

APPENDIX A

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United States v. Thompson

United States Court of Appeals, Eighth Circuit

Jul 26, 2021

20-1228 (8th Cir. Jul. 26, 2021)

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KOBES, CIRCUIT JUDGE.

Submitted: January 12, 2021

Appeal from United States District Court for the Western District of
Missouri - Kansas City

Before LOKEN, GRASZ, and KOBES, Circuit Judges.

KOBES, CIRCUIT JUDGE.

Tyreese Thompson was convicted of two counts of being a felon in possession of a firearm and received an Armed Career Criminal Act sentencing enhancement. The district court¹ denied his motion to suppress evidence and his motions for acquittal. We affirm his conviction and his sentence.

¹ The Honorable David Gregory Kays, United States District Judge for the Western District of Missouri, adopting the report and recommendation of the Honorable John T. Maughmer, United States Magistrate Judge for the Western District of Missouri. Before trial, Thompson's case was reassigned to the Honorable Roseann A. Ketchmark, United States District Judge for the Western District of Missouri.

I.

Tyreese Thompson, a convicted felon, was suspected of being involved in a gunfight in 2014 and stealing guns from a pawn shop in 2016. At the time of the 2016 burglary, Thompson was also the subject of a felony arrest warrant for a separate robbery. A confidential informant told the ATF that Thompson was at a house in Kansas City, Missouri that police thought belonged to his girlfriend. Police went there to arrest him.

Officers knocked on the door, announced themselves, and called Thompson's name. They saw window blinds move and heard sounds of people walking and moving things inside the house. Officers continued to knock and call for six to eight minutes. George Richards finally answered the door with an aggressive dog. Officers asked Richards to restrain the dog, and he dragged it away, leaving the door open. An officer then saw Thompson peek out from inside the house, so he ordered him to show his hands. Thompson instead retreated around a corner, but eventually he came out and surrendered. When he was arrested and put in a police car, officers saw dirt and spider webs on his arms, shirt, and the back of his head.

Richards then emerged. Police asked him twice whether anyone else was inside, but he did not answer right away. Then he said, "Nobody else that I

know of.” D. Ct. Dkt. 49 at 4. Officers were not sure of this because of his reluctance to answer, his odd response, the information suggesting Thompson’s girlfriend lived there, the sounds from inside, and the long delay in answering the door. Concerned about “some sort of an ambush,” D. Ct. Dkt. 48 at 30, they told Richards that they would do a protective sweep of the home. He did not object.

During the ten-minute sweep, police looked into a back bedroom closet and noticed an attic access panel in the ceiling and a scuff mark on the wall. Worried that someone went into the attic, an officer guarded the closet until the house was cleared. Then they opened the attic access panel and saw disturbed cobwebs and guns.

Richards claimed that he either owned or rented the house, but denied knowing about the guns. He agreed to a search of his house. Richards said that Thompson was dropped off at the house the day before and did not live there. Richards also said that Thompson spent the night and slept in the room with the attic access. When officers went into the attic again, they recovered four guns.

A grand jury indicted Thompson on two counts of possessing a gun as a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1): Count One was for possessing a handgun during the 2014 gunfight and Count Two was for the guns found in the attic. Thompson moved to suppress the attic guns. The district court adopted the magistrate judge’s findings that Thompson had no standing to object to the search or, in the alternative, that Richards consented to the search. Thompson was convicted of both counts at trial.

Thompson made four motions for judgment of acquittal. He first argued that the evidence of his guilt for Count One (the 2014 gun possession) was insufficient and the evidence of his guilt for Count Two (the attic guns) was gathered in violation of the Fourth Amendment. He also asserted that the Supreme Court’s holding in *Rehaif v. United States*, 139 S.Ct. 2191 (2019) requires a new trial on each count. These were all denied.

At sentencing, Thompson objected to the four-level increase under U.S.S.G. § 2K2.1(b)(6)(B) for possessing a firearm in connection with another felony offense based on marijuana found in his girlfriend’s car at the time of the

2014 gunfight. Thompson said that there was no evidence presented at trial to establish he possessed marijuana-but the Government presented three witnesses at sentencing and the district court applied the enhancement. The district court sentenced Thompson to concurrent 293-month sentences on each count.

Thompson appeals, arguing: (1) the district court improperly denied his motion to suppress the guns found in the attic; (2) his motions for judgments of acquittal were wrongly denied; and (3) the four-level sentencing enhancement for possessing a firearm in connection with felony drug possession was inappropriate.

II.

A.

We first address Thompson's argument that the district court improperly denied his motion to suppress evidence of the attic guns. He says the officers had no authority to do the protective sweep or search the home after he voluntarily came out of the house and was in the police car.

"When considering a denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions *de novo*."

United States v. Alatorre, 863 F.3d 810, 813 (8th Cir. 2017) (citation omitted).

We review whether the protective sweep was justified *de novo*. *Id.*

Thompson says that he had a legitimate and reasonable expectation of privacy in the bedroom with the closet attic access because he was an overnight guest. He argues that the sweep was illegal after the officers arrested him because the record shows nothing about "any additional individuals present[ing] a danger to the officers who were done with their task" and that no officer could "point to any threat to his safety." Thompson Br. 19.

Assuming without deciding that Thompson has "standing" to challenge the search, the protective sweep was justified. Officers doing a protective sweep must "possess[] a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing . . . that the area swept

harbored an individual posing a danger to the officer or others.” *Maryland v. Buie*, 494 U.S. 325, 327 (1990) (citation omitted) (cleaned up). “*Buie* authorizes protective sweeps for unknown individuals in a house who may pose a threat to officers as they effectuate an arrest[,]” but “*Buie* does not allow a protective sweep for weapons or contraband.” *United States v. Waldner*, 425 F.3d 514, 517 (8th Cir. 2005). Even so, officers may seize any “immediately apparent” contraband that is “in plain view” while performing the sweep. *Alatorre*, 863 F.3d at 815-16 (citation omitted).

There was good reason here for a sweep. First, Thompson was suspected of stealing several guns from a pawn shop in a burglary, committing a robbery, and possessing a handgun during a gunfight. That meant Thompson could have left guns behind in the house for another person to use against officers. Second, after announcing their presence, officers were forced to wait for minutes while the blinds on either side of the door moved and they heard movement (and possible preparation for an attack) inside. Third, officers thought the house belonged to Thompson’s girlfriend, who was not located. And after Richards was asked whether anyone else was still in the house, he was silent at first and then gave the odd, ambiguous answer that there was “[n]obody else” in the home “that [he] kn[e]w of.” D. Ct. Dkt. 49 at 4. Richards’s initial reluctance and his unusual response strengthened suspicion that potentially dangerous people remained in the house. See *United States v. Crisolis-Gonzalez*, 742 F.3d 830, 836 (8th Cir. 2014) (explaining that an occupant’s hesitation after being asked if there are others in the home supports an officer’s suspicion about potential danger). Finally, Thompson was covered in dust and cobwebs, suggesting that he had just been in a dusty place like an attic or basement. These facts support the reasonable belief that “someone else could be inside posing a danger to [officers] during or following the arrest.” *Alatorre*, 863 F.3d at 814.

This case is like *Alatorre*. We said in that case that because of the defendant’s “criminal history” involving concealed firearms, guns “were conceivably present in the residence.” *Alatorre*, 863 F.3d at 815. We recognized how that could give “anyone remaining inside the residence access to weapons to use in an ambush of the officers.” *Id.* We also said that “audible movements and behaviors . . . of people behind the door and blinds after the officers knocked, along with the delays in answering the door, created a reasonable

uncertainty as to how many people were inside the residence and their intentions toward the officers." *Id.* Those facts are all present here. Finally, before Thompson came out of the house, he ducked behind a wall inside the home, indicating that "it was easy for someone to hide just out of view of the officers inside the residence in a position from which an attack could be launched." *Id.* at 814-15. The officers here faced a similar "vulnerability] to attack from someone inside the residence." *Id.* at 815.

Officers reasonably believed that the home "harbored an individual" hiding in a place containing dust and cobwebs like an attic, basement, or closet who could "pos[e] a danger to the officer or others" during and after the arrest. *Buie*, 494 U.S. at 327. Extending the sweep to the closet and then to the attic after seeing the scuff mark was reasonable. Sweeping a space that requires a boost or ladder to access, like an attic, is at the outer boundary of the protective sweep doctrine; but we think the officers' conduct here was within *Alatorre's* scope.

Even if the protective sweep could not cover the attic, Thompson does not show that Richards's later consent to search the home was insufficient. Thompson says that Richards's consent did not "extend to the area of [Thompson]'s privacy which included the back bedroom, the closet[,] and attic access." Thompson Br. 24. But our caselaw contradicts that. *See United States v. Wright*, 971 F.2d 176, 180 (8th Cir. 1992) (A host possesses "authority to consent to a search of his own home, including the guest bedroom where [the houseguest] spent the evening."). Richards had actual authority to give officers permission to search the bedroom, closet, and attic.

Thompson's other argument is that Richards's consent "cannot absolve the officer's illegal entry." Thompson Br. 23. But he fails to cite any supporting authority. To the contrary, freely-given post-search consent can purge the taint of a constitutional violation in specific circumstances. *United States v. Yousif*, 308 F.3d 820, 830-31 (8th Cir. 2002). Thompson does not argue that Richards's consent was involuntary, so we need not analyze whether it was "truly an act of free will" that sufficed "to purge the primary taint" of any illegal search and seizure. *See id.* at 830.

B.

Next, we consider whether the Government failed to comply with *Rehaif*. Thompson says the Government did not prove all elements of the offense beyond a reasonable doubt, and so his motions for acquittal should have been granted.²

² Thompson also argues that the indictment was insufficient. Thompson Br. 8-10. But he does not show good cause for failing to raise this issue before trial, see Fed. R. Crim. P. 12(b)(3); see also Fed. R. Crim. P. 12(c)(3), and so we will not address this argument. See *United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015).

We review this issue for plain error because Thompson submitted his renewed motions for acquittal raising the *Rehaif* issue after the deadline for post-verdict motions. See *United States v. Gilmore*, 968 F.3d 883, 887 (8th Cir. 2020). Under plain error review, Thompson must show that “there was an obvious error that affected his substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* “We view the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury’s verdict.” *United States v. Ferguson*, 970 F.3d 895, 902 (8th Cir. 2020) (citation omitted).

Thompson was indicted for being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1). The Supreme Court clarified in *Rehaif* that an element of an offense under § 922(g) is the defendant’s knowledge that they belong to a class of people “barred from possessing a firearm.” 139 S.Ct. at 2200. Thompson stipulated at trial that he had been convicted of a crime punishable by imprisonment for more than one year. A stipulation like this is “legally sufficient to establish [the defendant’s] knowledge” of his status as a felon and so is enough to “sustain the conviction,” even under the standard announced in *Rehaif*. *United States v. Owens*, 966 F.3d 700, 709 (8th Cir. 2020).

Thompson also implies that the lack of a jury instruction about his knowledge of his felon status is clear error in light of *Rehaif*. While the absence of that instruction was erroneous, Thompson is not entitled to relief because he cannot show a reasonable probability that, but for the

error, the outcome of his trial would have been different in light of his stipulation. See *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1904-05 (2018) (To have "affected the defendant's substantial rights," the defendant must "show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.") (citation omitted).

Thompson also received a sentence enhancement under the Armed Career Criminal Act. Section 924(e)(1) of the ACCA provides that anyone who has three prior convictions for a violent felony, serious drug offense, or both shall be imprisoned for at least fifteen years. 18 U.S.C. § 924(e)(1).

Thompson argues that *Rehaif* requires the Government to prove each of the three prior convictions to a jury beyond a reasonable doubt before the enhancement can take effect. But the Supreme Court rejected that argument in *United States v. Haymond*. 139 S.Ct. 2369, 2377 n.3 (2019) ("Prosecutors need not prove to a jury the fact of a defendant's prior conviction.").

Although Thompson makes much of the fact that § 924(e) was mentioned in his indictment, that does not matter because, as we have said before, "[r]eferences in the indictment to sentence enhancements such as section 924(e) are mere surplusage and may be disregarded if the remaining allegations are sufficient to charge a crime." *United States v. Bates*, 77 F.3d 1101, 1105 (8th Cir. 1996) (citation omitted). Thompson had three qualifying prior convictions and the indictment was sufficient to charge him under § 922(g)(1) even without the reference to § 924(e). See *United States v. Jawher*, 950 F.3d 576, 579 n.2 (8th Cir. 2020) ("The language of the indictment against Jawher closely tracked the language of § 922(g)(5)(A) and sufficiently charged Jawher with being a prohibited person in possession of a firearm.").

C.

Thompson finally argues that the district court should not have applied a four-level sentencing enhancement for his possession of a firearm in connection with another felony offense. Thompson says that the enhancement under U.S.S.G. § 2K2.1(b)(6)(B) was wrong because the marijuana found in his girlfriend's car in the aftermath of the 2014 gunfight was not his and because his gun could not be connected to the drugs.

We need not address this argument because even if we agreed with Thompson, his total offense level would not decrease. *See United States v. Boman*, 810 F.3d 534, 544 (8th Cir. 2016), *vacated on other grounds*, 137 S.Ct. 87 (2016). Thompson's adjusted offense level, taking the enhancement into account, was 32. But because Thompson is an armed career criminal, his offense level was set at 33. *See* U.S.S.G. § 4B1.4. We declined to consider a similar challenge in *Boman* because the ACCA "resulted in an even higher base offense level and drove [the defendant's] sentence," so there would be no change in the offense level even if we agreed with the defendant's argument. 810 F.3d at 544. The reasoning from *Boman* is on all fours with this case.

III.

The judgment of the district court is affirmed.

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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-1228

United States of America

Appellee

v.

Tyreese Thompson

Appellant

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:16-cr-00264-RK-1)

MANDATE

In accordance with the opinion and judgment of 07/26/2021, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

September 29, 2021

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURTS OF APPEALS
For the Eighth Circuit

No: 20-1228

UNITED STATES OF AMERICA

Appellee,

v.

TYREESE THOMPSON

Appellant.

On Appeal from the United States District Court
For the Western District of Missouri
Honorable Roseann Ketchmark
United States District Judge

PETITION FOR REHEARING *EN BANC* FOR
TYREESE THOMPSON

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RULE 35(b)(1) STATEMENT

In my professional judgment, the questions presented by this petition satisfy the criteria of Federal Rule of Appellate Procedure 35(b)(1).

The panel decision conflated factors of Mr. Thompson's criminal history with suppositions of danger posed by unknown individuals enhanced by Mr. Thompson's conduct which is contrary to Maryland v. Buie, 494 U.S. 325 (1990). Further, the Panel found the use of a ladder or boost is at the outer boundary of a protective sweep without defining what are those boundaries.

The panel decision conflicts with Supreme Court precedent, United States v. Rehaif, 588 U.S. (2019) Almendarez Torres v. United States, 523 U.S. 224 (1997), the Fifth, and Sixth Amendments to the United States Constitution. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" or admitted by the defendant." United States v. Apprendi, 530 U. S. 466, 490 (2000). The Supreme Court's decision in Rehaif makes it clear that 18 U.S.C. 922(g)(1) requires the addition of 924(a)(2) to include the penalty range and element of knowledge in the offense. Because Mr. Thompson was charged under 922(g)(1) and 924(e), a unique offense with a distinct penalty range and additional requirements of three predicate offense was charged. However, the government did not present evidence of the three predicate offenses and instead obtained a

conviction based upon facts sufficient only for a conviction under 922(g)(1) and 924(a)(2). The panel decision determines that 924(e) is merely surplusage even when charged in the indictment and equated Mr. Thompson's stipulation of one felony conviction sufficient to maintain his conviction.

For these reasons, Mr. Thompson urges the court to rehear the case en banc.

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ISSUES MERITING EN BANC CONSIDERATION

1. Was the Panel Decision's determination that: 1) Mr. Thompson's criminal history indicates that weapons might be left behind; 2) a delay for the residents to answer the door; 3) Officers' belief the house was owned by the defendant's unaccounted for girlfriend; 4) another resident's statement that there was nobody else in the house that he knew of"; and 5) Mr. Thompson's appearance to be covered in dust and cobwebs sufficient to justify a protective sweep after the defendant was taken into custody outside of the house?
2. Is the fact of three predicate convictions necessary to the implementation of a sentence above the statutory maximum required to be proved beyond a reasonable doubt?

COURSE OF PROCEEDINGS AND DISPOSITION

On March 16, 2016, Mr. Thompson was indicted on two counts in violation of 18 U.S.C. § 922(g)(1) and § 924(e).

The Trial Court Decision

I. The trial court denied the Motion to Suppress, relying on Mr. Thompson's lack of standing, reasonable support for protective sweep, and the subsequent consent of the resident to justify the search.

Mr. Thompson proceeded to trial and on March 28, 2019, he was found guilty of violating 18 U.S.C. § 922(g)(1) and § 924(e).

II. Panel Decision

The Panel affirmed the District Court's Order and Mr. Thompson's conviction. United States v. Thompson, 2021 U.S. App. Lexis 22041 (8th Cir. 2021). The Panel focused on officer's reasonable beliefs in conducting a protective sweep after Mr. Thompson's arrest under Maryland v. Buie. Applying the factors of 1) Mr. Thompson was a suspect in a burglary where firearms were stolen, committing a robbery, and possessing a handgun during a gunfight and could have left guns behind for another person to use; 2) officers were forced to wait for minutes for a response from the residence; 3) officers believed the house belonged to Thompson's girlfriend who was unaccounted for; 4) the other occupant of the

home gave an “odd, ambiguous answer” to the question of whether anyone else was present; and 5) that Thompson was covered in dust and cobwebs, the Panel found the protective sweep justified.

The Panel rejected Mr. Thompson’s claim that the government was required to prove the three predicate convictions necessary for the Armed Career Criminal Enhancement based upon the narrow exception under Almendarez-Torres v. United States, 523 U.S. 224 (1998). However, Mr. Thompson’s case is distinguishable because Thompson was found guilty at trial, while Almendarez-Torres pled guilty and admitted the facts of three earlier convictions at his plea hearing. Mr. Thompson is raising a Sufficiency of Evidence claim because there was no basis for the jury to find him guilty when the offenses were not listed in the indictment or presented as evidence.

STATEMENT OF FACTS

On March 8, 2016, Mr. Thompson was taken into custody on the front porch of a third party's residence. Subsequent to his arrest and the custody of the other party, officers conducted a protective sweep. During the protective sweep, officers observed an attic access in a closet of one of the bedrooms. Officers, "utilizing a ladder or boost" entered the attic through the access and located 4 firearms. Subsequent to the protective sweep and after informing the third party of the discovery of the firearms, the officers obtained his consent to search the residence.

Mr. Thompson was charged with possession of the firearms from this incident and an earlier, unrelated incident. The indictment cited 18 U.S.C. § 922(g)(1) and 924(e) which subjected Mr. Thompson to a 15-year statutory minimum sentence instead of a 10-year sentence under 18 U.S.C. § 922(g)(1) and 924(a)(2).

Mr. Thompson filed a motion to suppress the search. The government's responded that Mr. Thompson lacked standing to challenge the search, the search was "protective sweep" and within an exception to the Fourth Amendment's exclusionary rule, and finally that another resident's consent absolved any Fourth Amendment concerns. Evidence was taken and the Court denied Mr. Thompson's Motion to Suppress.

At the trial, Officer Crump with the Kansas City Missouri Police Department testified that his tactical team was called out to serve an arrest warrant for Mr. Thompson. (Tr. T. P. 265, L.5-7).¹ He testified that he had received information that Mr. Thompson had been dropped off at the residence and that the residence belonged to someone else. (Tr. T. P. 265, L. 14-16). The officers approached the front of the house in a tactical manner and arrived on the front porch. (Tr. T. P 268, L 7-8). After a delay of 6 to 8 minutes where he reported hearing sounds of banging and observed the blinds in the front room and the front bedroom move, Det. Crump contacted the other resident and observed Mr. Thompson in a small hallway adjacent to the main room. (Tr. T. P.272, L. 20-25). Mr. Thompson went towards the front bedroom and then returned under Officer Crump's directions. (Tr. T. P. 273, L 1-8). Mr. Thompson was handed off to other officers after he exited the address. Crump then directed the other occupant to exit the residence and that individual was taken into custody. (Tr. T. P. 274, L 22-24). Officer Crump asked the individual if there were other persons inside of the house and his response was "not that I know of." (Tr. T. P. 275, L1). Officer Crump then told the occupant he was going to perform a protective sweep. (Tr. T. P.276, L 9-10). During the sweep, another officer entered the bedroom occupied by Mr. Thompson and opened the closet door, where he observed the attic access in the

¹ Trial Transcript

ceiling of the closet. (Tr. T. P. 277, L. 8-12). This officer then entered the attic through that access and observed the four firearms secreted in the attic. Only after this search revealed firearms, did the officers request consent from Mr. Richards to search the house.

ARGUMENT AND AUTHORITIES

This Court should grant this petition and rehear the case *en banc*. The issues requiring the full Court's resolution concern the Fourth Amendment, Fifth and Sixth Amendments. Review by the full Court is "necessary to secure or maintain uniformity of the Court's decisions." Fed. R. App. P. 35(a)(1). The question is also "one of exceptional importance."

I. The Panel decision to deny Mr. Thompson's Motion to Suppress evidence seized as a result of a protective sweep misapplies the Buie test and expands the boundaries of a protective sweep without a reasonable basis.

The Panel Decision determined Mr. Thompson, as an overnight guest, did not have standing to challenge a search of the attic, that the protective sweep was reasonable, and in the alternative, that the search was justified by the owner's subsequent consent.

The arrest of a person outside of a residence does not justify a warrantless search of the residence; an exception is when law enforcement officer accompanies the arrestee into his residence to obtain clothing or identification. United States v. DeBuse, 289 F.3d 1072, 1073 (8th Cir. 2002). Maryland v. Buie, 494 U.S. 325 (1990) authorizes protective sweeps for individuals who pose a danger to the

officers or others, but it does not allow a search for firearms or contraband. The Panel decision conflates the possible presence of Mr. Thompson's girlfriend and the possibility of weapons inside the residence as a danger to the officers. There was no particularized evidence the "girlfriend" was present or that she was a danger to the officers. Buie recognizes the danger must come from an individual different than the arrest. George Richardson's "ambiguous answer that there was '[n]obody else' in the home 'that he kn[e]w of'" does not strengthen that suspicion.

Mr. Thompson's facts closely follow the analysis in United States v. Custer, 281 F. Supp. 2d 1003 (D. Neb 2003). That Court upheld the motion to suppress where Custer was taken into custody outside of the residence. The Court recognized a line of cases that recognized once Mr. Custer was under arrest, a protective sweep of the residence would be justified only if there were suspicion of attack by a third party and not by the dangerousness of the arrested individual. United States v. Colbert, 76 F.3d 773, 777 (6th Cir. 1996); see also United States v. Akrawi, 920 F.2d 418, 420 (6th Cir. 1990); United States v. Tisdale, 921 F.2d 1095, 1097 (10th Cir. 1990). Furthermore, a protective sweep cannot be justified by mere speculation that another person might be inside the house. Colbert, 76 F.3d at 778.

Like Mr. Thompson's case, after all parties were accounted for, a vague statement in response to an officer's inquiry about other persons inside the

residence was “No, I don’t think so, I don’t know.” The Custer court found this could not be the basis for an inference that anyone else was inside the residence.

Here, the Panel decision specifically cited the officer’s awareness that Mr. Thompson may be a suspect in a burglary involving weapons, committing a robbery, and possessing a handgun during a gunfight as support for a sweep and that the presence of an unknown female might be a danger to them is contrary to the Buie test. The Panel’s lone concern for the protective sweep was whether the use of a “ladder or a boost” was a reasonable expansion of the protective sweep. Because the Panel based its decision on factors that are prohibited under Buie, this *en banc* should rehear the matter.

II. The Court should grant the petition for rehearing *en banc* because the panel’s opinion contradicts Supreme Court precedent that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” or admitted by the defendant.”

Any fact that increases the penalty range for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. United States v. Apprendi, 530 U.S. 466 (2000). The Panel rejected Mr. Thompson’s claim that the government was required to prove the three predicate

convictions necessary for the Armed Career Criminal Enhancement based upon the narrow exception under Almendarez-Torres v. United States, 523 U.S. 224 (1998). However, Mr. Thompson's case is distinguishable because Thompson was found guilty at trial, while Almendarez-Torres pled guilty and admitted the facts of three earlier convictions at his plea hearing. Without that admission, Mr. Thompson's Sufficiency of Evidence claim is valid because there was no basis for the jury to find him guilty when the offenses were not listed in the indictment or presented as evidence.

Courts have analyzed that the substantive offense and penalty provisions in firearms offenses are in separate provisions. "Normally, the mens rea for a crime is set out as part of the substantive offense, not as part of a penalties provision, as in section 924(a)." United States v. Hern, 926 F.2d 764, 766 (8th Cir. 1991). The Supreme Court has determined that § 922(g)(1) and § 924(a)(2) requires the government to prove both the defendant's knowledge of his relevant conduct and his relevant status. Rehaif v. United States, 139 S. Ct. (2019). The combination of §922(g)(1) and § 924(e) only constitutes a crime if § 924(e) provides the penalty range. "A determination of guilt that yields no sentence is not a judgment of conviction at all." United States v. Easter, 553 F. 3d 519, 526 (7th Cir. 2009) (*per curiam*). By charging Mr. Thompson with an enhanced penalty range, the government was required to prove the additional element of predicate convictions

under 18 U.S.C § 924(e) to justify the penalty. This was not a defect in the indictment, but rather the prosecutorial strategy to subject Mr. Thompson to a more severe punishment.

The government's case in chief proceeded as though Mr. Thompson was charged under § 922 and § 924(a). The only evidence of conviction presented at trial was Mr. Thompson's stipulation that he had one or more felony convictions. While the jury found him guilty of the offense of possession of a firearm, there was no evidence that Mr. Thompson was found guilty of that possession after three prior felony convictions for crimes of violence or serious drug felonies.

The recent Panel opinion contradicts elements of the Buie test to support the protective sweep and expands the Almendarez-Torres factor outside of the holding of that case. Only the en banc Court can decide what the proper application of the Buie factors and whether Mr. Thompson's pursuit of a trial requires the government to prove all facts of his conviction

CONCLUSION

For the Panel opinion to be established as case law, subsequent to any arrest near a residence, law enforcement would be enabled to search that house without probable cause, simply by asserting there might be another person inside of the residence that might be a threat to officers or others.

Further, the Panel opinion establishes that the government is not bound by the Due Process rights of the accused to have each element of the offense of conviction proven beyond a reasonable doubt.

Based upon the foregoing reasons, Mr. Thompson respectfully requests that this Court grant rehearing *en banc* and settle these important questions of federal law.

Respectfully submitted,

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CERIFICATE OF FILING AND SERVICE

I hereby certify that on this 24th day of August 2021, I electronically filed the foregoing Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class mail, postage pre-paid for delivery within 3 calendar days, to the following non-CM/ECF participants:

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/s/Chad. G. Gardner
Chad G. Gardner

**CERTIFICATE OF WORD PROCESSING PROGRAM AND
COMPLIANCE WITH FED. R. APP. 32 (a)(7)(c)**

The undersigned attorney hereby certifies that the above Brief was prepared using Microsoft Word. The Brief and the Addendum have been scanned for viruses and are virus free as required by Local Court Rule 28A. Additionally, in conformity with the Requirements of Fed. R. App. P. 32(a)(7)(c), the undersigned attorney certifies that the above brief complies with the type volume limitation and contains 3109 words.

/s/Chad. G. Gardner
Chad G. Gardner