Protective Sweeps

"Protective sweeps are a necessary fact of life in the violent society in which our law enforcement officers must perform the duties of their office."[1]

While the objective of most police searches is to discover evidence of a crime, there exists a separate category of search—the protective search—whose sole purpose is to help protect officers from harm. There are four types of searches that fall into this category.

The most common is the pat search, which is aimed at discovering and removing weapons in the possession of detainees and arrestees. Protective vehicle searches are conducted for the same reason, except their objective is to locate weapons inside a stopped vehicle.[2] The third protective search is the so-called *Chimel* search, which is a search for weapons within "grabbing distance" of a person who has just been arrested.[3] These three types of protective searches have one thing in common: they are all searches for *weapons*.

The fourth type of protective search—the "protective sweep"—is different because it is a search for *people*.[4] Specifically, it is a search for people who pose a threat to officers who are lawfully inside a residence or other place.[5]

Most sweeps are conducted just after officers have arrested a suspect inside his house. These situations are notoriously dangerous because virtually everyone on the premises may present a threat, including the arrestee's spouse, parents, and friends. To make matters worse, as the U.S. Supreme Court has pointed out, the officers are on their adversary's' "turf":

> The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. . . . [U]nlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.[6]

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[1] *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017.

[2] See *Michigan* v. *Long* (1983) 463 US 1032, 1049-51; *People* v. *King* (1989) 216 Cal.App.3d 1237; *People* v. *Molina* (1994) 25 Cal.App.4th 1038, 1042; *People* v. *Lafitte* (1989) 211 Cal.App.3d 1429, 1433; *People* v. *Williams* (1988) 45 Cal.3d 1268, 1303.

[3] See *Chimel* v. *California* (1969) 395 US 752, 763 ["A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested."].

[4] See *Maryland* v. *Buie* (1990) 494 US 325, 335, fn.3 ["A protective sweep is without question a 'search'"]; *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1015 ["(T)he same considerations that justify [pat searches] and [vehicle protective searches] animate the exception for the 'protective sweep.'"].

[5] See *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017, fn.9 ["An unknown assailant who attacks officers departing from an arrestee's home poses an equivalent, if not greater, risk to the safety of the officers and others as does the assailant who attacks the officers upon entry."]; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1285 ["(Had the officers) left the building and made their way to their vehicles, the officers could have been targets for any armed confederate who might have remained in the apartment."].

[6] *Maryland* v. *Buie* (1990) 494 US 325, 333. ALSO SEE *People* v. *Hannah* (1996) 51 Cal.App.4th 1335, 1345 ["(I)t is reasonable to conclude the individuals [inside the house] may attempt to alert the suspect to the fact the police are there or might assist him in escaping."]; *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1015 ["Law enforcement officers have an interest in ensuring their safety when they lawfully enter a house to effect an arrest. That interest justifies their ensuring that the

Although the focus of this article is on sweeps that occur in conjunction with in-home arrests, they may sometimes be conducted when the arrest takes place outside the dwelling. In addition, sweeps are not limited to arrest situations.[7] This subject will be covered later.

Finally, if a sweep is reasonably necessary, it doesn't matter that officers are on the premises to, for example, conduct a probation, parole, or consent search; conduct a consent search; execute a search warrant; secure the premises pending issuance of a search warrant; or abate an emergency.[8]

As we will now explain, there are two types of protective sweeps, each with its own requirements and scope: (1) vicinity sweeps, and (2) full sweeps.

VICINITY SWEEPS

A vicinity sweep is a inspection of "spaces immediately adjoining the place of arrest" in which a person might be hiding.[9] Vicinity sweeps are like *Chimel* searches in that both may be conducted as a matter of routine. In other words, both are permitted whenever a lawful in-home arrest is made, regardless of whether officers have reason to believe there are weapons or dangerous people nearby.[10] Another similarity is that the searchable area of *Chimel* searches ("grabbing distance") and vicinity sweeps ("immediately adjoining spaces") begins at the point where the suspect was arrested.[11]

There are, however, two significant differences. First, as noted earlier, the objective of a vicinity sweep is to find *people*, while the main objective of a *Chimel* search is to find *weapons*.[12] Second, there is a difference in scope between "grabbing distance" and

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dwelling does not harbor another person who is dangerous and who unexpectedly could launch an attack."].

[7] See *U.S.* v. *Gould* (5th Cir. en banc, 2004) 364 F.3d 578, 584 ["(A)rrest is not always, or *per se*, an indispensable element of an in-home protective sweep, and that although arrest may be highly relevant, particularly as tending to show the requisite potential danger to the officers, that danger may also be established by other circumstances."]; *Mincey* v. *Arizona* (1978) 437 US 385, 392; *Thompson* v. *Louisiana* (1984) 469 US 17, 21-2; *People* v. *Boragno* (1991) 232 Cal.App.3d 378, 386; *People* v. *Keener* (1983) 148 Cal.App.3d 73, 77; *People* v. *Wharton* (1991) 43 Cal.3d 522. 578; *Tamborino* v. *Superior Court* (1986) 41 Cal.3d 919, 924.

[8] See *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 864 [probation search]; *U.S.* v. *Taylor* (6th Cir. 2001) 248 F.3d 506, 514 [securing premises pending issuance of a search warrant]; *U.S.* v. *Patrick* (D.C. Cir. 1992) 959 F.2d 991, 996 [consent search]; *U.S.* v. *Gould* (5th Cir. 2004) 364 F.3d 578, 581 [consent search]; *U.S.* v. *Daoust* (1st Cir. 1990) 916 F.2d 757 [search warrant for gun that was known to be located in the kitchen]; *Drohan* v. *Vaughn* (1st Cir. 1999) 176 F.3d 17 [search warrant]; *U.S.* v. *Arch* (7th Cir. 1993) 7 F.3d 1300, 1303-4 [exigent circumstances]; *U.S.* v. *Gandia* (S.D.N.Y. 2004) __ F.Supp.2d __ ["This Court disagrees with Gandia's contention that a protective sweep for officer safety is only lawful when incident to an arrest"].

[9] See *Maryland* v. *Buie* (1990) 494 US 325, 333.

[10] See *Maryland* v. *Buie* (1990) 494 US 325, 334 ["We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."]; *U.S.* v. *Ford* (D.C. Cir. 1995) 56 F.3d 265, 269 ["(The vicinity sweep) requires no probable cause or reasonable suspicion"]; *U.S.* v. *Vargas* (2nd Cir. 2004) __ F.3d __ .

[11] NOTE: If officers moved the suspect from the spot at which he was arrested before they began the vicinity sweep, they may nevertheless sweep the immediate area if they did so promptly after he was removed. See *In re Sealed Case* (D.C. Circ. 1998) 153 F.3d 759, 767 ["The critical time for analysis is the time of the arrest and not the time of the search."].

[12] See *Maryland* v. *Buie* (1990) 494 US 325, 336 ["(T)he justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house."]. NOTE: *Chimel* searches are

"immediately adjoining" spaces. Although they both cover a fairly small amount of territory, the area "immediately adjoining" the place of arrest will usually extend well beyond the arrestee's "grabbing distance." After all, even a "big" arrestee can only grab so far. But it is possible for a friend or accomplice of the suspect to launch a sneak attack from any hidden space in the immediate vicinity.

(In reality, a friend or accomplice could launch an attack from virtually *anywhere* on the premises. For example, an armed accomplice hiding in a closet on the other side of the house could sneak up on officers as they walk outside with the arrestee.[13] But because vicinity sweeps represent a compromise between the competing interests of officers and arrestees, the U.S. Supreme Court has ruled they must be limited to the area immediately adjoining the place of arrest.)

"Immediately adjoining" spaces

The question remains: How can officers determine what constitutes the space "immediately adjoining the place of arrest from which an attack could be immediately launched?" There is no easy answer because it depends a lot on the size and layout of the premises.[14] In most cases, however, it will be limited to spaces in the room in which the arrest occurred, although it may extend to other rooms depending on their proximity to the place of arrest and whether the rooms are separated by a closed door.

For example, in *U.S.* v. *Curtis*[15] officers lawfully arrested Curtis and Melvin in the living room of their two-bedroom apartment. While two officers guarded the arrestees, two other officers "swept" a living room closet, the adjoining kitchen, and two bedrooms located "down the hall." In the course of the sweep, they found drugs in the bedrooms. The court ruled the officers "could legitimately look in other spaces in the living room, in the open kitchen, and in the living room closet near the couch on which Melvin was sitting just prior to his arrest." But the sweep of the bedrooms was unlawful because "[t]here was no justification for a sweep of such remote areas."

What things may be inspected

Even if officers may lawfully sweep a certain room, they may inspect only those places and things in which a person might be hiding. For example, in *U.S.* v. *Ford*,[16] an FBI agent arrested Ford in the hallway of his home as Ford was stepping from a bedroom. While other officers guarded Ford, the agent walked into the bedroom and saw a gun clip in plain view. He then lifted a mattress and found drugs and ammunition. After that, he lifted a window shade and found a handgun on the sill.

The court ruled the agent's entry into the bedroom was lawful because "the arrest took place in the hallway, and the bedroom from which Ford emerged was immediately adjoining the hallway." Thus, the gun clip was seized lawfully. But the drugs,

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also based on the need to prevent the arrestee from concealing or destroying evidence. See *Chimel* v. *California* (1969) 395 US 752, 763.

[13] *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017, fn.9 ["An unknown assailant who attacks officers departing from an arrestee's home poses an equivalent, if not greater, risk to the safety of the officers and others as does the assailant who attacks the officers upon entry."].

[14] See *U.S.* v. *Lauter* (2nd Cir. 1995) 57 F.3d 212, 217 [vicinity sweep was "well within the scope of a permissible protective sweep, particularly in light of the small size of the apartment."]; *U.S.* v. *Sunkett* (N.D. Ga. 2000) 95 F.Supp.2d 1367, 1368 ["Consideration must be given to the size and layout of the apartment in light of the justification for the limited search."]; *U.S.* v. *Curtis* (D.C. Cir. 2002) 239 F.Supp.2d 1, 4 ["(T)he living room was very large, covering at least one-third of the square footage of the apartment. It was large enough to hold a pool table."].

[15] (D.C. Cir. 2002) 239 F.Supp.2d 1.

[16] (D.C. Cir. 1995) 56 F.3d 265.

ammunition, and handgun were ordered suppressed because, said the court, it was apparent that no one was hiding under the mattress or behind the window shade.

FULL SWEEPS

As the name implies, a "full" protective sweep of a home or other structure is an inspection of every space on the premises in which a person might be hiding. Because a "full" sweep constitutes a much greater intrusion on the occupants' privacy than a vicinity sweep, full sweeps are permitted only if officers were aware of facts that reasonably indicated, (1) there was a person on the premises (other than the arrestee), and (2) that person posed a threat to the officers.[17]

Note that the required level of proof is merely reasonable suspicion, not probable cause.[18] Accordingly, full sweeps are permitted if the circumstances were consistent with the presence of such a threat, or even if there might have been an innocent explanation for circumstances that caused the officers to be concerned.[19] As the court observed in *U.S.* v. *Henry*:

> While it is true that the officers could not be certain that a threat existed inside the apartment, this does not impugn the reasonableness of their taking protective action. It is enough that they have a reasonable basis for believing that their search will reduce the danger of harm.[20]

Still, because reasonable suspicion cannot exist without some factual basis, sweeps may not be conducted as a matter of routine or departmental policy. Thus, in ruling the sweep of the defendant's home was unlawful, the court in *U.S.* v. *Brown* said, "[T]he protective sweep was not based upon any articulable suspicion, but rather was undertaken as a matter of standard ATF policy."[21]

Nor may sweeps be conducted on grounds that officers had no information that a threat did not exist and, therefore, the existence of a threat could not be ruled out. In the words of the U.S. Court of Appeal, "'No information' cannot be an articulable basis for a sweep that requires information to justify it in the first place."[22] Thus, in *U.S.* v. *Ford*[23]

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[17] See *Maryland* v. *Buie* (1990) 494 US 325, 334; *In re Sealed Case* (D.C. Circ. 1998) 153 F.3d 759, 769; *Sharrar* v. *Felsing* (3rd Cir. 1997) 128 F.3d 810, 825 ["the possible presence of anyone being [on the premises is] the touchstone of the protective sweep analysis."]. NOTE: Even before *Buie* was decided, California courts were applying this test. See *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 9 [sweep permitted incident to an in-home arrest if "the police have reasonable grounds for fearing for their security in the discharge of their duties."]; *People* v. *Block* (1971) 6 Cal.3d 239, 244. NOTE: There is arguably an additional requirement that the officer's primary motivation must have been to eliminate a threat, as opposed to obtaining evidence. But because full sweeps based on reasonable suspicion are objectively reasonable, the officers' motive should be irrelevant. See *Whren* v. *United States* (1996) 517 US 806, 811-2.

[18] See *People* v. *Celis* (2004) 33 Cal.4th 667, __ ["A protective sweep can be justified merely by a *reasonable suspicion* that the area to be swept harbors a dangerous person."]; *U.S.* v. *Daoust* (1st Cir. 1990) 916 F.2d 757, 759.

[19] See *United States* v. *Sokolow* (1989) 490 US 1, 10; *New Jersey* v. *T.L.O.* (1985) 469 US 325, 346; *People* v. *Souza* (1994) 9 Cal.4th 224, 233; *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 863; *People* v. *Britton* (2001) 91 Cal.App.4th 1112, 1119.

[20] (D.C. Cir. 1995) 48 F.3d 1282, 1284.

[21] (1999) 69 F.Supp.2d 925, 930. ALSO SEE *Indiana* v. *Estep* (Ind. App. 2001) 753 N.E.2d 22, 28 [officer testified that "a sweep is departmental policy and that felons ideally run with other felons."].

[22] *U.S.* v. *Colbert* (6th Cir. 1996) 76 F.3d 773, 778. ALSO SEE *People* v. *Celis* (2004) 33 Cal.4th 667, __ ["(T)he officers had not been keeping track of who was in the house."]; *Sharrar* v. *Felsing* (3rd Cir. 1997) 128 F.3d 810, 825; *U.S.* v. *Chaves* (11th Cir. 1999) 169 F.3d 687, 692 ["(T)he officers' lack of information cannot justify the warrantless sweep in this case."].

[23] (D.C. Cir. 1995) 56 F.3d 265, 270, fn.7.

the court ruled a sweep was unjustified because the only reason given by the FBI agent for conducting it was, "I did not know if there was anybody back there. I wanted to make sure there was no one there to harm us."

Likewise, a sweep is not permitted merely because there existed an abstract or theoretical possibility of a threat.[24] Officers may, however, interpret the facts in light of their training and experience. As the Court of Appeal observed, "[T]he officer's training and experience can be critical in translating observations into a reasonable conclusion."[25]

Relevant circumstances

In most cases, reasonable suspicion to conduct a sweep is based on circumstantial evidence.[26] The following are examples.

PERSON ON PREMISES: An officer's belief that there was someone on the premises (other than the arrestee) will commonly be based on one or more of the following circumstances:

PARKED CARS: Two or more cars were parked in the driveway or so close to the house as to indicate the occupants might be inside. For example, in *People* v. *Ledesma* the court, in ruling a full sweep was justified, noted that an officer saw two cars "parked sufficiently close to the residence to create a reasonable possibility that former occupants of the vehicles might be inside."[27]

TIME OF DAY OR NIGHT: Officers entered the premises at a time when most people are asleep, and they knew the arrestee lived with one or more other people; i.e., it was reasonable to believe the other occupants were at home.[28]

WARNING TO OCCUPANTS: The arrestee or other occupant yelled or did something that reasonably indicated he was attempting to warn someone on the premises of the officers' arrival.[29]

VOICES: Officers heard what sounded like the voices of two or more people in the residence and, upon entering, could not be sure that everyone was accounted for.[30] (Actually, the sound of even one voice would indicate the presence of two or more people.)

OTHER SOUNDS: After entering and arresting the suspect, officers heard a sound from within the house which could have been made by a person.[31]

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[24] See *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 866 ["Defendant correctly argued that the mere abstract theoretical possibility that someone dangerous might be inside a residence does not constitute articulable facts justifying a protective sweep."].

[25] *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 866.

[26] See *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1016 ["Of course, all these factors must be assessed from the perspective of the officer on the scene. It is the reasonableness of the officer's judgment at the time he was required to act that counts."].

[27] (2003) 106 Cal.App.4th 857, 866.

[28] See *U.S.* v. *Daoust* (1st Cir. 1990) 916 F.2d 757, 759 ["The officers searched the house at 7:00 A.M., a time when Daoust might have been at home sleeping"].

[29] See *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396, fn.7 ["It was also reasonable for the officers to infer that Hoyos was trying to warn others inside"].

[30] See *U.S.* v. *Taylor* (6th Cir. 2001) 248 F.3d 506, 514 ["(The officers) had heard noises suggesting that more than one person was present in the apartment."]; *People* v. *Mack* (1980) 27 Cal.3d 145, 149 [officers heard "multiple voices" inside the garage]; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [when officers arrived outside the defendant's motel room, they saw someone open the curtains then immediately close them, then they heard someone inside say "It's the fucking pigs."]; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1193 [after officers knocked and announced, someone yelled "cops," then there was a "commotion in the room."].

[31] See *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 9 ["(U)pon entering the apartment the officer had heard sounds coming from elsewhere than the open areas."]; *U.S.* v. *Taylor* (6th Cir. 2001)

MOVEMENT: Officers saw a curtain moving in the bedroom of an occupant other than the arrestee.[32]
ARRESTEE EVASIVE: When asked by officers if anyone else was on the premises, the arrestee did not respond, or his response was vague, evasive, or inconsistent.[33]
ARRESTEE SAYS PREMISES UNOCCUPIED: Although officers may consider the arrestee's assertion that no one else is on the premises, they are not required to accept his statement as true.[34]
CONSENT TO SEARCH SOME AREAS BUT NOT OTHERS: An occupant told officers they could look upstairs for other occupants but not in the back of the house.[35]
INFORMATION FROM NEIGHBOR, INFORMANT: A neighbor, motel desk clerk, or reliable informant said that someone other the suspect was on the premises. If the informant was untested, the significance of his tip depends on whether there was some reason to believe it was accurate.[36]
ACCOMPLICES OUTSTANDING: The arrestee usually committed his crimes with accomplices, or his accomplices frequented the premises.[37]
MULTIPLE SUSPECTS ON THE PREMISES, UNSURE IF EVERYONE WAS ACCOUNTED FOR: Officers reasonably believed there were several suspects on or about the premises;

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248 F.3d 506, 514 [the officers "heard noises suggesting that more than one person was present in the apartment."]; *U.S.* v. *Lopez* (1st Cir. 1993) 989 F.2d 24, 26, fn.1 [Officer testified he heard "fast moving footsteps. I couldn't determine how many people . . . But there was footsteps running about the house, inside the door."]. COMPARE *U.S.* v. *Akrawi* (6th Cir. 1990) 920 F.2d 418, 420 ["The agents heard no noises or voices that indicated anyone might have been in hiding on the second floor."]; *U.S.* v. *Vargas* (2nd Cir. 2004) __ F.3d __ ["(N)one of the agents testified to hearing any noises coming from the bathroom . . . "].

[32] See *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1013 [an officer "observed a curtain moving in an upstairs window of the apartment belonging to [the arrestee's] mother."].

[33] See *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["Richards twice failed to answer [the officer's] question about whether anyone else was in the house"]; *People* v. *Adams* (1985) 175 Cal.App.3d 855, 861; *People* v. *Lewis* (1980) 109 Cal.App.3d 599, 608; *People* v. *York* (1980) 108 Cal.App.3d 779, 785; *People* v. *Hart* (1999) 74 Cal.App.4th 479, 493; *Hill* v. *California* (1971) 401 US 797, 803, fn. 8; *People* v. *Memro* (1995) 11 Cal.4th 786, 843; *People* v. *Gravatt* (1971) 22 Cal.App.3d 133, 137; *People* v. *Shandloff* (1985) 170 Cal.App.3d 372, 382; *People* v. *Spears* (1991) 228 Cal.App.3d 1, 20; *U.S.* v. *Boyce* (11th Cir. 2003) 351 F.3d 1102, 1109. NOTE: Officers are not required to accept as true an occupant's claim that no one else is on the premises. See *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["(I)n our opinion, the officers would have been entitled to sweep the house even if Richards said that no one else was home."].

[34] See *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["(I)n our opinion, the officers would have been entitled to sweep the house even if Richards said that no one else was home."].

[35] See *People* v. *Baldwin* (1976) 62 Cal.App.3d 727, 743.

[36] See *Alabama* v. *White* (1990) 496 US 325, 330; *Guevara* v. *Superior Court* (1970) 7 Cal.App.3d 531, 535 ["The informant had told the officers that defendant was living with a woman, that other persons frequented the apartment"]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 5 ["(The informant) told the officers that two other suspects were in the apartment"]; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284 ["The informant had advised officers that [the arrestee's] 'boys' or 'counterparts' might be with him."]. COMPARE *U.S.* v. *Vargas* (2nd Cir. 2004) __ F.3d __ ["(T)he tip the agents received about Moran indicated that Moran had checked into the motel by himself, and the agents arrived at the motel only an hour or so after receiving the tip. Moreover, the agents did not stop at the reception desk to inquire whether anyone besides Moran had entered the room or been seen on the motel premises."].

[37] See *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675 [trial court noted that "Maier habitually pursued his criminal activities with accomplices"]; *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396 ["(T)he officers reasonably believed that at least six men were involved in the distribution of cocaine"].

although some had been arrested or detained, officers could not be sure they had arrested or detained all of them.[38]

DANGEROUS PERSON: The following circumstances are relevant in establishing a reasonable belief that the person on the premises posed a danger to the arresting officers:

NATURE OF ARRESTEE'S CRIME: The arrest was for a violent crime, or a crime in which weapons and violence are commonplace; e.g., drug trafficking.[39]

ONE DANGEROUS PERSON ARRESTED: If officers arrested one suspect who was armed or dangerous, it may be reasonable to believe that any others on the premises are also armed or dangerous.[40]

DANGEROUS ASSOCIATES: The arrestee associated with people who were known to be armed or dangerous.[41]

RESIDENCE A SITE FOR GUNS OR VIOLENCE: The house was occupied or frequented by people who have been armed or violent.[42]

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[38] See *People* v. *Block* (1971) 6 Cal.3d 239, 245; *People* v. *Baldwin* (1976) 62 Cal.App.3d 727, 742-3; *People* v. *Mack* (1980) 27 Cal.3d 145, 150-1; *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396 ["(T)here were at least five men including Hoyos who were not in custody."]; *U.S.* v. *Mendoza-Burciaga* (5th Cir. 1993) 981 F.2d 192, 197; *U.S.* v. *Delgado* (11th Cir. 1990) 903 F.2d 1495, 1502; *U.S.* v. *Lopez* (1st Cir. 1993) 989 F.2d 24, 26-7 ["The nature of the building—a dilapidated, multi-tenant structure—lent further weight to a reasonable concern that the shotgun might be hidden nearby, recovered by others, and used again."]. ALSO SEE *U.S.* v. *Colbert* (6th Cir. 1996) 76 F.3d 773, 777 ["(A)n individual bursting out of a house *unexpectedly* may well give rise to a concern that a danger lurks inside the home." Emphasis added.].

[39] See *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675 [trial court noted that "Maier habitually pursued his criminal activities . . . in a most dangerous manner."]; *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 865 ["(I)t was reasonable to conclude that the residence was the site of ongoing narcotics activity. Firearms are, of course, one of the tools of the trade of the narcotics business."]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 9 ["The value of the contraband reasonably believed present by [the arresting officer] was surely not so de minimis as to make remote the possibility of violent and desperate efforts to resist the arrests and defend the contraband."]; *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017 ["(The arrestees) were suspected of committing a violent crime involving a firearm"]; *U.S.* v. *Castillo* (9th Cir. 1989) 866 F.2d 1071, 1080 ["The officers who participated in the sweep testified that it was their experience with cocaine dealers that they had a tendency to carry weapons and would resort to violence."]; *U.S.* v. *Lopez* (1st Cir. 1993) 989 F.2d 24, 26 ["The most important element is that the police had reason to believe that [the arrestee] had a sawed-off shotgun nearby"]. NOTE: A sweep will not ordinarily be justified merely because the arrestee was prone to violence. See *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284 ["(T)he officers' awareness that [Henry] had a previous weapons conviction and could be dangerous did not itself directly justify the sweep. Once [he] was in custody, he no longer posed a threat to the police."]; *U.S.* v. *Ford* (D.C. Cir. 1995) 56 F.3d 265, 269.

[40] See *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["Richards opened the door with a gun. This gave the officers a specific and articulable fact regarding Richards' apartment: that it harbored at least one and possibly more threatening gun owners"].

[41] See *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["(T)he officers knew that the day prior, Richards had been seen with Moore, a suspect in the murder investigation."]; *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1016 [officers may consider "the characteristics of those known to be present and who might be present"].

[42] See *People* v. *Mack* (1980) 27 Cal.3d 145, 151 [officers knew that one of the occupants "had been arrested for an armed robbery in which shots had been fired," and that weapons taken in a recent burglary might be inside]; *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1016 [relevant circumstances include "the characteristics of those known to be present and who might be present" in the house and "its history in previous law enforcement efforts"]; *U.S.* v. *Barker* (7th Cir. 1994) 27 F.3d 1287, 1291 ["(W)hen serving the arrest warrant, the officers knew . . . that a weapon had been seen inside the home"]; *U.S.* v. *James* (7th Cir. 1994) 40 F.3d 850, 863 [the

DANGEROUS NEIGHBORHOOD: Although it is irrelevant that the house is located in a poor neighborhood or in a housing project, officers may consider whether the neighborhood has been the "recent scene of other violence or civil strife aimed at law enforcement officers."[43]

INFORMATION FROM INFORMANT: A reliable informant told officers that the occupants were armed or dangerous.[44]

REFUSAL TO ADMIT: The occupants' refusal to admit officers who have announced their presence may be a sign of danger.[45]

Arrest outside, sweep inside

The courts have sometimes permitted sweeps when the suspect was arrested just outside the house, usually near a door that was open or ajar.[46] The logic behind these rulings is that when officers reasonably believe that a person inside a house poses a threat to them, that threat is not eliminated merely because there happens to be a door between them.[47] In the words of the Court of Appeal:

> The basic question is whether the limited inspection of the premises was reasonable in each case, that is, was it in fact a protective sweep based upon articulable and reasonable facts supporting a belief in possible danger to officers or others, or was it an otherwise impermissible warrantless search for evidence? This, rather than on which side of a door an arrest is effected, is the issue in these limited-inspection cases.[48]

Although an arrest outside may sometimes justify a protective sweep inside, the courts are not in agreement as to whether the greater intrusion of a warrantless entry requires probable cause or whether reasonable suspicion is sufficient.[49] It is, however,

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arresting officer "knew that the lower floor of the duplex contained illegal narcotics, drug paraphernalia, and two loaded firearms"].

[43] See *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1016; *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["(T)his neighborhood was one of the most violent and dangerous in East St. Louis."].

[44] See *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284.

[45] See *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017 ["(A)lthough the officers repeatedly announced their presence, those in the apartment had refused them entry, yet could be heard moving about inside."].

[46] See *U.S.* v. *Oguns* (2nd Cir. 1990) 921 F.2d 442, 447 ["Had third parties been in the apartment, they would likely have been able to hear through the open door the agents arresting Oguns and, with that knowledge, would have posed a threat to the police outside."]; *U.S.* v. *Wilson* (5th Cir. 2001) 306 F.3d 231, 238-9; *U.S.* v. *Watson* (5th Cir. 2001) 273 F.3d 599, 603.

[47] See *U.S.* v. *Arch* (7th Cir. 1993) 7 F.3d 1300, 1303 ["Even cases that countenance protective sweeps when an arrest is made just outside the home do so on the theory that the officers are as much at risk from an unexpected assault on the defendant's doorstep as they might be inside the home."]; *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1397 ["If the exigencies to support a protective sweep exist, whether the arrest occurred inside or outside the residence does not affect the reasonableness of the officer's conduct. A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another."]; *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1016 ["(O)fficers may be at as much risk while in the area immediately outside the arrestee's dwelling as they are within it."].

[48] *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675.

[49] NOTE: This issue was recently presented in *People* v. *Celis* (2004) 33 Cal.4th 667 but the court, having concluded that the sweep was not even supported by reasonable suspicion, declined to address it. As the court observed, "Some [courts] have concluded, consistent with the facts presented in *Buie*, that a protective sweep must be incident to a lawful arrest inside a house. . . . [Other courts] have allowed a protective sweep of a house when the officers were not inside the house at all, but had arrested a suspect just outside; in these cases the officers then entered the house to conduct the sweep." Citations omitted.

clear that even where the reasonable suspicion standard has been applied, the courts tend to evaluate the circumstances more critically. As the court observed in *Sharrar* v. *Felsing*, "Predictably, where the courts have differed in permitting protective sweeps incident to arrests outside the home is on the quantity and quality of the articulable facts necessary to justify the sweep, rather than on the underlying standard."[50]

Sweep procedure

A full sweep must be limited to "a cursory visual inspection of those places in which a person might be hiding."[51] For example, officers may look inside closets, behind sofas and under beds; but they cannot look under rugs, or open desk drawers or small cabinets.

This was one of the issues in *U.S.* v. *Ford*[52] where an FBI agent who was sweeping an apartment lifted a mattress (finding crack cocaine) and looked behind a window shade (finding a gun). The court ruled, however, the agent exceeded the permissible scope of a full sweep because he "never suspected that he would find a person in either location."

QUICK SEARCH: By definition, a protective sweep must be "quick" and "cursory."[53] This is because an intensive search is unnecessary when the objective is to locate people. Thus, in upholding a full sweep in *U.S.* v. *Arch*,[54] the court noted:

> The evidence indicates that the officers did not dawdle in each room looking for clues, but proceeded quickly through the motel room and adjoining bathroom, leaving once they had determined that no one was present.

IF SOMEONE IS FOUND: If officers find someone on the premises they may, depending on the evidence of his involvement in criminal activity, detain him, arrest him, or escort him out of the building. Furthermore, if the person is reasonably believed to be

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[50] (3rd Cir. 1997) 128 F. 3d 810, 824. ALSO SEE *U.S.* v. *Colbert* (6th Cir. 1996) 76 F.3d 773, 776-7 ["(T)he fact that the arrest takes place outside rather than inside the home affects only the inquiry into whether the officers have a reasonable articulable suspicion that a protective sweep is necessary by reason of a safety threat."]; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284 ["That the police arrested defendant outside rather than inside his dwelling is relevant to the question of whether they could reasonably fear an attack by someone within it."]; *U.S.* v. *Arch* (7th Cir. 1993) 7 F.3d 1300, 1304 ["Arch was arrested in the first-floor lobby of the motel, far from his second-floor room; the ensuing search of his room was consequently not a search of the immediate arrest cite as *Buie* envisions."]. NOTE: The courts might eventually resolve the issue by applying a standard exigent-circumstances analysis. But if they do, they will probably rule that probable cause is required. See *People* v. *Celis* (2004) 33 Cal.4th 667, __ [entry for the exigent circumstance dealing with officer safety requires probable cause]; *Minnesota* v. *Olson* (1990) 495 US 91, 100.

[51] See *Maryland* v. *Buie* (1990) 494 US 325, 327; *U.S.* v. *Gould* (5th Cir. en banc, 2004) 364 F.3d 578, 587 ["(T)he legitimate protective sweep may not be a full search but may be no more than a cursory inspection of those places where a person may be found."]; *U.S.* v. *Crooker* (1st Cir. 1993) 5 F.3d 583, 584. ALSO SEE *Mincey* v. *Arizona* (1978) 437 US 385, 393 ["(A) warrantless search must be strictly circumscribed by the exigencies which justify its initiation."]; *Warden* v. *Hayden* (1967) 387 US 294, 298-9; *People* v. *Gentry* (1992) 7 Cal.App.4th 1255, 1261, fn.2 ["The nature of the exigency defines the scope of the search . . ."].

[52] (D.C. Cir. 1995) 56 F.3d 265, 270.

[53] See *Maryland* v. *Buie* (1990) 494 US 325, 327; *U.S.* v. *Gould* (5th Cir. en banc, 2004) 364 F.3d 578, 587 ["(The sweep) may last no longer than is necessary to dispel the reasonable suspicion of danger"]; *U.S.* v. *Delgado* (11th Cir. 1990) 903 F.2d 1495, 1502 ["The sweep lasted no more than three to five minutes . . . apparently lasting no longer than necessary."].

[54] (7th Cir. 1993) 7 F.3d 1300, 1304. ALSO SEE *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1292 ["(The officer) did not search through drawers or dawdle in each room looking for clues. He moved briefly through two bedrooms, the bathroom and kitchen. When satisfied that the apartment was secure he returned to the living room and called for assistance."].

dangerous, there is authority for conducting a search of the area within the person's "grabbing area" for weapons.[55]

PLAIN VIEW SEIZURES: If officers see evidence in plain view, they may seize it if they have probable cause that it is, in fact, evidence of a crime.[56] As the court noted in *U.S.* v. *Curtis*, "[O]fficers engaged in a legitimate protective sweep need not close their eyes to what they see in plain view."[57]

MULTIPLE SWEEPS: In some cases officers may need to make more than one pass through the premises. For example, they might initially look only in obvious places, such as closets, under beds, and behind doors. If no one is found, they might conduct a second pass, looking in less obvious places; e.g., behind furniture, behind curtains, in crawl spaces.

The courts have permitted multiple sweeps, but only when officers were able to explain why more than one pass was necessary. For example, in *U.S.* v. *Paradis* [58]officers discovered a gun after they had arrested the suspect and after they had thoroughly swept the premises twice. In ruling their third pass through the premises was unnecessary, the court said:

> There was no reason to think that there was another person besides Paradis in the small apartment. At the time the gun was found, the police had already been through the entire apartment. They had been through the living room at least twice (and one or two officers remained there doing paperwork). And they had been through the only bedroom of the unit twice, finding Paradis on the second hunt . . . . Furthermore, by their own testimony the police established that the only logical place someone could hide in the bedroom was under the bed, where they had found Paradis.

Appendix

Grounds for a Full Sweep

The following are examples of circumstances which were found to justify a full protective sweep.

VIOLENT, HECTIC SITUATION: Homicide investigators in East St. Louis wanted to talk with Moore about a murder for which he was a suspect. When they learned he had been seen with Richards a day earlier and that he might be staying with Richards, they went to Richards' house and knocked on the door. Someone inside asked, Who is it? One of the officers responded, "It's the police." After a few seconds, the door swung open and Richards stood there pointing a 9-milimeter semi-automatic handgun at the officers. The officers quickly wrested the gun from Richards and arrested him. Although Richards claimed that no one else was in the house, one of the officers conducted a protective sweep. During the sweep, he saw a large amount of crack cocaine in plain view.

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[55] See *U.S.* v. *Hernandez* (2nd Cir. 1991) 941 F.2d 133, 137; *U.S.* v. *Crooker* (1st Cir. 1993) 5 F.3d 583, 584.

[56] *Arizona* v. *Hicks* (1987) 480 US 321, 326; *Warden* v. *Hayden* (1967) 387 US 294, 299.

[57] (D.C. Cir. 2002) 239 F.Supp.2d 1, 3.

[58] (1st Cir. 2003) 351 F.3d 21. ALSO SEE *U.S.* v. *Oguns* (2nd Cir. 1990) 921 F.2d 442, 447 ["The agents no longer had authority to remain in Oguns' apartment after they determined that no one else was there."]; *Sharrar* v. *Felsing* (3rd Cir. 1997) 128 F.3d 810, 825 ["Once all four men were out of the house and in custody, the arresting officers had no basis to conclude that others remained inside."].

Although the officers did not know that Moore or anyone else was on the premises, the court ruled the sweep was justified because, (1) Richards and Moore were seen together one day earlier; (2) Richards opened the door with a gun; (3) officers saw crack cocaine in the living room; and (4) when officers asked Richards whether anyone else was on the premises, he refused to answer.[59]

ARRESTEE COMMITS VIOLENCE CRIMES WITH ACCOMPLICES: The arrestee was wanted for murder, attempted murder of a police officer, a string of armed robberies, and escape from prison. He "habitually pursued his criminal activities with accomplices in a most dangerous manner. This was his modus operandi."[60]

SEVERAL SUSPECTS, CAN'T BE SURE ALL HAVE BEEN LOCATED: Officers who were investigating a report of a "narcotics party" knocked on the door of the house and, when it was opened, immediately smelled burning marijuana. Apparently fearing that the evidence would be destroyed if they delayed taking action, they entered the house, saw marijuana in plain view, and arrested four people in the living room. Two other suspects were arrested in the dining room. The house was "quite large," with two stories and three or four bedrooms. Some of the upstairs lights were on. One officer walked upstairs "to see if there were any other people in the house." While looking, he saw marijuana and paraphernalia in plain view.

In ruling the officer reasonably believed that other suspects might be in the house, and that the suspects might pose a "security risk," the California Supreme Court said it was apparent that a "'pot party' was in progress, involving an undermined number of participants. The lights which illuminated the stairway and upstairs hall justified the further suspicion that other persons might be upstairs who were involved in the offenses charged or who might pose a security risk for the arresting officers."[61]

SEVERAL SUSPECTS, CAN'T BE SURE ALL HAVE BEEN LOCATED: LAPD officers received a tip from an anonymous informant that property taken in a series of recent burglaries was inside a house at a certain address. The informant said there were five burglars and he named them. One of them, Bowden, had been arrested three weeks earlier for an armed robbery in which shots were fired. Two of the other robbers escaped. When officers knocked on the door of the house, two men came out the side door of the garage and, when they saw the officers, yelled, "Look out! The cops!" Officers could hear "multiple voices" inside the garage. When officers ordered everyone in the garage to exit, five men stepped outside. Officers then conducted a sweep of the garage. During the sweep, they seized stolen property in plain view.

The California Supreme Court ruled the officers' belief that additional armed suspects were in the garage was "amply supported by specific and articulable facts." Said the court, "[The officer] knew Bowden had been arrested for an armed robbery in which shots were fired and that his accomplices had escaped. He believed these dangerous fugitives might be in the garage. He knew the stolen property alleged to be in the garage included firearms. Therefore, anyone remaining in the garage would have access to deadly weapons. Moreover, he did not know whether the five men who had come out of the garage included all five of the accused burglars."[62]

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[59] *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287.
[60] *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675.
[61] *People* v. *Block* (1971) 6 Cal.3d 239. ALSO SEE *People* v. *Baldwin* (1976) 62 Cal.App.3d 727, 743 ["After (the officers) entered, they knew only of the presence of Martinez and Baldwin; then they discovered Cano in the living room. They were told that Baldwin's sister was asleep upstairs and also that there were two other owners of the home who were not present. (The officers) also knew that Baldwin had tried to close the door during the arrest of Martinez . . . [B]aldwin did not object to [the officer's] proceeding upstairs but did object to the search of the back of the house."].
[62] *People* v. *Mack* (1980) 27 Cal.3d 145.

VIOLENT CRIME; SUSPICIOUS CIRCUMSTANCES: Officers obtained warrants to arrest Burrows and McLin on charges they shot two men. According to informants, Burrows and McLin were planning to take control of drug sales in the area of the housing project in which they lived. When officers arrived outside the two-story apartment, they saw a curtain moving in an upstairs window, possibly a bedroom. They knocked and announced and heard movement inside, but no one responded. McLin eventually opened the door and was arrested. Officers found Burrows hiding in an upstairs bathroom. There were five other rooms on the second floor. Officers swept them, finding a gun in one of the bedrooms. Burrows was charged with being a felon in possession of a firearm.

In ruling the sweep was justified, the court noted, among other things, "Mr. Burrows and McLin were suspected of committing a violent crime involving a firearm; Mr. Burrows had a history of violent criminal activity, and the pair was allegedly planning to control the local drug trade. Upon arriving on the scene, [officers] observed movement in an upstairs window. Finally, although the officers repeatedly announced their presence, those in the apartment had refused them entry, yet could be heard moving about inside. Thus, the doors at the second floor landing where Mr. Burrows was arrested gave the officers understandable cause for concern."[63]

DRUGS TRAFFICKING WITH GUN: An ATF agent made four buys of cocaine from Abrams inside a house he shared with Barker. During one of the buys, he saw a handgun on the couch. When a visitor arrived, Barker moved the gun to a table. During another buy, Barker sat facing the door and kept one of his hands behind his back "as if to be holding a weapon." During the other two buys, two different women were present.

When officers entered to arrest Abrams, they swept the premises and found a gun that was linked to Barker, a felon. In ruling the sweep was justified, the court said, "[W]hen serving the arrest warrant, the officers knew not only that a weapon had been seen inside the home, but also that people other than Barker and Abrams might very well have been within the house."[64]

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[63] *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011.

[64] *U.S.* v. *Barker* (7th Cir. 1994) 27 F.3d 1287. ALSO SEE *U.S.* v. *James* (7th Cir. 1994) 40 F.3d 850, 863 ["(The arresting officer) knew that the lower floor of the duplex contained illegal narcotics, drug paraphernalia, and two loaded firearms . . . . He also knew that there were at least four suspects in the flat, and that one of the suspects had attempted to flee by way of the upper floor of the duplex. He could thus deduce that there was an easy means of access between the two floors, and he could not be certain that all of the occupants of the duplex had been accounted for and secured."].