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BORDEN, J., dissenting. I disagree with the conclusion of the majority that the facts of the present case do not come within the so-called second tier protective sweep permitted under *Maryland* v. *Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990).[1] I conclude, to the contrary, that those facts bring this case squarely within that doctrine and that, therefore, the seizure of the crack cocaine, which was in plain view in the bedroom of the defendant, Michael Spencer, did not violate his rights under the fourth amendment to the United States constitution.[2] Accordingly, I would affirm the trial court's judgment because, in my view, that court properly denied the defendant's motion to suppress.

As the majority aptly notes, for a protective sweep such as was undertaken in the present case to be permissible under the fourth amendment, ''there must be 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 harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry*[3] and *Long*,[4] and as in those cases, we think this balance is the proper one.'' Id., 334.

It is important to emphasize that, in the application of *Buie*, the applicable standard under the fourth amendment is objective, not subjective. That is, the question is whether, as *Buie* itself states, the articulable facts and reasonable inferences ''*would warrant a reasonably prudent officer in believing* that the area to be swept harbors an individual posing a danger to those on the arrest scene.'' (Emphasis added.) Id. Thus, the standard does not focus on the subjective beliefs of the particular police officers, and how they might characterize them, such as a hunch, belief, suspicion, or other characterization. Furthermore, the application of an objective, rather than a subjective, standard requires that a reviewing court employ, not only the reasonable inferences that the police officers on the scene may have in fact drawn, but also those reasonable inferences that *a reasonably prudent police officer*, in the position of the police officers on the scene, *would be warranted in drawing, irrespective of whether those officers in fact drew or articulated them*. Put another way, as the Court of Appeals of Maryland concluded after the remand to it by the United States Supreme Court in *Buie* itself: ''The experience and training of the particular police officers involved will form a part of the matrix of facts that define the circumstances which must be considered, but the test is whether a reasonably prudent police officer, under those circumstances, is justified in forming a reasonable suspicion that the house is harboring a person posing danger to those on the arrest

scene.'' *Buie* v. *State*, 320 Md. 696, 703, 580 A.2d 167 (1990).

This objective standard is clear both from the language of *Buie* itself, as indicated previously, and also from its reliance on *Terry* and *Long*, both of which impose an objective, rather than a subjective, standard. See *Terry* v. *Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (''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''); *Michigan* v. *Long*, 463 U.S. 1032, 1050, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (same).

This application of the objective standard has long been uniform in fourth amendment jurisprudence. See, e.g., *Horton* v. *California*, 496 U.S. 128, 138, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (''[E]venhanded law enforcement 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. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by . . . a valid exception to the warrant requirement.''); *Maryland* v. *Macon*, 472 U.S. 463, 470–71, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985) (''[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' . . . and not on the officer's actual state of mind at the time the challenged action was taken'' [citation omitted]); *Scott* v. *United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978) (''the fact that the officer does not have the state of mind which is hypothe[sized] by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action''). Our own cases also recognize this fundamental principle of fourth amendment jurisprudence. See *State* v. *James*, 261 Conn. 395, 415, 802 A.2d 820 (2002) (''Probable cause exists when the facts and circumstances within the knowledge of the officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that a felony has been committed. . . . The probable cause test then is an objective one.'' [Internal quotation marks omitted.]); *State* v. *Lipscomb*, 258 Conn. 68, 75, 779 A.2d 88 (2001) (''[r]easonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion'' [internal quotation marks omitted]); *State* v. *Eady*, 249 Conn. 431, 441, 733 A.2d 112 (''[t]he United States Supreme Court has endorsed an objective standard, noting that 'even-

handed law enforcement 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' "), cert. denied, 528 U.S. 1030, 120 S. Ct. 551, 145 L. Ed. 2d 428 (1999).

With this legal background in mind, I turn to the facts of the present case, which I am compelled to repeat in some detail because there are several critical facts, and the inferences rationally drawn therefrom, that the majority simply ignores in its application of the *Buie* principle. First, the package originally destined for the defendant's address contained *twenty-seven pounds* of marijuana. This permitted the reasonable inference that a large-scale illegal drug selling operation was being conducted at that address. The large amount of illegal drugs involved justifies, indeed compels, the inference that this was a shipment made for the purposes of a large-scale commercial operation. One does not ordinarily have twenty-seven pounds of marijuana shipped to oneself through Federal Express for purely personal use.

Second, the facts and circumstances, together with their rational inferences, permitted the reasonable belief that the defendant was in fact the intended recipient of the package. The defendant accepted the package despite the fact that it was not addressed either to him or to his wife. In fact, the investigation prior to the controlled delivery disclosed that no one with the name of the addressee lived at that address; yet, the defendant accepted delivery of the package.[5] After the defendant was placed under arrest, the defendant denied knowledge of anyone named Sylvia Sloan, the addressee of the package. One ordinarily does not accept a package addressed to a person with whom one was not acquainted. Thus, it was reasonable to believe that the defendant was in fact the intended recipient, and knowingly accepted delivery, of a package addressed to a fictitious person, which the defendant believed would contain twenty-seven pounds of marijuana, and that the defendant was, therefore, part of a large-scale illegal drug selling operation located in his apartment at that address. This inference was buttressed by the defendant's furtive and suspicious conduct immediately after accepting the package, namely, reopening the door and looking up and down the street. In addition, the area around the defendant's address was known to the police as an area with a high level of drug activity. This further buttressed the reasonableness of the inference that drug selling was going on at that address.

Third, it was reasonable to believe that the defendant was not the only occupant of the apartment in which the illegal drug selling operation was being conducted. The police knew, from the domestic disturbance call just two months before, that the defendant's wife lived there, as well as the defendant. Moreover, it is certainly

a rational, objective inference that one does not ordinarily conduct a large-scale illegal, commercial drug selling operation as a sole proprietor, without another participant or employee. This permitted the reasonable inference that someone in addition to the defendant, including his wife or the yet-to-be-identified Sylvia Sloan, was likely to be part of the illegal drug selling operation being conducted out of the defendant's apartment. In addition, the defendant did not respond to the police officers when they repeatedly asked him whether anyone else was in the apartment. Despite the majority's misplaced reliance on *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which I discuss later in this opinion, this reinforced the inference that, at the time of the defendant's arrest, someone else was in fact in the apartment, who was also involved in the drug operation.

Fourth, it was reasonable for the police to believe that guns or other dangerous weapons would be located in the apartment and, therefore, posed a danger to them from use by a coparticipant with the defendant in the drug operation. We have often stated, as the police officers testified in the present case, that it is reasonable for police officers to suspect guns to be associated with illegal drug selling operations. *State* v. *Clark*, 255 Conn. 268, 284, 764 A.2d 1251 (2001) (''Connecticut courts repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms'' [internal quotation marks omitted]); see also *United States* v. *Wilson*, 306 F.3d 231, 238 (5th Cir. 2002) (dealing in narcotics sufficient for reasonable belief in potential for violence and presence of weapon).

Fifth, the door to the defendant's apartment was ajar, and was only fourteen or fifteen stairway steps away from the police officers and the defendant. This permitted the reasonable inference that the police officers were in a place where they would have a justified fear for their safety from any accomplice of the defendant in the apartment, who was likely to have been aware of the defendant's arrest.

Sixth, as the trial court, which is the sole arbiter of credibility in this case, specifically found, the police entered the apartment for the purpose of searching for weapons or other persons, the ''safety of officers [being] paramount.'' Thus, in effect, the court found that the police had a subjective fear that someone else located in the apartment was a likely source of danger to them, and acted to alleviate that fear. This finding is conclusive on the question of the purpose of the protective sweep involved.

In sum, the police officers had reasonable and articulable suspicion: that the defendant was the intended recipient of the package containing twenty-seven pounds of marijuana, and was therefore involved in a large-scale, commercial, illegal drug selling enterprise;

that someone else, who may or may not have been his wife,[6] and who also was involved in the enterprise, was in the apartment; that that person was likely to be armed; and that the door to the apartment, which was but fifteen steps from the site of the defendant's arrest, was ajar, and, therefore, the armed person was likely to be aware of the arrest. On the basis of these facts and inferences, the conclusion is inescapable that there were ''articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent police officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.'' *Maryland* v. *Buie*, supra, 494 U.S. 334. That is what *Buie* requires, and it is all that *Buie* requires.

Indeed, the United States Court of Appeals for the Second Circuit has come to the same conclusion in a case almost identical to the present one. In *United States* v. *Oguns*, 921 F.2d 442, 444 (2d Cir. 1990), federal customs agents apprehended Saka Adenrele, who had arrived at John F. Kennedy International Airport from Nigeria carrying 1405 grams of heroin in his underwear. After Adenrele told the agents that the heroin was to be delivered to the defendant or his roommate, Timo, and Adenrele agreed to cooperate, the agents arranged a controlled delivery by Adenrele to the defendant at the defendant's apartment. Id., 444–45. In a telephone call to the defendant, the defendant told Adenrele that he did not have any money but that Timo would have the money when he returned the next day, and the defendant suggested that Adenrele come to his apartment and spend the night there. Id., 444. In a second telephone conversation one-half hour later, the defendant told Adenrele that he would be waiting for Adenrele outside his home wearing a pair of shorts. Id., 445. The agents prepared a sample of the heroin, and put it in a tote bag for Adenrele to carry. Id. Adenrele rode in a taxicab driven by an agent to the defendant's home, where the defendant was sitting on the front steps of a two-family house. Id., 444–45. The defendant approached the taxicab and paid the fare, and then he and Adenrele walked toward the building, with Adenrele carrying the tote bag that contained the sample of heroin. Id., 445. At that point, the agents arrested the defendant. Id. One of the agents, seeing an open apartment door abutting the hallway inside the building, asked the defendant if that was the door to his apartment. The defendant responded that it was. Id. The agents then conducted a security sweep of the apartment. Id.

The defendant challenged the legality of the security sweep as a predicate for his challenge to a subsequent consensual search of the apartment. Id., 446. The Court of Appeals rejected the challenge, stating: ''Applying [*Buie*] to the agents' security sweep of the [defendant's] apartment, we conclude that the agents' actions did not

violate [the defendant's] Fourth Amendment rights. The agents arrested [the defendant] at twilight just outside of a two family house. When the agents entered the lobby of the building, they noticed that the door to the [defendant's] apartment was open. Even though the agents had been told that [the defendant's] brother was not in the apartment, they still could have reasonably believed that others were in the apartment. The agents also could have reasonably believed that people in the apartment saw or heard them arrest [the defendant] and might jeopardize the agents' safety or destroy relevant evidence. Had third parties been in the apartment, they would likely have been able to hear through the open door the agents arresting [the defendant] and, with that knowledge, would have posed a threat to the police outside. In view of the circumstances confronting the officers and the fact that the [D]istrict [C]ourt's factual findings were not clearly erroneous, we hold that the security sweep met the Fourth Amendment requirements specified in *Buie* . . . ." Id., 446–47.

Despite the majority's attempt to distinguish this case, I can find no distinguishing features. In both the present case and *Oguns*: (1) a large amount of illegal drugs were destined for the defendant at his address; (2) there was no certainty that anyone else was in the apartment—indeed, in *Oguns*, unlike the present case, there was specific evidence that the only other known inhabitant was *not* therein; (3) there was no specific evidence that whoever might be in the apartment would be armed; and (4) the defendants were arrested outside the apartment, and the door to the apartment was ajar, indicating that anyone inside would know of the arrest. Nonetheless, in both cases the police officers reasonably could have believed that others were in the apartment who (1) would be likely to know of their accomplice's arrest, and (2) would pose a danger to the arresting officers; and in both cases, therefore, the requirements of *Buie* were met. See also *United States* v. *Cavely*, 318 F.3d 987, 996 (10th Cir. 2003); *United States* v. *Wilson*, supra, 306 F.3d 238–39; *United States* v. *Howard*, 106 F.3d 70, 74–75 (5th Cir. 1997); *United States* v. *Biggs*, 70 F.3d 913, 916 (6th Cir. 1995). Although opinions of the Court of Appeals for the Second Circuit are not binding on this court, we have consistently held that they are persuasive and are entitled to significant deference. See *Turner* v. *Frowein*, 253 Conn. 312, 340–41, 752 A.2d 955 (2000) ("In general, we look to the federal courts for guidance in resolving issues of federal law. . . . Decisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive. 'In deciding to adopt the analysis of the Second Circuit Court of Appeals, we recognize that the decisions of the federal circuit in which a state court is located are entitled to great weight . . . .' " [Citations omitted.]). *Oguns* is undeniably within that category, particularly because the present case is resolved on the

basis of the federal constitution.[7]

The majority opinion is fundamentally flawed. First, as I indicated previously, it fails to apply the objective test required by established fourth amendment jurisprudence and, therefore, fails to account, not only for critical undisputed facts, but for critical reasonable inferences to be drawn from those facts. In effect, it focuses, wrongly, on what was *not specifically established* by the evidence, rather than, correctly, on the reasonable inferences to be drawn from what *was undisputedly established* by the evidence. In this regard, rather than focus, collectively, on the facts and inferences established by the evidence, the majority selectively chooses particular facts, views each in isolation, and then states that each fact provided an insufficient basis on which to sweep the defendant's apartment. Such a piecemeal approach is inconsistent with accepted fourth amendment jurisprudence.

Thus, in my view, the majority oversteps this court's proper bounds in its application of the *Buie* principle. It is well established that a state court cannot apply federal constitutional standards more broadly than applied by the United States Supreme Court. *Oregon* v. *Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975) ("of course, a [s]tate may not impose . . . greater restrictions as a matter of federal constitutional law when this [c]ourt specifically refrains from imposing them"). The majority's application of *Buie* to the undisputed facts and reasonable inferences of the present case violates this precept. In doing so, moreover, the majority strips law-abiding police officers of the legitimate safety net that *Buie* provides, and tells them that, in a situation like this, in which an abundance of facts and inferences gives them the reasonable and articulable suspicion that their lives or those of the public are in danger, they must, if they are to obey the law, forgo their, and the public's, legitimate safety concerns.

Second, the majority's reliance on the fact that the defendant had been given *Miranda* warnings before he failed to answer the police officers' questions about whether anyone else was in the apartment is simply irrelevant to the fourth amendment analysis under *Buie*. *Miranda* is a prophylactic exclusionary rule of evidence regarding the admissibility of confessions at trial, based upon the federal constitution's fifth amendment proscription against compelled self-incrimination. See *Chavez* v. *Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003). I know of no authority, nor do the cases cited by the majority establish, that *Miranda* informs the reasonableness of a security sweep under the fourth amendment.[8] Indeed, it would be bizarre to hold that it does, because it would then bar law enforcement officers, who are required to give a defendant his *Miranda* warning upon arresting and ques-

tioning him, from then asking him, for their own protection and the protection of the public, whether anyone else is in his apartment. Indeed, the majority's point that silence after such warnings is ''insolubly ambiguous'' is also beside the point. (Internal quotation marks omitted.) A defendant's silence has been said to be ''ambiguous'' as it relates to a jury's ability to draw an inference therefrom at trial; see *Doyle* v. *Ohio*, 426 U.S. 610, 617–18, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); it does not play a role in determining the reasonableness of police conduct.[9] The fact that it may be ambiguous—meaning that it is susceptible of more than one plausible meaning—does not mean that the police cannot choose the more prudent meaning, and act on that choice for their own safety and the safety of others.[10] In the fourth amendment context, the objective test requires the reviewing court to give deference to the reasonable inferences drawn or drawable by the police officer involved that support the legitimacy of the search and seizure, irrespective of whether other reasonable inferences could also have been drawn that would undermine that legitimacy.

I conclude that the trial court properly denied the defendant's motion to suppress, and would affirm the judgment of the trial court. I therefore dissent.

[1] I agree with the majority that: (1) the facts of this case do not bring it within the so-called first tier protective sweep under *Buie*; and (2) the second tier protective sweep under *Buie* is not confined to a sweep following an arrest within the home, but also extends to a sweep inside the home following an arrest in an area close to but outside the home, as in the present case.

[2] I would also conclude that there are no persuasive reasons to conclude that our state constitution affords any more expansive protections against protective sweeps than those articulated in *Maryland* v. *Buie*, supra, 494 U.S. 325. I would, therefore, also conclude that the seizure in the present case was permissible under our state constitution.

[3] *Terry* v. *Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (fourth amendment permits patdown of person on basis of specific facts and reasonable inferences that individual is armed and dangerous).

[4] *Michigan* v. *Long*, 463 U.S. 1032, 1049–50, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (fourth amendment permits limited search of automobile passenger compartment on basis of specific facts and reasonable inferences that individual may gain access to weapons).

[5] The majority's reference to the fact that the arresting officers did not investigate the name of the addressee of the parcel; see footnote 14 of the majority opinion; both ignores the testimony of police sergeant Eugene Dohmann, and is legally irrelevant. Dohmann testified that the police officers did not expect the package to be traced back to the addressee because ''it's typically not done that way for obvious reasons,'' namely, that neither trained police officers nor even laypersons of common sense would ordinarily expect a drug seller to arrange for twenty-seven pounds of an illegal substance to be delivered to him under his given name. It is legally irrelevant because the fourth amendment focuses, not on what the facts and inferences do *not* establish, but on whether, under the objective test, those facts and circumstances *would* warrant a *reasonably prudent officer* in engaging in the protective sweep. Certainly, as indicated previously in this opinion, the fact that the defendant accepted the package, addressed *not* to him or his wife, permitted the reasonable inference that the package was being sent to the defendant under a fictitious name.

[6] In my view, the majority's reliance on *United States* v. *Akrawi*, 920 F.2d 418 (6th Cir. 1990); see footnote 13 of the majority opinion; for the proposition that the presence of the defendant's girlfriend and his accomplice's mother is insufficient to establish a reasonable belief that dangerous persons are on the premises, is unpersuasive. First, that was not the focus of the

court's opinion in *Akrawi*. In that case, the agents already had entered the residence and identified the accomplice's mother as present before the protective sweep took place. *United States* v. *Akrawi*, supra, 419. Thus, she was a known entity, and I do not read *Akrawi* as indicating that the government's reliance on a known presence as a source of a reasonable suspicion is akin to the risk posed from an unknown potential accomplice, as in the present case.

Second, the majority's focus on the defendant's wife, coupled with its lack of focus on the police officers' knowledge that the defendant resided with his wife, simply ignores the reasonable inference that the defendant was not operating as a sole proprietor. Indeed, the potential existed that another person may have been participating in the defendant's large-scale drug selling operation, who may or may not have been his wife.

Finally, the fifteen to eighteen agents that entered the defendant's apartment in *Akrawi* remained there for forty-five minutes after arresting the defendant and identifying the other occupants. Id., 420–21. That fact, in the court's view, belied the agents' contention that the sweep was purely conducted for safety purposes. Id. Thus, as a factual matter, the sweep in *Akrawi* did not resemble either the sweep in *Buie* or the sweep in the present case.

[7] Indeed, if anything, the present case is an a fortiori case compared to *Oguns*. In the present case, although the majority does not, I specifically refer to the well established notion that it is perfectly reasonable for the police to believe that persons involved in drug selling are likely to be armed. The court in *Oguns* did not even mention that association in upholding the validity of the sweep under *Buie*. In addition, the police officers in the present case knew that the defendant was not the only tenant of the apartment, and he remained silent when asked if anyone else was on the premises. In *Oguns*, the agents were specifically told that the defendant's brother was not in the apartment, and the court nonetheless held that the police did not have to credit that representation. *United States* v. *Oguns*, supra, 921 F.2d 446.

[8] To the extent that the concerns of *Miranda might* apply to the protective sweep in the present case, a lack of administering the warnings would likely come within the public safety exception to *Miranda*, which permits such interrogation for purposes of immediate protection of the officers and the surrounding public. See *State* v. *Betances*, 265 Conn. 493, 502–503, 828 A.2d 1248 (2003); see also *New York* v. *Quarles*, 467 U.S. 649, 657, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). This point is purely hypothetical, however, because the defendant in the present case was given *Miranda* warnings.

[9] As the majority itself recognizes with its citation to *United States* v. *Richards*, 937 F.2d 1287, 1291 (7th Cir. 1991), even if the defendant had responded ''no'' to the officers' questions about whether there were other persons in his apartment, the officers may nonetheless, in their specialized judgment, reasonably elect to sweep the premises. See also *United States* v. *Oguns*, supra, 921 F.2d 446 (agents were told that defendant's roommate was not in apartment).

[10] In the present case, the defendant accepted a package originally containing twenty-seven pounds of marijuana. Upon his arrest, the defendant denied that he knew the addressee of the package, and then refused to answer the police officers' questions regarding whether anyone else was in the apartment. It is contrary to common sense to suggest, as the majority does, that the arresting officers could not consider the defendant's silence in response to their questions as one of many factors in determining whether the protective sweep was reasonable to ensure their own safety and the safety of others.