
IN THE

**SUPREME COURT OF THE UNITED
STATES**

JUAN GUERRERO,
Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

**Appendix for Petition for a Writ of Certiorari to the
Supreme Court of the State of Rhode Island and Providence Plantations**

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19 F.4th 547

United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellant,

v.

Juan GUERRERO, a/k/

a Pawtucket, Defendant, Appellee.

No. 21-1244

I

December 6, 2021

Synopsis

Background: In prosecution for being felon in possession of ammunition, the United States District Court for the District of Rhode Island, [William E. Smith, J.](#), [514 F.Supp.3d 410](#) and [2021 WL 767932](#), granted defendant's motion to suppress evidence seized during protective search in connection with investigative detention of vehicle's occupants. Government appealed.

[Holding:] The Court of Appeals, [Thompson](#), Circuit Judge, held that officers' actual fear for their safety is not required, for a protective sweep of a vehicle to be reasonable under the Fourth Amendment, abrogating [United States v. Lott](#), [870 F.2d 778](#).

Reversed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (17)

[1] Searches and Seizures 🔑 Fourth Amendment and reasonableness in general

The Fourth Amendment's core command regarding searches and seizures is reasonableness. [U.S. Const. Amend. 4](#).

[2] Searches and Seizures 🔑 Fourth Amendment and reasonableness in general

Reasonableness for searches and seizures, as required by the Fourth Amendment purposes, usually requires balance, and balance typically requires an appreciation of the community's interest in being free from the menace of crime and the individual's interest in being left alone by the police. [U.S. Const. Amend. 4](#).

[3] Arrest 🔑 Duration of detention and extent or conduct of investigation

Because of the perils associated with investigative detentions involving suspects in vehicles, concerns about officer safety support a warrantless protective weapons search of the suspects and the area within their grab space, even if they are not under arrest, but only if the police reasonably believe the suspects are dangerous and may gain immediate control of weapons. [U.S. Const. Amend. 4](#).

1 Case that cites this headnote

[4] Searches and Seizures 🔑 Fourth Amendment and reasonableness in general

The Fourth Amendment's reasonableness command for searches and seizures does not depend on an officer's actual motivations, because the Fourth Amendment generally prefers objective inquiries over subjective ones. [U.S. Const. Amend. 4](#).

1 Case that cites this headnote

[5] Courts 🔑 Number of judges concurring in opinion, and opinion by divided court

Courts 🔑 Conclusiveness of decisions of Court of Appeals within its circuit

The law of the circuit rule ordinarily forces a panel of a federal court of appeals, and the district courts in the circuit, to follow the holdings of earlier panel decisions regardless of how anyone might feel about them.

2 Cases that cite this headnote

- [6] **Criminal Law** 🔑 Presumptions and burden of proof

Criminal Law 🔑 Wrongfully obtained evidence, admission of

While the government has the burden of justifying a warrantless search, it need not anticipate in the district court every possible suppression theory, nor adduce evidence to rebut legal arguments never articulated in defendant's suppression motion, in order to preserve for appellate review challenges to those theories or arguments, on appeal from the grant of the suppression motion. *U.S. Const. Amend. 4*.

1 Case that cites this headnote

- [7] **Courts** 🔑 Conclusiveness of decisions of Court of Appeals within its circuit

The law of the circuit doctrine recognizes that the public has a right to expect a reasonable degree of predictability and certainty, and that without the doctrine, the finality of federal court of appeals decisions would be threatened, and every decision, no matter how thoroughly researched or how well-reasoned, would be open to continuing intramural attacks.

- [8] **Courts** 🔑 Conclusiveness of decisions of Court of Appeals within its circuit

An exception to the law of the circuit rule, for federal court of appeals decisions, applies when an intervening higher authority, i.e., a directly-on-point Supreme Court opinion, an en banc opinion of the federal court of appeals, or a statutory enactment, overrules the earlier decision of a panel of the court of appeals.

1 Case that cites this headnote

- [9] **Courts** 🔑 Supreme Court decisions

An exception to the law of the circuit rule applies when Supreme Court precedent that postdates the original decision of a panel of the federal court of appeals, although not directly controlling, provides a clear and convincing

basis to believe that the earlier panel would have decided the issue differently.

1 Case that cites this headnote

- [10] **Arrest** 🔑 Justification for pat-down search

Under the Fourth Amendment, officers, during an investigatory detention of a person, may frisk the person for weapons if they have reasonable suspicion that he is armed and presently dangerous. *U.S. Const. Amend. 4*.

1 Case that cites this headnote

- [11] **Arrest** 🔑 Justification for pat-down search

When it comes to a weapons frisk in connection with an investigatory detention, the Fourth Amendment issue is whether a reasonably prudent man in the circumstances would have been warranted in the belief that his safety or that of others was in danger. *U.S. Const. Amend. 4*.

1 Case that cites this headnote

- [12] **Arrest** 🔑 Justification for pat-down search

The sole purpose of a limited protective search in connection with an investigatory detention is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. *U.S. Const. Amend. 4*.

- [13] **Searches and Seizures** 🔑 Fourth Amendment and reasonableness in general

Because the reasonableness of a search or seizure, as required by the Fourth Amendment, is predominately an objective inquiry, the court asks whether the circumstances, viewed objectively, justify the challenged action, and asks whether the challenged action was reasonable whatever the subjective intent motivating the relevant officials. *U.S. Const. Amend. 4*.

- [14] **Searches and Seizures** 🔑 Fourth Amendment and reasonableness in general

The advantages of an objective inquiry regarding whether a search or seizure was reasonable, as required by the Fourth Amendment, are many, including: the recognition that the Fourth Amendment regulates conduct rather than thoughts; promoting evenhanded, uniform enforcement of the law by avoiding arbitrarily variable protection of constitutional rights; and allowing the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. [U.S. Const. Amend. 4](#).

[15] Arrest 🔑 Justification for pat-down search

Whether a reasonable suspicion exists to justify a  [Terry](#) frisk is treated as an objective inquiry, and the actual motive or thought process of the officer is not plumbed. [U.S. Const. Amend. 4](#).

1 Case that cites this headnote

[16] Arrest 🔑 Duration of detention and extent or conduct of investigation

Officers' actual fear for their safety is not required, for a protective sweep of a vehicle to be reasonable under the Fourth Amendment; abrogating  [United States v. Lott](#), 870 F.2d 778. [U.S. Const. Amend. 4](#).

[17] Courts 🔑 Conclusiveness of decisions of Court of Appeals within its circuit

The law of the circuit rule, for federal court of appeals decisions, does not depend on whether courts outside the circuit march in absolute lockstep with in-circuit precedent.

***548** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND [Hon. William E. Smith, [U.S. District Judge](#)]

Attorneys and Law Firms

[Lauren S. Zurier](#), Assistant United States Attorney, with whom [Richard B. Myrus](#), Acting United States Attorney, was on brief, for appellant.

[George J. West](#) for appellee.

Before [Thompson](#), [Lipez](#), and [Kayatta](#), Circuit Judges.

[THOMPSON](#), Circuit Judge.

***549 Overview**

[1] [2] “Policing is difficult and dangerous work,” though sometimes “so is being a citizen trying to exercise his Fourth Amendment right to be free from unreasonable seizures.” [See](#)  [United States v. Knights](#), 989 F.3d 1281, 1291 (11th Cir. 2021) (Rosenbaum, J., concurring in the judgment).¹ The Fourth Amendment's core command is reasonableness. [See](#)  [United States v. Rodriguez-Morales](#), 929 F.2d 780, 786 (1st Cir. 1991) (citing  [Delaware v. Prouse](#), 440 U.S. 648, 659, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)). Reasonableness usually requires balance. And balance typically requires an appreciation of the “community[’s]” interest “in being free from the menace of crime” and the “individual[’s]” interest “in being left alone by the police.” [See](#)  [United States v. Serna-Barreto](#), 842 F.2d 965, 966 (7th Cir. 1988) (Posner, J., for the court); [see also](#)  [United States v. Hensley](#), 469 U.S. 221, 228, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).

[3] Take, for example, “investigative detentions involving suspects in vehicles,” [see](#)  [Michigan v. Long](#), 463 U.S. 1032, 1047, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) — the context of today's case. Because of the perils associated with such situations, concerns about officer safety support a warrantless “protective” weapons “search[]” of the suspects and the area within their grab space, even if they are not under arrest — but *only if* the police “reasonabl[y] belie[ve]” the suspects are “dangerous” and “may gain immediate control of weapons.”  [Id.](#) at 1049-50, 103 S.Ct. 3469.

Applying  [Long](#) years later, we said in  [United States v. Lott](#) that officers *cannot* do a “frisk for weapons ... where, although the circumstances might pass an *objective* test,”

the police “were not *actually* concerned for their safety.” See  870 F.2d 778, 783-84 (1st Cir. 1989) (first emphasis added). Other First Circuit panels then read that statement as requiring that officers be subjectively and objectively worried about their safety. A good exemplar is [United States v. Ivery](#), which reasoned from  [Lott](#) that “(1) the officers must have actually harbored a suspicion that the suspect was armed” and that “(2) [this] suspicion must have been reasonable under the circumstances.” See 427 F.3d 69, 72 (1st Cir. 2005).

[4] But over the many decades since  [Lott](#) came on the scene, the Supreme Court has issued opinion after opinion interpreting (in various contexts) the Constitution's reasonableness command as not depending on the officer's “actual motivations” — and that is because the Fourth Amendment generally prefers “objective” inquiries over “subjective” ones. These quotes are from  [Whren v. United States](#), for instance. See  517 U.S. 806, 812-14, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). [United States v. McGregor](#) signaled that  [Whren](#)'s “reasoning” *might* put  [Lott](#)'s actual-fear test in serious jeopardy. See *550 650 F.3d 813, 821-22 (1st Cir. 2011). But because the government did not press the matter there, we did not take up the topic. See *id.* at 822 (remarking that other cases — [Ivery](#), 427 F.3d at 73, and [United States v. Nee](#), 261 F.3d 79, 85 (1st Cir. 2001) — had also flagged the issue without resolving it).

The issue [McGregor](#) (and others) spotlighted is now squarely before us, however.

The government appeals — as allowed under 18 U.S.C. § 3731 — the grant of Juan Guerrero's motion to suppress evidence seized during a protective search of a car. Rejecting the government's claim that Supreme Court rulings since  [Lott](#) justify dumping  [Lott](#)'s actual-fear analysis, a district judge found that while the officers had an objectively reasonable basis for the search, they had no subjective concerns for their safety. Still convinced that it is right, the government asks us to ditch the actual-fear requirement and undo the judge's suppression decision.

[5] The government's argument implicates the “law of the circuit” rule, which ordinarily forces us — and the district courts under us — to follow the holdings of earlier panel decisions regardless of how anyone might feel about them. But as with many rules, exceptions exist. And the one

the parties fight over comes into play when “authority that postdates the original decision, although not directly controlling, ... nevertheless offer[s] a compelling reason for believing that the former panel, in light of new developments, would change its collective mind.” See [United States v. Guzmán](#), 419 F.3d 27, 31 (1st Cir. 2005). Agreeing with the government that this exception applies, we conclude that  [Lott](#)'s actual-fear inquiry is no longer controlling and so reverse the judge's evidence suppression and remand for further proceedings.

How This Case Arose²

Stop and Search

A Saturday night in Providence, Rhode Island, October 21, 2019 — around 1 a.m. Responding to a “shots fired” call from a nearby laundromat, police officers in separate cruisers saw a dark BMW sedan racing away from the alleged crime scene. After turning around, the officers started tailing the car. One of them flipped on his lights and siren to pull the BMW over. But the sedan kept on going, carelessly making several quick turns. The car eventually stopped, however. And the officers (now joined by backup) exited their cruisers with guns drawn. Nearing the car, they ordered the driver, who turned out to be Guerrero, and the passenger, who turned out to be a 16-year-old minor, to get out. The minor did as directed, got handcuffed, and ended up in a police cruiser. The officers repeatedly told Guerrero to get on the ground. Finally doing as asked, he also got cuffed and put in a cruiser. A search of the BMW uncovered a magazine loaded with bullets in a backpack behind the driver's seat. Having found the magazine, the officers searched the rest of the car (including the trunk) for a firearm but came up empty.

With the search out of the way, the officers got the passenger's info, which is when they learned he was a minor. They called his mother and drove him home. But they arrested Guerrero for eluding law enforcement.

Legal Proceedings

That was not Guerrero's only legal trouble, however, for the feds later charged him with unlawful possession of ammunition *551 under  18 U.S.C. § 922(g)(1). Pleading

not guilty, Guerrero moved to suppress the evidence seized in the search. What happened next is a bit involved. But an abbreviated version suffices for present purposes.

The government opposed Guerrero's motion. The judge held an evidentiary hearing. And after considering post-hearing arguments, the judge granted Guerrero's suppression request. His analysis ran like this.

 [Lott](#), the judge wrote, says the government must “show[] ... both that the officers were subjectively motivated by officer safety and that the motivation was objectively reasonable.” Turning to  [Lott](#)'s objective prong, the judge found that the concatenation of circumstances — *e.g.*, “the BMW's temporal and geographic proximity to the gun shots, the direction in which the BMW was travelling (away from the location of the gun shots), Guerrero's reckless and evasive driving, and his lack of compliance with officer commands” — raised legitimate concerns about officer safety. Plus the judge thought that the minor's temporary restraint created conditions justifying a protective search of the BMW. Moving then to  [Lott](#)'s subjective prong, the judge found that the collection of facts — *e.g.*, the officers' not frisking or closely watching the minor, despite testifying that they worried for their safety, as well as their “demeanor, as documented in the body camera footage” — showed they “lacked” an actual “fear of the sixteen-year-old passenger” and “demonstrate[d] an eye towards investigation and prosecution, not officer safety.”

The judge noted that after  [Lott](#) the Supreme Court decided  [Whren](#), which held that “the constitutional reasonableness of traffic stops depends” on objective factors (like the violation of traffic laws), not “on the actual motivations of the individual officers involved” — and thus meant that “[s]ubjective intentions” have “no role in ordinary, probable-cause Fourth Amendment analysis.” See  517 U.S. at 813, 116 S.Ct. 1769. And the judge also noted that our [McGregor](#) opinion suggested — without deciding the point — that  [Whren](#) might undercut  [Lott](#)'s actual-fear prong. But the judge concluded that “ [Lott](#) remains good (if vulnerable) law.”

The government moved for reconsideration, talking up not only  [Whren](#) but also  [Maryland v. Buie](#), where the

Supreme Court held that officers lawfully entering a house to make an arrest can protectively sweep adjacent rooms “from which an attack could be immediately launched,” see  494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) — regardless of their subjective fears, see  [id.](#) at 337 & n.1, 110 S.Ct. 1093 (Stevens, J., concurring).  [Whren](#) and  [Buie](#), the government continued, strongly imply that an officer's subjective belief is not constitutionally relevant when it comes to protective sweeps. But the judge did not change his mind on the actual-fear issue, pertinently ruling that “the First Circuit has repeatedly declined to reach the question of whether  [Lott](#) survived  [Whren](#)'s broadside against inquiries into subjective intent” and that cases like  [Buie](#) “involving protective sweeps of houses” (as opposed to vehicles) do not make  [Lott](#) a legal “dead letter” either.

This is where we come in, with the government telling us that we should end  [Lott](#)'s “condition that a lawful protective sweep” under  [Long](#) “requires police to demonstrate a subjective fear for their safety,” and Guerrero telling us that we should find the judge's analysis to be error-free.

Our Take

Standard of Review

The government asks us to critique the judge's legal conclusion about  [Lott](#) *de novo* (*i.e.*, without giving the judge's analysis *552 any special weight). Convinced that the government did not develop its argument about  [Lott](#)'s viability in a timely manner, Guerrero asks us to either consider the government's  [Lott](#) arguments waived or limit our review to a search for plain error. We side with the government, however.

[6] It is true that the government did not raise concerns about  [Lott](#) before the judge filed his decision. But Guerrero's pre-hearing memo did not make  [Lott](#)-based suppression arguments. His two-page submission stated in conclusory terms that “[c]ourts have fashioned a few established and well delineated exceptions to the warrant requirement, in the case of an automobile search,” but “none ... apply to this

case” — he did not spell out what those exceptions are. Citing [Long](#), the government briefed the case under an objective standard. And neither the defense's nor the judge's suppression-hearing comments clearly put the government on notice that the judge had concerns about [Lott](#)'s actual-fear test — a point the judge made in his reconsideration ruling. While the government has the burden of justifying the warrantless search, “it need not ... anticipate[] every possible suppression theory, or ... adduce[] evidence to rebut legal arguments never articulated in defendant's suppression motion.” See [United States v. Vanvliet](#), 542 F.3d 259, 265 (1st Cir. 2008). Anyhow, Guerrero had a full opportunity to respond to the government's post-hearing arguments in his post-hearing memo.

Given all this, we believe *de novo* review is the way to go. See, e.g., [United States v. Paradis](#), 351 F.3d 21, 28-29 (1st Cir. 2003) (applying *de novo* review to a legal issue after rejecting a waiver argument).

Cheat Sheet

On the Law-of-the-Circuit Rule

[7] A key part of circuit judging is following the “law of the circuit” rule, which (as already noted) says that once a panel decides a legal issue (as the [Lott](#) panel did), that ruling usually binds later panels too — even where the succeeding panel disagrees with the prior one. See, e.g., [San Juan Cable LLC v. P.R. Tel. Co.](#) (“[San Juan Cable](#)”), 612 F.3d 25, 33 (1st Cir. 2010). The public has a right to expect a reasonable degree of predictability and certainty. See, e.g., [United States v. Barbosa](#), 896 F.3d 60, 74 (1st Cir. 2018). And “[w]ithout the law of the circuit doctrine, the finality of appellate decisions would be threatened and every decision, no matter how thoroughly researched or how well-reasoned, would be open to continuing intramural attacks.” *Id.*; see also [Kisor v. Wilkie](#), — U.S. —, 139 S. Ct. 2400, 2422, 204 L.Ed.2d 841 (2019) (commenting that “[a]dherence to precedent is ‘a foundation stone of the rule of law’ ” (quoting [Michigan v. Bay Mills Indian Cmty.](#), 572 U.S. 782, 798, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014))).

[8] [9] Our saying “usually binds” in the preceding paragraph is a tip-off that there are exceptions to when prior panel precedent controls. One applies when an intervening higher authority — a directly-on-point Supreme Court opinion, an en banc opinion of this court, or a statutory enactment — overrules the earlier panel decision.

[United States v. Rodriguez](#), 527 F.3d 221, 225 (1st Cir. 2008). Another applies when Supreme Court precedent “that postdates the original decision, although not directly controlling,” provides a clear and convincing basis to believe that the earlier panel would have decided the issue differently.

[San Juan Cable](#), 612 F.3d at 33 (quoting [Williams v. Ashland Eng'g Co.](#), 45 F.3d 588, 592 (1st Cir. 1995)); see also [United States v. Lewis](#), 963 F.3d 16, 25 (1st Cir. 2020), cert. denied, *553 — U.S. —, 141 S. Ct. 2826, 210 L.Ed.2d 945 (2021). These exceptions are “narrowly circumscribed,” however. [Arevalo v. Barr](#), 950 F.3d 15, 21 (1st Cir. 2020) (quoting [Barbosa](#), 896 F.3d at 74). And the situations in which they operate are “hen's-teeth-rare.” *Id.* (quoting [Barbosa](#), 896 F.3d at 74).³ This is exactly as it should be, because we here at the First Circuit

are a court of six [active-status] members, on which it customarily takes four votes to sit en banc. Were panels of three too prone to reverse prior precedent, we would lose the benefits of stability and invite [lawyers and] litigants to regard our law as more unsettled than it should be.

[Lewis](#), 963 F.3d at 25.

With these preliminary principles in mind, we take on the government's bid to get around the law-of-the-circuit rule.

Arguments and Analysis

A heads-up first. Our opinion is somewhat longish. But length should not be confused for complexity. See [Mass. Sch. of L. at Andover v. Am. Bar Ass'n](#), 142 F.3d 26, 29, (1st Cir. 1998). [Lott](#)'s days were numbered after [Buie](#). Yes,

 Buie is “distinguishable” because it involved a protective sweep of a home rather than a car. But that distinction actually cuts against  Lott because privacy interests implicated by a home sweep significantly outweigh those implicated by a car sweep. See generally  California v. Carney, 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) (holding that the Fourth Amendment allows warrantless car searches because “[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls”). Perhaps a baseball analogy will help (at least for devotees of our national pastime). Imagine Supreme Court caselaw holds that a single *is* a good hit. Now imagine a litigant asks us to consider the status of a prior circuit opinion holding that a double *is not* a good hit. The cases would be “distinguishable,” but hardly in a way that would raise any questions about the correct result. So too here. But because we take our duty to follow circuit precedent very seriously — making sure to weigh heavily the strong presumption against invoking an exception to the law-of-the-circuit rule — we explore in greater depth below the many developments that would have influenced the  Lott panel to adopt a different ruling and the specific arguments to the contrary Guerrero raises.

The government invokes the second law-of-the-circuit exception, which (to put it in slightly different terms) comes to the fore when “recent Supreme Court precedent calls into legitimate question a prior opinion” by this court. See United States v. Rodriguez-Pacheco, 475 F.3d 434, 442 (1st Cir. 2007) (emphasis and quotation marks omitted). Success under this exception is even rarer than under the first (*i.e.*, the directly-overrules exception). See United States v. Wurie, 867 F.3d 28, 34 (1st Cir. 2017) (calling the second exception the “less common” of the two). Anyway, to hear the government tell it,  Whren and *554  Buie, “both of which postdate  Lott,” while not controlling, “ ‘call[] into legitimate question’  Lott’s viability” when “taken together.” Guerrero does not agree that this exception applies. But we do.

To trace our path to this conclusion, we begin at the beginning (so to speak) — repeating some of what we said in our “Overview” section above.

[10] [11] [12] Way back in 1968, the Supreme Court held in  Terry v. Ohio that officers may briefly detain a person based on reasonable suspicion that he committed, is

committing, or will soon commit a crime — “even though there is no probable cause to make an arrest.” See  392 U.S. 1, 22, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Not only may they take reasonable investigative measures, but they may also frisk the person for weapons if they have reasonable suspicion that he is “armed and presently dangerous.”  Id. at 30, 88 S.Ct. 1868. And courts “judge[]” their decisions “against an objective standard: would the facts available to” them “ ‘warrant [persons] of reasonable caution in the belief’ that the action[s] taken w[ere] appropriate?”  Id. at 21-22, 88 S.Ct. 1868 (quoting  Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)). More specifically,  Terry explained, when it comes to a weapons frisk “the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”  Id. at 27, 88 S.Ct. 1868. And lest there be any doubt, the Court later explained that

[n]othing in  Terry can be understood to allow a generalized “cursory search for weapons” or, indeed, any search whatever for anything but weapons. The “narrow scope” of the  Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked.

 Ybarra v. Illinois, 444 U.S. 85, 93-94, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). The sole “purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.”  Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

So too, because of the increased dangers in  Terry stops of cars,  Long held in 1983 that officers can do a protective car frisk (as it is sometimes called) if they develop some reasonable suspicion that a suspect could immediately access weapons. See  463 U.S. at 1049, 1051, 103 S.Ct. 3469. Among other things,  Long voiced concern that absent a

protective search, “if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside.” [Id.](#) at 1052, 103 S.Ct. 3469. But echoing [Terry](#), [Long](#) said that courts assess the officers’ actions based on what is “objectively reasonable” — *i.e.*, whether “‘a reasonably prudent man in the circumstances’ ” would believe that the “suspect is ‘dangerous.’ ” See [id.](#) at 1050, 103 S.Ct. 3469 (quoting [Terry](#), 392 U.S. at 27, 88 S.Ct. 1868).

Fast-forward to our 1989 [Lott](#) decision, which is also a car-frisk case. [Lott](#) acknowledged that “[Terry](#) and [Long](#) speak in terms of an *objective* test (‘reasonableness’) for determining the validity of an officer’s frisk for weapons.” See [870 F.2d at 783](#) (emphasis added). But (a very big “but,” actually) [Lott](#) did not view either decision as okaying a car frisk where — even though the situation “*might* pass an *objective* test” — the officers at the scene had no “*actual* []” safety concerns. [Id.](#) at 783-84 (first two emphases added). Officers “cannot have a *reasonable* suspicion that a person is armed and dangerous,” [Lott](#) declared, “when [they] **in fact** ha[ve] *no* such suspicion.” [Id.](#) at 784 (bold emphasis and *555 bracketed material added). And if they do not “have an *actual* suspicion that weapons are present” — if they were driven, say, by an unconstitutional desire to find contraband — no “ex post facto reconstruction based upon an argument of *objective* reasonableness can validate the search.” See [id.](#) (emphasis added).

Turning to the case’s facts, [Lott](#) said that the circumstances known to the officers before the search — *e.g.*, the driver’s running stop signs, driving away from an attempt to stop him, having bloody wrists, and making statements about the wounds that clashed with his passenger’s story — “might be sufficient to justify” a “search of the car under [Long](#).” [Id.](#) at 784-85. But in the next breath [Lott](#) stated that other “reasons fatally undercut” the search’s “validity.” [Id.](#) at 785. For one, the officers did not frisk either defendant “upon exiting the car (or at any subsequent time) until the[] arrest[s]” — if they “*truly feared* that the two were armed and dangerous ... they would have made sure, by a [Terry](#) frisk, that the *defendants* were not armed and then have

proceeded to search the car.” [Id.](#) (first emphasis added). Furthermore, the officers “directed” the search “towards finding contraband” — the police conceded that the search “was not ... for weapons only,” making it “improper under [Terry](#) and [Long](#).” See [id.](#); see also [id.](#) at 782-83.

Successor First Circuit panels have read [Lott](#) as holding that officer-safety concerns in a car-frisk scenario must be subjectively felt *and* objectively reasonable. See (in chronological order) [Nee](#), 261 F.3d at 85 (citing [Lott](#), 870 F.2d at 783, 785); [Ivery](#), 427 F.3d at 72 (citing [Lott](#), 870 F.2d at 783-84); [United States v. Diaz](#), 519 F.3d 56, 62 (1st Cir. 2008) (citing [Ivery](#), 427 F.3d at 72, and noting that [Ivery](#) discusses [Lott](#), 870 F.2d at 783-84); [McGregor](#), 650 F.3d at 820 (citing [Ivery](#), 427 F.3d at 72, and noting that [Ivery](#) discusses [Lott](#), 870 F.2d at 783-84). [Ivery](#) is worth reviewing for a moment.

The [Ivery](#) defendant challenged the district judge’s ruling that “the officers *actually* feared for their safety” and that their “suspensions were *reasonable* under the circumstances.” See [427 F.3d at 72-73](#) (emphases added). Starting with the basics, [Ivery](#) held that [Lott](#) “*impose[d]*” the following “requirement[s] for a permissible warrantless search for weapons” in a car-frisk context: “(1) the officers must have *actually* harbored a suspicion that the suspect was armed; and (2) that suspicion must have been *reasonable* under the circumstances.” See [id.](#) at 72 (emphases added and citing [Lott](#), 870 F.2d at 783-84). From there, [Ivery](#) saw no error with the judge’s finding “that the officers testified credibly” about their “*actual* []” safety concerns. [Id.](#) (emphasis added). And after adopting the perspective of a “*reasonable*” officer at the site, [Ivery](#) also ruled that the accumulated facts — *e.g.*, the defendant’s “presence in a high-crime neighborhood,” his “nervousness,” his “concealment of the car’s rear floorboard,” and his “possession of objects suggesting illegal conduct” — made the officers’ concerns objectively “*reasonable*” too, just as the judge had ruled. See [id.](#) at 73 (emphasis added).

With the actual-fears issue percolating through our Circuit, the Supreme Court decided [Buie](#) and [Whren](#) — the two post-[Lott](#) Supreme Court decisions the government says require us to “overrul[e]” [Lott](#)’s actual-fear requirement. On to them then.

 Buie held that officers making an in-home arrest under a warrant could perform a warrantless “protective sweep” — defined as a “quick” and “ cursory visual inspection of those places in which a person might be hiding” — to make sure no threat lurks within. See  *556 494 U.S. at 327, 110 S.Ct. 1093. They may do so when there are “articulable facts” that would justify “a reasonably prudent officer in believing” that a dangerous third party might be in “the area to be swept.” See  id. at 334, 110 S.Ct. 1093. And they may do so despite the special privacy involved with a house, see  id. at 333, 110 S.Ct. 1093, and despite their having no safety “worrie[s]” — they could look just as a precaution, see  id. at 337 & n.1, 110 S.Ct. 1093 (Stevens, J., concurring). “This,”  Buie asserted, “is no more and no less than was required in  Terry and  Long.” See  id. at 334, 110 S.Ct. 1093.

 Whren held that courts may not discredit a traffic stop backed by probable cause simply because the officers acted pretextually — *i.e.*, using a traffic infraction as cover to subjectively investigate some other crime. See  517 U.S. at 810, 813, 116 S.Ct. 1769. Beyond a few exceptions not relevant here (administrative inspections and inventory searches, for instance), “[n]ot only” has the Supreme Court “*never held ... that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment,*”  Whren proclaimed — but the Court has “repeatedly held and *asserted the contrary.*”  Id. at 812, 116 S.Ct. 1769 (emphases added). In other words, according to  Whren, the legality of their actions in that situation turns on objective justifications, not on subjective motivations. See  id. at 813, 116 S.Ct. 1769.

[13] And  Buie and  Whren are hardly aberrations. In more recent decisions, the Supreme Court has repeatedly (and forcefully) played up how the Fourth Amendment's basic test is objective. A case in point is  Nieves v. Bartlett, which said that “[i]n the Fourth Amendment context, ... we have almost uniformly *rejected* invitations to probe *subjective intent.*” See  — U.S. —, 139 S. Ct. 1715, 1724, 204 L.Ed.2d 1 (2019) (emphases added and quotation marks omitted). Another is  Kentucky v. King, which said that

the Court has “*never held*, outside limited contexts such as an ‘inventory search or administrative inspection ..., that an *officer's motive invalidates objectively justifiable behavior* under the Fourth Amendment.’ ” See  563 U.S. 452, 464, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (emphases added and quoting  Whren, 517 U.S. at 812, 116 S.Ct. 1769). Still another is  Ashcroft v. al-Kidd, which stated that because “Fourth Amendment reasonableness ‘is predominately an *objective inquiry,*’ ” the Court “ask[s] whether ‘the circumstances, *viewed objectively,* justify [the challenged] action’ ” — and if yes, “that action was reasonable ‘*whatever the subjective intent*’ motivating the relevant officials.” See  563 U.S. 731, 736, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (emphases added except for “whatever,” and first quoting  Indianapolis v. Edmond, 531 U.S. 32, 47, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), then quoting  Scott v. United States, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978), and then quoting  Whren, 517 U.S. at 814, 116 S.Ct. 1769). And showing that the Court has said what it meant and meant what it has said, there is this passage in  Florida v. Jardines: “[ al-Kidd and  Whren] merely hold that a stop or search that is *objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has *nothing to do* with the validating reason.” See  569 U.S. 1, 10, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (second emphasis added).

[14] According to our judicial superiors, the advantages of an objective inquiry are many — including: “recogniz[ing] that the Fourth Amendment regulates conduct rather than thoughts,” see  al-Kidd, 563 U.S. at 736, 131 S.Ct. 2074; “promot[ing] evenhanded, uniform enforcement of the law,” see  id., by avoiding “arbitrarily variable protection” of constitutional rights, see *557  Devenpeck v. Alford, 543 U.S. 146, 154, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004); and “allow[ing] the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment,” see  Torres v. Madrid, — U.S. —, 141 S. Ct. 989, 998, 209 L.Ed.2d 190 (2021) (quotation marks omitted).

[15] With [Whren](#) on the books, we have said that “[w]hether a reasonable suspicion exists” to justify a [Terry](#) frisk “is treated as an *objective inquiry: the actual motive or thought process of the officer is not plumbed*.” [Bolton v. Taylor](#), 367 F.3d 5, 7 (1st Cir. 2004) (citing [Whren](#), 517 U.S. at 813, 116 S.Ct. 1769) (emphasis added). And with [Buie](#) and [Whren](#) in mind, we have held that judges should test the lawfulness of a protective sweep of a home on an *objective standard only*. [United States v. Lawlor](#), 406 F.3d 37 (1st Cir. 2005), and [United States v. Winston](#), 444 F.3d 115 (1st Cir. 2006), jump out as obvious examples.

[Lawlor](#) rejected an argument that because the officers did not act like “they feared an attack from within the house,” the protective sweep crossed a constitutional line. See [406 F.3d at 43 n.8](#). This claim, [Lawlor](#) wrote, “miss[ed] the mark.” [Id.](#) What matters is that the police were “justified in entering the house to conduct a protective sweep and that the sweep itself was appropriate in scope,” [Lawlor](#) added. [Id.](#) And bowing to [Whren](#), [Lawlor](#) held that “an officer’s *subjective belief or intention is irrelevant* to Fourth Amendment analysis.” [Id.](#) (emphasis added and parenthetically discussing [Whren](#), 517 U.S. at 813, 116 S.Ct. 1769).

[Winston](#) held much the same. Faced with an argument that the officers “did not actually fear for their safety” but rather used the protective sweep simply as “a pretext to search [the defendant’s] house,” [Winston](#) repeated that “*subjective intentions are not relevant* as long as the protective sweep was *objectively reasonable*.” See [444 F.3d at 120](#) (emphases added and citing [Lawlor](#), 406 F.3d at 43 n.8, which in turn cited [Whren](#), 517 U.S. at 813, 116 S.Ct. 1769). We federal judges are poorly equipped by training and experience “to second guess the agents as to how to conduct a protective sweep,” [Winston](#) remarked — though “w[e] are able” to assess “whether their actions were *objectively reasonable* given the circumstances and constraints within which they operated.” [Id.](#) (emphasis added).

[16] Where this leaves us is clear. We as a panel can and must give up [Lott](#)’s actual-fear requirement.

[Lott](#)’s actual-fear test runs counter to the strong modern trend in the caselaw — started by the Supreme Court and faithfully applied by us in other contexts — “‘repeatedly *reject[ing]*’ a *subjective approach*” because “[l]egal tests based on reasonableness are generally *objective*.” See [King](#), 563 U.S. at 464, 131 S.Ct. 1849 (emphases added and quoting [Brigham City v. Stuart](#), 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)). And with post-[Lott](#) decisions holding officers’ subjective fears irrelevant in protective sweeps of homes — where privacy expectations are at their apex, see [Collins v. Virginia](#), — U.S. —, 138 S. Ct. 1663, 1670, 201 L.Ed.2d 9 (2018) — we cannot see a good reason why subjective fears should be relevant in protective searches of autos. See generally [Buie](#), 494 U.S. at 334, 337, 110 S.Ct. 1093 (extending [Terry](#) and [Long](#) by letting officers with an objectively credible fear of danger do a visual protective home sweep to minimize that danger).

[17] Critically too, while scrapping [Lott](#)’s actual-fear analysis will align our precedent with post-[Lott](#) Supreme Court *558 precedent, *not* doing so could frustrate the goal of “evenhanded law enforcement” — which, the Court tells us, “is best achieved by the application of *objective* standards of conduct, rather than standards that depend upon the *subjective* state of mind of the officer.” See [Horton v. California](#), 496 U.S. 128, 138, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) (emphases added). If we let [Lott](#)’s actual-fear inquiry stay, this court (as best we can tell) will stand alone among the Circuits. Opinions from the Fifth, Eighth, and D.C. Circuits reject the importance of an officer’s subjective fear in reviewing the constitutionality of a [Long](#)-based search (a few choice quotes):

- “This Court ... has never held that an officer’s objectively reasonable concern for safety does not justify a protective [search] for weapons where the officer has no actual fear for his safety.” [United States v. Baker](#), 47 F.3d 691, 694 (5th Cir. 1995) (refusing to follow [Lott](#)).

- [Long](#)'s reasonableness test “is an objective one” — which “does not depend upon the searching officer actually fearing the suspect is dangerous” — and so makes “such a search ... valid if a hypothetical officer in the same circumstances could reasonably believe the suspect is dangerous.” [United States v. Plummer](#), 409 F.3d 906, 909 (8th Cir. 2005) (quotation marks omitted).
- “Because the [pertinent] test is objective, an officer's actual subjective motives ... are irrelevant to the Fourth Amendment analysis of [a] traffic stop and protective search of the car.” [United States v. Vinton](#), 594 F.3d 14, 21 (D.C. Cir. 2010) (citation and quotation marks omitted).

And decisions from many other Circuits also apply an objective test to Fourth Amendment issues (again, just a sampling):

- “The Supreme Court has long rejected any attempt to inject subjectivity into the Fourth Amendment context.” [United States v. Weaver](#), 9 F.4th 129, 145 (2d Cir. 2021) (en banc) ([Terry](#) situation).
- “[T]he ‘reasonable suspicion’ analysis is objective; subjective motive or intent is not relevant.” [United States v. Goodrich](#), 450 F.3d 552, 559 (3d Cir. 2006) ([Terry](#) situation).
- “The reasonable suspicion standard is an objective one, and the officer's subjective state of mind is not considered.” [United States v. George](#), 732 F.3d 296, 299 (4th Cir. 2013) ([Terry](#) situation).
- The reasonable-suspicion analysis “is an objective inquiry.” [United States v. McCraney](#), 674 F.3d 614, 620 (6th Cir. 2012) ([Long](#) situation).
- “[A]s is typically the case in the Fourth Amendment context, the subjective beliefs and knowledge of the officer are legally irrelevant” — since “reasonableness remains the Amendment's touchstone, the constitutional inquiry turns on” the “objective[] reasonable[ness]” of the officer's actions. [United States v. Rochin](#), 662 F.3d 1272, 1274 (10th Cir. 2011) ([Terry](#) situation).⁴

All of this raises the unacceptable specter of Fourth Amendment protections varying among jurisdictions, [see](#) [al-Kidd](#), 563 U.S. at 746, 131 S.Ct. 2074 (Kennedy, J., concurring) *559 (cautioning against such a scenario) — and between similarly dangerous sets of circumstances (protective sweeps of homes and autos) as well, [see](#) [Devenpeck](#), 543 U.S. at 154, 125 S.Ct. 588 (ditto).⁵

The bottom line then is that given the Supreme Court cases in vogue after [Lott](#), we believe the [Lott](#) panel would (if it had the chance) reverse its view of the actual-fear issue 180 degrees.

And nothing Guerrero argues persuades us differently.

Guerrero suggests that neither [Buie](#) nor [Whren](#) count when discussing the law-of-the-circuit rule because they predate [McGregor](#) (applying [Lott](#)) and [United States v. Orth](#), 873 F.3d 349 (1st Cir. 2017) (also applying [Lott](#)). [Lott](#)'s continued viability was not at issue in either case, however. So [Lott](#) remains the key panel precedent. And (to state the obvious) [Buie](#) and [Whren](#) postdate [Lott](#).

Also going nowhere is Guerrero's claim that [Lawlor](#) and [Winston](#) contribute nothing to the analysis. Specifically, he says that while [Lawlor](#) held that the police can protectively sweep a residence if adequate facts would lead a reasonably prudent officer to have safety concerns, the judge here found the officers actually had no such concerns. But what matters is whether their subjective fears should have made a difference.

And on that point [Lawlor](#) said with conspicuous clarity “that an officer's *subjective* belief or intention is *irrelevant* to Fourth Amendment analysis.” [See](#) 406 F.3d at 43 n.8 (emphases added and parenthetically discussing [Whren](#)).

Similarly, Guerrero claims that while [Winston](#) applied an objective test to assess the legality of a protective home sweep, [Winston](#)'s ruling relied on the actual facts that the agents knew. But what he misses is that [Winston](#) said that “[r]egardless” of whether the “agents ... actually fear[ed] for their safety,” their “*subjective* intentions are *not relevant* as

long as the protective sweep was objectively reasonable.” See 444 F.3d at 120 (emphases added).

Guerrero next suggests that our [Paradis](#) opinion shows that [Buie](#) in no way makes [Lott](#)’s actual-fear standard passé. [Paradis](#) ruled an apartment sweep illegal, saying that the officers had “no *reasonable basis* to conclude that there was a risk to officers or others” because they “had already been through the entire apartment” before starting the sweep. See 351 F.3d at 29 (second quote), 30 (first quote, emphasis added). But that is exactly the kind of dive into *objective* reasonableness [Buie](#) demands. See 494 U.S. at 327, 335-36, 110 S.Ct. 1093. Significantly too, [Paradis](#) did not involve a situation where, as in [Lawlor](#) and [Winston](#), the defendant claimed the officers’ subjective beliefs trumped any reasonably objective fear that prompted the sweep — the very type of claim [*560 Lawlor](#) and [Winston](#) rejected. So [Paradis](#) does not assist Guerrero in any way.

Citing [Cady v. Dombrowski](#), 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), and [Caniglia v. Strom](#), — U.S. —, 141 S. Ct. 1596, 209 L.Ed.2d 604 (2021), Guerrero also contends that a constitutional difference exists between protective car sweeps and protective home sweeps. Not so, we say — for some straightforward reasons.

Decided in the 1970s, [Cady](#) held that officers can sometimes search autos without a warrant while performing “community caretaking functions.” See 413 U.S. at 441, 93 S.Ct. 2523 (observing that officers often “investigate vehicle accidents in which there is no claim of criminal liability and engage in what ... may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute”). [Cady](#) did not involve a protective sweep of an auto under [Long](#), which did not appear in the U.S. Reports until the 1980s — well before [Buie](#) in the 1990s. And if [Cady](#) really means that we should treat autos and homes differently for protective-sweep purposes, [Buie](#) — which extended [Long](#)’s logic from autos to homes — should have come out the other way and

invalidated the protective sweep there. Yet [Buie](#) does not even mention [Cady](#). The short of it is that [Cady](#) holds no sway here.

Issued last term, [Caniglia](#) said that “[w]hat is reasonable for vehicles is different from what is reasonable for homes,” see 141 S. Ct. at 1600, and held that “[Cady](#)’s acknowledgement of these ‘caretaking’ duties” does not “create[] a standalone doctrine that justifies warrantless searches and seizures in the home,” see [id.](#) at 1598. But [Caniglia](#) took care to describe the police’s community-caretaking duties as “*noncriminal*” functions, see [id.](#) (emphasis added) — *i.e.*, “conducted for *non-law-enforcement* purposes,” see [id.](#) at 1600 (Alito, J., concurring) (emphasis added). Perhaps that explains why [Caniglia](#) cited neither [Long](#) nor [Buie](#), both of which are criminal cases. Consequently, like [Cady](#), [Caniglia](#) has no effect on this case.

Pulling out all the stops, Guerrero argues that the officers could not protectively sweep the BMW because they had him and the passenger “under officer control at all relevant times.”

As support, he relies on [Arizona v. Gant](#), 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). [Gant](#) held that officers “may search a vehicle *incident to* a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” [Id.](#) at 351, 129 S.Ct. 1710 (emphases added). But the simple response is that “[Gant](#) explicitly limited its holding to a search-incident-to-arrest setting,” thus keeping [Long](#)’s standard for protective sweeps “intact,” see [McGregor](#), 650 F.3d at 826 n.5 (citing [Gant](#), 556 U.S. at 346-51, and at 352, 129 S.Ct. 1710 (Scalia, J., concurring)) — meaning Guerrero scores no points with [Gant](#).

Insisting that [Lott](#) is not an outlier, Guerrero cites a Tenth Circuit case — [United States v. Wald](#), 216 F.3d 1222 (10th Cir. 2000) — that he says (to quote his brief) acknowledges a “circuit[] ... split on the issue of whether a particular officer’s actual motivation is relevant to the

reasonableness analysis.” That Circuit, remember, holds that an officer's subjective beliefs do *not* count for [Terry](#) frisks. See [Rochin](#), 662 F.3d at 1274. But going back to the “split,” before concluding that the officers there had no “objectively reasonable suspicion that [the defendant] was armed and dangerous,” [Wald](#) listed [Lott](#) and *561 [United States v. Prim](#), 698 F.2d 972 (9th Cir. 1983), as the two cases saying subjective motives count. See [216 F.3d at 1227](#). [Lott](#) obviously does not help Guerrero's the-First-Circuit-hardly-stands-alone thesis. And as it turns out, neither does [Prim](#) — a case he spends some time on.

Released months before [Long](#), [Prim](#) said — in a [Terry](#) context, without citing any authority — that “[a]lthough the existence of reasonable suspicion or probable cause is judicially viewed under an objective standard, it is a standard applied to the actual and/or perceived belief of the law enforcement officer as he either stops and detains or engages in search and seizure.” See [Prim](#), 698 F.2d at 975. Years later, the Ninth Circuit wrote — in another [Terry](#) situation, citing [Prim](#) and [Lott](#) — that “an objectively reasonable concern for safety does not justify a [Terry](#) search if the officer did not subjectively entertain that concern.” See [United States v. Newberry](#), 8 F.3d 32 (Table), at *1 (9th Cir. 1993) (unpublished). But more recently, the Ninth Circuit held — in a protective-car-sweep

scenario under [Long](#), citing [Whren](#) but *not* [Prim](#) or [Newberry](#) — that the officer's “subjective intentions” are irrelevant. See [United States v. Cain](#), 349 F. App'x 169, 170 (9th Cir. 2009) (ruling that the “conditions ... *objectively justified* the performance of a protective search by an officer in [the deputy's] situation” (emphasis added)). So [Prim](#) is not the difference-maker that Guerrero thinks it is.

In something of a final pitch, Guerrero claims that abandoning [Lott](#)'s actual-fear requirement will “create[] a serious and recurring threat to the privacy of countless individuals.” But Supreme Court caselaw outlined above already defines the scope of privacy in the protective-sweep setting: if an officer's decision to search is *not* objectively reasonable, the search cannot stand — regardless of what the officer's subjective motives were. Which makes Guerrero's concern not well founded.

Wrap Up

In fidelity to the Supreme Court cases highlighted earlier, we abrogate [Lott](#) to the extent it is inconsistent with this opinion, reverse the judge's evidence suppression, and remand for further proceedings.

All Citations

19 F.4th 547

Footnotes

- 1 The Fourth Amendment guards against “unreasonable searches and seizures” and requires that warrants be based on “probable cause.” See [U.S. Const. amend. IV](#).
- 2 We recap the record evidence in the light most generous to the judge's ruling, noting only those details necessary to understand the government's appeal. See [McGregor](#), 650 F.3d at 816.
- 3 Not to sound pedantic about this, but because “hens do not possess teeth,” the hen's-teeth-rare expression “impli[es] ... that something is rare to the point of non-existence.” See [Rare As Hen's Teeth](#), Idioms by The Free Dictionary, <https://idioms.thefreedictionary.com/as+rare+as+hen%27s+teeth> (last accessed Dec. 3, 2021). But see generally [Hens' Teeth Not So Rare After All](#), Sci. Daily (Feb. 23, 2006), <https://www.sciencedaily.com/releases/2006/02/060223083601.htm> (noting that “researchers say they have found

a naturally occurring mutant chicken ... that has a complete set of ivories” and “have also managed to induce teeth growth in normal chickens — activating genes that have lain dormant for 80 million years”).

- 4 Guerrero tries to distinguish both sets of cases, insisting that because the courts there considered the “totality of the circumstances,” these decisions in no way undermine  [Lott](#)'s reliance on the officers' subjective beliefs. But cutting against his theory is that each opinion used an *objective* test, as the above snippets show.
- 5 We know that “[t]he law of the circuit rule does not depend on whether courts outside the circuit march in absolute lockstep with in-circuit precedent.” See [United States v. Lewis](#), 517 F.3d 20, 24 (1st Cir. 2008). We simply mention the out-of-circuit opinions to explain our evenhanded-law-enforcement and arbitrarily-variable-protection concerns.

And staying with these concerns for a second, Guerrero (as the government notes) could have faced state rather than federal weapons charges. See  [R.I. Gen Laws §§ 11-47-5\(a\)\(1\)](#),  [11-47-2\(5\)](#). And if he had and then asked a Rhode Island judge to suppress the ammo, that judge would have viewed matters through an *objective* standard only. See [State v. Santos](#), 64 A.3d 314, 320-21 (R.I. 2013) (discussing  [Long](#) and affirming the lawfulness of the “protective” vehicle “search” because the officer “was reasonable in her belief that [the defendant] might be armed and dangerous”); see also [id.](#) at 323 (repeating that the officer's “*objectively* reasonable safety concerns justified her protective search of the area near the passenger seat” (emphasis added)).

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v.

Juan Guerrero

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:20CR00012-WES

USM Number: 33264-013

George J. West, Esq.

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 922(g)(1)	Felon in Possession of Ammunition which has been Shipped or Transported in Interstate Commerce	10/21/2019	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/12/2023

Date of Imposition of Judgment

WE Smith

Signature of Judge

William E. Smith
US District Judge

Name and Title of Judge

4/12/2023

Date

DEFENDANT: **Juan Guerrero**CASE NUMBER: **1:20CR00012-WES****IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
30 Months to run consecutively to the sentence imposed in 05CR00030-WES.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Juan Guerrero
CASE NUMBER: 1:20CR00012-WES

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Juan Guerrero

CASE NUMBER: 1:20CR00012-WES

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Juan Guerrero
CASE NUMBER: 1:20CR00012-WES

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of substance use treatment (inpatient or outpatient), as directed and approved by the Probation Office.
2. The defendant shall participate in a program of substance use testing (up to 72 drug tests per year), as directed and approved by the Probation Office.
3. The defendant shall participate in a program of mental health as directed and approved by the Probation Office.
4. The defendant shall participate in a manualized behavioral program as directed by the USPO. Such program may include group sessions led by a counselor or participation in a program administered by the USPO.
5. The court also makes a judicial recommendation that the defendant consider participation in the H.O.P.E Court program.
6. The defendant shall contribute to the cost of all ordered treatment and testing based on ability to pay as determined by the probation officer.
7. The defendant shall permit the probation officer, who may be accompanied by either local, state, or federal law enforcement authorities, upon reasonable suspicion of a violation of supervision by possessing firearms, to conduct a search of the defendant's residence, automobile, and any other property under the defendant's control or ownership.

DEFENDANT: Juan Guerrero

CASE NUMBER: 1:20CR00012-WES

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Juan Guerrero
CASE NUMBER: 1:20CR00012-WES

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
The ammunition seized from the defendant's motor vehicle on October 21, 2019, to wit, eight live 9 mm cartridges marked FC 9mm luger and a black magazine capable of holding 10 rounds of .9mm ammunition.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States Court of Appeals For the First Circuit

No. 23-1371

UNITED STATES,

Appellee,

v.

JUAN GUERRERO, a/k/a Pawtucket,

Defendant - Appellant.

Before

Barron, Chief Judge,
Gelpí and Aframe, Circuit Judges.

JUDGMENT

Entered: November 21, 2024

Defendant-Appellant Juan Guerrero has filed this appeal pursuant to a narrow exception to the waiver of appeal provision in his plea agreement, which allows defendant to appeal only the following: "the Fourth Amendment issue that the government previously raised in an interlocutory appeal in this case, which was resolved in the government's favor by the First Circuit in United States v. Guerrero, 19 F.4th 547 (1st Cir. 2021) [(Guerrero I)]." The government has moved for summary disposition. After careful review of the parties' filings, we grant the government's motion and affirm. In briefing, defendant fails to develop any argument not foreclosed by the court's opinion in Guerrero I, by way of the "law of the case" doctrine, and we are unconvinced by defendant's suggestions that the "law of the case" doctrine cannot be or should not be applied under the circumstances. See Naser Jewelers, Inc. v. City of Concord, N.H., 538 F.3d 17, 20 (1st Cir. 2008) (background on the law of the case doctrine and its narrow exceptions); United States v. Moran, 393 F.3d 1, 7 (1st Cir. 2004) ("The second branch [of the law of the case doctrine] contemplates that a legal decision made at one stage of a *criminal* or civil proceeding should remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court. That branch binds, for example, a successor appellate panel in a second appeal in the same case . . .") (citation omitted; emphasis added).

Affirmed.

By the Court:

Anastasia Dubrovsky, Clerk

cc:

Richard B. Myrus

Sandra Rae Hebert

Lauren S. Zurier

William Joseph Ferland

George Joseph West

