IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE
SPECIALIST (E-4) LEVI A. KEEFAUVER, UNITED STATES ARMY, Appellant.	)	Crim. App. Dkt. No. 20121026 USCA Dkt. No. 15-0029/AR

John A. Pray
Clinical Professor
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 263-7461
john.pray@wisc.edu

Assisted by:
Jake Blair
Veronica Sustic
Law Students
University of Wisconsin Law School

Index of Brief

Table of Authorities

Page

Supreme Court of the United States

United States Court of Appeals for the Armed Forces

Federal Courts

State Courts

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEE
SPECIALIST (E-4) LEVI A. KEEFAUVER, UNITED STATES ARMY, Appellant.	)	Crim. App. Dkt. No. 20121026 USCA Dkt. No. 15-0029/AR

TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES.

Granted Issue

Whether the Army Court erred in finding that the protective sweep was appropriate in total.

Introduction

The amicus curiae from the University of Wisconsin Law School submit this brief in support of Appellee. This brief was prepared by law students Jake Blair and Veronica Sustic under the supervision of Attorney John A. Pray who has submitted a motion to appear before this Court *pro hac vice* in compliance with Rule 26.

Summary of Argument

This Court should affirm the Army Court of Appeals' decision for two reasons. First, the appellate court properly considered facts from the entire record to support the military judge's ruling on the motion to suppress. Second, the special

agents' protective sweep of Appellant's home was not an unreasonable search and was sufficiently limited in.

Argument

I. The Army Court of Appeals properly considered the entire record when it affirmed the military judge's denial of Appellant's motion to suppress.

An appellate court may rely upon facts developed after a trial court's pre-trial ruling when reviewing a motion to suppress. *United States v. Cordero*, 11 M.J. 210, 215 n. 3 (C.M.A. 1981) (citing *Carrol v. United States*, 267 U.S. 132, 162 (1925)). Every federal circuit court of appeals has held that this practice is appropriate.[1] Additionally, the majority of states that have addressed this issue have held that an appellate court may consider the entire record when reviewing a trial court's ruling on a motion to suppress. *See e.g., State v. Henning*, 975 S.W.2d 290, 297-98 (Tenn. 1998) (collecting cases from 27 other states). This court should expressly adopt a rule permitting appellate courts to consider the entire record on review of a suppression motion to bring its precedent in line

[1] *See Washington v. United States*, 401 F.2d 915, 919 n. 19 (D.C. Cir. 1968); *United States v. Martins*, 413 F.3d 139, 144 (1st Cir. 2005); *United States v. Canieso*, 470 F.2d 1224, 1226 (2nd Cir. 1972); *United States v. Silveus*, 542 F.3d 993, 1001 (3rd Cir. 2008); *United States v. Gray*, 491 F.3d 138, 148 (4th Cir. 2007); *United States v. Pearson*, 448 F.2d 1207, 1210 (5th Cir. 1971); *United States v. Hinojosa*, 606 F.3d 875, 880 (6th Cir. 2010); *United States v. Tilmon*, 19 F.3d 1221, 1224 (7th Cir. 1994); *United States v. Rowland*, 341 F.3d 774, 778 (8th Cir. 2003); *United States v. Sanford*, 673 F.2d 1070, 1072 (9th Cir. 1982); *United States v. Rios*, 611 F.2d 1335, 1344 n. 14 (10th Cir. 1979); *United States v. Caraballo*, 595 F.3d 1214, 1222 (11th Cir. 2010).

with the majority of federal and state jurisdictions and to preserve the underlying purpose of the exclusionary rule.

A. A Rule allowing an appellate court to consider the entire record supports the underlying purposes of the exclusionary rule.

Because the purpose of the exclusionary rule is to deter police misconduct, an appellate court should not be limited to considering only the facts at a pre-trial hearing when the legality of a search may later be proved by evidence introduced at trial. *Henning*, 975 S.W.2d at 299. The exclusionary rule's sole purpose "is to deter future Fourth Amendment violations." *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011). But the deterrent value of suppressing evidence is not the only consideration. *Id.* at 2427.

In many cases, the effect of excluding evidence is to "suppress the truth and to set the criminal loose in the community without punishment." *Id.* Therefore, a court must balance the potential for suppressing reliable evidence and letting guilty criminals go free with the need to deter future Fourth Amendment violations. *Id.* Such a determination depends not only on the legality of the initial warrant or authorization for search, but also on a myriad of other factors, including the culpability of the officers' conduct. *See United States v. Leon*, 468 U.S. 897, 909 (1984). Thus, the question of whether evidence should be excluded depends on more than simply the

validity of a warrant or a magistrate's verbal search authorization.[2] When a trial court considers the validity of a search warrant pre-trial, it necessarily rules upon limited information—usually the affidavit the magistrate based its authorization upon. The facts of the case will inevitably be more rigorously expanded at trial. To limit an appellate court to considering only the facts available at the pre-trial stage would be to limit its ability to weigh the purposes underlying the exclusionary rule in general and the trial court's application of those policies to the case at hand. This would be to "exalt form over substance." *Henning*, 975 S.W.2d at 298.

In this case, it is clear that certain facts developed at trial further supported the military judge's denial of the suppression motion. As the Appellant admits in his brief, the testimony at the suppression hearing was more limited than at trial. (Appellant's Br. 11.) The officer's testimony pre-trial regarding TC-D's statements was that "he used all sorts of

---

[2] The Appellant argues that this Court may only review the facts known to the military judge at the time of his ruling on the suppression motion. (Appellant's Br. 8.) This argument mischaracterizes the issue. The Appellant cites *United States v. Cowgill* as support. 68 M.J. 388 (C.A.A.F. 2010). However, in that case, whether the judge abused his discretion in denying the suppression motion turned on the validity of the magistrate's warrant. Therefore, this Court only reviewed the information known to the magistrate at the time, in order to review the legality of the *warrant*. *See Aguilar v. Texas*, 378 U.S. 108, 109 n. 1 (1964). Here, there is a broader issue—whether the evidence gleaned from the protective sweep should have been suppressed. When reviewing a ruling on a suppression hearing, the appellate court may consider all relevant facts from the record. *Cordero*, 11 M.J. at 215 n. 3 (citing *Carrol*, 267 U.S. at 162).

vulgarities telling the police to get the F-U-C-K off his property, and 'you don't have any right to do this,' and all that." *Id.* However, on review, 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 'cops can all die.'" *Id.* This latter testimony, which was developed at trial under the rigor of the military rules of evidence and was subjected to cross-examination by defense counsel, clearly provides a more accurate indication of what TC-D *actually* said to the officers.

The exclusionary rule is concerned precisely with the truth of what was *actually* said to the officers as they entered the Appellant's home because the rule is concerned with the culpability of the officers' conduct. *Leon*, 468 U.S. at 909. These statements are relevant to the officers' perceived necessity to conduct a protective sweep of the entire house. Thus, the Appellant's own concessions show why this case is a prime example of the importance of allowing an appellate court to consider the entire record on review of a suppression motion.

Certainly, a defendant would have the opportunity to renew a suppression motion at trial if further evidence of the illegality of a search surfaced. Likewise, an appellate court should be able to support a trial judge's denial of a

suppression motion with information from the entire record. By reviewing the entire record, the appellate court will have a more holistic picture of whether the trial court's ruling on the suppression motion comports with the purposes underlying the exclusionary rule.

II. The privacy interest of individuals in their homes must be balanced against the interest of police officers in ensuring their own safety in potentially dangerous situations, and officers must be allowed to engage in a protective sweep when the totality of the circumstances is enough to support such a sweep.

Longstanding principles of law dictate that the reasonableness of a given search be assessed by balancing its intrusion on an individual's privacy against its promotion of legitimate governmental interests. *Maryland v. Buie*, 494 U.S. 325, 331 (1990). Applying this balancing test, the Supreme Court in *Maryland v. Buie* found permissible a limited warrantless search, or protective sweep, of a home by officers executing an arrest warrant inside the home, when the officers have a reasonable suspicion that an individual posing a threat to the officers is present elsewhere on the premises. *Id.* at 334. The governmental interest at play in these situations is "the interest of the police 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." *Id.* at 333.

In arriving at this conclusion, the Supreme Court recognized that a limited search of an individual's home "constitutes a severe, though brief, intrusion upon cherished personal security." *Id.* (citing *Terry v. Ohio,* 392 U.S. 1, 24-25 (1968)). Nonetheless, where police have arrested a person inside a home, the Court was "quite sure… that the arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest." *Id.* at 334. The interest of ensuring the safety of officers and others at the scene of an arrest "is sufficient to outweigh the intrusion such procedures may entail." *Id.*

In this case, the military judge correctly found that the Government sustained its burden of showing "[u]nder the particular facts of this case, th[at] law enforcement agents had reasonable suspicion to believe that an individual or individuals who posed a danger to the agents may have been hiding in the residence..." (JA 132.) The military judge also correctly found that the scope of the sweep proper based on the entirety of the circumstances. (JA 132.)

A. The military judge properly concluded that the facts were sufficient to uphold the legality of the protective sweep.

The inquiry into whether a particular protective sweep was justified is "exceptionally fact-intensive." *United States v. Starnes*, 741 F. 3d 804, 809 (7th Cir. 2013). At the time of the protective sweep, officers knew 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 most important,
> 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.

(JA 8-9.) Keefauver does not dispute these facts; he argues that the military judge's findings were merely "speculative conclusion[s]" and that such "speculation and conjecture did not equate to particularized, individual suspicion." (Appellant's Br. 17, 19.)

To bolster this statement, Keefauver cites to several cases where courts found inadequate facts to support protective sweeps. *United States v. Moran Vargas*, 376 F.3d 112, 114-16 (2d Cir. 2004) (finding that generalized beliefs about the dangerousness of drug traffickers were not sufficient to justify

the protective sweep); *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) (finding that when officers had no reason to believe there was anyone else present, and where the reason given for the sweep was "to ascertain whether or not there was anyone in the residence that could be a threat," the protective sweep was unjustified); *United States v. Colbert*, 76 F.3d 773, 777-78 (6th Cir. 1996) (finding that where an officer "didn't have any information at all" as to the existence of danger, that "[l]ack of information cannot provide an articulable basis upon which to justify a protective sweep.").[3]

Keefauver argues that the guiding principle of these cases is "that lack of information cannot justify a protective sweep." (Appellant's Br. 18.) However, these cases are easily distinguished on that principle. Here, unlike in *Moran Vargas*, officers had more than just suspicion of drug traffickers generally. They had particularized, individual suspicion based on the fact that, in addition to having had an eight-pound package that contained marijuana delivered to the home, (JA 125), (1) officers did not see anyone leave the premises during several hours of surveillance, (JA 118), (2) the house smelled

[3] Keefauver also cites to *United States v. Chaves* for the same proposition. 169 F.3d 687, 692 (11th Cir. 1999) (citing *Colbert*, supra, and *Sharrar v. Felsing*, 128 F.3d 810, 825 (3rd Cir. 1997) (finding that a "lack of information" about whether other individuals are on the premises "cannot justify [a] warrantless sweep.").

of marijuana upon the officers' entrance, (JA 187) and (3) TC-D had an aggressive outburst when they entered. (JA 59.)

Unlike in *Rudaj* and *Colbert*, officers in this case did in fact have reason to believe that there may be others present in the home. Officers knew that three individuals other than Keefauver lived in the home and that, during the course of their surveillance, no one had been seen leaving the premises. (JA 8.) While police arrested one individual, Keefauver's son, they did not know the whereabouts of the other members of Keefauver's family, (JA 8-9), including his wife, who "was in her room upstairs most of the time", (JA 340), or of Keefauver himself, an individual with military training, suspected of involvement in drug distribution. (JA 8.) At least one circuit court has found protective sweeps valid where "[w]hen the law enforcement officers entered the house…they had no way of knowing how many people were there." *United States v. Horne*, 4 F. 3d 579, 586 (8th Cir. 1993); *see also United States v. Boyd*, 180 F.3d 967, 975 (8th Cir. 1999).

Keefauver alleges that agents "conducted the sweep merely because '[i]t's standard procedure for any law enforcement to clear a house.'" (Appellant's Br. 19); (JA 42-43.) The actual circumstances of the protective sweep, however, reveal a different story. SA SR received verbal authorization to search the home of a military-trained individual suspected of drug

distribution, a violent activity.[4] (JA 39.) Officers surveilled the home for several hours, during which time no one left the premises and the whereabouts of the occupants of the home were unknown. (JA 8.) Upon entering the home, officers detected a strong odor of marijuana, (JA 187), an indication that someone may have been smoking more recently than two hours prior to officers' entrance into the home (the approximate length of time over which they surveilled the premises). (JA 40.) Lastly, upon their entrance, TC-D exploded into invective against police. (JA 59.) While this alone does not lead inexorably to the conclusion that TC-D was alerting the occupants of the house to the officers' presence, it is an entirely reasonable conclusion based on the entirety of the circumstances.

Keefauver argues that each of these individual facts is not enough to warrant a protective sweep. However, courts do not engage in such piecemeal analysis; they instead view the situation as a whole. *See United States v. Taylor*, 248 F.3d 506, 514 (6th Cir. 2001) (concluding that a protective sweep was justified based on "the totality of the circumstances."). Here, officers had particularized, individualized suspicion based on a number of articulable facts which would allow a reasonable

---

[4] *See United States v. Robinson*, 119 F. 3d 663, 667 (8th Cir. 1997) (finding that "[i]t is reasonable for an officer to believe that an individual may be armed and dangerous when that individual is suspected of being involved in a drug transaction because 'weapons and violence are frequently associated with drug transactions.'" (citations omitted)).

officer to believe that there may have been other, possibly dangerous, individuals inside Keefauver's home. Officers had more than enough information to justify the protective sweep, and the scope of that sweep.

B. The evidence shows that the scope of the protective sweep was appropriately tailored to the circumstances of the arrest, thus, the military judge did not err in finding the sweep appropriate.

A protective sweep has two steps. First, officers may, as an incident to arrest and "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*, 494 U.S. at 334. To expand the sweep beyond the area immediately adjoining the place of arrest, officers must provide "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.*

A protective sweep is limited in two ways. First, such a sweep 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 [their work] and depart the premises." *Id.* at 335-36. Second, a protective sweep "is a quick and limited search of the premises" and "is narrowly confined to a cursory

visual inspection of those places in which a person might be hiding." *Id.* at 327. The protective sweep of Keefauver's home was properly limited both in its length and its breadth.

The protective sweep of Keefauver's home was limited in time to "no longer than is necessary to dispel the reasonable suspicion of danger." *Id.* at 335-336. SA SR testified that his sweep of the home lasted only "a couple of minutes."(JA 64.) Further, he explained that, once he "determine[d] that there's no one in that room," he then moved on to a sweep of the next room. (JA 64-65.)

The protective sweep conducted by SA SR was also appropriate in that it was "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Buie* at 327. SA SR testified that the sweep included looking "under beds...on the opposite side of beds, in closets." (JA 64.) He testified that during the sweep, he saw in plain view, "a bag of marijuana sitting on the bed," "a purple figurine kind of thing with...what appeared to be a marijuana cigar sticking out of its mouth" on the headboard shelf, and "a smoking device up on the top shelf" of an open closet. (JA 43.) In a hallway closet, he saw "a couple of rifles." (JA 43.) He saw boxes, "laying next to the bed in the master bedroom that looked similar to the package that was downstairs." (JA 46.) In the kitchen, he saw a pipe out on the counter. (JA 45.) There

is no indication that SA SR dug through any drawers, rifled through closets, or looked anywhere but in those places where someone may have been hiding.

It was also reasonable for the sweep to encompass the entirety of the dwelling. First, the person who was suspected of engaging in drug trafficking, the defendant, had not yet been located, and his whereabouts were unknown. (JA 8.) Further, when TC-D brought the box into the house, he set it down in the entryway of the home, next to the stairs; the second floor therefore presented an advantageous position from which to attack police in foyer. (SJA 013) Officers also knew that Keefauver's entire family lived in the home, and that there were three bedrooms located upstairs. (JA 42.) Lastly, at the time of their entrance into the home, officers believed that they had authorization to bring in drug dogs to do a sweep of the entirety of the house. (JA 39-40.) As such, it was reasonable for them to secure both levels of the home, with the knowledge that the dogs and their handlers would soon be walking through it.

In other cases, courts have found sweeps of an entire dwelling justified because "[t]he safety of the officers, not the percentage of the home searched, is the relevant criterion." *United States v. Thomas*, 429 F.3d 282, 287 (D.C. Cir. 2005). In a case analogous to this one, *United States v. Cash*, officers

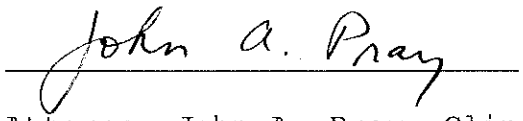
engaged in a protective sweep of the home of a suspected drug trafficker. 378 F.3d 745 (8th Cir. 2004). The court found that "an officer arresting a suspected drug trafficker in one room of a multi-room residence is justified in conducting a *Buie* sweep out of concern that there could be individuals lurking in the other rooms who may resort to violence to thwart the arrest." *Id.* at 749.

Another court upheld the broad protective sweep of a home despite the fact that the arrest took place outside. In *United States v. Lawlor*, an officer reported to the scene of a gunshot and an altercation in the driveway. 406 F.3d 37, 38 (1st Cir. 2005). The officer knew there to be at least two people living in the house, and knew that its occupants were involved in drug-related activities. *Id.* at 42. Though the altercation and the subsequent arrest both occurred outside, the court nonetheless upheld the officer's protective sweep of the inside of the house, specifically noting the broad scope of the sweep: the officer "walked first through the kitchen, then the living room, and then two rooms off of the living room… [a]fter looking into one final room" the officer went back outside. *Id.* at 39. The court further noted that, as in this case, "there can be no objection to the scope of the sweep, as [the officer] conducted a cursory inspection of only those spaces where a person could have been found." *Id.* at 42.

In sum, the military judge properly concluded that the protective sweep was valid. A prudent officer could reasonably believe that the home may have harbored one or more dangerous individuals because (1) Keefauver had been mailed an eight-pound box containing marijuana that had (2) been identified as such by two individuals trained in drug identification and by a drug-sniffing dog; (3) one of those individuals testified that the individuals in the house would "have been in danger due to the drug trafficking"; (4) the whereabouts of Keefauver and the home's other occupants were unknown; and (5) TC-D had an aggressive outburst when officers entered the home, possibly alerting the suspect to their presence and subjecting them to attack.

Conclusion

For the reasons stated above, the amicus curiae submit this brief in support of Appellee and respectfully ask this Court to affirm the Army Court of Appeals decision.

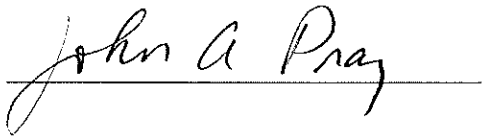


Attorney John A. Pray, Clinical Professor
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 263-7461
john.pray@wisc.edu

Assisted by:
Jake Blair, Law Student
Veronica Sustic, Law Student

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court by email on the 27th day of March, 2015. I further certify that this brief complies with the 7,000 word limit for amicus briefs under Rule 26, and has 3,782 words.



Attorney John A. Pray