IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	FINAL BRIEF ON BEHALF OF APPELLANT
v.	
	Crim. App. Dkt. No. 20121026
Specialist (E-4) **LEVI A. KEEFAUVER,** United States Army, Appellant	USCA Dkt. No. 15-0029/AR

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UNITED STATES, Appellee	FINAL BRIEF ON BEHALF OF APPELLANT
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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES 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 Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

On November 14, 2012, at Fort Campbell, Kentucky, a military judge sitting as a general court-martial tried Specialist (SPC) Levi A. Keefauver. Contrary to his pleas, the military judge convicted SPC Keefauver of one specification of

possession of five and a quarter pounds of marijuana with the intent to distribute, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a (2006) [hereinafter UCMJ], two specifications of disobeying a general order in violation of Article 92, UCMJ, and one specification of child endangerment in violation of Article 134, UCMJ. The military judge sentenced SPC Keefauver to be reduced to E-1, to forfeit all pay and allowances, to be confined for four years, and to receive a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On July 29, 2014, the Army Court issued a published opinion affirming the findings and sentence. *United States v. Keefauver,* 73 M.J. 846 (Army Ct. Crim. Ap. 2014). Appellant then filed a petition for grant of review of the Army Court decision with this Honorable Court. This Honorable Court granted the petition to review on December 8, 2014.

Statement of the Facts

On December 8, 2011, Criminal Investigation Command (CID) Special Agent (SA) SR received a telephone call from Postal Inspector (PI) SL. (JA at 39). Postal Inspector SL informed SA SR that postal investigators had discovered a suspicious package that smelled of marijuana with a delivery address of, "T. Keefauver, 4518 Beers Street, B, Fort Campbell." (JA at 68). The return address was, "B. Samuelson, 870 North Circle Drive,

Diamond Springs, California;" an address formerly used by SPC Keefauver and his wife, Tabitha Keefauver. (JA at 147). Postal Inspector SL hand-carried the package to SA SR on Fort Campbell, where SA SR had a military working dog (MWD) sniff the box. (JA at 39). The dog alerted to the box. (JA at 39).

Shortly thereafter, SA SR went to the part-time military magistrate, Captain (CPT) Mark Robinson, and received a verbal search authorization "to go into the house and search for the package after it was taken into the house . . . to search for the package inside the house and once the package was found, any additional search, if we had a K9 search the house and alerted to any other drugs inside the house, that we would have authorization to search the rest of the house." (JA at 39).

That day, December 8, at approximately 1330, Inspector NO, dressed as a postal carrier, delivered the package to the appellant's home on Fort Campbell. (JA at 73). After a knock on the door resulted in no answer, Inspector NO scanned the package into the postal system as "delivered" at 1436. (JA at 73). According to Investigator SL, the agents had determined that no one was home. (JA at 73). Agents of CID and the postal service maintained surveillance on the package and home. (JA at 73).

At about 1520, a teenage boy, later identified as TC-D, SPC Keefauver's 16 year old stepson, returned home, picked up the

package on the front porch and entered the home. (JA at 193-194). Members of law enforcement then executed the search authorization, doing this so quickly that the door was still slightly open and the key was still in the door. (JA at 193). TC-D was upset when the agents entered the home, telling the police to "'get the F-U-C-K off [my] property' and, '[y]ou don't have any right to do this,' and all that." (JA at 74). Criminal Investigation Command agents immediately located the package inside the front door, and then searched the entire home. (JA at 40, 423); ("We found the package. It was, you know, right inside the doorway into the hallway.") The search turned up some marijuana and smoking devices. (JA at 43). A military working dog (MWD) arrived after the "security sweep" and after law enforcement left the Keefauver home. (JA at 196). The MWD, along with numerous members of law enforcement, then conducted a further search, discovering numerous other items related to the use and sale of marijuana. (JA at 196).

Because of marital difficulties, SPC Keefauver regularly slept in the living room while TC-D (16 years old at the time): EK, SPC Keefauver's son (13 years old at the time); and Tabitha Keefauver (SPC Keefauver's wife) lived on the second floor in their own individual rooms. (JA at 341).

Summary of Argument

Conducting a protective sweep when there is no articulable reason for doing so is unreasonable and a violation of the Fourth Amendment. The Army Court erred in two ways. First, contrary to this Court's precedents, it relied on the portions of the record developed after the military judge ruled on the suppression motion. Second, finding that there were reasonable, articulable facts to support the search of the appellant's entire home is not supported by the record before the military judge at the time of his ruling.

Statement of the Law

"It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (internal quotation and citation omitted). In the sanctity of the home, all details are intimate details because the entire home is safe from prying government eyes. *United States v. Kyllo*, 533 U.S. 27, 37 (2001). The Fourth Amendment protects the "security of one's privacy against arbitrary intrusion by the police." *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)). A search of a residence conducted without a warrant based on probable cause is "per se unreasonable." *Id.* at 219. Evidence obtained directly or indirectly through illegal government

conduct is inadmissible. *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338 (1939); *Mapp v. Ohio*, 376 U.S. 643 (1961).

The Supreme Court has held that "[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." *Horton*, 496 U.S. at 140. However, a protective sweep is authorized if the searching officer "possesse[d] a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed] the officer in believing that the area swept harbored an individual posing a danger to the officer or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990); *citing Michigan v. Long*, 463 U.S. 1032, 1049-1050(1983) (*quoting Terry v. Ohio*, 392 U.S. 1, 21 (1968) (internal cites and quotations omitted). "A protective sweep is a quick and limited search of premises . . . conducted to protect the safety of police officers or others." *Id.* It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. *Id.*

"When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, 'we typically have pierced through that intermediate level' and examined the military judge's

ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling." *United States v. Rader*, 65 M.J. 30, 33 (C.A.A.F. 2007) (citing *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006)) (quoting *United States v. Siroky*, 44 M.J. 394, 399 (C.A.A.F. 1996)). The military judge's exercise of discretion is reviewed on the basis of the facts before him at the time of the ruling. *United States v. Grant*, 49 MJ 295, 297 (1998); pet. denied 119 S.Ct. 1344; *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000)

Standard of Review

This Court "review[s] a military judge's decision to suppress or admit evidence for an abuse of discretion." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (citations omitted).

Argument

1. The Army Court erred in relying on portions of the record developed after the trial judge ruled on the search.

"When military judges exclude evidence, [the CCAs] review [the trial judge's] exercise of discretion on the basis of the record before them." *United States v. Grant*, 49 M.J. 295, 297 (C.A.A.F. 1998). In *Grant*, this Court reviewed a military judge's denial of appellant's motion under Rules for Courts-Martial (RCM) 412. *Id.* In his appeal, Grant argued that the evidence was admissible as a motive for the purported victim to lie. *Id.* However, because neither that argument nor any facts to support the argument were before the military judge at the time of the ruling, this Court refused to even entertain the argument. *Id.* In *United States v. Cowgill*, this Court had to review a military magistrate's issuance of a search authorization, taking into consideration that some of the affidavits before the magistrate were false. 68 M.J. 388, 391 (C.A.A.F. 2010). This Court found that in reviewing the magistrate's decision to issue an authorization, "this Court examines the information known to the magistrate at the time of his decision, and the manner in which the facts became known." *Id.* See also *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000); *United States v. Vangelisti*, 30 M.J. 234, 237

(C.M.A. 1990), *quoting United States v. Roberts,* 7 U.S.C.M.A. 322, 325, 22 C.M.R. 112, 115 (1956).[1]

Unlike the sanctioned approach, the Army Court scoured the record for additional facts, going so far as to look to facts elicited during the merits and after the military judge's decision on appellant's motion to suppress. Such a practice is wholly inappropriate, calling into question the Army Court's neutrality. This practice also encourages the government to piecemeal evidence into a ruling, thus permitting the re-litigation of trial motions on appeal under new theories, a strategy previously rejected by this Court. *United States v. Rust,* 41 M.J. 472, 479 n. 3 (C.A.A.F. 1995) ("M[ajor] Rust had an opportunity to testify on the motion to suppress but did not. This court will not permit him to re-litigate the motion by means of an *ex parte* affidavit offered for the first time on appeal."); *see also United States v. Clark,* 35 M.J. 98, 107 (C.M.A. 1992) (accused may not withhold "trump card" and play it on appeal if he loses at trial.)

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[1] Where, during trial, defendant renewed his motion to suppress evidence allegedly the product of illegal search and parties advised court that no additional testimony was to be offered and counsel agreed to court's suggestion that in deciding the renewed motion only transcript of pretrial motion would be considered, reviewing court, in considering propriety of court's order denying suppression, would consider only such evidence as was revealed by record on pretrial motion to suppress. *Rocha v. United States,* 387 F.2d 1019 (9th Cir. 1967).

In scouring the post-suppression motion for facts to support the notion that the sweep was appropriate, the Army Court relied on *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, the Supreme Court, in reviewing a trial court's decision in a prohibition error alcohol trafficking case stated that "[t]he record does not make it clear what evidence was produced in support of or against the motion . . . . If the evidence given on the trial was sufficient . . . it is immaterial that there was an inadequacy of evidence when application was made for its return." *Id.* at 162.

First and foremost, the cases can be clearly distinguished. In *Carroll*, it was unclear what evidence was before the trial judge at the time of his decision. *Id.* However, the Army Court and this Court review a verbatim record. Second, this Court's precedent does not support the Army Court's interpretation of *Carroll*. "Ordinarily, the correctness of a ruling by the law officer is determined on the basis of the evidence before him at the time of the ruling." *United States v. Katner*, 29 C.M.R. 17, 20 (U.S.C.M.A. 1960); citing *United States v Richard*, 7 USCMA 46, 51, 21 CMR 172 (U.S.C.M.A. 1956); see also *United States v. O'Such*, 37 C.M.R. 157, 168 (1967); *United States v. Grant*, 49 M.J. 295, 297 (C.A.A.F. 1998); *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009); *United States v. Cowgill*, 68 M.J. 388, 391 (C.A.A.F. 2010). Third, the statement in *Carroll* is *obiter*

dictum. This was a decision by the Supreme Court not on the issue of what portions of a record an appellate court should take into consideration in reviewing a trial judge's ruling on a motion to suppress, but instead on the precedent setting automobile exception to the Fourth Amendment's warrant requirement.

The significant differences between what the Army Court used in its decision and what was permissible for it to use is striking. For example, first, the Army Court emphasized that TC-D became "irate," yelling an "ungodly tirade of obscenities" at the agents including, "what the fuck" and "get the fuck off my property," as well as "I hate pigs," "I hate cops," and "[c]ops can all die," or words to that effect. *Keefauver*, 73 M.J. at 850, 852; (JA at 179). However, the testimony during the motions hearing was less aggressive and completely focused on the officers. The testimony was that "[h]e used all sorts of vulgarities telling the police to get the F-U-C-K of his property and, '[y]ou don't have any right to do this,' and all that. He was eventually placed in handcuffs and sat on the ground next to the garage." (JA at 74). Second, the Army Court relied on the fact that a very strong smell of marijuana emanated from the house in general and not just from the box. *Id.* at 850; (JA at 314). However, during the motions hearing, the only testimony was that the box itself smelled of marijuana.

(JA at 41, 52, 67 and 69). Finally, the Army Court relied on the finding large amounts of cash, scales for weighing marijuana, and plastic bags with large denominations of currency printed on them. *Id.* at 850-851; (JA at 196, 240, 256, 270). However, there was no mention of any of these items at the time of his ruling.[2]

By relying on these facts, the Army Court essentially holds that what was in the record at the time of the military judge's decision would not have supported the finding of a valid search of the home.

2. The Army Court erred in determining that there were "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."

The facts that were on the record at the time of the ruling were that law enforcement personnel had reason to believe that a box of marijuana was being delivered to SPC Keefauver's address. (JA at 125). From about noon until 1520, law enforcement personnel surveilled SPC Keefauver's residence, noted no activity and determined no one was home. (JA at 40, 73). During that time, a law enforcement officer knocked at the home to deliver the package and determined no one was home. (JA at 73). Approximately forty-five minutes later, TC-D arrived and

[2] For a comparison of what the Army Court relied on and what the military judge had to rely on, see the Appendix.

took the box inside the house. (JA at 40, 73). Once inside the home, law enforcement officers searched the entire home. These officers gave two reasons for conducting the sweep. It was standard procedure (JA at 42-43); and "to make sure that there's nobody inside with a weapon that can harm [an] officer[]." (JA at 62).

During the "sweep," law enforcement officers looked behind a bed headboard (finding drugs) (JA at 43), and on a top shelf of a closet (finding a water pipe). (JA at 43). During this search/"sweep," SA CR found some white boxes which the postal investigator immediately inspected to determine whether they may have been used in illegal activities. (R. at 21, 52-53). The agent in charge even termed what they were doing a "search." (JA at 44-45).

In finding the "sweep" lawful, the Army Court found that, "1) an eight-pound box containing marijuana had just been delivered to the home; 2) in addition to TC-D, appellant, his wife, and EK lived in the home; 3) although no one was seen entering the home during the time it was under surveillance, no one was seen leaving it either; thus the *agents did not know the whereabouts of the adults who lived in the home* and it was not unreasonable to believe they could still be in the home; and 4) upon discovery that the police were at his home, TC-D became 'irate' and combative, shouting, 'I hate pigs. I hate cops. Cops

can all die,' or words to that effect and he had to be placed in handcuffs and moved away from the front entryway. . . . TC-D's behavior *could have* caused investigators to reasonably believe that anyone in the home could have heard TC-D's tirade, take it as a warning, and attempt to destroy evidence . . . ."

Keefauver, 73 M.J. at 852 (emphases added).

Argument

The Army Court erred when it found "specific and articulable facts" supporting the notion that the search in this case was a "protective sweep." *Keefauver*, 73 M.J. at 852. The record established, and indeed the officers believed, that no one was home because of the knock on the door and the surveillance from 1200 to 1520 demonstrating no activity around the home. (JA at 39-40, 73). The only finding of fact cited by the military judge as supporting his decision was that:

> [CID] believed that the residents of that home received a box with approximately 8 pounds of marijuana; From that amount of marijuana, one can reasonably infer that residents of the home were involved in distributing drugs; It is common knowledge that drug trafficking involves violence, including the use of weapons; The reaction of the high school aged male supported this belief.

(JA at 132).

In *Buie*, the Supreme Court identified three searches that could be performed during the course of an in-home arrest. *United States v. Buie*, 494 U.S. 325 (1990). First, when an

arrest is initiated based on a warrant and probable cause to believe that the target is within the premises, officers are "entitled to enter and to search anywhere in the house in which [the arrestee] might be found. Once he [is] found, however, the search for him [is] over, and there [is] no longer that particular justification for entering any rooms that ha[ve] not yet been searched." *Id.* at 333. Second, because of the risks inherent in taking an individual into custody, officers are automatically justified in searching as "an incident to the arrest" the area adjoining the place of arrest "from which an attack could be immediately launched." *Id.* at 334. Third, for officers to search further in a protective sweep, "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.* The justification for a protective sweep is ephemeral: it may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Id.* at 335-36. The Court's justification for permitting a suspicionless search of "spaces immediately adjoining the place of arrest" was the danger inherent in taking a person into custody in a home. *Id.* at 333-34.

In *Moran Vargus*, the government claimed law enforcement agents had a reasonable belief that other people might be in a motel room due to their suspicion that Moran was a drug courier, experience that drug couriers often met up with their contacts, and awareness that drug traffickers are frequently armed and dangerous. *United States v. Moran Vargas*, 376 F.3d 112, 114-16 (2d Cir. 2004). The Second Circuit found that "such generalizations, without more, are insufficient to justify a protective sweep." *Id; see United States v. Taylor*, 248 F.3d 506, 514 (6th Cir. 2001) (generalized suspicion that defendant was a drug dealer was inadequate, standing alone, to justify protective sweep); *cf. Buie*, 494 U.S. at 334 n. 2 (noting that "[e]ven in high crime areas, where the possibility that any given individual is armed is significant, reasonable, individualized suspicion [is required] before a [protective sweep] can be conducted"). The court elaborated that it found no evidence of subjective fear on the part of the agents giving rise to even an inference that a sweep was needed to protect law enforcement. *Id.*

Similarly, in *Rudaj*, a case with similar facts to this case, agents asked Rudaj if anybody aside from his wife and children (who were all accounted for downstairs at the time of the sweep of the master bedroom) were in the house, and Rudaj replied in the negative. *United States v. Rudaj*, 390 F. Supp. 2d 395, 401

(S.D.N.Y. 2005) *aff'd sub nom United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009). The district court found no observations would have led law enforcement to believe that somebody else was in the Rudaj residence, nor had they received any prior information to that effect. *Id.* Although the lead agent for the arrest team stated that the sweep of Mr. Rudaj's bedroom was intended "to ascertain whether or not there was anyone in the residence that could be a threat" and that "there was a possibility there could be additional people" present, the court found that the lack of information and unfounded speculation did not rise to the level of a specific, articulable basis for a reasonable belief. *Id;* see *also Moran Vargas*, 376 F.3d at 117. In other words, speculation and conjecture did not equate to particularized, individual suspicion. *See also United States v. Hatcher*, 680 F.2d 438, 444 (6th Cir.1982) ("[W]e believe it was error for the district court to conclude that a search of the basement subsequent to Hatcher's arrest and handcuffing was justified solely because 'the subject of drugs is a dangerous one, dangerous for all of those persons involved in it, especially those who are on the law enforcement side.'").

The Sixth Circuit, in a case in which an officer testified that he "didn't have any information at all" as to the potential existence of danger, held that such circumstances were insufficient to establish the "articulable facts" mandated by

Buie. *United States v. Colbert*, 76 F.3d 773, 777-78 (6th Cir. 1996). In that case, the court concluded that

> [l]ack of information cannot provide an articulable basis upon which to justify a protective sweep. . . . [A]llowing the police to justify a protective sweep on the ground that they had no information at all is directly contrary to the Supreme Court's explicit command in *Buie* that the police have an articulable basis on which to support their reasonable suspicion of danger from inside the home. 'No information' cannot be an articulable basis for a sweep that requires information to justify it in the first place.

Id.

Similarly, the Eleventh Circuit, in *United States v. Chaves*, 169 F.3d 687, 692 (11th Cir. 1999), found illegal a warehouse search conducted forty-five minutes after an arrest and the officers had no information about what was inside the warehouse. The court held that "in the absence of specific and articulable facts showing that another individual, who posed a danger to the officers or others, was inside the warehouse, the officers' lack of information cannot justify [a] warrantless sweep." *Id.* citing *Colbert*, *supra*, and *Sharrar v. Felsing*, 128 F.3d 810, 825 (3rd Cir. 1997). The principle enunciated in these cases—that lack of information cannot justify a protective sweep—applies with equal force here.

Thus, the Fourth Amendment does not sanction, in all circumstances, searches of a home; nor does the fact-intensive question of reasonable suspicion accommodate a policy of

automatic protective sweeps incident to every arrest. *United States v. Hauk*, 412 F.3d 1179, 1186-87 (10th Cir. 2005). Nevertheless, the Army Court sanctioned a "protective sweep" in which the agents conducted the sweep merely because "[i]t's standard procedure for any law enforcement to clear a house to--for safety of officers to make sure no one is inside with a gun, no one's inside with a knife, or try to hurt someone that we don't know is there." (JA at 42-43). Nothing else, articulable or speculative, supports the sweep.

The fundamental question is whether the government met its burden of showing a reasonable, articulable belief that someone was in the home who threatened the safety of law enforcement. While TC-D was upset, there was no threat of violence. He simply possessed a pronounced dislike of law enforcement personnel. Instead of articulable facts, the Army Court relied on a speculative conclusion, specifically "investigators were aware that 1) an eight-pound box containing marijuana had just been delivered to the home; 2) in addition to TC-D, appellant, his wife, and EK lived in the home; 3) although no one was seen entering the home during the time it was under surveillance, no one was seen leaving it either; thus the agents did not know the whereabouts of the adults who lived in the home and it was not unreasonable to believe they could still be in the home" and TC-D's comments to law enforcement personnel upon his detention.

Keefauver, 73 M.J. at 852-853. This evidence does not support an articulable belief that someone was in the Keefauver home and that the person posed a danger to law enforcement personnel.

The record only supports that the comments of TC-D towards law enforcement reflected his distaste for law enforcement personnel, not that he was engaging in an effort to notify anyone in the home of an impending police action. For example, had TC-D shouted into the home, that may have given agents some suspicion that someone was home. See *United States v. Rodriguez*, 601 F.3d 402, 406 (5th Cir. 2010). That is not, however, what TC-D did in this case.

The mere existence of a box containing an illicit substance does not make the presence of someone in appellant's home who may cause harm to law enforcement more or less likely. The Army Court speculated, precisely what numerous courts warn against in this situation. *see Moran Vargus, supra, Rudaj, supra, Colbert, supra, et al.* Because people lived in the home and none of them were seen entering or leaving the home therefore someone "*could* still be in the home." *Keefauver*, 73 M.J. at 852-853. This decision would, if allowed to stand, create a *per se* exception allowing a "protective sweep" of *every* home because people may always be lurking inside.

Significantly, appellant's home was on a United States Army installation. "[This Court] must analyze myriad factors

including, among other considerations, the configuration of the dwelling, the general surroundings, and the opportunities for ambush." *Keefauver*, 73 M.J. at 852; citing *United States v. Starnes*, 741 F.3d. 804, 808 (7th Cir. 2013). This is consistent with the Supreme Court's decision in *Illinois v. Wardlow* where the court held that flight from a police officer, while not in and of itself enough for a *Terry* stop, if done in a high crime neighborhood would be. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). In this case, the "general surrounding[]" is a military installation, not an "area known for heavy narcotics trafficking" such as the neighborhood of Chicago in *Wardlow*. *Id.* at 121. Absent reliable information that drugs were being sold from the house or that a shooting had occurred in the area just a few hours prior, insufficient information supported the execution of a protective sweep. *United States v. Starnes*, 741 F.3d 804, 808 (7th Cir. 2013).

Additionally, exigent circumstances do not justify a warrantless search when the exigency was created or manufactured by the conduct of the police. *See Kentucky v. King*, 131 U.S. 1849 (2011). In this case, law enforcement personnel delivered the box containing an illicit substance, and then entered the home to search for the very same box. When they immediately found the box, the intrusion should have ceased. Here, once the box was recovered, the police had one permissible option; to

leave and obtain a proper search authorization. Instead, the police created the circumstances and then took advantage of these circumstances to circumvent the Fourth Amendment. The search of the appellant's home was without a search authorization and unreasonable considering the circumstances and, therefore, unlawful. *Buie*, 494 U.S. at 331.

Even if a protective sweep of the immediate area was warranted, agents should have gone no further. Intrusion onto the second floor and into personal bedrooms was unwarranted. In *Buie*, law enforcement officers conducted a protective sweep of the first floor when they arrested Buie. 494 U.S. at 328. They only ventured into the basement after they discovered, based upon Buie's actions—facts not present in this case—a person wanted for a violent crime may have been in the basement. *Id.*

Law enforcement officers—confronted with a home that had no activity for hours, with no weapons registered to the home, on a military installation, where police knocked and believed no one was home—unreasonably searched the entire Keefauver home. In sum, a sweep is supposed to balance the need for law enforcement safety (*Buie*, 494 U.S. at 327) against the rights of people to be secure in the most sacrosanct place: the home. *See Kyllo*, 533 U.S. at 34. There was no need to conduct such balancing in this case. Law enforcement personnel, with no reason to believe

anyone was in the home who could do them harm, should have left immediately after seizing the object of the search.

3. The Government cannot demonstrate that this constitutional violation was harmless beyond a reasonable doubt.

"Having found constitutional error, the question remains whether that error was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The harmless beyond a reasonable doubt inquiry focuses on whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 (internal quotations and citations omitted). "Whether a constitutional error was harmless beyond a reasonable doubt is a question of law reviewed de novo." *United States v. Tearman*, 72 M.J. 54, 62 (C.A.A.F. 2013).

"The inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment." *United States v. Wallace*, 66 M.J. 5, 11 (C.A.A.F. 2008) (Baker, J. concurring); citing *United States v. Allen*, 159 F.3d 832, 842 (4th Cir. 1998); see also *United States v. Souza*, 223 F.3d 1197, 1203 (10th Cir. 2000); *United States v. Johnson*, 22 F.3d 674, 683 (6th Cir. 1994); *United States v. Cherry*, 759 F.2d 1196,

1206 (5th Cir. 1985); *United States v. Mejia*, 69 F.3d 309, 319 (9th Cir. 1995).

If the sweep is unconstitutional, the government must demonstrate that there was no reasonable possibility that the evidence and information found during the sweep did not contribute to the conviction. It cannot. First, there was no warrant to search the home after the box was found. *Keefauver*, 73 M.J. at 855. After that, no authorization given or sought. Any authorization based upon the evidence found during an unconstitutional sweep would be void as "fruit of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341 (1939). Furthermore, the only evidence on the record at the time of the ruling was that a box that smelled of marijuana was delivered to a home, it was briefly taken into the home by a teenaged stepson of SPC Keefauver, and was never opened. *Id.* While one person exercised control over the box, no one, particularly not SPC Keefauver, exercised control over the marijuana.

The proper analysis for the inevitable discovery doctrine is *prospective*, not *retrospective*. *United States v. Wicks*, 73 M.J. 93 (C.A.A.F. 2014); *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999). Airman Basic (AB) Owens, withdrew his consent to search his automobile. *Owens*, 51 M.J. at 207. Owens was then told that law enforcement officers "would seize the car and try to get a search warrant in order to recover the rest of the

items from the car" if Owens did not consent. *Id.* Owens then acquiesced. *Id.* This Court found that the consent was the result of a coercive environment and consent was not freely given. *Id.* at 210. However, this Court took a 'prospective' look at the time of the illegal conduct (i.e. coercing consent) and reasoned that had consent not been given, law enforcement personnel would have requested, and received, a search authorization. *Id.* at 210-211. It was clear that if police procedures were followed, law enforcement personnel would have sought a search authorization because it was clear from the record at the time of the illegal act (i.e. searching without consent). The law enforcement officer testified that the moment prior to the tainted authorization, had the authorization not been given, law enforcement "would seize the car and try to get a search warrant in order to recover the rest of the items from the car." *Id.* at 207. Thus, the Court conducted a prospective analysis asking what would have happened had the illegal conduct not occurred, not what could have happened.

Wicks pertained to the search of a cell phone. *Wicks*, 73 M.J. 93. In that case, a Fourth Amendment-exempt private search of Wicks' cell phone was conducted by his girlfriend. *Id.* at 96. She found what she believed to be evidence of a crime and later turned the phone over to law enforcement. *Id.* The government conducted at least three later searches of the cell

phone. *Id.* at 98. Prior to the searches, law a enforcement officer consulted with the legal office three times, but never sought a search authorization. *Id.* at 104. The government made no effort to obtain a warrant or even consider the ramifications of searching a phone which law enforcement was clearly on notice contained TSgt Wicks' personal information and was unlawfully taken. *Id.* at 104; see also *Riley v. California*, 134 S. Ct. 2473 (2014). "[T]he record reflects that the Government's next investigative step following [law enforcement's] review of the phone was to send the phone for additional search and analysis." *Wicks*, 73 M.J. at 104. In its analysis, the Court placed itself in the shoes of the law enforcement officer at the time of the violation of appellant's rights to see what would have happened had the illegal conduct not occurred. The court determined the government was not in the process of obtaining a warrant nor were they proceeding along a path that would have, eventually, lead to a warrant. *Id.*

In appellant's case, law enforcement agents left the home after the 'protective sweep.' (JA at 40). The authorized search had ended. (JA at 132). Law enforcement agents then went back in the house and searched everywhere, including inside a teapot. (JA at 470-471). At the time, no warrant was sought nor was one sought upon the termination of the already existing warrant (when the box was found). Therefore, at the time of the

illegal conduct (both the protective sweep and the re-entry afterwards) law enforcement was not seeking an authorization. As in *Wicks*, the law enforcement officer's next step was not to seek a warrant but was to search the entire home. Allowing the government to conduct searches without a warrant or exigent circumstances essentially removes the warrant requirement from the Fourth Amendment.

WHEREFORE, appellant respectfully requests that this Honorable Court over rule 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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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Keefauver, Crim. App. Dkt. No. 20121026, Dkt. No. 15-0029/AR, was delivered to the Court and Government Appellate Division on January 5, 2015.

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Appendix

1. The box that was delivered was heavily taped. *Keefauver,* 73 M.J. at 849; (JA at 148). The only testimony regarding the appearance of the box before the military judge's rulings was that it was a common "Ready Post" box. (JA at 44, 68, 74).

2. The box was addressed to a B. Samuelson. *Id.* at 848; (JA at 147). Law enforcement searched an address database to determine if the sender's information was legitimate, he found no record of a "B. Samuelson" at the return address. *Id.*; (JA at 148). Prior to the military judge's ruling, the only testimony was that it was from Diamond Springs, California. (JA at 68).

3. Specialist Keefauver and his wife had claimed the return address in Northern California as their address in years past. *Id.*; (JA at 141). There was no mention of this prior to the ruling.

4. TC-D became "irate," yelling an "ungodly tirade of obscenities" at the agents including, "what the fuck" and "get the fuck off my property," as well as "I hate pigs," "I hate cops," "[c]ops can all die," or words to that effect. *Id.* at 850, 852; (JA at 179). However, the testimony during the motions hearing was less aggressive and completely focused on the officers. The testimony was that "[h]e used all sorts of vulgarities telling the police to get the F-U-C-K of his property and, 'You don't have any right to do this,' and all that. He was eventually placed in handcuffs and sat on the ground next to the garage." (JA at 74).

5. A very strong smell of marijuana emanated from the house in general and not just from the box. *Id.* at 850; (JA at 314). However, during the motions hearing, the only testimony was that the box itself smeled of marijuana. (JA at 41, 52, 67 and 69).

6. The investigators also found a vaporizer which appeared to be used to smoke marijuana, a scale which could be used to weigh drugs, and a large sum of money in a dresser drawer. *Id.* at 850; (JA at 240). No evidence of this appeared before the ruling.

7. The black duffel bag found in the closet contained no marijuana but did contain $4000 in cash.

Id at 850-851; (JA at 196). However, the neither the duffel bag nor its contents were mentioned prior to the ruling.

8. Investigators also found an amount of cash inside a teapot in the dining room. *Id.*; (JA at 270). Again, this was not mentioned prior to the ruling.

9. In a closet immediately inside the residence, investigators found two handguns stored in a locked container and a bag of marijuana inside a bin of toy cars. *Id.*; (JA at 242). The only items mentioned prior to the ruling were 'weapons' inside the closet. (JA at 41). However, this was the upstairs closet while the handguns and marijuana were found in the first floor closet. (JA at 197).

10. Investigators searched garbage cans outside the house and found plastic bags similar to ones found inside the house that had $1000, $2000, $8000, and $8300 written on them. *Id.*; (JA at 256). No evidence of what was found in the trash outside the home was mentioned prior to the ruling.

11. Appellant testified at trial that his wife spent a significant amount of time at home in her room. *Id.* at fn. 10; (JA at 382). Again, this was not before the military judge at the time of his ruling.