

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES, )  
Appellee ) AMICUS CURIAE BRIEF IN  
 ) SUPPORT OF APPELLANT  
 )  
v. )  
 ) Crim. App. Dkt. No. 20121026  
 )  
Specialist (E-4) )  
**LEVI A. KEEFAUVER,** ) USCA Dkt. No. 15-0029/AR  
United States Army, )  
Appellant )

STEVEN H. WRIGHT  
Amicus Curiae in Support of  
Appellant  
University of Wisconsin Law School  
Frank J. Remington Center  
975 Bascom Mall  
Madison, WI 53706  
(608) 890-3540  
Wisconsin Bar No. 1090780

Assisted by:  
CURTIS J. HINCA  
CATHERINE E. WHITE  
Law Students  
University of Wisconsin Law School

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COURT OF APPEALS FOR THE ARMED FORCES:

**Issue Presented**

WHETHER THE ARMY COURT ERRED IN FINDING THAT  
THE PROTECTIVE SWEEP WAS APPROPRIATE IN  
TOTAL.

**Statement of Statutory Jurisdiction**

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b). This Court has jurisdiction over this matter pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

**Statement of the Case**

On 22 July 2012, a military judge denied Specialist Levi A. Keefauver's (SPC Keefauver) motion to suppress all evidence seized during searches of his home. (JA 133). On 14 November 2012, the military judge sitting as a general court-martial

convicted SPC Keefauver of one specification of possession with the intent to distribute marijuana, two specifications of disobeying a general order, and one specification of child endangerment, in violation of Articles 112a, 92, and 134, UCMJ, 10 U.S.C. §§ 912a, 892, 934 (2006). (JA 34-35). The military judge sentenced SPC Keefauver to four years' confinement, a reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (JA 36).

On 29 July 2014, the Army Court affirmed the military judge's findings and sentence. United States v. Keefauver, 73 M.J. 846 (A. Ct. Crim. App. 2014). SPC Keefauver filed a petition for grant of review of the Army Court decision with this Court. This Court granted the petition on 8 December 2014.

#### **Statement of Facts**

On the morning of 8 December 2011, the military magistrate on duty, Captain Mark Robinson (CPT Robinson), verbally authorized a search of a package and its immediate surroundings within the Keefauvers' home at 4518B Beers Street, Fort Campbell, Kentucky. (JA 67, 85-86). This authorization was based on Special Agent Steven Roche's (SA Roche) affidavit stating that his office planned to conduct a controlled delivery of a suspicious package to the Keefauvers' home. (SJA 6). SA Roche believed that once the package, which smelled of marijuana, entered the home, investigators would have probable cause to

believe marijuana would be within the house. Id. CPT Robinson noted that the package was the only evidence of marijuana at the time and thus, once SA Roche found the package, he would not have probable cause to search any other places in the house as he would have already found the drugs that he was looking for. (JA 95-96). The magistrate limited the search to the immediate area in which the package was found within the house. (JA 91). SA Roche understood CPT Robinson's authorization as allowing SA Roche to go into the house to find the package. (JA 105).

SA Roche and his team performed a controlled delivery of the package that afternoon. (JA 40). The package was left on the front door when no one answered the door. (JA 40, 73). SA Roche's team maintained surveillance on the house for almost two hours. (JA 193-94). SPC Keefauver's 16-year-old stepson, TC-D, arrived home. (JA 193, 222). As soon as TC-D picked up the package and took it into the house, SA Roche and his team moved in. (JA 40). TC-D's keys were still hanging in the open door. (JA 193). TC-D did not authorize SA Roche to search the house and instead protested the police invasion of his family's home. (JA 58-60). SA Roche "found the package . . . right inside the doorway. . . ." (JA 40).

After finding the package, SA Roche "conducted a security sweep of the house to ensure that no one else was inside the house." Id. SA Roche described this sweep as a standard

procedure to ensure that no one was inside with a gun or knife. (JA 42-43). During the sweep, Postal Inspector Steven Lamp (PI Lamp) stayed by the front door with the suspicious package. (JA 73-74). SA Roche searched every room and closet in the house, finding marijuana, bong, rifles, and boxes similar to the delivered package. (JA 43). The military judge concluded that this search was a valid protective sweep because SA Roche and his team could reasonably believe that SPC Keefauver's family was involved in distributing drugs and that such an activity could be violent. (JA 131-32). Once the protective sweep was completed, SA Roche and his team stepped outside the house. (JA 40).

#### **Summary of Argument**

The undersigned Amicus Curiae respectfully request that this Court find that SA Roche's protective sweep of the Keefauvers' home infringed on the Keefauvers' right to privacy in violation of the Fourth Amendment. SA Roche's search does not qualify for the protective sweep exception to the Fourth Amendment's warrant and probable cause requirements because the search was not incident to an arrest and did not further an objective of SA Roche's authorized intrusion into the Keefauver family's home. This Court should correct the military judge's erroneous interpretation of the protective sweep doctrine and order the suppression of all evidence found during the sweep.

### Standard of Review

This Court directly reviews a military judge's decision to suppress evidence for an abuse of discretion. United States v. Khamsouk, 57 M.J. 282, 286 (C.A.A.F. 2002). This Court should overturn a military judge's decision when the judge's findings of fact are clearly erroneous, the judge's decision is influenced by an erroneous view of the law, or the judge's decision on the issue is outside the range of choices reasonably arising from the applicable facts and law. United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008). A military judge's findings of fact are reviewed under a clearly erroneous standard. Khamsouk, 57 M.J. at 286. A military judge's conclusions of law are reviewed *de novo*. Id.

### Argument

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Searching a house "is generally not reasonable without a warrant issued on probable cause." Maryland v. Buie, 494 U.S. 325, 331 (1990). Buie identified two limited exceptions to this rule: First, police may search "spaces immediately adjoining the place of arrest from which an attack could be immediately launched" while executing an arrest warrant. Id. at 334. Second, police may execute a broader "protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on

specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. at 337. Searches not falling into one of these two narrow categories do not qualify for the protective sweep exception to the Fourth Amendment's warrant and probable cause requirements.

**I. The protective sweep is unconstitutional because it was not performed incident to an in-home arrest.**

Police may conduct a protective sweep of a home incident to arrest when they have reasonable suspicion to believe the home may harbor a dangerous third party. Buie, 494 U.S. at 337. Such a sweep must last "no longer than it takes to complete the arrest and depart the premises." Id. at 336. The Supreme Court defined the issue in Buie as "what level of justification is required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises." Id. at 327.

The Supreme Court has not resolved the question of whether protective sweeps are valid where the sweep is not performed incident to an in-home arrest pursuant to a valid arrest warrant. The circuit courts are split on how to balance officer safety with the touchstone of the Fourth Amendment: the right to be left alone in one's own home. Despite this circuit split, in footnote 9 of its opinion, the Army Court concluded, without

discussion, that the protective sweep doctrine is "almost routinely expanded . . . to apply in situations where there is lawful entry for reasons other than an in-home 'arrest.'" "

Keefauver, 73 M.J. at 852 n.9 ; (JA 7).

**A. The protective sweep is invalid because it was not performed in conjunction with an authorized in-home arrest as required by Buie.**

"The Ninth and Tenth Circuits have applied the protective sweep doctrine only where entry has been made incident to an arrest in the home. . . ." United States v. Hassock, 631 F.3d 79, 86-87 (2d Cir. 2011); see also, e.g., United States v. Torres-Castro, 470 F.3d 992 (10th Cir. 2006); United States v. Reid, 226 F.3d 1020 (9th Cir. 2000). This Court should likewise limit protective sweeps to those made incident to an arrest because this rule complies with Buie and provides clarity regarding when protective sweeps are allowed.

In Reid, police knocked on the door of a suspect's apartment, and an individual other than the suspect answered. 226 F.3d at 1022-23. When the officers identified themselves, the man shut the door and ran out through the apartment's rear exit. Id. The officers stopped the man, who then permitted the officers to enter the apartment to retrieve his identification and make certain no other persons remained inside. Id. The Ninth Circuit held that man's consent was invalid and the search was not a valid protective sweep because Buie applies only when an

arrest is being made. Id. at 1027-28. Because no one was under arrest or about to be arrested when the officers entered the apartment, the search was not a protective sweep. Id.

The Tenth Circuit also follows Buie's definition of a protective sweep as "a brief search of premises during an arrest to ensure the safety of those on the scene." United States v. Smith, 131 F.3d 1392, 1396 (10th Cir. 1997). Thus, the Tenth Circuit has repeatedly held that "[f]ollowing Buie, . . . protective sweeps are only permitted incident to an arrest." Torres-Castro, 470 F.3d at 996 (internal quotation marks omitted). See also United States v. Davis, 290 F.3d 1239, 1242 n.4 (10th Cir. 2002) (holding 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.'" (quoting Buie, 494 U.S. at 327) (internal quotation marks omitted)). Furthermore, the Tenth Circuit has admitted evidence seized during protective sweeps incident to in-home arrests but suppressed evidence found during invalid sweeps unconnected to an arrest. Compare Smith, 131 F.3d at 1400 (affirming denial of a motion to suppress) with Davis, 290 F.3d at 1240, 1242 n.4 (affirming suppression of evidence seized during protective sweep because "no one was under arrest, and . . . there was no probable cause to arrest anyone").

Following the guidance of the Ninth and Tenth Circuits, this court should suppress all evidence found during the protective sweep because the sweep was unconnected to an arrest. SA Roche and his team did not have authorization for an arrest when they entered the Keefauvers' home. (SJA 8). Nor did they arrest anyone when they entered the Keefauvers' home. (JA 187-228). Because SA Roche's protective sweep was unconnected to an arrest, the search of the Keefauvers' home violated the Fourth Amendment. Therefore, all evidence discovered during the sweep must be suppressed.

**B. Allowing protective sweeps in non-arrest situations is contrary to the letter and spirit of Buie.**

Some circuits have "extended the Buie doctrine to allow protective sweeps of living quarters in non-arrest situations." Hassock, 631 F.3d at 87. Such an extension "pose[s] Fourth Amendment concerns not present in cases where the initial entry is pursuant to a warrant." United States v. Gould, 364 F.3d 578, 589 (5th Cir. 2004) (en banc). Allowing a protective sweep unconnected to an in-home arrest fails to properly "balance[] the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Buie, 494 U.S. at 331.

In Buie, the Court balanced the "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" against the "expectation of privacy" in the home. Id. at 333. The Court noted the unique "risk of danger in the context of an arrest in the home" and the fact that "[a] protective sweep . . . occurs as an adjunct to the serious step of taking a person into custody . . . ." Id. The Court found that, within the context of an in-home arrest, the police "interest is sufficient to outweigh the intrusion" of a protective sweep. Id. at 334.

When the protective sweep is not incident to an in-home arrest, however, the balance changes. The "risk of danger in the context of an arrest in the home" is no longer present. Id. at 333. The officers' attention is not devoted to performing an adversarial arrest. The officers need not ensure the safety of the arrestee. Without a person in their custody, the police may more easily leave the area if an imminent danger presents itself. Under the Court's own analysis in Buie, a protective sweep not performed incident to an arrest is not a reasonable search and therefore is contrary to the Fourth Amendment. This Court should follow the letter and spirit of Buie and find SA Roche's protective sweep invalid, because it was not performed incident to an arrest.

**II. The protective sweep was unconstitutional because the agents began the search only after they had accomplished the objective of their authorized intrusion.**

Even if a protective sweep conducted during the execution of a search authorization is valid, the police must conduct the sweep while they accomplish the lawful objective of the search authorization. Buie, 494 U.S. at 335-36. The Fourth Amendment only allows "police action[] in execution of a warrant . . . related to the objectives of the authorized intrusion." Wilson v. Layne, 526 U.S. 603, 611 (1999). Once all actions related to the objectives of the authorized intrusion are complete, the police must exit the home. In this case, the military judge misconstrued Buie, finding that SA Roche's search of the Keefauvers' entire home was a valid protective sweep even though it was unrelated to the objectives of the officers' authorized intrusion. The Army Court failed to correct the military judge's erroneous conclusion of law. As a result, this Court must reverse the Army Court's decision.

**A. Searches completed after accomplishing the objective of the authorized intrusion are not valid protective sweeps.**

Buie allows law enforcement agents to perform a protective sweep only while the objective of the authorized intrusion is accomplished. 494 U.S. at 335-36. Police action unconnected to the objective of the authorized intrusion into the home violates

the Fourth Amendment. Wilson, 526 U.S. at 611. In Buie, the Court made clear that a protective sweep may last “no longer than it takes to complete the arrest and depart the premises.” Buie, 494 U.S. at 336. Simply put, a protective sweep may last no longer than it takes the agents to accomplish the objective of the authorized intrusion. Hassock, 631 F.3d at 88. Even if this Court finds that protective sweeps executed without an in-home arrest warrant are valid, Buie demands that police conduct protective sweeps while accomplishing the objective of the authorized intrusion. Id.

A number of courts agree that “Buie [only] authorizes protective sweeps for unknown individuals in a house who may pose a threat to officers as they” carry out the objective of their authorized intrusion. United States v. Waldner, 425 F.3d 514, 517 (8th Cir. 2005); see also, e.g., Hassock, 631 F.3d at 88; Smith, 131 F.3d at 1296. “Where no other purpose is being pursued, a sweep is no different from any other search and, therefore, requires a warrant, exigency, or authorized consent . . . .” Hassock, 631 F.3d at 88. Thus, when an officer’s search is unrelated to the objectives of the authorized intrusion, the items found during the search are the product of an unconstitutional search and must be suppressed.

In Khamsouk, this Court refrained from deciding whether courts must suppress evidence gained during a search unrelated

to the objectives of the authorized intrusion, choosing instead to remand the case based on a prejudicial post-trial delay. 57 M.J. at 294. However, Judge Effron, with the support of Judge Gierke, noted that “[o]nce the law enforcement officials [complete] ‘the objective of the authorized intrusion,’” a protective sweep is unnecessary and therefore invalid. Id. at 305 (Effron, J., concurring) (quoting Wilson, 526 U.S. at 611).

To allow police to perform protective sweeps after all objectives of their authorized intrusion have been accomplished would strip the Fourth Amendment of its meaning. Such a rule could allow police to gain access, via consent or a limited authorization, to a home as a pretext “in order to then make a protective sweep of the entire home for unrelated reasons and thus circumvent the warrant requirement.” Gould, 364 F.3d at 589; accord United States v. Gandia, 424 F.3d 255, 262 (2d Cir. 2005) (noting that allowing protective sweeps unconnected to the objective of an authorized intrusion would “enable and encourage officers to obtain . . . consent as a pretext for conducting a warrantless search of the home”).

**B. The agents had already completed the objective of their authorized intrusion when they began the protective sweep.**

The protective sweep in this case is invalid because SA Roche and his team did not begin the sweep until after they accomplished the objective of their authorized intrusion. See,

e.g., Hassock, 631 F.3d at 89. CPT Robinson authorized an intrusion into SPC Keefauvers' home for one specific objective: to "search [the] immediate area that [they] find the package, and that's the limit of [the] search." (JA 85). CPT Robinson limited the search authorization in this way because there was "no probable cause to believe that [there was] marijuana in other places of the house." (JA 91). Thus, the objective of the authorized intrusion into SPC Keefauvers' family home was simply to locate the suspicious package.

SA Roche testified at the suppression hearing that he and his team converged on the front door of the house as soon as TC-D picked up the package and took it into the house. (JA 40). SA Roche saw the package right inside the doorway, in the hallway. Id. At that point, SA Roche had accomplished the objective of his authorized intrusion. Yet SA Roche testified that it was only after he found the package inside the doorway that he conducted a protective sweep of the home. Id. ("We found the package. It was, you know, right inside the doorway into the hallway. From there, I conducted a security sweep of the house to ensure that no one else was inside the house.") After completing the protective sweep, SA Roche and his team stepped outside the house, underscoring the fact that there was no need to perform the protective sweep, as they had already

accomplished the sole objective of the authorized intrusion.<sup>1</sup> Id. SA Roche's "actions reflect that his concern over the [potential evidence] prevailed over concerns about safety." Khamsouk, 57 M.J. at 305.

In Hassock, the Second Circuit held that a search violated the Fourth Amendment in a similar situation. 631 F.3d at 89. In that case, officers entered an apartment with the occupant's consent in order to question Mr. Hassock, discovered that Hassock was not there, and then completed what they termed a "protective sweep," leading to the discovery of an illegal gun in plain view in Mr. Hassock's bedroom. Id. at 81-83. "Although [the officers] went to the Hassock apartment for a legitimate purpose . . . when Hassock did not answer the door, that purpose could not be pursued until Hassock was found. Under these circumstances, the [protective] sweep cannot be viewed as a reasonable security measure incident to Hassock's interrogation or arrest." Id. at 88. Because the protective sweep was "incident to no other lawful police conduct," it was an "illegitimate search" conducted in violation of the Fourth Amendment. Id. at 89. Likewise, SA Roche's protective sweep was not performed during any lawful police conduct and thus is a search in violation of the Fourth Amendment.

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<sup>1</sup> The military judge found that all subsequent events were beyond the scope of CPT Robinson's authorization. (JA 132-33). That holding is not at issue in this appeal.

Similarly, in Gandia, the Second Circuit held that a protective sweep initiated after the defendant consented to the officers' entrance into his home violated the Fourth Amendment because "there was no need for the police officers to enter [the defendant's] home in the first place. . . ." 424 F.3d at 263. The officers' objective was simply to talk with the defendant: "the entrance or hallway of the building, or their own police vehicle, would have fulfilled their stated purposes." Id. In both Gandia and this case, the officers' presence in the home was not related to their legitimate objective and so the officers had no need to perform a protective sweep. The officers could have obtained the same level of safety by leaving the home rather than remaining in it.

Just as the objective of the authorized intrusion was completed "once the law enforcement officials entered the dwelling and apprehended [the defendant] in the foyer" in Khamsouk, so too was the objective of CPT Robinson's search authorization completed once SA Roche entered the dwelling and saw the package in the foyer. Khamsouk, 57 M.J. at 305. "[F]urther entry was not authorized." Id. at 304.

### **Conclusion**

WHEREFORE, the undersigned Amicus Curiae respectfully request that this Court overrule the Army Court's decision, suppress all evidence obtained after the box was found, set

aside the findings and sentence, and return the record to the  
Judge Advocate General of the Army.

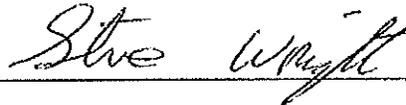
  
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STEVEN H. WRIGHT  
Amicus Curiae in Support of  
Appellant  
University of Wisconsin Law School  
Frank J. Remington Center  
975 Bascom Mall  
Madison, WI 53706  
(608) 890-3540  
Wisconsin Bar No. 1090780

Assisted by:  
CURTIS J. HINCA  
CATHERINE E. WHITE  
Law Students  
University of Wisconsin Law School

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case United States v. Keefauver, Crim. App. Dkt. No. 20121026, Dkt. No. 15-0029/AR, was delivered to the Court, Appellate Defense Counsel, and Government Appellate Division on March 31, 2015. I further certify that this brief complies with the 7,000-word limit for amicus briefs under Rule 26, and has 3,597 words.



---

STEVEN H. WRIGHT  
Amicus Curiae in Support of  
Appellant  
University of Wisconsin Law School  
Frank J. Remington Center  
975 Bascom Mall  
Madison, WI 53706  
(608) 890-3540  
Wisconsin Bar No. 1090780