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# THE FEDERAL LAW ENFORCEMENT - INFORMER -

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW  
ENFORCEMENT OFFICERS AND AGENTS

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# The Informer – July 2015

## Case Summaries

### **United States Supreme Court**

**City of Los Angeles v. Patel:** Whether a provision of the city’s municipal code that authorizes law enforcement officers to conduct warrantless inspection searches of hotel records is constitutional.....4

**Kingsley v. Hendrickson:** Whether the standard for judging a pre-trial detainee’s excessive force claim against officers is an objective one or a subjective one.....5



### **Circuit Courts of Appeals**

#### **Second Circuit**

**United States v. Bershchansky:** Whether officers exceeded the scope of a warrant by searching an apartment that was not included in the warrant.....6

**United States v. Thomas:** Whether an officer in a child pornography investigation was required to include in his search warrant affidavit the name of the third-party software he used to establish probable cause to search the defendant’s computer.....7

#### **Seventh Circuit**

**United States v. Shields:** Whether officers established reasonable suspicion to stop the defendant.....8

**United States v. Gary:** Whether officers established probable cause to arrest the defendant.....8

#### **Eighth Circuit**

**United States v. Trogdon:** Whether officers established reasonable suspicion to stop and then frisk the defendant.....9

**United States v. Smith:** Whether an officer lawfully extended the duration of a traffic stop after he smelled the faint odor of marijuana in the defendant’s vehicle.....10

**Ransom v. Grisafe:** Whether officers were entitled to qualified immunity for seizing the defendant after responding to a report of shots fired from his vehicle.....10

#### **Court of Appeals for the Armed Forces**

**United States v. Keefauver:** Whether officers exceeded the scope of a verbal search authorization when they conducted a protective sweep of the defendant’s entire house.....12



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# CASE SUMMARIES

## United States Supreme Court

**City of Los Angeles v. Patel, 576 U.S. \_\_\_\_ (2015), 2015 U.S. LEXIS 4065 (U.S. June 22, 2015)**

Los Angeles Municipal Code §41.49 requires hotel operators to record and keep specific information about their guests on the premises for 90 days. Section 41.49 also provides these records “shall be made available to any officer of the Los Angeles Police Department for inspection . . . at a time and in a manner that minimizes any interference with the operation of the business.” A hotel operator’s failure to make records available to an officer upon demand is a criminal misdemeanor, punishable by up to six months in jail and a \$1,000 fine.

Patel, a motel owner in Los Angeles, sued the city, asking the court to prevent the continued enforcement of §41.49’s warrantless inspection provision. Patel argued that as written, or on its face, §41.49 violated the *Fourth Amendment’s* prohibition against unreasonable searches and seizures.

The Ninth Circuit Court of Appeals agreed. Although Patel did not allege that an unconstitutional search occurred at his motel, the court nevertheless held that § 41.49 was invalid on its face. Specifically, the court concluded §41.49 violated the *Fourth Amendment* because it authorized the inspection of hotel records without allowing the hotel owner an opportunity to obtain judicial review of the reasonableness of an officer’s demand before being potentially jailed or fined for refusing to comply. The City of Los Angeles then appealed to the United States Supreme Court.

The Supreme Court, in a 5-4 decision, first held that Patel was entitled to challenge the constitutionality of §41.49 on its face, or without first having alleged that his hotel was subjected to an unconstitutional search under §41.49. The court further held the provision of §41.49 that requires hotel operators to make their registries available to the police upon demand was unconstitutional because it penalized the hotel operators for declining to turn over their records without affording them any opportunity for pre-compliance review.

The court reiterated the well-settled rule that warrantless searches of homes or commercial premises are *per se* unreasonable, unless they fall within one of the few established exceptions to the *Fourth Amendment’s* warrant requirement. One of these exceptions provides for warrantless administrative searches. The primary purpose of an administrative search is to ensure compliance with some type of governmental record keeping, health or safety requirement, and not for the discovery of criminal evidence. Under such circumstances, the court recognized the *Fourth Amendment’s* warrant and probable cause requirements were not practical; therefore, it was reasonable to allow warrantless administrative searches. However, the court held for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain pre-compliance review of the lawfulness of the search before a neutral decision maker. Without deciding the exact form an opportunity for pre-compliance review must take, the court indicated that an administrative subpoena would be sufficient in most cases. For example, in this case, if a subpoenaed hotel operator believed that an attempted search of his records was unlawful, he could request an administrative law

judge quash the subpoena before he suffered any criminal penalties for failure to comply with the subpoena. Conversely, if an officer reasonably suspected a hotel operator might tamper with the requested records while the motion before the judge is pending, the officer would be able to guard the records until the required hearing occurred. Finally, the court stressed that its holding had no bearing on cases where exigent circumstances would allow a warrantless records search or where the record owners consented to the search.

Click [HERE](#) for the court's opinion.

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**Kingsley v. Hendrickson, 576 U.S. \_\_\_\_ (2015), 2015 U.S. LEXIS 4073 (U.S. June 22, 2015)**

Kingsley was arrested and detained in a county jail pending trial. Officers forcibly removed Kingsley from his cell after he refused to comply with instructions to remove a piece of paper that was covering the light fixture above his bed. Kingsley later filed a lawsuit under 42 U.S.C. § 1983, alleging the officers used excessive force against him, in violation of the *Fourteenth Amendment's Due Process Clause* when they removed him from his cell.

The district court instructed the jury that to prevail, Kingsley had to establish the officers acted with malice and intended to harm Kingsley when they used force against him, a subjective standard. Kingsley disagreed, arguing the correct standard for judging a pretrial detainee's excessive force claim is objective unreasonableness.

The United States Supreme court accepted the case to resolve a split among the circuits and determine whether to prove an excessive force claim, a pretrial detainee must show the officers were subjectively aware their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable.

The Court concluded the appropriate standard to apply to a pretrial detainee's excessive force claim is an objective one. First, the court noted this holding is consistent with court precedent. In *Bell v. Wolfish*, the court held a pretrial detainee could prevail on an excessive force claim by providing objective evidence the alleged use of force was not related to a legitimate governmental objective or that the force was excessive in relation to the alleged reason for its use. Second, the court held an objective standard is "workable," as many facilities, including the one in this case, train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard. Finally, the court held the use of an objective standard protects an officer who acts in "good faith." The court recognized that running a detention facility is difficult and that officers facing disturbances are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving. In addition, the court explained as part of the objective reasonableness analysis, it is appropriate to give deference to a facility's policies and practices, which are in place to maintain order and institutional security.

Click [HERE](#) for the court's opinion.

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# Circuit Courts of Appeal

## Second Circuit

### United States v. Bershchansky, 788 F.3d 102 (2d Cir. 2015)

Federal agents suspected Bershchansky was offering child pornography for others to download on a peer-to-peer file-sharing network. The agents believed Bershchansky lived in apartment number 2 in a multi-family dwelling that contained three apartments. As a result, the agents obtained a warrant to search 2462 Gerritsen Avenue, Apt. #2, and seize evidence of child pornography. During a pre-search briefing, the agents' Enforcement Operation Plan repeatedly identified Apartment 2 as the place to be searched and included no other physical description of the building.

When the agents arrived at the building located at 2462 Gerritsen Avenue, they entered Apartment 1 and conducted their search, seizing a desktop computer and two external hard drives. Photographs of the exterior of building clearly showed that both the outer and inner doors to the apartments located within the building were clearly marked "1" and "2." Bershchansky was present during the search of Apartment 1 and admitted to receiving and possessing child pornography. A forensic examination of the seized computer and hard drives revealed files containing child pornography. Bershchansky was arrested and charged with possession of child pornography.

Bershchansky filed a motion to suppress his incriminating statement and the evidence discovered in the search of Apartment 1.

The district court concluded the agents exceeded the scope of the warrant by searching Apartment 1 because the warrant only authorized the agents to search Apartment 2. As a result, the court ordered the suppression of the evidence seized and Bershchansky's statements made during the execution of the warrant. The government appealed.

The court of appeals affirmed the district court, holding it was apparent from the face of the warrant as well as the agent's supporting affidavit that the magistrate judge authorized a search of Apartment 2 only. The finding of probable cause was based on evidence that child pornography was being shared from a computer with an internet protocol (IP) address the agent believed was associated with a user in Apartment 2. In addition, the agent repeatedly referred to Apartment 2 in his affidavit and represented that he received confirmation from the internet service provider, the utility company and a neighbor that Apartment 2 was the apartment in question. Consequently, when the agents searched Apartment 1 rather than Apartment 2, they searched an apartment the magistrate judge did not authorize them to search. When they did so, the agents conducted a warrantless search in violation of the Fourth *Amendment*.

The court further held the good faith exception to the exclusionary rule did not apply because it was not objectively reasonable for the agents to believe they were authorized to search Apartment 1 when the warrant clearly authorized only a search of Apartment 2. The court added that a reasonable police officer would have recognized the warrant authorized only a search of Apartment 2. The court further stated a reasonable police officer would have

contacted the magistrate for permission to search Apartment 1 instead of bypassing constitutionally mandated procedure and taking a shortcut.

Click [HERE](#) for the court's opinion.

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**United States v. Thomas, 2015 U.S. App. LEXIS 9733 (2d Cir. Vt. June 11, 2015)**

During an investigation into child pornography offenses committed by using peer-to-peer (P2P) file-sharing software, an officer used an automated software program called Child Protective Systems (CPS) to identify an internet protocol (IP) address traced to Thomas' house that offered to share images and video files tagged as child pornography. A private company created CPS, which it licenses to law enforcement agencies. Before CPS was available, officers would attempt to detect files containing child pornography by manually sending out search queries over P2P networks. CPS automates this process by canvassing P2P networks, identifying files that contain child pornography, cataloguing this information, and providing officers with a list of the online users who are sharing these files over P2P networks. After the officer confirmed the files identified by CPS constituted child pornography by comparing their hash values with the hash values of images of known child pornography, he obtained a warrant to search Thomas' house and computers. In his affidavit, the officer provided a detailed explanation of P2P file sharing, how P2P child file-sharing software is used to exchange child pornography, how CPS was used in the investigation and a description of the files that CPS detected on Thomas' computer. The affidavit did not identify the company that created CPS nor did it refer to the CPS software by name. After files containing child pornography were discovered on Thomas' computer, he was arrested.

Thomas argued the evidence discovered on his computer should have been suppressed because the officer omitted from the search warrant affidavit the fact that CPS, a third-party software source, generated the information upon which the government relied to establish probable cause. Thomas also argued the search warrant affidavit did not include any information regarding the reliability of the CPS software.

The court disagreed. First, the CPS software merely aggregated existing public information; therefore, the fact that a third party created it was not relevant. In addition, Thomas provided no authority to support his argument that the government was required to disclose the commercial name of the software used to uncover evidence of his crime. The court noted that just as an informant's name can be presented anonymously in an affidavit, so can a company's name. Probable cause determinations are made on the veracity of an informant's information, not on the informant's name. Similarly, the court found the primary relevance of automated third-party software is not in the name of the software, but in how the software works. In this case, the officer described in his affidavit the CPS software's purpose and then described in considerable detail how the software operated. No additional or more specific information was required.

The court further held the search warrant affidavit established the reliability of the CPS software. The officer verified and corroborated the information received from CPS through a hash value analysis and made a reasonable argument that evidence of a crime would be found on Thomas' computer.

Click [HERE](#) for the court's opinion.

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## **Seventh Circuit**

### **United States v. Shields, 2015 U.S. App. LEXIS 10058 (7th Cir. Ill. June 15, 2015)**

Two police officers saw Shields' parked SUV partially blocking a crosswalk, in violation of the law. One of the officers approached Shields, who was sitting in the driver's seat of the SUV and asked for his driver's license. After handing the officer his license, Shields voluntarily exited the SUV and at the officer's request, walked toward the rear of the vehicle with the officer. When Shields reached the rear of the SUV, he did not stop to talk to the officers, but instead fled down the street. While chasing Shields on foot, one of the officers saw Shields pull a firearm out of his coat pocket. The officer caught Shields in an alley and pushed him to the ground. The officer handcuffed Shields and discovered a loaded revolver on the ground underneath him. The government charged Shields with being a felon in possession of a firearm.

Shields filed a motion to suppress the firearm, arguing the officers conducted an unlawful traffic stop.

First, the court held when the officers saw Shields' SUV blocking the crosswalk, they had reasonable suspicion to conduct a *Terry* stop to investigate the parking offense. Second, Shields' decision to run from the officers constituted another violation because Shields was interfering with the performance of the officers' duty to investigate and, if appropriate, hold him accountable for the parking violation. Finally, once the officer saw Shields remove the firearm from his pocket he had probable cause to arrest Shields for unlawful carrying of a firearm. As a result, the court held the officer lawfully seized Shields when he tackled Shields in the alley and lawfully seized the firearm, which was in plain sight on the ground underneath Shields.

Click [HERE](#) for the court's opinion.

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### **United States v. Gary, 2015 U.S. App. LEXIS 10381 (7th Cir. Ill. June 19, 2015)**

An undercover officer saw Gary talking on a cell phone in the passenger seat of a car when the officer bought heroin from the driver of the car. During this time, the driver did not attempt to conceal the drug transaction from Gary. A short time later, uniformed officers conducted a traffic stop of the car at the request of narcotics officers. During the stop, officers discovered heroin on the driver of the car and arrested him. In addition, the officers handcuffed and transported Gary to the police station so his parole officer could speak to him. The government later indicted Gary for conspiracy to distribute heroin.

Gary argued the officers did not have probable cause to seize him and transport him to the police station because the arresting officer admitted the sole reason Gary was seized was to bring him to speak with his parole officer. Gary also argued his mere presence in the car with the driver who sold drugs to the undercover officer was not enough to establish probable cause to arrest him.

While conceding that Gary's seizure amounted to an arrest, the government argued Gary's arrest was supported by probable cause.



The court agreed with the government, holding the arresting officer's subjective intent in arresting Gary was irrelevant as long as there was objective probable cause for the arrest. Here, the court concluded there was probable cause for the undercover officer to believe Gary conspired with the driver of the car who sold him the heroin. First, Gary was sitting next to the driver when the driver sold the officer heroin without any attempt to conceal the transaction. In such close quarter, the court determined it was reasonable to infer that Gary and the driver were probably engaged in a common criminal enterprise. Given the reasonable inference that Gary was engaged in a common and unlawful enterprise with the driver, the officer did not arrest Gary because of his mere presence in the car.

Click [HERE](#) for the court's opinion.

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## **Eighth Circuit**

### **United States v. Trogdon, 2015 U.S. App. LEXIS 10243 (8th Cir. Iowa June 18, 2015)**

At approximately 1:00 a.m., officers in a marked squad car were patrolling an area near a commercial building where a shooting had recently occurred as well as other violent crimes and criminal activity. When the officers saw five individuals loitering near the building, which was closed for business, they decided to investigate whether or not the group was trespassing. The officers knew one of the occupants of the building had posted "No Trespassing" signs on the property and had filed a letter of trespass with the city, requesting police assistance in keeping the property free of trespassers. When the officers got close to the group, the officers recognized that one of the individuals was a gang member who was also a suspect in a murder investigation. Upon seeing the squad car, the group began to walk briskly away from the approaching officers down a blocked-off street. As the group walked away, officers saw Trogdon place something on the ground. The officers ordered Trogdon to stop, and when he did, an officer grabbed Trogdon's arm and attempted to frisk him. When Trogdon pulled away from the officer, another officer took him to the ground and handcuffed him. Trogdon then told the officers he had a firearm, and the officers found a handgun concealed in the waistband of his pants. Trogdon was charged with being a felon in possession of a firearm.

Trogdon argued the handgun should have been suppressed because the officers did not have reasonable suspicion to stop and frisk him.

The court disagreed. First, the officers saw Trogdon loitering late at night near a commercial building, which was located in a high-crime area. Second, the officers knew one of the building's occupants had posted "No Trespassing" signs and had requested police assistance in removing trespassers. Third, because it was late at night, the officers knew the businesses in the building were closed and there did not appear to be a legitimate reason for Trogdon and the others to be on the property. Based on these facts, the court concluded the officers established reasonable suspicion that Trogdon and the others were trespassing; therefore, they were entitled to conduct a *Terry* stop.

The court further held the officers were entitled to conduct a *Terry* frisk because they established reasonable suspicion that Trogdon was armed and dangerous. First, the officers knew that one of the members of the group was a murder suspect. As a result, the officers

were entitled to take Trogdon's association with this person into account in determining whether Trogdon might also be armed. Second, after noticing the officers, the group immediately began to walk away from the officers down a blocked-off street where it would be difficult for a police car to follow. Finally, the officers saw Trogdon place something on the ground as he walked away, suggesting that he was trying to hide something from the officers.

Click [HERE](#) for the court's opinion.

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**United States v. Smith, 2015 U.S. App. LEXIS 10337 (8th Cir. Minn. June 19, 2015)**

An officer stopped Smith for speeding. While speaking with Smith, the officer noticed a "slight odor of marijuana" coming from within Smith's car. After Smith denied consent to search, the officer requested a K-9 to conduct a dog sniff of Smith's car. As the K-9 unit approached, Smith sped away from the scene. After a brief vehicle pursuit, Smith abandoned his car and fled on foot. Smith escaped; however, the officers searched his car and found two kilograms of cocaine, a large sum of currency and a loaded handgun. Officers later arrested and charged him with drug and weapons offenses.

Smith argued the evidence seized from his car should have been suppressed because the faint smell of marijuana detected by the officer did not justify extending the duration of the traffic stop for speeding.

The court disagreed. The Eighth Circuit has held numerous times that the smell of marijuana, whether faint or strong, coming from a vehicle during a lawful traffic stop, gives an officer probable cause to search the vehicle for drugs. Here, the officer testified he had been trained in the detection of controlled substances, including the odor of marijuana. As a result, the officer had probable cause to search Smith's car once he smelled the odor of marijuana, even though he took the less intrusive approach by calling the K-9 unit to conduct a sniff of Smith's car first.

In addition, the court held the evidence seized from Smith's car was admissible as Smith gave up any reasonable expectation of privacy in his car and its contents when he abandoned it on side of the road after leading the officers on a high-speed chase.

Click [HERE](#) for the court's opinion.

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**Ransom v. Grisafe, 2015 U.S. App. LEXIS 10441 (8th Cir. Mo. June 22, 2015)**

Ransom was driving home from work on a dark, raining night. When his van began to backfire, Ransom pulled over to the side of the road. Someone who heard the sounds from Ransom's van called 911 and reported that gunshots had been fired from or near the van. Two patrol officers responded and pulled up behind Ransom's van. Seconds later, the van backfired again, and the driver's-side door opened. One of the officers yelled at Ransom to get back into the van, but Ransom, appearing not to hear the command, stepped out. At that time, both officers fired a total of eight shots at Ransom. Ransom did not react as if he had been shot, nor did he appear to notice the officers had fired at him. The officers ordered Ransom to lie on the ground and he complied. When the officers asked Ransom about the

gunshots, Ransom told them his van was backfiring. The officers told Ransom his van could not be backfiring because one of the windows on their patrol car had been shot out. When other officers arrived on the scene, a sergeant directed two detectives to transport Ransom to the police station to be interviewed. The detectives transported Ransom to the station where they spoke to him for approximately thirty-five minutes before releasing him. The investigation revealed that Ransom's van had been backfiring, and that ricocheting bullets fired from the officers' guns had caused the damage to their patrol car.

Ransom sued the patrol officers, claiming the officers seized him in violation of the *Fourth Amendment* by shooting at him and then by ordering him to lie on the ground and handcuffing him.

The court disagreed. First, it was undisputed that none of the officers' rounds hit Ransom. However, assuming Ransom was grazed by bullet or piece of broken glass, the court held that any seizure that resulted was reasonable. First, the officers responded to a 911 call of shots fired from a van. Second, when the officers arrived, Ransom's van backfired; a sound that both sides agreed could have been mistaken for a gunshot. Third, Ransom then got out of the van and appeared to disregard the officer's commands to get back inside. As a result, the officers were justified in firing their guns at Ransom to neutralize what they reasonably believed to be a threat to themselves.

The court further held it was reasonable for the officers to order Ransom to the ground and handcuff him while they determined if there might be another person firing a gun at them. After detaining Ransom, the officers saw that one of their windows was shot out. Although it was later determined that a ricochet from one of the officers' bullets caused the damage to the patrol car, at the time, it was reasonable for the officers to believe there might be another person firing at them. Consequently, the court held the patrol officers were entitled to qualified immunity.

Ransom also sued the detectives, arguing they violated the *Fourth Amendment* by detaining him at the police station.

Again, the court disagreed. When the detectives arrived on the scene, the sergeant provided them with the facts that were known at the time. At that point, the court held it was objectively reasonable for the detectives to detain Ransom and drive him to the police station for an interview to determine if he had fired a gun at the patrol officers.

Finally, Ransom sued the sergeant, claiming the sergeant violated the *Fourth Amendment* rights by directing the detectives to obtain a statement from him at the police station.

The court held that even if the detectives had violated Ransom's *Fourth Amendment* rights by detaining him, the sergeant could not be held liable for a seizure effected by other officers.

Click [HERE](#) for the court's opinion.

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## **Court of Appeals for the Armed Forces**

### **United States v. Keefauver, 2015 CAAF LEXIS 547 (C.A.A.F. June 12, 2015)**

Postal inspectors discovered a heavily taped box that smelled of marijuana. Because the box was addressed to a house within Fort Campbell, Kentucky, the postal inspectors contacted a special agent with Criminal Investigation Command (CID) office's Drug Suppression team. The CID agent transported the box to Fort Campbell and obtained verbal authorization from the military magistrate to conduct a controlled delivery. The military magistrate authorized the agents to enter the house after the box was taken inside, seize the box and then search the room or immediate area in which the box was found.

Before conducting the controlled delivery, the agents discovered Keefauver, his wife, his sixteen-year old stepson, and his thirteen-year old son lived in the house. In addition, the agents learned that no one at the house had a firearm registered in his or her name. Before conducting the controlled delivery, the agents maintained surveillance on the house for one-hour, but during that time, they did not see anyone enter or exit. After one-hour, a postal inspector knocked on the front door, and when no one answered, he left the box on the front porch. The box remained on the porch until Keefauver's sixteen-year old stepson arrived home approximately one-hour later and took the box inside. At that point, CID agents and postal inspectors knocked on the door, and when the stepson answered it, they told him they would be conducting a search. After the stepson became verbally abusive, the agents handcuffed him and seated him outside the house next to the garage. The lead CID agent entered the house and found the box in the hallway, ten-feet from the door. After the agent noticed a strong odor of marijuana in the house, he decided to conduct a "security sweep" of the entire house. While sweeping the kitchen, the agent saw drug paraphernalia on the counter. On the second floor, the agent saw in plain view, marijuana and drug paraphernalia in the stepson's room, rifles in an unlocked walk-in closet off the hallway, and suspicious boxes in the master bedroom. Based on a misunderstanding of the verbal search authorization, the agents then conducted a second, full search of the home with military working dogs (MWDs).

Keefauver was convicted of wrongfully possessing marijuana, drug paraphernalia, and unregistered weapons on post as well as child endangerment in violation of several Articles of the Uniform Code of Military Justice.

Keefauver filed a motion to suppress all evidence, other than the original that contained marijuana, arguing, agents exceeded the scope of the military magistrate's search authorization by conducting a full sweep of his house. Specifically, Keefauver claimed the search authorization limited the agents to locating the box after the controlled delivery and searching the immediate area around the box.

The Court of Appeals for the Armed Forces agreed. In *Maryland v. Buie*, the United States Supreme Court created the "protective sweep" exception to the *Fourth Amendment's* warrant requirement. In *Buie*, the court authorized two types of protective sweeps. In the first type of sweep, officers may search only spaces immediately adjoining the place of arrest from which "an attack could be immediately launched," during or after an arrest. Officers may conduct this type of sweep as a precautionary measure, without reasonable suspicion or probable cause. The second, more extensive sweep authorized in *Buie* allows officers to make a protective sweep of areas beyond those immediately adjoining the place of arrest. To conduct

this type of sweep, officers must establish reasonable suspicion that the area to be swept harbors an individual who poses a threat to the officers. This type of sweep does not allow officers to conduct a full search of the premises, but rather only a search of areas or spaces where a person may be found. While *Buie* addressed the issue of protective sweeps in the context of arrests, a majority of federal circuits have held that officers who lawfully enter a home for reasons other than effecting an arrest, may make a protective sweep, as long as the *Buie* criteria are met.<sup>1</sup>

In this case, the court held the extensive protective sweep conducted of the entire house was unlawful, as the lead agent did not testify that he believed anyone was in the house after the stepson was taken outside. Instead, the agent testified the sweep of the entire house was “standard procedure.” The court emphasized this practice was in “perfect opposition” to the criteria from *Buie*, which requires reasonable suspicion to believe the area to be swept harbors an individual that poses a threat to the officers.

Even if the agent had testified he believed there was someone else in the house after the stepson was removed, the court concluded the facts presented would not have supported this conclusion. First, the agents conducted surveillance of the house for one-hour, during which time they did not see anyone enter or exit the house. Second, when the postal inspector knocked on the door to conduct the controlled delivery, no one answered the door. Third, after the postal inspector left the box on the porch, it remained there for approximately one-hour until the stepson arrived home and took the box inside. Fourth, when the agents entered the house, they handcuffed the stepson and detained him outside. Finally, one of the agents testified that before the stepson arrived at the house, the agent believed that “nobody was home.”

Click [HERE](#) for the court’s opinion.

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<sup>1</sup> Only the Tenth Circuit and one panel of the Ninth Circuit have read *Buie* so narrowly as to limit the scope of a protective sweep to in-home arrests only.