PETITION APPENDIX

TABLE OF APPENDICES

APPENDIX A

NOT FOR PUBLICATION

FILED

AUG 10 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE LUIS NUNEZ, AKA Corps, Defendant-Appellant.	No. 21-50131 D.C. Nos. 2:19-cr-00212-SVW-2 2:19-cr-00212-SVW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted August 2, 2022**
Pasadena, California

Before: CALLAHAN and H. THOMAS, Circuit Judges, and HUMETEWA,*** District Judge.

Jose Nunez appeals his conviction for unlawful possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1). In the alternative, he challenges

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Diane J. Humetewa, United States District Judge for the District of Arizona, sitting by designation.

the district court's imposition of an electronic search condition as part of his supervised release conditions. We have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and we affirm.

1. Nunez first argues that the district court erred in denying his motion to suppress evidence of firearms and ammunition recovered by law enforcement officers during a protective sweep of his house. Nunez claims the search violated the Fourth Amendment because the deputies did not have a reasonable belief that any dangerous individuals might be in the house when they conducted the sweep. Alternatively, assuming some form of protective sweep was justified, Nunez argues the deputies exceeded the permissible scope of the sweep by entering his bedroom. We review a district court's denial of a motion to suppress de novo and any underlying factual findings for clear error. *United States v. Wilson*, 13 F.4th 961, 967 (9th Cir. 2021). The ultimate determination of whether there was reasonable suspicion to conduct a warrantless search is reviewed de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

The Fourth Amendment protects the right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the

arrest scene." *Maryland v. Buie*, 494 U.S. 325, 337 (1990). "[A] protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." *Id.* at 335.

Here, the record demonstrates that the deputies who conducted the sweep watched an armed known gang member enter Nunez's house, heard a commotion inside the house, and saw the gang member leave without the weapon. Subsequently, two other gang members left the house, and those two individuals could not confirm to the deputies whether anyone else was in the house. Based on these specific and articulable facts, the deputies had a reasonable belief that there may have been people in the home who had access to at least one firearm and thus posed a threat to the deputies' safety.

Further, the deputies did not exceed the permissible scope of the protective sweep because they only briefly and cursorily searched the home, including Nunez's bedroom. While the separate bedroom at the back of the property was accessible only by an exterior door, it was not obvious to the deputies observing from the street at the time that this was the only access point. Nunez does not otherwise explain why it would have been unreasonable to believe that an armed individual could have been hiding in the bedroom, particularly given the inability of the occupants of the house to confirm that there were no other individuals

present on the property. Because the search did not violate the Fourth Amendment, we affirm the district court's denial of Nunez's motion to suppress.

2. The government argues that even if the district court erred in finding that the officers' search was conducted pursuant to a valid protective sweep, we should still affirm the denial of the motion to suppress on the alternate ground that Nunez's firearms and ammunition would have been inevitably discovered.[1] The inevitable discovery doctrine is an exception to the exclusionary rule that applies "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984).

We agree with the government that the doctrine applies here. The deputies involved in the protective sweep explained in their declarations that had they not conducted the sweep, they still would have sought a search warrant pursuant to "standard departmental operating procedures." The district court found there was likely probable cause for a warrant authorizing the search of the house even without reliance on the guns seized during the protective sweep. Indeed, the

[1] While the district court did not base its holding on this ground, we "may affirm the denial of [a] motion on any basis supported in the record," even if not relied upon by the district court. *United States v. Lemus*, 582 F.3d 958, 961 (9th Cir. 2009) (quotations and citation omitted).

deputies did ultimately seek and obtain a search warrant, the execution of which uncovered additional ammunition not found during the officers' initial sweep.

Our prior decision in *United States v. Lundin*, 817 F.3d 1151 (9th Cir. 2016), is distinguishable. There, we rejected the defendant's argument that the inevitable discovery doctrine applied and excused the officers' failure to obtain a warrant because the officers knew they had probable cause to arrest the defendant before ever showing up at the house, and thus could have sought a warrant in advance. *Id.* at 1162. By contrast, the deputies here did not arrive at Nunez's house with the intent to arrest Nunez or search his house. It was only after Gudino ran from police into Nunez's home while carrying a weapon, and exited the house without the weapon and after a commotion, that the deputies developed probable cause to believe that evidence of a crime would be found inside. The deputies here could not have anticipated that this sequence of events would occur prior to their attempt to detain Gudino, and thus they did not have an advance opportunity to obtain a warrant like the officers in *Lundin* did.

For these reasons, we affirm the district court's denial of Nunez's motion to suppress the evidence on the alternative ground that Nunez's firearms and ammunition would have been inevitably discovered during a subsequent lawful search.

3. Nunez next argues that the district court abused its discretion in imposing a condition of release permitting law enforcement officers to search his property, including electronic devices and communications, upon reasonable suspicion that Nunez violated the terms of his supervised release. Nunez also argues that the district court plainly erred by not adequately explaining its reasoning for imposing the condition. We typically review the imposition of conditions of supervised release for abuse of discretion. *United States v. Wolf Child*, 699 F.3d 1082, 1089 (9th Cir. 2012). However, we review Nunez's contention that the district court erred by failing to provide an explanation for plain error because Nunez did not object on this ground at the time of sentencing. *See id*.

A supervised release condition need not relate to the offense conduct, so long as it is reasonably related "to the goals of deterrence, protection of the public, and rehabilitation" of the offender. *United States v. Weber*, 451 F.3d 552, 558 (9th Cir. 2006) (quoting *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003)). Further, such conditions must not infringe on the defendant's liberty more than is reasonably necessary. *Id*. The district court need not fully articulate the reasoning behind every supervised release condition if "we can determine from the record whether the court abused its discretion." *United States v. Betts*, 511 F.3d 872, 876 (9th Cir. 2007). Only if the condition implicates a "particularly significant liberty

interest" must the district court support its decision with record evidence that the condition is necessary. *Weber*, 451 F.3d at 561.

We find that the district court did not abuse its discretion in imposing the electronic search condition because, given Nunez's criminal history and the fact that he committed this violation while on supervised release for another crime, the record demonstrates that the condition is reasonably related to several of the relevant factors including deterrence, rehabilitation, and protection of the public. 18 U.S.C. §§ 3583(d)(1), 3553(a)(2)(B)–(D); *see also United States v. Cervantes*, 859 F.3d 1175, 1184 (9th Cir. 2017) (upholding suspicionless search condition in part because the defendant engaged in the relevant conduct while already on supervised release), *as amended on denial of reh'g and reh'g en banc* (Sept. 12, 2017). Further, the search condition does not infringe on Nunez's liberty more than reasonably necessary because any search under this provision may only be conducted upon reasonable suspicion that Nunez has violated the terms of his release. Additionally, although Nunez argues that his offense and criminal history did not include technology-related offenses, a condition does not need to relate to the offense conduct so long as it satisfies a statutory goal. *United States v. Bare*, 806 F.3d 1011, 1017 (9th Cir. 2015). Thus, the district court did not abuse its discretion in imposing the condition.

Nunez also fails to establish that the district court plainly erred by not providing an explanation for imposing the condition because Nunez has not demonstrated that the condition—which requires that a law enforcement officer have reasonable suspicion before conducting any search—rises to the level of the narrow class of particularly significant liberty interests that require such an explanation before being imposed. *See, e.g.*, *Wolf Child*, 699 F.3d at 1092 (holding that condition infringing a defendant's right to associate with an intimate family member implicated a significant liberty interest); *United States v. Williams*, 356 F.3d 1045, 1055 (holding that a condition forcing a person to take antipsychotic medication was an infringement on a significant liberty interest).

The judgment is AFFIRMED.[2]

[2] The Social Justice League Foundation (SJLF) filed a motion for leave to file an amicus brief in support of Nunez. While both parties have consented to the filing, the Foundation requires leave from the court because it is not timely. *See* Fed. R. App. P. 29(a)(6). We grant the motion. However, the brief seeks to introduce new facts outside of the record and advance arguments not raised by the parties. Because we do not entertain legal issues raised for the first time in an appeal by a party appearing as an amicus, *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982), we decline to consider these arguments.

APPENDIX B

United States District Court
Central District of California

UNITED STATES OF AMERICA vs. **Docket No.** 2:19-cr-00212-SVW-2

Defendant Jose Luis Nunez **Social Security No.** 7 7 0 5

akas: Moniker: Corps (Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
05	24	2021

COUNSEL Elena R. Sadowsky, DFPD
(Name of Counsel)

PLEA [X] **GUILTY,** and the court being satisfied that there is a factual basis for the plea. [ ] **NOLO CONTENDERE** [ ] **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of **Felon in Possession of Firearms and Ammunition in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) as charged in Count 2 of the Indictment**

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

TWENTY-FOUR (24) MONTHS

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of two years under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and General Order 18-10.

2. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.

3. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.

4. The defendant shall cooperate in the collection of a DNA sample from the defendant.

5. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), cell phones, other electronic communications or data storage devices or media, email accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which is due immediately.

USA vs. Jose Luis Nunez Docket No.: 2:19-cr-00212-SVW-2

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

It is further ordered that the defendant surrender himself to the institution designated by the Bureau of Prisons on or before 12 noon, June 23, 2021. In the absence of such designation, the defendant shall report on or before the same date and time, to the United States Marshal located at 350 W. First Street, Los Angeles, CA 90012.

The Court recommends to the Bureau of Prisons that the defendant be designated to a facility in the Southern California area.

The bond is exonerated upon self surrender.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

May 28, 2021
Date

STEPHEN V. WILSON, U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

May 28, 2021
Filed Date

By PM Cruz
Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to theProbation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. Jose Luis Nunez Docket No.: 2:19-cr-00212-SVW-2

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/Designated Witness Date

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 23 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE LUIS NUNEZ, AKA Corps, Defendant-Appellant.	No. 21-50131 D.C. Nos. 2:19-cr-00212-SVW-2 2:19-cr-00212-SVW Central District of California, Los Angeles ORDER

Before: CALLAHAN and H.A. THOMAS, Circuit Judges, and HUMETEWA,* District Judge.

The Memorandum Disposition, filed on August 10, 2022 in the above-captioned matter, is amended as follows:

Footnote ** <The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).> is deleted and footnote *** <The Honorable Diane J. Humetewa, United States District Judge for the District of Arizona, sitting by designation.> will now be shown as footnote **.

At footnote 2 replace <The Social Justice League Foundation (SJLF)> with <Dignity and Power Now> and <the Foundation> with <it>.

A clean copy of the amended memorandum disposition is attached to this

* The Honorable Diane J. Humetewa, United States District Judge for the District of Arizona, sitting by designation.

order. With these amendments, the panel unanimously voted to deny the petition for panel rehearing. Judges Callahan and Thomas voted to deny the petition for rehearing en banc, and Judge Humetewa so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote. Appellant's petition for rehearing and rehearing en banc, filed on September 23, 2022, are DENIED. No further petitions for rehearing or rehearing en banc may be filed.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	2:19-cr-00212-SVW	Date	October 16, 2019
Title	*USA v. Gudino*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS [56]

Defendant, Jose Luis Nunez ("Nunez"), has motioned to suppress evidence of firearms and ammunition found in his bedroom in his home located at 334 West Elm Street ("Residence") on February 14, 2019. For the reasons stated below, the motion to suppress is DENIED.

I. Factual Background

On February 14, 2019, Deputy Taylor Ingersoll and Deputy Edwin Barajas (together "Deputies") were on patrol when they saw Juan Carlos Gudino ("Gudino"), who Deputies knew to be a member of the "violent street gang Compton Varrio Tortilla Flats," on the street. Dkt. 58 at 1. Gudino had led the Los Angeles Police Department ("LAPD") in a hot-pursuit chase just two weeks prior and had escaped without being apprehended. *Id*. Deputies had previously interacted with Gudino thirty to forty times and knew he was on probation. *Id.* Deputies called out to Gudino to initiate a probation search, but Gudino fled. *Id.* Gudino was holding his waistband as he ran, and Deputies noticed Gudino was holding the buttstock of a firearm. *Id.*

Gudino fled into the Residence, home of Jose Luis Nunez, Sr. ("Nunez Sr.") and current defendant Nunez. *Id.* Deputies then called for backup, announced their presence, and observed two occupants of the home– Nunez Sr. and Juan Rivera ("Rivera")– exit the Residence. *Id.* Both Nunez Sr. and Rivera came out of the Residence with their hands up and complied with restraints. *Id.* Nunez was observed seated in a car parked in the driveway of the Residence and also complied with Deputies' instructions. *Id.* After exiting the vehicle, Nunez told Deputy Barajas that he was currently on probation for assault.

Initials of Preparer PMC

Dkt. 58-2 at 3. Nunez Sr. expressed concern that Gudino had entered the Residence, as Gudino was not allowed in the home. *Id.* The Deputies observed Gudino exit the Residence, and the two additional deputies who had responded to the backup call placed Gudino under arrest a few blocks down the road. Dkt. 58 at 1. At the time of his arrest, Gudino did not have a firearm on his person. *Id.*

Deputies entered the Residence without a warrant and found Gudino's gun– a .45 JHP handgun, loaded with ammunition including a round in the chamber. *Id.* Deputies continued to sweep the Residence and found firearms and ammunition in Nunez's bedroom: a .22 U.S. Survival Rifle and a black Amadeo Rossi SA Revolver. Dkt. 58-2 at 4. When Deputies entered Nunez's bedroom, they saw the rifle sitting on the bed and the revolver placed on top of the nightstand. *Id.* Deputies then obtained a warrant to search the entire Residence, justified in part by the firearms found in Nunez's bedroom, and found additional ammunition in Nunez's bedroom. *Id.* The basic facts of this case as related here are not significantly disputed. *See* Dkt. 56 at 6–8; Dkt. 58 at 3–6.

II. Motion to Suppress Evidence

Defendant claims the search of his bedroom was unlawful because it violated his Fourth Amendment rights. "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (citing *Wyoming v. Houghton*, 526 U.S. 295 (1999)). A warrantless search is reasonable if it meets one of the established exceptions to the warrant requirement. "The government bears the burden of demonstrating the reasonableness of the search and of demonstrating the applicability of one of the narrow exceptions to the warrant requirement." *United States v. Dadd*, 963 F.2d 380, 380 (9th Cir. 1992).

A. Protective Sweep.

Deputies entered the Residence to conduct a protective sweep– making sure there were no other gang members inside the Residence. Dkt. 58 at 1–2 As an exception to the warrant requirement, "officers can perform a further protective sweep beyond immediately adjoining areas when there are 'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene.' " *United States v. Lemus*, 582 F.3d 958, 962 (9th Cir. 2009) (citing

Maryland v. Buie, 494 U.S. 325, 334 (1990)).

A lawful protective sweep requires a "reasonable suspicion of danger." *United States v. Paopao*, 469 F.3d 760 (9th Cir. 2006) (citing *Maryland v. Buie*, 494 U.S. 335 (1990)). "This 'protective sweep' is not a license to search every nook and cranny of a house but is subject to two significant limitations: it 'extend[s] only to a cursory inspection of those spaces where a person may be found' and lasts 'no longer than it takes to complete the arrest and depart the premises.' " *Lemus*, 582 F.3d at 962 (citing *Maryland v. Buie*, 494 U.S. 335, 335–36 (1990)).

Gudino was arrested outside of the Residence by two separate deputies, and as those deputies were securing Gudino, Deputies Ingersoll and Barajas continued into the Residence to conduct the protective sweep. Dkt. 1 at 4. Deputies conducted the sweep to secure the area against other potential gang members. Dkt. 58-2 at 3. Arrests taking place outside do not present an obstacle to protective sweeps inside. *See United States v. Hoyos*, 892 F.2d 1387, 1395 (9th Cir. 1989) (officers were justified in conducting a protective sweep inside the home after arresting the defendant outside) *overruled on other grounds by United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001); *Paopao*, 469 F.3d at 767 ("The fact that Paopao was arrested outside the Game Room did not automatically preclude the officers from conducting an appropriate sweep of the interior of the Game Room to dispel this suspicion and protect themselves."). Deputies also had specific facts that gang members regularly lived in the Residence and that at least one firearm was still inside.

The search and seizure of Gudino's gun from beneath the stairs is not in dispute, but Nunez's guns were found in "plain view" in a separate bedroom. Dkt. 58-2 at 4. It is irrefutable that a bedroom is a "space where a person may be found." *Buie*, 494 U.S. at 36. Evidence is properly seized "under the 'plain view doctrine' if (1) the weapon was in 'plain view' and (2) 'its incriminating character [was] immediately apparent.' " *Lemus*, 582 F.3d at 964 (citing *Horton v. California*, 496 U.S. 128, 136–37 (2002)). Deputies found Nunez's guns on top of the bed and on top of a nightstand. Dkt. 58-2 at 4. Any officer conducting a protective sweep of the house would have encountered the firearms in "plain view" once the officer entered the bedroom, and the incriminating character of the guns would be obvious to any officer familiar with the gang or its members.

Under similar circumstances, in an unpublished opinion, the Ninth Circuit found an officer's protective sweep unconstitutional. *United States v. Garcia*, 749 Fed. App'x. 516 (9th Cir. 2018). In *Garcia*, a suspect entered a home while fleeing police pursuit and was arrested after exiting the home

and running into a neighbor's yard. Two people, a woman and young child, exited the home after the suspect fled, and officers entered the home and conducted a protective sweep. *Id.* at 519. In reviewing the constitutionality of the sweep, the court concluded the officer did not have the "specific and articulable facts" to "reasonably warrant[] the officers in believing that the area swept harbor[s] an individual posing a danger to the officers or others." *Id.* (citing *Buie*, 494 U.S. at 327).

Even though the authority is not binding, *Garcia* can be distinguished from the present case in several ways. In *Garcia*, a woman and her child exited the house, not other gang members. Here, the Residence was known to be a gang residence, and the two men that exited (Nunez Sr. and Rivera) were recognized gang members. Nunez was seated in a car in the driveway, but he was also known to Deputies as a member of the same gang– Compton Varrio Tortilla Flats. Without Gudino, there were three total members of the Compton Varrio Tortilla Flats on the scene, and, with the two additional deputies in pursuit of Gudino, only two Deputies to secure the Residence and surrounding area. Deputies had no way of knowing how many other gang members remained in the Residence or what level of danger those gang members may have posed. For their own safety, Deputies conducted a protective sweep of the Residence and discovered a total of three unattended firearms.

Garcia holds that officers cannot base a protective sweep on information that is "speculative and generalized." *Id.* at 520. Here, the Deputies knowledge was not "generalized," as they recognized specific members of the Compton Varrio Tortilla Flats. Because Gudino entered the Residence with a firearm and exited without one, Deputies had specific facts to know at least one firearm was still located in the Residence. This is unlike the suggestion of a gun in *Garcia*, where officers merely inferred a firearm from the defendant's ambiguous gesture of grabbing his waistband. *Id.* at 518. Here, the Deputies actually observed the firearm on Gudino as he entered the Residence but noticed the lack of a firearm on Gudino as he exited. Dkt. 58-2 at 3–4. These are specific articulable facts which would give an officer a reasonable suspicion of danger. The search is therefore justified as a constitutional protective sweep.

B. Exigent Circumstances & Destruction of Evidence

Deputies search of the Residence was not justified by the exigent circumstances exception– to prevent injury and the potential destruction of evidence. "Even without a warrant, police may sometimes enter a home to secure it when exigent circumstances exist. Exigent circumstances are present when a

reasonable person [would] believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. Alaimalo*, 313 F.3d 1188, 1192–93 (9th Cir. 2002) (internal quotations omitted). "Probable cause requires only a fair probability or substantial chance of criminal activity, and we determine the existence of probable cause by looking at the totality of the circumstances known to the officers at the time." *Id.* at 1193.

When Guido ran into the Residence with the gun, Deputies might reasonably have been concerned for the safety of another person, and the gun was still missing when the Deputies heard shouting inside the house. There was no further commotion, however, after Gudino left the Residence and was arrested. This is not similar to other cases justifying an exigent-circumstance-search where officers *knew* that someone reamined inside, even if the immediate commotion had subsided. *See United States v. Romo*, 652 F. App'x 534, 535 (9th Cir. 2016) ("It was apparent that someone was in the camper, the property was known to harbor drug dealers, and the officers had announced themselves and arrested people on the property. Under these circumstances, an officer could reasonably believe that the person in the camper posed a danger.").

Reasonable fear of the destruction of evidence also permits officers to enter under exigent circumstances. *Alaimalo*, 313 F.3d at 1192. Deputies knew the Residence was a gang house, that two additional gang members had exited the house, and that at least one firearm likely remained inside. Deputies had no other indication that evidence would be destroyed. This situation is distinguishable from other exigent circumstance cases where some immediate event led officers to believe evidence would imminently be destroyed. *See, e.g.*, *Kentucky v. King*, 563 U.S. 452 (2011) (police smelled marijuana and heard panicked noises after knocking and announcing); *United States v. Fowlkes*, 804 F.3d 954 (9th Cir. 2015) (exigent circumstances justified a warrantless search where investigators heard the suspect planning to destroy evidence via a wiretap). There is no similar triggering event here, and the search cannot be justified by exigent circumstances.

C. Probation Search

Nunez was on probation for assault and had search conditions attached to his probation. Dkt. 58 at 2. Probationers and parolees (simplified to "probation/er/s") are subject to a lesser expectation of privacy because "[p]robation, like incarceration, is a form of criminal sanction imposed by a court upon an

offender after verdict, finding, or plea of guilty." *Knights*, 534 U.S. at 119 (internal quotation marks omitted). Theoretically, "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply . . . ." *Id.* at 120. But unconstitutional searches are not saved retroactively "if the facts that rendered the search 'reasonable' . . . were unknown to the officer at the time of the intrusion . . . ." *Moreno v. Baca*, 431 F.3d 633, 639 (9th Cir. 2005).

In the Ninth Circuit, "[t]he search condition validates a search only if the police had advance knowledge that the search condition applied before they conducted the search." *United States v. Caseres*, 533 F.3d 1064, 1075–76 (9th Cir. 2008). The Deputies knew Nunez was on probation for assault, but it is not clear the Deputies knew Nunez had a search condition attached to his probation. Dkt. 58 at 17. Defendant characterizes the *Caseres* case as holding that the lack of knowledge of the suspect's parolee status *and* lack of knowledge of search conditions were important to ruling the search unconstitutional. Although they were analyzed together in *Caseres*, Defendant reads *Caseres* to say each element was essential to the holding.

We need not decide that interpretation now. Nunez's case is distinguishable from *Caseres* in that Deputies knew that Nunez was on probation for assault, but they were not sure of the search conditions attached to that probation. We have found no authority to conclude that officers can *assume* search conditions once they know a suspect is on probation and be vindicated after the fact. We therefore conclude this was not a valid probation search under *Caseres*.

D. Independent Source

Although the independent source and inevitable discovery doctrines are related, they differ significantly in that "the independent source doctrine asks whether the evidence *actually was obtained independently* from activities untainted by the initial illegality." *United States v. Lundin*, 817 F.3d 1151, 1161 (9th Cir. 2016) (internal quotation marks omitted) (emphasis added). Here, there is no dispute Nunez's firearms were discovered during the initial, warrantless search of the Residence. The independent source rule does not apply because the guns and ammunition in Nunez's bedroom were already seized and therefore unavailable to be discovered by an independent source. The question of

whether the contraband *would have* been discovered absent the warrantless search is better addressed under the inevitable discovery doctrine.

E. Inevitable Discovery

If they had not entered to conduct a protective sweep, Deputies would inevitably have discovered the firearms by executing the warrant they later obtained. Dkt. 58 at 2. "The inevitable discovery doctrine acts as an exception to the exclusionary rule, however, and permits the admission of otherwise excluded evidence 'if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police . . . .' " *United States v. Reilly*, 224 F.3d 986, 994 (9th Cir. 2000) (quoting *Nix v. Williams*, 467 U.S. 431, 447(1984)). "To determine whether evidence acquired through an illegal search may be admitted at trial, the court asks whether 'by following routine procedures, the police would inevitably have uncovered the evidence' through lawful means." *United States v. Harris*, 731 F. App'x 718, 719 (9th Cir. 2018) (citing *United States v. Ramirez-Sandoval*, 892 F.2d 1392, 1399 (9th Cir. 1989)).

Here, Deputies obtained a warrant and searched the Residence after conducting a warrantless search and seizing Nunez's firearms. Dkt. 58-2 at 4. Deputies' expedient procural of the warrant following the protective sweep is a strong implication that Nunez's firearms would have been discovered during the course of routine, lawful police procedure. Based only on Gudino's actions (even without the discovery of Nunez's firearms), it seems likely the Deputies would have easily shown probable cause for a warrant to search the Residence which would have included Nunez's bedroom.

The Ninth Circuit has recently held, however, that "[t]he inevitable discovery exception does not apply when officers have probable cause to apply for a warrant but simply fail to do so." *Lundin*, 817 F.3d at 1161 (9th Cir. 2016). In *Lundin*, officers knocked on the suspect's door at 4:00 a.m. without a warrant and with the intent to make an arrest. *Id.* When officers heard commotion behind the door, they entered, arrested the suspect, and seized several handguns. *Id.* The Ninth Circuit held the inevitable discovery doctrine was inapplicable because the officers had no right to arrest the suspect in his home without first securing a warrant. *Id.* at 1162. We read *Lundin* to hold that officers cannot be vindicated by the inevitable discovery doctrine when they have no right to be present on the scene in the first instance. *See id.* ("the officers who arrived at Lundin's home had no right, absent an arrest warrant, to arrest Lundin in his home, or, absent a search warrant, to search his home.").

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Here, the Deputies entered the Residence and conducted a search based on a protective sweep and later obtained a warrant for the entire Residence. Dkt. 58 at 2. The concern underlying *Lundin* is that "allowing the government to claim admissibility under the inevitable discovery doctrine when officers have probable cause to obtain a warrant but fail to do so would encourage officers never to bother to obtain a warrant." *Lundin*, 817 F.3d at 1162. That concern is not manifested here, where Deputies approached the Residence in hot-pursuit and temporarily delayed obtaining a warrant until they conducted a protective sweep.

Here, Deputies did not "simply fail" to get a warrant; Deputies felt compelled to perform a protective sweep immediately following a chase and proceeded to follow routine police-warrant-procedure afterwards. *Id.* at 1161. This seems outside the scope of *Lundin*'s holding, as Deputies here were lawfully inside the Residence to conduct a protective sweep and observed Nunez's guns in plain view. Since the Court has found the protective sweep lawful, we need not decide that issue here.

III. Conclusion

The Deputies have presented "specific and articulable facts" to "reasonably warrant[] the officers in believing that the area swept harbored an individual posing a danger to the officers or others." *Buie*, 494 U.S. at 327. The government has therefore met its burden in showing the search was reasonable under the circumstances, and the motion to suppress is DENIED.

IT IS SO ORDERED.

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