 477, 484-485. (Hereafter, *Jones*.)[6]

The potential for abuse of authority is clear, but most importantly the decision sanctions searches based merely on a double layer of suspicion. Protective sweeps should be authorized only with probable cause or exigency.

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[6] As in *Spentz*, the *Jones* court noted that: "Although the *Buie* case involved a protective sweep incident to an in-home arrest, virtually all of our sister circuits have recognized that the *Buie* protective sweep doctrine applies to an arrest occurring just outside a residence. See, e.g., *United States v. Paopao*, 469 F.3d 760, 765-67 (9th Cir. 2006) (collecting cases); *Sharrar v. Felsing,* 128 F.3d 810, 824 (3d Cir. 1997), abrogated on other grounds by *Curley v. Klem*, 499 F.3d 199 (3d Cir. 2007); *United States v. Tobin*, 923 F.2d 1506, 1513 (11th Cir. 1991); see also *United States v. Davis*, 471 F.3d 938, 945 (8th Cir. 2006). . . ." All the cited authority involves *post-arrest* searches.

II.

The law enforcement officers who detained Mr. Ikeda did not have reasonable suspicion to conduct a protective sweep.

A protective sweep after a suspect's arrest *inside* his home, requires a reasonable suspicion that (1) another person is in the premises; and (2) that person is dangerous. (*Werner*, *supra*, 207 Cal.App.4th at p. 1206.) This suspicion must be supported by "articulable facts considered together with the rational inferences drawn from those facts." (*Celis, supra*, 33 Cal.4th at p. 379.) Here, of course, Mr. Ikeda was detained outside and law enforcement officers did not have sufficient reasonable suspicion from which any reliable inferences could be derived to justify a protective sweep.

The reported theft of the laptop was totally non-violent in nature. Detective Hardy's suspicions that narcotics activities might be involved did not elevate the investigation to one of a violent crime or a volatile incident in progress. Second, Detective Hardy lacked reasonable suspicion that *another person* was present in the hotel room. Detective Hardy testified at the preliminary hearing that he conducted the protective sweep because he thought that there may be a female or somebody else inside the room. As discussed, the "articulable facts" were thin hunches.

In *Celis*, "while police had information that two other people lived with the defendant, they had no information that anyone was inside the home when they detained the defendant outside." Similarly here, the police had no information that anyone was inside the room when they detained the defendant outside. Detective Hardy testified that it was an "*unknown*" in his mind whether anybody was inside (CT p. 31, l. 21) and only that "*there could be.*" (CT p. 138, l. 1.) Further, he articulated no specific facts as to why a person who might possibly be inside posed a danger to police.

The "articulable facts" presented by Deputy Hardy as to why a person inside the room posed a threat to the officers were that petitioner changed ground floor rooms frequently which "*made him wonder*" if there were "*possible* drug transactions going on." (CT p. 137, l.21.) The officers had no plausible information about that possibility, which was only speculation on their part; their investigation involved only a stolen laptop computer.

One important consideration in the Court of Appeal's argument seems to be that petitioner admitted there was a BB gun inside the room. As *was argued in the motion*, the BB gun did not transmute into a reasonable suspicion that the BB gun was a danger to police or that a person inside intended to use it.

> "The mere abstract possibility that someone dangerous might be inside a residence does not constitute 'articulable facts' justifying a protective sweep." (*People v. Werner, supra,* 207 Cal.App.4th 209.)

The undisputed facts in this case reveal that Ikeda was the subject of an investigative detention for a non-violent crime; he was detained outside his residence; he was handcuffed, posed no harm, and had indicated no one else was inside the room. Neither the police nor anyone else observed anyone inside the room.

In its opinion, the Court of Appeal was especially accommodating of the "experience and specialized training" of the officers who conducted the protective sweep when they commented: "The United States Supreme Court has repeatedly warned that reasonable-suspicion determinations must be based on 'the totality of the circumstances' . . . . [Citation.] This process allows officers to draw on their own experience and specialized training to make inferences from deductions about the cumulative information . . . that 'might well elude an untrained person.' [Citations.] (*United States v. Arvizu* (2002) 534 U.S. 266, 273)." (Opinion, p. 4.) Here, the

"experience and specialized training" of the officers simply impelled them to jump to uncertain conclusions. As the great fictional detective Charlie Chan said in *Charlie Chan in Egypt* (1935): "Hasty conclusions are like holes in the water, easy to make."

The *Werner* court summed up the issue nicely when they cautioned that, "It does not appear to be enough, under *Celis,* that the police were genuinely apprehensive of danger based on past experience with domestic battery situations or large scale drug operations. . . . [T]o say that the warrantless entry into defendant's home in this case was justified because of a police officer's past experiences with domestic violence arrests would be tantamount to creating a domestic violence exception to the warrant requirement. This we cannot do. [Citation.]" *(People v. Werner, supra,* 207 Cal.App.4th at p. 1209.)

Here, by allowing protective sweeps after a suspect is safely detained away from his home on the mere suspicion there may be someone else inside the home posing a danger, the Court of Appeal has attempted to carve out a new exception to the warrant requirement based on a police officer's "experience and specialized training." The training here led to an officer-created exigency when Detective Hardy speculated that a laptop computer theft would be attended by a drug operation which always involves weapons and, therefore, there was reasonable suspicion that a person inside with dangerous weapons was ready and willing to use them against police officers. Police-created exigencies are disapproved and condemned in California. (See, in general, *People v. Bellizzi* (1995) 34 Cal.App.4th 1849, 1852.) Further, no exigency arose, as officers easily could have secured the dwelling and sought a warrant.[7]

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[7] In *People v. Carney* (1983) 34 Cal.3d 597, 610 the court said, "We note in this respect that the People present no cognizable claim of 'exigent circumstances' independent of the automobile exception itself. In that the incident occurred on a

III.

Consent was vitiated by taint of the illegal search.

Mr. Ikeda "consented" to a second search of his home after an illegal protective sweep. In *Florida v. Royer* (1983) 460 U.S. 491, Mr. Royer was illegally detained but then consented to a search of his luggage. The consent was held to be tainted by the illegality. Mr. Ikeda's consent to search his home was not voluntary, but rather vitiated as a consequence of the illegal sweep; the alleged "consent" cannot stand as an exception to the warrant requirement.

CONCLUSION

Petitioner respectfully requests that this Court reverse the opinion of the Court of Appeal and make clear that a mere detention outside a suspect's dwelling cannot support an entry into the residence without probable cause, exigence, consent, or a warrant, especially in the context of conducting a protective sweep. A detention based on reasonable suspicion coupled with reasonable suspicion that a protective sweep might be a good idea does not comport with Fourth Amendment constitutional principles.

The items seized from the motel room should be suppressed.

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weekday afternoon while the motor home was parked within a few blocks of the courthouse, it would have been quite simple for the officers to seek a warrant from a magistrate and to have thereby avoided all their present difficulties." (Overruled on other grounds related to the automobile exception in *California v. Carney* (1985) 471 U.S. 386.)

Petitioner respectfully requests that this Court reverse and remand the matter to the Court of Appeal with instructions directing the Superior Court to vacate the order denying petitioner's motion to suppress evidence and allow petitioner at least 60 days from the date of the Court of Appeal's order to move to vacate his plea.

Dated: May 31, 2013

Respectfully Submitted,
STEPHEN P. LIPSON, Public Defender

By: _____
CYNTHIA ELLINGTON,
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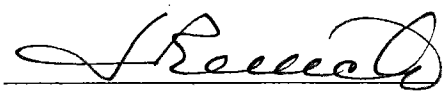
CERTIFICATE OF WORD COUNT

I, Jeane Renick, certify pursuant to the California Rules of Court that the word count for this document is 7,475 words, excluding Declaration of Service. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document for MSWord font #13. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Ventura, California, on May 31, 2013.

STEPHEN P. LIPSON, Public Defender

By: 

Jeane Renick, Legal Mgmt. Asst. III
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APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ARNOLD IKEDA,

Defendant and Appellant.

2d Crim. No. B238600
(Super. Ct. No. 2011007697)
(Ventura County)

We hold that where a person is detained outside but near his residence, the police may conduct a "protective sweep" inside the residence when there is a reasonable suspicion that a person therein poses a danger to officer safety.

Arnold Ikeda appeals his conviction by plea to possession of methamphetamine for sale (Health & Ins. Code, § 11378), entered after the trial court denied a motion to suppress evidence (Pen. Code, § 1538.5). The trial court found that the protective sweep of appellant's motel room, made in conjunction with appellant's detention outside the room, did not violate his Fourth Amendment rights. We affirm.

Facts & Procedural History

On February 14, 2011 the named victim reported that his laptop computer equipped with a GPS tracking device was stolen. On March 1, 2011, the tracking company notified Ventura County Deputy Sheriff Hardy that someone had changed the computer password to "Arnold Ikeda" and was using the laptop at the Holiday Inn Express in Oxnard. Deputy Hardy went to the motel and showed the motel manager appellant's photo. The manager said that appellant was in room 104, that appellant

changed rooms every day, and that he had left a card key at the front desk for a woman who came and went.

Based on his training and experience, Deputy Hardy was concerned because the room change was consistent with someone selling narcotics. Room 104 was on the ground floor and had a curtained rear glass sliding door to the parking lot. Deputies Hardy and Johnson went to the front door and Detective Lynch positioned himself outside the rear sliding door,

Deputy Hardy heard two male voices inside the room, knocked, and announced "Sheriff's Department." A voice responded "One moment." A minute later, Detective Lynch saw the rear glass door open and appellant step out.

Detective Lynch detained and handcuffed appellant for officer safety purposes. Appellant said that a BB gun was in the room. Appellant claimed no one was in the room. This was inconsistent with Deputy Hardy having heard voices before knocking. He believed a woman or someone else was in the room.

Deputy Hardy and Detective Lynch announced "Sheriff's Department," pulled back the door curtain, and conducted a protective sweep. A laptop computer was in plain view and matched the description of the stolen laptop. A crystalline substance that resembled methamphetamine was on the counter and a scale, pay/owe sheet, and cash were on the bed. Appellant was arrested and consented to a search of the room. The officers seized the BB gun. After advisement and waiver of his constitutional rights, appellant admitted selling drugs and using methamphetamine.

Appellant brought a motion to suppress evidence on the theory that the protective sweep violated his Fourth Amendment rights. The trial court denied the motion to suppress because the officer had a reasonable suspicion that someone was hiding in the room and posed a danger to officer safety.

Protective Sweep

On review, we defer to the trial court's express and implied factual findings which are supported by substantial evidence and independently determine whether the protective sweep was reasonable under the Fourth Amendment. (*People v. Ledesma* (2003) 106 Cal.App.4th 857, 862.) It is settled officers may conduct a protective sweep of a house when a suspect is *arrested* outside the house and the officers have a reasonable, articulable suspicion that the house harbors a person who poses a threat to officer safety. (*Maryland v. Buie* (1990) 494 U.S. 325, 335-336 [108 L.Ed.2d 276, 287].)

Appellant argues that a protective sweep is not permitted unless the officer is lawfully inside the house or the sweep is incident to an arrest outside the house. In *People v. Celis* (2004) 33 Cal.4th 667 (*Celis*), our Supreme Court assumed, without deciding, that the *Buie* reasonable suspicion standard applied to a *detention* where an officer detained defendant outside his house and conducted a protective sweep. (*Id.*, at pp. 679.) In *Celis*, officers watched defendant's house for two days and had no information that anyone else was in the house when defendant was detained in the backyard. "The facts known to the officers before they performed the protective sweep fell short of what *Buie* requires, that is, 'articulable facts' considered together with the rational inferences drawn from those facts, that would warrant a reasonably prudent officer to entertain a reasonable suspicion that the area to be swept harbors a person posing a danger to officer safety. [Citation.]" (*Id.*, at pp. 679-680.)

We reject the argument that protective sweeps must be incident to a lawful arrest, as opposed to a detention outside his house. Consistent with *Buie and Celis,* courts have concluded that a protective sweep may be conducted in conjunction with a suspect's detention where there is a reasonable suspicion that the area to be swept harbors a dangerous person. (*People v. Werner* (2012) 207 Cal.App.4th 1195, 1206 [rule allowing protective sweep in conjunction with suspect's detention recognized but suppression motion should have been granted because no reasonable suspicion that a dangerous person was inside the residence]; see also *United States v. Garcia* (9th Cir. 1993) 997 F.2d 1273, 1282.)

Reasonable Suspicion

Appellant asserts that the officers lacked a reasonable suspicion that someone was hiding in the room and posed a risk of harm to the officers. Although Deputy Hardy was investigating a computer theft, the motel clerk said that appellant changed rooms daily and always requested a ground floor room. The officers were told that appellant had left a card key at the front desk for a woman who came and went.

Deputy Hardy heard male voices in the room and knocked. Someone in the room said "one moment" and appellant exited the rear sliding door, was detained, and said there was a BB gun in the room. Based on the voices, the card key at the front desk, the report that a woman came and went to the room, appellant's use of motel rooms consistent with drug trafficking, and appellant's statement that a gun was in the room, a reasonably prudent officer would entertain a reasonable suspicion that a protective sweep of the room was required for officer safety purposes.

Although appellant was detained and handcuffed, the rear door was ajar about two feet and the door curtain blocked everyone's view into the room. Detective Lynch testified: "I was concerned that there might be another individual inside the room, coupled with the fact that Mr. Ikeda told me there was, in his words, a BB gun, I didn't feel safe. I don't feel secure in being able to investigate in the manner we were doing without first ensuring there was nobody in the room that could hurt us."

"Reasonable suspicion" is an abstract concept, not a finely-tuned standard. (*People v. Ledesma, supra,* 106 Cal.App.4th at p. 863.) The United States Supreme Court has repeatedly warned that reasonable-suspicion determinations must be based on "the totality of the circumstances'. . . . [Citation.] This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citations]." (*United States v. Arvizu* (2002) 534 U.S. 266, 273 [151 L.Ed.2d 740, 749-750].)

Conclusion

The Fourth Amendment has never been, and should not be, interpreted to require that police officers take unreasonable risks in the performance of their duties. We again borrow from the words of Presiding Justice Pierce, i.e., the law requires police officers, "live ones," to enforce constitutional statutory, and decisional law. Here, we have balanced competing rights and conclude that "officer safety" must carry the day. (See e.g., *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1255, citing *People v. Koelzer* (1963) 222 Cal.App.2d 20, 27.) .)

The judgment (order denying motion to suppress) is affirmed.

CERTIFIED FOR PUBLICATION

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Charles W. Campbell, Judge

Superior Court County of Ventura

Stephen P. Lipson, Public Defender; Michael C. McMahon, Chief Deputy and Cynthia Ellington, Senior Deputy Public Defender, for appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

DECLARATION OF SERVICE

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

On **May 31, 2013**, I, **JEANE RENICK,** declare:

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

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

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

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

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

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

Kamala Harris, Attorney General
Mary Sanchez, DAG
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300 South Spring Street
North Tower- Fifth Floor
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Arnold Ikeda
Address of Record
(Defendant-Petitioner)

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

STEPHEN P. LIPSON, Public Defender

By: _____

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