In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ARNOLD IKEDA,** **Defendant and Appellant.**

Second Appellate District, Division Six, Case No. B238600
Ventura County Superior Court, Case No. 2011007697
The Honorable Roland N. Purnell, Judge

RESPONDENT'S ANSWER 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 of a danger to the safety of officers or others sufficient under the Fourth Amendment to justify entry into the residence to conduct a protective sweep?

2. Did the officers have "reasonable suspicion" prior to entering the residence?[1]

STATEMENT OF THE CASE

A. The Charges

In a complaint filed by the Ventura County District Attorney's Office, appellant was charged with receiving stolen property (Pen. Code,[2] § 496, subd. (a); count 1), possession for sale of a controlled substance (Health & Saf. Code, § 11378; count 2), and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); count 3). (1CT 1.)

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[1] Appellant also raises a third issue not included in the Court's grant of review, consisting of a brief paragraph asserting that his consent to a second search of his "home" (which netted a BB gun) was tainted by the illegality of the protective sweep. (OBOM 22.) As respondent will demonstrate that the protective sweep was justified, it is not necessary to address this cursory "consent" argument. More importantly, because this distinct issue is beyond the scope of the issues on review, this Court should decline to address it. (See Cal. Rules of Court, rule 8.520(b)(3) ["Unless the court orders otherwise, briefs on the merits must be limited to the issues stated in" the petition for review and answer "and any issues fairly included in them"].)

[2] All further undesignated statutory references will be to the Penal Code.

B. The Motion to Suppress

Appellant filed a motion to suppress evidence pursuant to section 1538.5. (1CT 13-21.) The prosecution filed an opposition to the motion to suppress, arguing that the warrantless protective sweep of appellant's motel room was justified by specific articulable facts. (1CT 25-31.) The motion to suppress was heard at the preliminary hearing, in which three deputies testified. (1CT 105-172.)[3]

1. Deputy Scott Hardy

First, Ventura County Deputy Sheriff Scott Hardy testified that on February 21, 2011, he contacted Elias Vasquez regarding Vasquez's stolen laptop computer. The computer was equipped with a GPS tracking device. (1CT 109, 112.) Deputy Hardy then contacted an investigator with the company that monitored the GPS device. The investigator, Grant Rainsley, stated that he was tracking the stolen computer. The investigator gave Deputy Hardy an "IP address . . . for that particular computer." (1CT 110.) Based on that information, Deputy Hardy contacted an AT&T employee, who confirmed that it was an AT&T IP address, but requested a search warrant before she would release further information. Deputy Hardy secured a search warrant, and received information showing that the laptop had been used on February 21, 2011, at a motel located at 181 Santa Clara Avenue. (1CT 111.)

On March 1, 2011, Deputy Hardy contacted Rainsley again by telephone. Rainsley confirmed that he was still tracking the laptop. Rainsley stated that someone had last logged on at 12:40 a.m. and that the

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[3] "Since the trial court resolved this matter in favor of the prosecution, for purposes of this proceeding we view the record in the light most favorable to the People's position." (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 780.)

password had been changed to "Arnold Ikeda." (1CT 111-112.) Rainsley further stated that the laptop was currently located at 1050 Schooner Drive, Oxnard. (1CT 112.)

Based on this information, Deputy Hardy did a records check on "Arnold Ikeda" and found a booking photograph of appellant. Deputy Hardy then went to 1050 Schooner Drive, which was the address of two separate motels: the Holiday Inn Express and the Four Points Sheraton. (1CT 112-113.)

Deputy Hardy entered the Holiday Inn Express and spoke to the manager, who confirmed that appellant had been staying there for several days and had changed rooms every day. The manager further stated that appellant had left a card key at the desk for use by a woman named "Desiree," who was "coming and going" from the room. (1CT 114, 152.) Based on this information, along with his training in the recognition and investigation of narcotics cases and his 22 years of law enforcement experience, Deputy Hardy thought appellant might be dealing narcotics. (1CT 108, 114.)

Deputy Hardy went outside, where he was joined by Deputy Dave Johnson and Detective Kevin Lynch. Together, they approached appellant's room, room 104, which was located at the rear of the motel on the ground floor. The room had a front door and a rear sliding glass door that led to the parking lot. Detective Lynch went around to the rear by the sliding glass door, where he stayed in contact with Deputy Johnson via cell phone. (1CT 115.) Deputy Hardy and Deputy Johnson approached the front door of room 104. Deputy Hardy listened at the door and thought he heard two males conversing inside. Deputy Hardy knocked on the door and a male voice asked who was there. Deputy Hardy replied, "Sheriff's department." After a slight delay, the male voice said, "One moment." There was silence inside the room for about a minute. Then Deputy

Johnson stated that Detective Lynch had told him via cell phone that the rear sliding glass door was being opened and someone was coming out. Deputy Johnson ran to assist Detective Lynch. Deputy Hardy remained at the front door. (1CT 116.)

After several minutes, Deputy Hardy went around to the rear of the motel to see what was happening. There he saw appellant, in handcuffs, next to Deputy Johnson. Detective Lynch told Deputy Hardy that he saw the sliding glass door open and appellant coming through. Detective Lynch identified himself and told appellant he was being detained. Appellant had stated there was a BB gun in the motel room. The deputies discussed the situation and decided to do a "protective sweep of the room" based on "all the information" they had: the voices Deputy Hardy heard inside the room, "the gun," and "that there may be a female or somebody else inside" the room. (1CT 117.) Deputy Hardy also believed it was "possible" that a drug transaction was going on and he was concerned that "[a] weapon had been mentioned, whether a BB gun or not." The purpose of a "protective sweep," he explained, was to "make it safe to enter the location" and ensure the deputies were not "ambushed" by someone hiding inside. (1CT 118.) Based on his training and experience, people involved in narcotics activities are "commonly armed" with guns and knives. (1CT 136.)

The deputies stood off to one side while discussing the protective sweep, out of concern for "officer safety," because they did not know if anybody else was inside the room. (1CT 137.) Deputy Hardy was concerned, despite appellant's statement that there was no one else inside the room. (1CT 137-138.) Deputy Hardy believed that somebody could be inside the room. (1CT 138.)

Deputy Hardy and Detective Lynch conducted the protective sweep. (1CT 118.) Detective Lynch announced "Sheriff's department," pulled back the curtains, and they entered with their guns drawn. They searched

the immediate area, and then continued through to the bathroom door, which was closed. They announced themselves and opened the door, but no one was inside. (1CT 119.)[4]

The motel room was not very big; it held two beds and a desk. Deputy Hardy saw a laptop computer "in plain view." A "couple feet away" from the laptop was a "crystal substance, which appeared to be methamphetamine, sitting on a piece of paper . . . ." There was also a scale, a "pay/owe sheet," and some cash on one of the beds. (1CT 119-120.) The laptop appeared to match the description of the stolen laptop. (1CT 120.) The sweep lasted only a couple of minutes. (1CT 133.)

About an hour after the initial sweep, appellant gave his consent to Deputy Hardy to further search his room. (1CT 121-122, 133-134.) Deputy Hardy found a BB gun inside the motel room. (1CT 136.)

2. Detective Kevin Lynch

Next, Detective Kevin Lynch testified that he had 17 years of experience as a peace officer and had received specialized training in narcotics investigations. (1CT 139.) Detective Lynch went with Deputy Hardy to the motel on Schooner Drive, and he heard the motel clerk say that appellant changed motel rooms constantly, picking rooms on the bottom floor. Based on his training and experience, Detective Lynch felt this behavior was consistent with drug sales. Moreover, "people involved in narcotics" are often armed. (1CT 141.)

Upon approaching appellant's motel room, Detective Lynch went around to the rear of the motel room, in case anyone tried to slip out the back. (1CT 141-142.) Detective Lynch crouched behind some bushes and

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[4] At some point, "the female showed up" and was arrested for being under the influence. (1CT 134, 150.)

waited, while maintaining cell phone contact with Deputy Johnson. Deputy Johnson told Detective Lynch that they were knocking at the front door, and a few moments later, Detective Lynch saw the sliding glass door open and appellant walking out. (1CT 142-143.) Detective Lynch identified himself, commanded appellant to turn around, and handcuffed him. Detective Lynch had unsnapped his holster, and his hand was on his weapon as he approached appellant to put on the handcuffs. (1CT 143.) Appellant was still in the patio area, adjacent to the sliding glass door. (1CT 146.) Appellant resisted a little at first, but then submitted to Detective Lynch. Detective Lynch told appellant he was detained, and asked him if he knew the difference between detention and arrest. Appellant said that he did. Detective Lynch asked appellant if anyone else was in the motel room, and appellant said there was no one else inside. Appellant volunteered that there was a BB gun inside the room, which concerned Detective Lynch. (1CT 144.) In his training and experience, Detective Lynch had "come across several BB guns that look like real guns" and he was "not willing to take that chance." Deputy Hardy and Deputy Johnson approached with their service weapons drawn. Deputy Johnson watched appellant while Deputy Hardy and Detective Lynch approached the motel room. The sliding glass door was open by a couple of feet, but the curtains or blinds blocked Detective Lynch's view inside the room. Detective Lynch yelled, "Sheriff's department!" (1CT 145.) There was no response. Both Detective Lynch and Deputy Hardy had their weapons drawn. (1CT 146-147.)

Detective Lynch reached inside and pulled the curtain away, again yelling, "Sheriff's department!" Based on the fact that appellant had stated there was a BB gun in the room, Detective Lynch did not feel safe until he was sure "there was nobody in the room that could hurt" them. He decided to conduct a protective sweep to see if there were people hiding inside the

room. (1CT 147.) When they entered the room, Detective Lynch saw a laptop computer in plain view on the counter, along with what appeared to be methamphetamine. (1CT 148.)

3. Deputy Dave Johnson

Deputy Dave Johnson was called next to testify that appellant admitted to using methamphetamine and subsequently tested positive for methamphetamine use. (1CT 154-158.) On cross-examination, Deputy Johnson testified that he did not recall hearing two voices inside the motel room and that his police report did not state that he heard two voices. (1CT 159-160.) Deputy Johnson heard one male voice respond when Deputy Hardy knocked on the door. (1CT 160.) On redirect, Deputy Johnson agreed that he was a couple of feet from Deputy Hardy when Hardy was standing outside appellant's motel room door. Deputy Johnson also agreed that he was not actually listening at the door to see if he could hear other voices inside. (1CT 165.)

4. The court's ruling

The court denied the suppression motion, explaining that the protective sweep of the motel room was justified by reasonable suspicion because Deputy Hardy testified that he thought he heard two male voices inside the room; a female had been seen coming and going from the room; appellant was moving from room to room, which indicated narcotics activity; when narcotics are involved, weapons are often involved; and appellant stated there was a weapon inside the room. (1CT 170-171.)[5] The

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[5] Appellant asserts that his trial counsel argued that "probable cause" was the correct standard when assessing the constitutionality of a protective sweep following an arrest outside the home. (OBOM 6.) But it

(continued...)

court also found that the contraband and laptop were in plain view before appellant consented to the search. (1CT 172.)

Appellant renewed his motion to suppress in the trial court. The trial court reviewed the preliminary hearing transcript, read the moving papers and cases, heard argument, and denied the motion. (1RT 1-7.)

C. The Guilty Plea

After an information was filed, charging appellant as originally charged in the complaint, appellant pled not guilty to all counts. (1CT 42-43, 45.) Appellant filed a motion to set aside the information pursuant to section 995, which was denied. (1CT 48-57, 77.)

Appellant then withdrew his not guilty plea as to count 2, and pled guilty to possession for sale of methamphetamine, in violation of Health and Safety Code section 11378, subdivision (a). (1CT 78, 96.) Appellant was sentenced to county jail for 300 days and formal probation for 36 months. (1CT 99.) Counts 1 and 3 were dismissed. (1CT 101; 1RT 20-21.)

D. The Appeal

On appeal, appellant contended that the police unlawfully conducted a protective sweep of appellant's motel room because he was detained and secured outside the room. (AOB 5.) Appellant further argued that the facts known to the officers at the time they entered his motel room fell short of those necessary to create the reasonable suspicion that would justify a protective sweep. (AOB 9.) Appellant also argued that his consent to

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(...continued)
does not appear that trial counsel ever made this argument. (See 1CT 165-170.)

search his motel room was not voluntary, but rather was vitiated as a consequence of the illegal search. (AOB 11.)

On January 30, 2013, the California Court of Appeal filed a published opinion affirming the order denying the motion to suppress. It held 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." (Slip. Opn. 1.) The Court of Appeal "reject[ed] the argument that protective sweeps must be incident to a lawful arrest, as opposed to a detention outside his house." Further, the appellate court concluded that "a protective sweep may be conducted in conjunction with a suspect's detention when there is a reasonable suspicion that the area to be swept harbors a dangerous person." (Slip Opn. 3.) The appellate court found that there was reasonable suspicion justifying the officers' suspicion that someone was hiding in appellant's motel room and posed a risk of harm to the officers. (Slip Opn. 4.)

SUMMARY OF ARGUMENT

The California Court of Appeal's opinion in this case and the vast majority of state and federal circuit court cases that have addressed the question presented in this case involve a uniform, and correct, application of *Maryland v. Buie* (1990) 494 U.S. 325 (*Buie*). *Buie* addressed the dual concerns of an officer's right to safety and an individual's right to be free from unreasonable searches in the context of a protective sweep of a home. With those dual concerns in mind, *Buie* discussed the level of justification required by the Fourth Amendment before a protective sweep of a premises may be conducted. (*Buie*, *supra*, 494 U.S. at p. 327.) In resolving that issue, *Buie* turned for guidance to two prior decisions—*Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*), and *Michigan v. Long* (1983) 463 U.S. 1032

(*Long*). (*Buie*, *supra*, at pp. 331-332.) *Terry* addressed the on-the-street frisk of an individual for weapons; *Long* involved the search of the passenger compartment of a vehicle during a roadside encounter—"[i]n a sense . . . a 'frisk' of an automobile for weapons." (*Buie*, *supra*, at p. 332; see also *id.* at p. 331.) *Buie*, in turn, viewed a protective sweep of a home as a "frisk" of a premises for an armed individual.

Buie noted that "[i]n the instant case, there is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." (*Buie*, *supra*, 494 U.S. at p. 333.) *Buie* authorized two types of protective sweeps: (1) as an incident to an arrest, officers could, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched" and (2) for searches involving other areas "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Id.* at p. 334.)

Accordingly, *Buie* extended the reasonable suspicion standard of the protective search used in *Terry* and *Long* to the home. Like in *Terry* and *Long*, the conclusion in *Buie* was based on the important public policy of insuring officer safety while simultaneously limiting the intrusion on an individual's right to be free from unreasonable warrantless searches. Although *Buie* itself speaks to protective searches incident to arrest, the arrest warrant in *Buie* was not a prerequisite to the conclusion reached in the case. In fact, *Terry* and *Long* themselves do not concern searches stemming from arrests. (*Long*, *supra*, 463 U.S. at pp. 1049-1050; *Terry*, *supra*, 392 U.S. at p. 24.)

As the Court of Appeal and the vast majority of other courts that have addressed this issue have correctly concluded, the rationale behind the protective sweep doctrine—officer safety—extends to detentions occurring outside the home, and the reasonable suspicion standard accordingly applies. (See Slip Opn. 3-4.) Appellant's argument urging this Court to establish a bright line rule that protective sweeps are only valid when conducted inside a home, during an arrest, is contrary to the Fourth Amendment's touchstone of reasonableness.

Here, the deputies had specific, articulable facts supporting their conclusion that the motel room harbored a person dangerous to the deputies and to others at the motel. Both Deputy Hardy and Detective Lynch formed the opinion that appellant was involved in dealing drugs out of his motel room, based on appellant's behavior: he had been staying at the motel for several days and had changed rooms every single day, picking rooms that were on the bottom floor. (1CT 108, 114, 141.) Deputy Hardy thought he heard two men conversing inside appellant's room. (1CT 116.) After Deputy Hardy knocked on the door and identified himself, appellant attempted to sneak away out the back, but was detained by Detective Lynch. (1CT 116, 142-143.) Appellant told Detective Lynch that there was a BB gun inside the room. (1CT 144.) A woman had been seen coming and going from the room. (1CT 116, 152.) Additionally, the curtains were drawn across the sliding glass door and the deputies could not see inside the room. (1CT 118-119, 133.) All of these specific, articulable facts, considered in their totality, supported a reasonable suspicion that the motel room harbored a person dangerous to the deputies and to others at the motel. (See *Buie*, *supra*, 494 U.S. at p. 336, fn. 3.) Thus, the Court of Appeal correctly found there was no Fourth Amendment violation.

ARGUMENT

I. UNDER THE FOURTH AMENDMENT'S REASONABLENESS STANDARD, THE DEPUTIES LAWFULLY CONDUCTED A PROTECTIVE SWEEP OF APPELLANT'S MOTEL ROOM AFTER HE WAS DETAINED BECAUSE THEY HAD REASONABLE SUSPICION THAT THE ROOM HARBORED A DANGEROUS PERSON

Appellant asks this Court to hold, contrary to the weight of authority, that probable cause, rather than reasonable suspicion, is the constitutional standard justifying a protective sweep after a suspect is detained outside his residence. (OBOM 9-18.) Appellant's argument must be rejected, because it ignores the policy reasons behind the "reasonable suspicion" standard: that a protective sweep is permissible on less than probable cause because it is limited to that which is necessary to protect the safety of officers and others. (*Buie*, *supra*, 494 U.S. at p. 336, fn. 3.) Adopting appellant's proposed new standard would contravene the balanced approach set by *Buie*, and would subject police officers to unreasonable risks in the performance of their duties. Because in this case there was reasonable suspicion to believe that appellant's motel room harbored a person posing a danger to the officers or others on the scene, the Court of Appeal properly upheld the denial of appellant's motion to suppress.

A. Appellate Review of Protective Sweeps

On review, the trial court's ruling on a motion to suppress evidence will be upheld as to any factual finding, express or implied, that is supported by substantial evidence. The reviewing court independently assesses, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

"The Fourth 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 . . . .' [Citation.] This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states. [Citation.]" (*People v. Camacho* (2000) 23 Cal.4th 824, 829-830.) A warrantless search of a private residence is presumptively unreasonable under the Fourth Amendment. (*Payton v. New York* (1980) 445 U.S. 573, 586.) Evidence obtained as a result of an unreasonable search and seizure is excluded at trial only if exclusion is required by the federal Constitution. (*People v. Camacho*, *supra*, 23 Cal.4th at p. 830.)

"[T]he ultimate touchstone of the Fourth Amendment . . . is reasonableness." (*Michigan v. Fisher* (2009) 130 S.Ct. 546, 548 (internal quotation omitted).) "[W]arrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. (*Kentucky v. King* (2011) 131 S.Ct. 1849, 1858.) "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." (*Graham v. Connor* (1989) 490 U.S. 386, 396-397.)

In *Buie*, the Supreme Court set forth two scenarios where a warrantless search of a home[6] is reasonable: First, where as an incident to an arrest the officers, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." (*Buie*, *supra*, 494 U.S. at p. 334.) This first scenario includes

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[6] A "home" for Fourth Amendment purposes can include a motel room. (*People v. Escudero* (1979) 23 Cal.3d 800, 807.)

the search of a hotel room immediately adjacent to the hallway where a suspect was under arrest for multiple felony warrants and was a possible suspect in a murder. (*State v. Manuel* (2011) 229 Ariz. 1, 5 [270 P.3d 828].)

Second, a warrantless protective sweep of a home may be undertaken where there are "articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Buie, supra*, 494 U.S. at p. 334; see also *Terry, supra*, 392 U.S. at p. 21 ["in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"].) The high court in *Buie* stated that "[a] 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." (*Buie, supra*, 494 U.S. at p. 327.) Although a protective sweep intrudes on a homeowner's privacy, such a search tactic may be "'reasonable when weighed against the 'need for law enforcement officers to protect themselves and other prospective victims of violence.'" (*Id.* at p. 332, quoting *Terry, supra*, 392 U.S. at p. 24; see also *Long, supra*, 463 U.S. at pp. 1049-1050 [authorizing "frisk" of automobile].) "The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger . . . ." (*Buie, supra*, at p. 335.) A protective sweep is permissible on less than probable cause only because it is "limited to that which is necessary to protect the safety of officers and others." (*Id.* at p. 335, fn. 3.)

Under the second *Buie* scenario, a warrantless protective sweep of a home for officer safety purposes must be supported by a reasonable suspicion the area harbors a dangerous person. (*People v. Celis* (2004) 33 Cal.4th 667, 678, 680 ("*Celis*").) "'[R]easonable suspicion' is a less

demanding standard than probable cause." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123.) However, a "'mere abstract theoretical "possibility" that someone dangerous might be inside a residence does not constitute "articulable facts"' justifying a protective sweep." (*People v. Ledesma* (2003) 106 Cal.App.4th 857, 866.) In determining the existence of reasonable suspicion, a reviewing court must look at the totality of the circumstances, allowing police officers to draw on their experience and training in assessing the information available to them. (*United States v. Arvizu* (2002) 534 U.S. 266, 273; *People v. Ledesma, supra*, 106 Cal.App.4th at p. 863.) The People's burden under the Fourth Amendment is to identify *an* objectively reasonable basis for believing that the area to be swept harbors a dangerous person—not to eliminate every other reasonable inference that might also have been supported by those facts. (See *People v. Troyer* (2011) 51 Cal.4th 599, 613, citing *State v. Mielke* (2002) 257 Wis.2d 876 [653 N.W.2d 316, 319] ["When a police officer is confronted with two reasonable competing inferences, one that would justify the search and another that would not, the officer is entitled to rely on the reasonable inference justifying the search"].)

B. Following a Detention or Arrest Immediately Outside a Home, a Protective Sweep is Lawful upon Reasonable Suspicion that a Person Posing a Danger to Officers or Others Remains Inside

Appellant argues that only a protective sweep incident to an arrest inside the home may be based on reasonable suspicion. He argues that his detention outside his home "is a critical distinction" justifying application of the probable cause standard to the sweep of his motel room. (OBOM 10-12.) Respondent disagrees.

In *Celis*, this Court acknowledged federal cases holding that "'in some circumstances, an arrest taking place just outside a home may pose an

equally serious threat to the arresting officers' as one conducted inside the house." (*Celis*, *supra*, 33 Cal.4th at p. 679 (emphasis omitted), citing *Sharrar v. Felsing* (3d Cir. 1997) 128 F.3d 810, 824 & *United States v. Colbert* (6th Cir. 1994) 76 F.3d 773, 776.) But this Court did not decide in *Celis* whether, under those circumstances, the appropriate standard was reasonable suspicion or probable cause, because this Court found that the facts known to the police officers when they entered the defendant's house fell short of the reasonable suspicion standard necessary to justify a protective sweep under *Buie*. (*Celis*, *supra*, at p. 679.) The issue is now squarely before this Court, and respondent urges this Court to hold, as did the Court of Appeal here and numerous other courts, that the rationale behind the protective sweep doctrine extends to detentions occurring outside the home, and that the reasonable suspicion standard applies.

There are some "protective sweep" cases, similar to the case here, where there was a detention *and* it occurred outside the home. (E.g., *State v. Revenaugh* (1999) 133 Idaho 774 [992 P.2d 7690].) The majority of the cases, however, involved either a detention inside a home or an arrest outside a home. As will be seen, courts have, almost uniformly, applied *Buie's* reasonable suspicion standard to both of these situations.

1. Inside versus outside the home

First, the vast majority of courts considering this issue have concluded that protective sweeps are not limited to in-home arrests, but include arrests outside the home. This is because the concern of officer safety, the *raison d'etre* of protective sweeps, is not quelled by the suspect being arrested away from the suspected danger.

In a pre-*Buie* case, *United States v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, the Ninth Circuit rejected the argument that the "protective sweep exception to the requirement of a search warrant" did not apply if the arrest

occurred outside the home. The court noted that there was no authority for such a distinction. Further, "the distinction is logically unsound. If the exigencies to support a protective sweep exist, whether the arrest occurred inside or outside the residence does not affect the reasonableness of the officer's conduct. A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another." (*Id.* at p. 1397, overruled on other grounds by *United States v. Ruiz* (9th Cir. 2001) 257 F.3d 1030, 1032 (en banc); see also *United States v. Paopao* (9th Cir. 2006) 469 F.3d 760, 766 ["Paopao has not shown any reason why the precedent established in *Hoyos* is no longer good law. The rationale espoused in *Hoyos*, that an individual within a house can still pose a threat to arresting officers outside of it, remains as true today, post-*Buie*, as it did seventeen years ago"].) Similar holdings with similar rationales have been adopted by other circuits and state courts since the *Buie* decision. (See, e.g. *United States v. Lawlor* (1st Cir. 2005) 406 F.3d 37, 41 [upholding a protective sweep following an arrest made just outside of the home because "an arrest that occurs just outside the home can pose an equally serious threat to arresting officers as one that occurs in the home"]; *United States v. Cavely* (10th Cir. 2003) 318 F.3d 987, 995-996 ["Depending on the circumstances, the exigencies of a situation may make it reasonable for officers to enter a home without a warrant in order to conduct a protective sweep"]; *United States v. Watson* (5th Cir. 2001) 273 F.3d 599, 602-603 [upholding a protective sweep of a house where the arrest was made on the porch outside the house]; *State v. Revenaugh, supra*, 992 P.2d at pp. 771-773 [upholding warrantless entry of home as "protective sweep" after officers detained the defendant immediately outside his home]; *United States v. Colbert, supra*, 76 F.3d at pp. 776-777 [affirming the general principle that a protective sweep of the interior of a house can follow an arrest outside the house, but ultimately holding the sweep in that case to be

illegal due to a lack of justification for the sweep]; *United States v. Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284 [upholding a sweep inside the dwelling where the arrest was made outside]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1675 [noting the issue was whether there were articulable and reasonable facts supporting the sweep, rather than "on which side of a door an arrest is effected"]; *United States v. Oguns* (2d Cir. 1990) 921 F.2d 442, 446-447 [allowing the protective sweep where the officers could have reasonably believed that people inside the apartment heard them arresting the defendant outside the apartment]; see also *Arizona v. Fisher* (2011) 226 Ariz. 563, 566 [250 P.3d 1192] [assuming, without deciding, that a protective sweep is not forbidden when a suspect is detained and questioned but not yet arrested outside a residence]; *People v. Mack* (1980) 27 Cal.3d 145, 150 [in determining whether an officer acted reasonably in entering a garage to see if any suspects remained inside, "due weight must be given not to his unparticularized suspicions or 'hunches,' but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary"].) As the Ninth Circuit correctly concluded, "the fact that an arrest occurs outside a residence does not invalidate an otherwise lawful protective sweep." (*Hoyos*, *supra*, 892 F.2d at p. 1397.)

Appellant argues that *Buie* and subsequent federal cases, including *United States v. Burrows* (7th Cir. 1995) 48 F.3d 1011 (*Burrows*), established a "general rule . . . that a limited protective sweep may be based on reasonable suspicion *only* after an in-home arrest." (OBOM 10, emphasis added.) Appellant misreads the cases. Contrary to appellant's assertion, *Buie* did not lay down a bright-line rule banning protective sweeps by law enforcement in every other context outside the circumstances set forth in that case. In *Buie*, the circumstances involved an

armed robbery committed by two men. One of the robbery suspects was arrested inside his home, pursuant to an arrest warrant, as he was emerging from the basement of his house. After the suspect was arrested, a police detective entered the basement "'in case there was someone else' down there." (*Buie*, *supra*, 494 U.S. at p. 328.)[7] The issue addressed by the high court, however, was not whether a protective sweep was justified *only* following an in-home arrest. Rather, "[t]he issue in this case is what level of justification the Fourth Amendment required before [the detective] could legally enter the basement to see if someone else was there." (*Id.* at p. 330.) Thus, *Buie* does not stand for the proposition that "a limited protective sweep may be based on reasonable suspicion *only* after an in-home arrest." (OBOM 10, emphasis added.) Moreover, the analytical approach taken by the Supreme Court in *Buie* argues against the adoption of a bright-line rule such as appellant suggests. The *Buie* Court was careful to emphasize that, except in cases involving "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched" (*Buie*, *supra*, 494 U.S. at p. 334), a protective sweep of the house was not "'automatic,' but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene" (*id.* at p. 336).

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[7] Tellingly, the concurrence and dissent in *Buie*, citing to the Court of Appeal of Maryland, noted that at the time the search took place, "'*Buie* was safely outside the house, handcuffed and unarmed.'" (*Buie*, 494 U.S. at p. 338 (con. opn. Stevens, J.); p. 342, fn. 4 (dis. opn. of Brennan, J.), citing *Buie v. State* (Md. 1988) 314 Md. 151, 166 [550 A.2d 79].) Appellant also notes this distinction in order to suggest that "no reasonable suspicion of danger justified the entry into the basement." (OBOM 10.) The dissent and concurrence in *Buie*, as well as appellant, misapprehend the danger referred to by the *Buie* Court: the threat is not posed by the apprehended suspect, but from "unseen third parties in the house." (*Buie, supra*, 494 U.S. at p. 336.)

Appellant similarly misreads the Seventh Circuit decision in *Burrows*. In *Burrows,* after Burrows and his half-brother were arrested inside their residence, pursuant to arrest warrants, the police conducted a protective sweep of rooms inside the home, which led to the discovery of a firearm in plain view. Burrows was subsequently convicted of being a felon in possession of a firearm. He argued on appeal that the trial court erred in failing to suppress the weapon, on the ground that the police had obtained it through an illegal search. (*Burrows*, *supra*, 48 F.3d at pp. 1012-1013.) While the *Burrows* Court analyzed the reasonableness of the protective sweep based on the facts of that case, including that the arrest occurred inside the home, the court "recognized that officers may be at as much risk while in the area immediately outside the arrestee's dwelling as they are within it. (*Id.* at p. 1016, fn. omitted, citing *United States v. Hoyos*, 892 F.2d at p. 1397.) The *Burrows* court also emphasized, "Of course, all these factors must be assessed from the perspective of the officer on the scene. It is the reasonableness of the officer's judgment at the time he was required to act that counts." (*Burrows*, *supra*, at p. 1016.) Accordingly, *Burrows* does not support appellant's bright-line argument that "a limited protective sweep may be based on reasonable suspicion *only* after an in-home arrest." (See also *Sharrar v. Felsing*, *supra*, 128 F.3d at p. 824 ["we see no reason to impose a bright line rule limiting protective sweeps to in-home arrests, as . . . an arrest taking place just outside a home may pose an equally serious threat to the arresting officers"].)

2. Detention versus arrest

Next, a protective sweep of a house is not limited to situations involving an arrest. (*People v. Ledesma*, *supra*, 106 Cal.App.4th at p. 864 [collecting cases and concluding that "a security sweep may properly precede a probation search"].) Numerous courts have upheld protective

sweeps conducted before the suspect is formally arrested. (See, e.g., *Leaf v. Shelnutt* (7th Cir. 2005) 400 F.3d 1070, 1087 [it is not necessary for officers to have made an arrest in order to justify a protective sweep; the only question is whether the search was objectively reasonable]; *United States v. Maddox* (10th Cir. 2004) 388 F.3d 1356, 1362 [*Buie* applies to "protective detentions" occurring outside the home when an in-home arrest is also occurring]; *United States v. Gould* (5th Cir. 2004) 364 F.3d 578, 584 ["arrest is not always, or *per se*, an indispensable element of an in-home protective sweep, and . . . although arrest may be highly relevant, particularly as tending to show the requisite potential of danger to the officers, that danger may also be established by other circumstances"], abrogated on other grounds in *Kentucky v. King*, *supra*, 131 S.Ct. at pp. 1859, 1861; *United States v. Taylor* (6th Cir. 2001) 248 F.3d 506, 513 ["We think that it follows logically that the principle enunciated in *Buie* with regard to officers making an arrest—that the police may conduct a limited protective sweep to ensure the safety of those officers—applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained"]; *United States v. Garcia* (9th Cir. 1993) 997 F.2d 1273, 1282 [reasonable for officers to conduct a protective sweep of home to ensure officer safety, even though no one was yet under arrest]; but see *United States v. Davis* (10th Cir. 2002) 290 F.3d 1239, 1242, fn. 4 [*Buie* permits protective sweep only if incident to arrest]; *United States v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027 [officers not entitled to conduct protective sweep because no one had been arrested when the officers entered the apartment].)

The reasoning of the Idaho Supreme Court in *State v. Revenaugh*, *supra*, 992 P.2d 769, is instructive. The Idaho high court had not previously addressed the issue of whether the fact that a defendant was not formally placed under arrest until after the protective sweep of his home

violated the Fourth Amendment's warrant requirement. The court noted that two Ninth Circuit cases had upheld protective sweeps before the suspect is formally arrested. (*Id.* at p. 772, citing *United States v. Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, and *United States v. Garcia*, *supra*, 997 F.2d at p. 1282.) The *Revenaugh* court noted that in *Meza-Corrales*, the Ninth Circuit found the police were justified in detaining the suspect outside of his residence because they had a reasonable suspicion that he was involved in criminal activity that had occurred or was about to occur inside the residence, and that a protective sweep was justified because the officers had a reasonable basis to believe there were others inside who could pose a threat to the officers. (*Revenaugh*, *supra*, at p. 772, citing *Meza-Corrales*, *supra*, 183 F.3d at pp. 1123-1124.) Similar to *Meza-Corrales*, the officers in *Revenaugh* had a reasonable belief that Revenaugh was involved in criminal activity that had occurred or was about to occur inside the residence, and were "clearly justified in detaining Revenaugh outside. Therefore . . . any distinction between a 'detention' and a formal arrest [was] negligible." (*Id.* at p. 772.) Further:

> The concern for the safety of officers which justifies allowing officers to conduct warrantless protective sweeps following the arrest of a suspect is just as applicable where the suspect has been detained while the officers attempt to ascertain the extent of the situation. In either case, the arresting officers would still have to have a reasonable, articulable suspicion that someone might be in the residence who could pose a threat in order to conduct even a limited protective sweep. Therefore, we hold that the protective sweep exception to the warrant requirement is not rendered inapplicable to this case simply because Revenaugh was detained rather than formally arrested at the time the protective sweep occurred.

(*Ibid.*)

In both *United States v. Reid*, *supra*, 226 F.3d at p. 1027, and *United States v. Davis*, *supra*, 290 F.3d at p. 1242, fn. 4, the courts assumed,

without analysis, that *Buie* set forth a bright-line rule limiting the protective sweep to formal arrests. However, as shown previously, *Buie* does not set forth a per se inflexible rule. The sole question relevant under *Buie* is whether the search was reasonable, as opposed to the artificial and bright-line rule assumed by *Reid* and *Davis*, and proposed by appellant. As Justice Werdegar observed in her concurring opinion in *People v. Troyer*, *supra*, 51 Cal.4th at page 614, even where the circumstances do not fit "squarely" within *Buie's* protective sweep doctrine, the courts should not "ignore the potential risk" to officers and others posed by the possibility of "ambush from a nearby hiding place." (*Ibid.*) The rigid rule adopted by the courts in *Reid* and *Davis* do "ignore the potential risk" to officers and others.

3. *Reasonable suspicion versus probable cause for protective sweep based on a detention outside the home*

Appellant argues that only protective sweeps incident to an arrest inside the home may be based on reasonable suspicion, and that a protective sweep incident to a detention outside the home must be based on probable cause or exigency. (OBOM 13.) Respondent disagrees. Sound policy reasons support the application of the reasonable suspicion standard to protective sweeps following a detention outside the home. In *Celis,* this Court made clear that a brief investigative detention required no more than reasonable suspicion. (*Celis*, *supra*, 33 Cal.4th at p. 674, citing *Terry*, *supra*, 392 U.S. at pp. 6-7.) Further, this Court determined that reasonable suspicion, not probable cause, was the standard for permitting a protective sweep:

> A protective sweep of a house for officer safety as described in *Buie*, *does not* require probable cause to believe there is someone posing a danger to the officers in the area to be swept. (*Buie*, *supra*, at p. 327.) A *Buie* sweep is unlike

> warrantless entry into a house based on exigent circumstances (one of which concerns the risk of danger to police officers or others on the scene); such an entry into a home must be supported by probable cause to believe that a dangerous person will be found inside. (See *Minnesota v. Olson* [1990] 495 U.S. 91, 100.) A protective sweep can be justified merely by a reasonable suspicion that the area to be swept harbors a dangerous person. (*Buie, supra*, at p. 327.) Like the limited patdown for weapons authorized by *Terry v. Ohio, supra*, 392 U.S. 1, 21, 27, a protective sweep may not be based on "a mere 'inchoate and unparticularized suspicion or "hunch . . . ."'" (*Buie, supra*, at p. 332.)

(*Celis, supra*, 33 Cal.4th at p. 678, emphasis in original.) This Court then asked "whether *Buie's* lowered level of justification - reasonable suspicion that a person posing a danger to the officers is in the area to be searched - is limited only to those situations in which the officers are already lawfully inside a house conducting an arrest, or whether it will support the entry into a house, as in this case, by officers who lack probable cause to make an arrest but who have lawfully detained a suspect just outside." (*Ibid.*) After compiling cases that fell on both sides of the question, this Court decided it was not necessary to reach the issue, "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*," and therefore, "it follows that the higher standard requiring probable cause was not met either." (*Id.* at pp. 679-680.)

To resolve that issue in this case, the sameness of purpose and scope between protective sweeps and protective searches yields the conclusion that the reasonable suspicion standard is appropriate in this situation. In *Buie*, the high court emphasized that the lower reasonable suspicion standard was justified because the protective sweep "extend[s] only to a cursory inspection of those spaces where a person may be found" and "lasts no longer than is necessary to dispel the reasonable suspicion of danger."

(*Buie, supra*, 494 U.S. at p. 335.) As the court noted, a protective sweep is like a *Terry* "patdown" search because both are "permissible on less than probable cause only because they are limited to that which is necessary to protect the safety of officers and others." (*Id.* at p. 335, fn. 3.) In contrast, probable cause is a higher standard because the intrusion goes deeper, involving "a *full* search of the person or of his automobile or other effects." (*Florida v. Royer* (1983) 460 U.S. 491, 499, emphasis added.)

Appellant contends that a warrantless entry may be justified based on exigent circumstances, such as the belief that a dangerous person is inside the home, but the belief "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." (OBOM 15.) However, as set forth previously (Arg. I.B.1, *ante*), numerous cases have approved of the warrantless entry into a home to conduct a protective sweep, even if the suspect was arrested or detained outside the premises, and the courts did so applying a reasonable suspicion standard, not the probable cause standard. (See, e.g., *State v. Revenaugh, supra*, 992 P.2d at p. 774 [holding that the combination of circumstances rose to the "level of a reasonable, articulable suspicion that someone might be in the residence who could pose a threat to the officers on the scene"]; *United States v. Colbert, supra*, 76 F.3d at p. 778 [affirming the "reasonable suspicion" standard for a protective sweep, but ultimately holding the sweep in that case to be illegal due to the police's lack of an articulable basis on which to support their reasonable suspicion of danger from inside the home]; *United States v. Henry, supra*, 48 F.3d at pp. 1284-1285 [applying reasonable suspicion standard to a sweep inside the dwelling where the arrest was

made outside]; *People v. Maier*, *supra*, 226 Cal.App.3d at p. 1675 [noting the issue was whether there were articulable and reasonable facts supporting the sweep, rather than "on which side of a door an arrest is effected"]; *United States v. Oguns*, *supra*, 921 F.2d at pp. 446-447 [applying reasonable suspicion standard to protective sweep where the officers could have reasonably believed that people inside the apartment heard them arresting the defendant outside the apartment].) The recurring theme throughout these cases is that any search justified by reasonable suspicion must be limited and cursory in scope. (*Buie, supra*, 494 U.S. at p. 327.)

People v. Ormonde (2006) 143 Cal.App.4th 282, cited by appellant (OBOM 14), does not justify a higher standard for protective sweeps. In *Ormonde*, an officer and a detective responded to an apartment complex where there had been a report of domestic violence. (*Id.* at p. 286.) They contacted a man standing near a car parked close to the defendant's apartment. (*Ibid.*) While the officer spoke with the man believed to be the suspect, the detective—after looking through the open front door of the defendant's apartment and seeing no one, and believing that the domestic violence incident occurred either inside or outside that unit—entered the apartment because he was uncertain whether someone might emerge with a weapon. (*Id.* at pp. 286-287.) After rejecting the People's contention that the search was justified under the exigent circumstances doctrine (*id.* at pp. 291-292), the appellate court considered whether the search was appropriate as a protective sweep. The court concluded the facts fell short of reasonable suspicion justifying a protective sweep, because the detective knew that the victim was not on the premises, did not believe there was anyone in the unit, and was simply attempting to find out if someone was inside. (*Id.* at p. 294.) The *Ormonde* court did not apply the "probable cause" standard to the protective sweep nor did it hold that the "reasonable

suspicion" standard was inapplicable to the protective sweep based on the facts of that case. (*Id.* at p. 295.)

Appellant next cites *United States v. Spetz* (9th Cir. 1983) 721 F.2d 1457, 1465-1466, a pre-*Buie* case. (OBOM 15-17.) There, Drug Enforcement Administration agents arrested five suspects in the driveway of a residence and subsequently conducted a sweep search of the residence, on the asserted ground that other suspects might, in the district court's words, "be disposed to draw a bead on [the officers]." (*Id.* at pp. 1465, 1467.) The Ninth Circuit acknowledged that "[t]he exigent circumstances exception to the warrant requirement applies in some instances when law enforcement officers arrest an individual in *or near* a residence." (*Id.* at p. 1465, emphasis added.) However, the court found the district court's reasoning speculative and, noting that there was not even the "slightest indication that the suspects arrested in the driveway were armed or that there were weapons within the house" (*id.* at p. 1467), held the search unlawful. The court also observed that "[t]here were no known confederates of the individuals arrested; . . . the agents were able to observe that all of the doors were open and presumably could keep the means of egress under surveillance[, and] the agents knew of no weapons connected with any of the individuals arrested or the residence, nor had they any other articulable basis for a conclusion that a potential for violence existed." (*Ibid.*) Appellant's conclusion that the Ninth Circuit "reiterated the rule that reasonable suspicion is the constitutional standard only with arrests inside the home" (OBOM 17), ignores the plain meaning of the words in *Spetz*, which allowed for protective sweeps of residences even if the suspects are arrested outside the residence, so long as the police had reasonable suspicion based on specific and articulable facts. While the facts were lacking in *Spetz*, such is not the case here, as set forth in the next section.

In sum, appellant's argument that "protective sweeps should be authorized only with probable cause or exigency" (OBOM 18) avoids, without sufficient justification, *Buie's* holding allowing protective sweeps based on reasonable suspicion. The touchstone of the Fourth Amendment is reasonableness, and appellant's proposed rule would violate that principle.

C. There Was Reasonable Suspicion Justifying the Protective Sweep of Appellant's Motel Room

Appellant next argues that the law enforcement officers who detained him did not have reasonable suspicion to conduct a protective sweep of his motel room. (OBOM 19-21.) Respondent disagrees.

Here, the totality of the circumstances support the protective sweep of appellant's motel room. (See *United States v. Arvizu*, *supra*, 534 U.S. at p. 273; *People v. Ledesma*, *supra*, 106 Cal.App.4th at p. 863.) While the initial investigation concerned a stolen laptop, both Deputy Hardy and Detective Lynch, drawing upon their training and experience in narcotics investigations, formed the opinion that appellant was involved in dealing drugs out of his motel room. (1CT 108, 114, 141.) Their opinion was based on appellant's behavior: he had been staying at the motel for several days and had changed rooms every single day, picking rooms that were on the bottom floor. (1CT 114, 141.) In the experience of both Deputy Hardy and Detective Lynch, people involved in drug sales are often armed. (1CT 136, 141.) When Deputy Hardy approached appellant's motel room, and listened briefly outside the door, he thought he heard two men conversing inside. Deputy Hardy knocked on the door and identified himself as "sheriff's department." After a slight delay, a single male voice responded "one moment," and then there was silence inside the room for about a minute. (1CT 116.) Appellant, meanwhile, was attempting to sneak away out the back, but was detained by Detective Lynch. (1CT 116, 142-143.)

Appellant told Detective Lynch that there was a BB gun inside the room. (1CT 144.) Detective Lynch was concerned because he had come across several BB guns that looked like real firearms and he was not willing to take a chance that the BB gun in the motel room was a real firearm. (1CT 145.) Moreover, even though appellant said there was no one else in the room, Deputy Hardy had heard two male voices in the room, and there had been a woman who had been seen coming and going from appellant's room. (1CT 116, 152.) Additionally, the curtains were drawn across the sliding glass door and the deputies could not see inside the room. (1CT 118-119, 133.) All of these specific, articulable facts, considered in their totality, supported a reasonable suspicion that the motel room harbored a person dangerous to the deputies and to others at the motel. (See *Buie*, *supra*, 494 U.S. at p. 336, fn. 3; *Celis*, *supra*, 33 Cal.4th at pp. 678, 680.) Put differently, this information "filtered through the lens of [the deputies'] experience and training, justified the protective sweep undertaken." (*People v. Ledesma*, *supra*, 106 Cal.App.4th at p. 865.)

Appellant relies on *People v. Werner* (2012) 207 Cal.App.4th 1195 (*Werner*), in arguing that these circumstances do not justify a protective sweep. (OBOM 19-21.) But the facts of *Werner* are readily distinguishable from those here, in that those facts suggested only "[t]he mere abstract possibility that someone dangerous might be inside a residence" rather than, as here, "'articulable facts' justifying a sweep." (*Werner*, *supra*, 207 Cal.App.4th at p. 1209, some quotation marks omitted.) In *Werner*, two deputies interviewed a woman who reported she had been assaulted that morning by her boyfriend, Werner, at his home. The two deputies, plus a third, went to Werner's home around 5:00 p.m. and knocked on his front door. Werner answered the door after some delay. Ingram, Werner's roommate, came outside as Werner was speaking to one of the deputies. Werner was placed in handcuffs and asked Ingram to

retrieve his keys and shoes from inside his bedroom. Ingram went inside the house accompanied by a deputy, who testified he was concerned about officer safety because he did not know who might be in the house or what Ingram might retrieve. The deputy had pat-checked and checked Ingram for warrants, however, and Ingram had come back "'clean.'" Ingram also stated that no one was inside the house. Moreover, there was no ongoing criminal activity in the house. The deputy followed Ingram inside Werner's bedroom, where he smelled marijuana and saw what appeared to be marijuana on the dresser and in an open closet. The deputy also searched inside a dresser and found $968 in cash and psilocybin. (*Werner*, *supra*, 207 Cal.App.4th at pp. 1201-1202.) Werner brought a motion to suppress the evidence, which was denied. (*Id.* at p. 1202.)

On appeal, Werner argued that the court erred in denying his motion to suppress evidence because, among other reasons, the initial warrantless entry by the deputy into Werner's home was unlawful and could not be justified under *Buie*, *supra*, 494 U.S. 325, as a valid protective sweep incident to arrest. (*Werner, supra*, 207 Cal.App.4th at p. 1204.) Werner further argued that Ingram's later consent to the search of his bedroom and other areas of the home was tainted by the prior unconstitutional search of the bedroom; therefore the search based upon that consent was also unlawful. (*Ibid.*)

The Court of Appeal held, first, that the protective sweep was unjustified. Werner was in handcuffs outside the residence and presented no threat to the deputies. The crime itself that the deputies were investigating had occurred hours earlier and the alleged victim was no longer at Werner's home. Ingram likewise posed no threat. The Court of Appeal also noted "there was no evidence that deputies were aware of any ongoing criminal activity in the home, or that there were others even present inside, let alone that it 'harbor[ed] a dangerous person. [Citation.]'"

(*Werner*, *supra*, 207 Cal.App.4th at p. 1207, citing *Celis*, *supra*, 33 Cal.4th at p. 678.) The Court of Appeal further noted that the deputy asked Ingram if there was anyone in the home and he replied in the negative, and the deputy did not testify that he had any reason to doubt Ingram. (*Werner*, *supra*, at p. 1207.) The *Werner* court found that these facts did not justify a protective sweep. Of particular importance, the *Werner* court distinguished the crime of domestic violence from "drug smuggling—here weapons are considered to be ""'tools of the trade[.]'"" [Citation.]" (*Id.* at p. 1208, citing *Ybarra v. Illinois* (1979) 444 U.S. 85, 106 (dis. opn. of Rehnquist, J.); see also *People v. Ledesma*, *supra*, 106 Cal.App.4th at p. 865 ["the type of criminal conduct underlying the arrest or search is significant in determining if a protective sweep is justified"].)

Here, unlike in *Werner*, the deputies had specific reasonable suspicion that appellant was engaging in ongoing criminal activity in his motel room. Not only did the deputies have reasonable suspicion that appellant was selling drugs out of his motel room (1CT 114, 141), but a stolen laptop computer had been tracked to appellant's room and appellant had logged on to the computer that very day (1CT 111-112). Moreover, as the *Werner* court observed, where illegal drugs are concerned, weapons are "'the tools of the trade.'" (*Werner*, *supra*, 207 Cal.App.4th at p. 1208; see also *United States v. Castillo* (9th Cir. 1988) 866 F.2d 1071, 1080 [protective sweep upheld on basis of officers' testimony they knew of tendency of cocaine dealers to carry weapons and resort to violence].) Indeed, appellant admitted he had a weapon—a BB gun—inside the room. A BB gun is capable of inflicting serious injury. (See *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 541 [sufficient evidence to support finding BB gun was a deadly weapon under section 245 where expert testimony established BB gun could "expel pellets at speeds in excess of those required to penetrate a significant distance into muscle tissue or to enter an eyeball, and thus it was

easily capable of inflicting serious injury"].) Additionally, while appellant denied that there was anyone else in his motel room, there was good reason to doubt his word. Deputy Hardy heard two male voices in the room, and after he knocked, he only heard one voice respond. (1CT 116.) Meanwhile, appellant was attempting to sneak out the back door (1CT 142-143), which showed a consciousness of guilt and supplied a reasonable basis to doubt his assertion that there was no one else in the room. (See *Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124 ["nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"].) The deputies had no way of knowing whether appellant was telling the truth and it would have been unreasonable in such circumstances to expect the deputies to forego the necessary precautions. (See *United States v. Henry*, *supra*, 48 F.3d at pp. 1284-1285.)

Appellant argues that Deputy Hardy was merely speculating that he heard two voices inside the room and that the deputy was wrong. (OBOM 19.) Appellant is engaging in "unrealistic second-guessing." (*People v. Ledesma*, *supra*, 106 Cal.App.4th at p. 864.) This Court should decline appellant's invitation to likewise engage "in *post hoc* evaluation of police conduct . . . ." (*Ibid.*) Because the deputy's testimony on this point was substantial evidence, the trial court's factual finding to this effect must be upheld. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 327.)

Appellant also argues that the fact that he stated there was a BB gun inside the room does not create a reasonable suspicion that there was a person inside who intended to use it. (OBOM 20.) Appellant, however, is overlooking that this Court must look at the totality of the circumstances in determining whether there was reasonable suspicion supporting the protective sweep, and here, the deputies had ample reason to suspect there was another person in the room who might use the gun. (See *United States*

v. Arvizu, *supra*, 534 U.S. at p. 273; *People v. Ledesma*, *supra*, 106 Cal.App.4th at p. 863.)

In any event, the search would have been justified even if probable cause rather than reasonable suspicion were the correct standard for protective sweeps. First, the officers had probable cause to arrest appellant because there were reasonable grounds for believing appellant had committed a crime with respect to the stolen laptop computer. (See *Celis*, *supra*, 33 Cal.4th at p. 673 [noting that "probable cause is a fluid concept" and is defined as a "'reasonable ground for belief of guilt'"].) Even though Detective Lynch told appellant that he was being detained and not arrested (1CT 144), the officers had probable cause to arrest appellant for receiving stolen property, based on the computer being tracked to appellant's motel room, that the computer's password had been changed to appellant's name, and that appellant was trying to sneak away from the motel room. (1CT 111-114, 116-117, 143.) These facts would have persuaded "someone of 'reasonable caution' that the person to be arrested has committed a crime." (*Celis*, *supra*, 33 Cal.4th at p. 673, quoting *Dunaway v. New York* (1979) 442 U.S. 200, 208.) Next, the officers had probable cause to enter appellant's motel room because of "the risk of danger to the police or other persons inside or outside the dwelling" based on the factors discussed earlier, including that Deputy Hardy heard two male voices in the room and appellant admitted that there was a BB gun in the room. (See *Minnesota v. Olson* (1990) 495 U.S. 91, 100; *Celis*, *supra*, 33 Cal.4th at p. 676.)

In sum, the Court of Appeal correctly found that, under the totality of the circumstances, the officers in this case had reasonable suspicion of a person inside the motel room posing a danger to their safety. Alternatively, the search was justified based on probable cause to arrest appellant and of the risk of danger in the room. Accordingly, the limited protective search was reasonable.

CONCLUSION

Respondent respectfully requests that this Court affirm the Court of Appeal's judgment.

Dated: July 19, 2013

Respectfully submitted,

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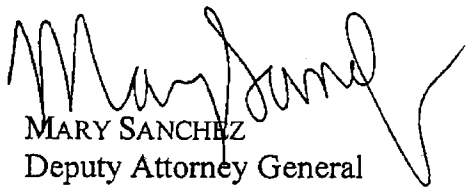

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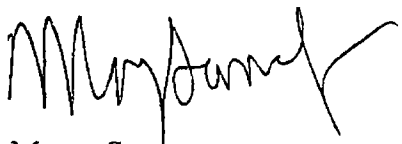
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT' uses a 13 point Times New Roman font and contains 10,541 words.

Dated: July 19, 2013

KAMALA D. HARRIS
Attorney General of California



MARY SANCHEZ
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***People v. Arnold Ikeda*** No.: **S209192**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 19, 2013, I served the attached **Respondent's Answer Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Cynthia Ellington,
Senior Deputy Public Defender
Ventura County Public Defender's Office
800 South Victoria Avenue
Ventura, CA 93009
(Attorney for Petitioner Ikeda)

Hon. Gregory Totten, District Attorney
Ventura County District Attorney's Office
Attn.: David Russell, Deputy DA
800 S. Victoria Avenue, Suite 314
Ventura, CA 93009

CAP-LA
California Appellate Project (LA)
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071-2600
(by daily messenger run system)

Court Clerk
County of Ventura, Main Courthouse
Superior Court of California
Ventura Hall of Justice
To be delivered to:
Hon. Roland N. Purnell, Judge
P.O. Box 6489
Ventura, CA 93006-6489

California Court of Appeal
Second Appellate District, Division Six
200 East Santa Clara Street
Ventura, CA 93001

On July 19, 2013, I caused original and thirteen (13) copies of the **Respondent's Answer Brief on the Merits** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, California 94102-4797 by U.S. Mail.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 19, 2013, at Los Angeles, California.

M.O. Legaspi
Declarant

Signature

MS:mol
LA2013608079 / 61050433.doc