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DO THE FEDERAL COURTS SWEEP BUIE CLEAN?

by Jeffrey T. Wennar

The development of exceptions to the Fourth Amendment’s warrant requirement represents a balance between safety and privacy. Often they are designed to grant arresting police officers an opportunity to secure a person, area, or items that represent a threat to the individual officer or public. Alternatively, these exceptions can be viewed as an encroachment on individual rights that enable police to skirt the Fourth Amendment. Over the years, the United States Supreme Court and federal circuits have emphasized that searches and seizures outside the narrow exceptions are presumptively invalid. While many articles and analyses of these exceptions review the incentives, impacts, and influences these exceptions have on criminal procedure, the words used by federal courts have become increasingly indicative of a permissive approach to criminal procedure. This article reviews those developments with particular attention to verbiage used by courts in applying the decision Maryland v. Buie and the underlying rationale for the “protective sweep” exception to the Fourth Amendment.

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

A point of departure for any understanding of the Fourth Amendment was established in Coolidge v. New Hampshire when the Supreme Court held that “[t]he most basic constitutional role in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well defined exceptions.’ ²

Over the years the Supreme Court has recognized certain exceptions to the warrant requirement of the Fourth Amendment including: searches incident to arrest;³ automobile searches;¹ the plain view exception;³ the invention

¹ U.S. Const. amend. IV.
³ See Chimel v. California, 395 U.S. 752, 768 (1969) abrogation recognized by Davis v. United States, 131 S. Ct. 2419 (2011) (implying that in the absence of a warrant, a warrantless Fourth Amendment search may be valid if confined to the immediate person and area in which an arrested suspect may have obtained a weapon or something that could be used as evidence against him).
⁴ See Chambers v. Maroney, 399 U.S. 42, 52 (1970) (holding with regard to the search of accused’s car, “[t]he blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search . . . In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car’s immobilization until a warrant is obtained”).
⁵ See Coolidge, 403 U.S. at 467-68 (noting that the plain-view doctrine does not run afoul of Fourth Amendment
tory exception;⁶ the consent exception;⁷ Terry stops;⁸ the abandoned property exception;⁹ the hot pursuit exception¹⁰ or the exigent circumstances exception;¹¹ the community-caretaking exception;¹² the suitcase or container exception;¹³ and the protective sweep exception.¹⁴ The following text surveys the current status of protective sweeps throughout the federal circuits.

I. The Buie Decision

In Maryland v. Buie, a Godfather’s pizza restaurant in Prince George’s County, Maryland was robbed by two men.¹⁵ One of the robbers wore a red running suit. The police developed Jerome Edward Buie as a suspect and subsequently obtained a warrant for his arrest and that of his accomplice. The warrant for Buie was executed at his residence, and Buie was arrested as he emerged from the basement of the home. After the arrest an officer entered the basement “in case there was someone else [there],” and in doing so, the officer observed the red running suit in plain view and he seized it.¹⁶

Buie made a motion to suppress the red running suit prior to trial, which the trial court denied.¹⁷ On appeal to the intermediate appellate court, the trial judge’s ruling was affirmed. The Maryland Court of Appeals subsequently reversed the Court of Special Appeals holding that the running suit was inadmissible as the state failed to satisfy the probable cause requirement. The United States Supreme Court granted certiorari and framed the issue as one of determining “what level of justification the Fourth Amendment required before [the detective] could legally enter the basement to see if someone else was there.”¹⁸ The Court acknowledged that until the moment Buie was arrested “the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found, including the basement.”¹⁹

may be conducted, so long as the search occurs incident to an arrest, or there is an exigent circumstance).

⁶ See South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (holding a search of an impounded car did not violate the Fourth Amendment when such search occurred incident only to the taking of inventory of the contents of the vehicle).
⁷ See Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (holding that when a suspect is not in custody, a search will not violate the Fourth Amendment if it is voluntarily consented to in the absence of duress or coercion).
⁸ See Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (holding that there is no Fourth Amendment violation when, “a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him”).
⁹ See Abel v. United States, 362 U.S. 217, 241 (1960) (noting that there was no Fourth Amendment violation when hotel management consented to an FBI search of the room after a suspect abandoned property in a hotel room trash can and checked out of the hotel).
¹⁰ See Warden, M.D. Penitentiary v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring) (commenting “[t]here are exceptions to this [warrant] rule. Searches may be made incident to a lawful arrest, and—as today’s decision indicates—in the course of ‘hot pursuit’”).
¹¹ See Mincey v. Arizona, 437 U.S. 385, 394 (1978) (citing McDonald v. United States, 335 U.S. 451, 456 (1948)) (noting that “warrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the need of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment”).
¹² See Cady v. Dombrowski, 413 U.S. 433, 447-48 (1973) (holding that searches conducted in the course of an officer’s caretaking duties are not facially unreasonable in the absence of a warrant).
¹⁴ Id. at 328.
¹⁵ Id.
¹⁶ Id.
¹⁷ Id.
¹⁸ Id. at 330.
¹⁹ Id.
Justice White, writing for the majority, analogized Terry v. Ohio and Michigan v. Long,20 to the case at hand. With regard to Terry, Justice White noted:

[W]e held that an on-the-street “frisk” for weapons must be tested by the Fourth Amendment’s general proscription against unreasonable searches because such a frisk involves “an entire rubric of police conduct-necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.21

Similarly as it related to Long, Justice White reflected:

[The] search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant” the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.22

Justice White noted that “[t]he ingredients to apply the balance struck in Terry and Long are present . . . . Possessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found.”23 The Court further acknowledged the risk of officers’ safety in the home and found “[i]t is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter.”24 The Court’s rationale for this safety risk was due in large part to being an officer’s disadvantage of on his “adversary’s turf.”25

The Court limited the search “as an incident to the arrest the officers could, as a precaunyatory matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be launched.”26 The Court then went on to place further restrictions on what officers could do beyond a precaunyatory sweep noting, “just as in Terry and Long, 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.”27 The Court cautioned, however, that such a sweep is not the equivalent of a search; it must be swift and last only long enough to dispel any reasonable suspicion of danger.

Further, a protective Buie sweep is a more limited intrusion than that articulated in Chimel v. California.28 Unlike a Chimel search, allowing the immediate area of the arrestee to be searched, which is essentially automatic, a Buie sweep may only be conducted “when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.”29 Thus, the underlying rational for the protective sweep doctrine is the principle that police officers should be able to ensure their safety when they lawfully enter a private dwelling.30 The officer must have a rea-

20 See Michigan v. Long, 463 U.S. 1032, 1051 (1983) (holding that “the balancing required by Terry clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous”).
21 Buie, 494 U.S. at 331-32 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).
23 Id. at 332-33.
24 Id. at 333.
25 Id.
26 Id.
27 Id.
28 See generally Buie, 494 U.S. at 336 (distinguishing the facts of Chimel from those of Buie).
29 Id.
30 Leaf v. Shelnutt, 400 F.3d 1070, 1087 (7th Cir. 2005) (quoting United States v. Burrows, 48 F.3d 1011, 1015-16 (7th Cir. 1995)).
sonable suspicion of danger." For an officer to harbor a reasonable suspicion of danger 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.”

II. Articulable Susicion

The circuit courts differ on what circumstances are constitutionally sufficient to justify a Buie sweep. In United States v. Winston, the First Circuit Court of Appeals was presented with an interlocutory appeal from the government regarding the District Court of Massachusetts’ suppression of evidence holding that the Buie doctrine had been violated. The circuit court addressed the facts known to the agents:

First, the agents had information to believe that Winston was armed and dangerous and possibly with armed cohorts. Winston was indicted, along with twenty-five others, for distribution of cocaine as part of an investigation of a large-scale cocaine trafficking organization. One of the other defendants informed agents that he had sold Winston two handguns and a bullet-proof vest. One of the agents present had also previously arrested Winston after a traffic stop for possession of a handgun. Second . . . that Winston’s girlfriend initially denied having knowledge of Winston’s car.”

In reversing and remanding the case, the majority of the court held that the agents had the right to protect themselves from Winston and other circumstances “reasonably within the scope of the dangers they were facing, i.e., an arrest involving a member of a drug organization with multiple constituents, not all of whom had been accounted for, who were likely to be armed, as Winston was, in a setting which presented an opportunity for ambush or similar violent conduct against the arresting officers.”

On the other hand, in United States v. Moran Vargas, the Second Circuit concluded there was no objective basis, nor evidence of subjective fear, when it found that an agent’s testimony alone was not sufficient to amount to articulable facts that would lead a “reasonably prudent officer” to believe that a dangerous individual was hiding in the bathroom. In addressing reasonable belief, in Perkins v. United States, the Sixth Circuit Court of Appeals stated, “[i]n the fifteen years since Buie, this circuit has had several opportunities to apply the decision. And in each instance that the officers had a reasonable belief that another person (besides the seized individual) was on the premises and posed a threat to the officers who were making the arrest the court has upheld a protective sweep incident to the arrest.” An earlier decision by that circuit suppressed evidence located during a protective sweep, stating there was no specific basis to believe anyone else was in the house. Along these same lines, United States v. Johnson, the Seventh Circuit reminded lower courts and law enforcement officers that “although the Supreme Court has found exceptions to the warrant requirement in a number of compelling situations, it has never deviated from the rule that generalized suspicion alone is not enough to justify a warrantless search of a home, or a seizure of a person incident to such a search.”

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31 See generally Buie, 494 U.S. at 335-36 (inferring the need for a reasonable suspicion of danger to exist before conducting a sweep).
32 Id. at 334.
33 444 F.3d 115,116 (1st Cir. 2006).
34 Id. at 118.
35 Id. at 120.
36 376 E.3d 112, 116 (2d Cir. 2004).
37 127 F. App’x 830, 834 (6th Cir. 2005).
38 See United States v. Akwari, 920 E.2d 418, 420 (6th Cir. 1990) (holding a protective sweep of a residence was improper because officers faced no resistance when entering, received no threats after arrests were made, and heard no voices or noises after arrests indicating any potential danger).
39 170 E.3d 708, 710 (7th Cir. 1999).
III. Arrests

_Buie_ identifies two types of warrantless protective sweeps of a residence that are constitutionally permissible immediately following an arrest. The first type allows officers to “look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” The second type of sweep goes ‘beyond’ immediately adjoining areas, but is confined to ‘such a protective sweep aimed at protecting the arresting officers.’ While the first type of sweep requires no probable cause or reasonable suspicion, the second requires “articulable facts which, taken together with the rational inferences from the 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.” The Tenth Circuit noted, “Buie applies to both protective searches and protective detentions because the Court’s reasoning in Buie supports treating protective sweeps and protective detention similarly.”

A. Closets and Spaces

Courts have struggled with allowing officers to justify “protective sweeps” in certain spaces. A common issue among many courts is the search between the mattress and box spring of a bed. “It may well be that during the course of an otherwise justified protective sweep for a dangerous individual, thought to be hiding, the Fourth Amendment permits a simultaneously conducted limited search of places which might contain a weapon readily accessible to that as-yet undiscovered individual.” Police officers escorted the defendant through his house to his bedroom so he could get dressed. A quick sweep of the bed and closet, along with a look into an unlocked cabinet on the top shelf of the closet, resulted in the court eschewing the application of _Buie_: “The cabinet searched was too small to accommodate a person.” Having declined to authorize the search pursuant to the “protective sweep” exception, the First Circuit proceeded to analyze the search under the search incident to arrest doctrine.

In the Second Circuit, however, in _United States v. Blue_, when officers looked between the mattress and box spring, the court found that because it was within the immediate reach of the defendant, such a search was permissible. An earlier case in the Second Circuit focused on two questions when addressing this issue: “one, whether the search was ‘properly limited;’ and two, whether it was reasonable for the deputy marshal to conclude that [the suspect] posed a danger to those on the arrest scene.” The court reasoned that the deputy marshal could search the immediate area to “neutralize the threat of physical harm” by determining whether there were weapons within [the suspect’s] reach.

In two unpublished opinions, the Fourth Circuit approved the search of a bedroom closet after an in-house arrest, but cautioned, “that is not to say, however that _Buie_ condones a top-to-bottom search of a private room simply because law enforcement officers have carried out a valid custodial arrest on the premises.” In a more recent decision, the Fourth Circuit accepted the testimony of a deputy United States marshal, and found it an objectively reasonable action for the deputy to

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40 United States v. Archibald, 589 F.3d 289, 295 (6th Cir. 2009).
41 Archibald, 589 F.3d at 295 (citing Maryland v. Buie, 494 U.S. 325, 334 (1990)).
42 Id.
43 United States v. Maddox, 388 F.3d 1356, 1362 (10th Cir. 2004).
44 Crooker v. Metallo, 5 F.3d 583, 585 (1st Cir. 1993).
45 United States v. Nascimento, 491 F.3d 25, 50 (1st Cir. 2007).
46 See id. (referring to Chimel v. California, 395 U.S. 752 (1969)).
47 United States v. Blue, 78 F.3d 56, 58 (2d Cir. 1996).
48 Id. at 60 (citing Chimel, 395 U.S. at 763) (defining the within the immediate reach to mean “the area from within which [the defendant] might gain possession of a weapon or destructible evidence”).
50 Id. at 137.
search a bedroom where he had previously discovered an individual hiding under a mattress.\textsuperscript{52} Similarly, the District of Columbia Circuit has found that an agent was justified in looking in a bedroom immediately adjoining the place of arrest.\textsuperscript{53} The agent’s subjective intentions are not relevant as long as the protective sweep was objectively reasonable.\textsuperscript{54}

In 2005, the Second Circuit was presented with the question whether a \textit{Buie} protective sweep may be conducted when officers are lawfully present in a home for a reason other than the in-home execution of an arrest warrant.\textsuperscript{55} The court, in applying \textit{Buie} held:

\begin{quote}
[A] law enforcement officer present in a home under lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party, may conduct a protective sweep when the officer possesses 'articulable facts which, taken together with the rational inferences from the 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 . . . scene.'\textsuperscript{56}
\end{quote}

In a commonsense approach the court stated, “The restriction of the protective sweep doctrine only to circumstances involving arrests would jeopardize the safety of officers in contravention of the pragmatic concept of reasonableness embodied in the Fourth Amendment.”\textsuperscript{57}

Having said this, the question of consent leading to subsequent sweeps also found its way to the Second Circuit. In \textit{United States v. Gandia}, the defendant gave consent to officers to enter a kitchen. As the officers entered the area, they looked into the living room and observed a bullet. In response, they conducted a protective sweep prior to placing the defendant under arrest.\textsuperscript{58} The Southern District of New York held, “limited pre-arrest protective sweeps of a home for officer safety are lawful where there are specific articulable facts supporting a reasonable suspicion of risk to the officers’ safety.”\textsuperscript{59} The circuit court then remanded the case to the district court to decide the issue of consent,\textsuperscript{60} warning the trial court that “generously construing \textit{Buie} will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home.”\textsuperscript{61} The Sixth Circuit approved a search of an upstairs area where the defendant was observed coming from the upstairs and followed by his son from upstairs shortly thereafter.\textsuperscript{62}

Analogizing \textit{Terry}, the Eighth Circuit found that “since an officer approaching a suspected drug trafficker in the open is justified in conducting a \textit{Terry} stop and frisk out of concern that the suspect may resort to violence to thwart the encounter; it follows that an officer arresting a suspected drug trafficker in one room of a multi-room residence is justified in conducting a \textit{Buie} sweep out of concern that there could be individuals lurking in the other rooms who may resort to violence to thwart the
motel room.69

In United States v. Davis,70 an Eighth Circuit case, a team of officers entered the front door as the defendant was exiting the rear door. As the defendant was exiting, he was placed under arrest.71 Officers did a protective sweep of the home and the barn, a building that did not adjoin the house. Because the officers had observed Davis make two trips between the house and the barn located approximately 100 yards apart, the court upheld the protective sweep of the barn.72 Though “the barn did not immediately adjoin the area of arrest, the barn was not so far removed from the house that a reasonable prudent officer could dismiss the potential danger.”73

In a 2006 Ninth Circuit case, the facts presented a situation with the police observing the defendant exiting the establishment with a brown bag. He then reentered the building. Two people then exited the building, and shortly thereafter the defendant exited without the bag. The police had observed the defendant when he reentered the building and saw him pause, take the bag off his shoulder and put it down. Police conducted a protective sweep.74 Citing an earlier decision from that circuit (that predates Buie) which upheld a protective sweep of the interior of a house when an arrest had been made outside of the house,75 the court reasoned that “[a] bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another.”76 In dicta, the court, concurring with other circuits, stated, “[T]he location

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63 United States v. Cash, 378 F.3d 745, 749 (8th Cir. 2004).
64 See United States v. Garza, 125 F. App'x 927, 931 (10th Cir. 2005) (holding officers’ sweep of a hotel bathroom improper because it was not executed incident to an arrest because officers had no reasonable belief that the bathroom contained individuals posing danger to anyone).
65 United States v. Lawlor, 406 F.3d 37, 41 (1st Cir. 2005).
66 See United States v. Oguns, 921 F.2d 442, 446–47 (2d Cir. 1990) (holding officers’ sweep of an apartment valid following an arrest outside the apartment because officers had a reasonable belief that individuals posing an immediate threat were inside).
67 Sharrar v. Felsing, 128 F.3d 810, 825 (3d Cir. 1997) (concluding the standard was not met and reasoned, “[w]e see no reason to impose a bright line rule limiting protective sweeps to in-home arrests . . .” but acknowledged that they “must consider whether there was an articulable basis for a protective sweep . . .”).
68 United States v. Watson, 273 F.3d 599, 603 (5th Cir. 2001).
69 United States v. Biggs, 70 F.3d 913, 914 (6th Cir. 1995); see also United States v. Colbert, 76 F.3d, 773, 778 (6th Cir. 1996).
70 See United States v. Davis, 471 F.3d 938 (8th Cir. 2006).
71 Id. at 942.
72 Id. at 941-42.
73 Id. at 945.
74 United States v. Paopao, 465 F.3d 404, 407 (9th Cir. 2006), amended, 469 F.3d 760 (9th Cir. 2006).
75 See generally United States v. Hoyos, 892 F.2d 1387 (9th Cir. 1989).
76 Paopao, 465 F.3d at 409 (quoting Hoyos, 892 F.2d at 1397).
of the arrest, inside or outside the premises, should only bear on the question of whether the officers had a justifiable concern for their safety."\(^{77}\)

Four years later, in *United States v. Lemus,\(^{78}\)* the Ninth Circuit denied a request for an en banc hearing. In *Lemus,* an arrest had occurred just outside the home. The defendant attempted to return inside and was arrested before fully entering the home, and a sweep was done of the home, which the court upheld.\(^{79}\) In a strongly worded dissent, Chief Judge Kozinski wrote, “The panel says the police could enter the house-with no suspicion whatsoever—because Lemus’s living room ‘immediately adjoined’ the place surrounding the arrest, but *Buie* only authorizes a suspicion-less search when the police make an ‘in-house-arrest’ (and then only for a small area near the arrest, not a grand tour of the entire apartment).”\(^{80}\) Chief Judge Kozinski continued:

The *Buie* exception is particularly toxic to Fourth Amendment values because it permits a search with zero individualized suspicion—with nothing at all but the presumption that the home is a dangerous place for the police. This is a fair presumption if the police are already inside the home and exposed to danger. But to use the exception as a wedge for entering the home turns *Buie* inside out.\(^{81}\)

The dissent notes *Lemus* should be distinguished from *United States v. Paopao,* another case in which the court dealt with an arrest made outside the home, by noting that in *Paopao* the court upheld a sweep of the home “only because the officers had a reasonable suspicion of danger.”\(^{82}\)

A Tenth Circuit opinion, in *United States v. Maddox,* differs from the aforementioned cases as it does not expressly limit the protective sweep areas within the home, and further the court concluded “that it is proper to consider . . . reasonable threats posed to . . . officers when drawing the boundaries of the arrest scene in an individual case.”\(^{83}\) Additionally, in the Eleventh Circuit, the court found appropriate the sweep of a house conducted once the suspect had been ordered outside and was placed under arrest.\(^{84}\)

In a doorway threshold situation, the District of Columbia Circuit also declined to narrowly define the place of arrest stating, “merely in order to avoid permitting the police to sweep the entirety of a small apartment. The safety of the officers, not the percentage of the home searched, is the relevant criterion.”\(^{85}\) The same circuit opined, “Although *Buie* concerned an arrest made in the home, the principles enunciated by the Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence.”\(^{86}\) The court went on to explain that the officers’ exact location, whether in or outside of a home at the time of arrest, does not change the nature of the appropriate inquiry, which is: “Did articulable facts exist that would lead a reasonably prudent officer to believe a sweep was required to protect the safety of those on the arrest scene?”\(^{87}\)

IV. Exigency

“It is well established that ‘exigent circumstances,’ including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search..."
without first obtaining a warrant.” However, “although exigent circumstances may justify a warrantless probable cause entry into the home, they will not do so if ‘the exigent circumstances were manufactured by the agents.”

United States v. Hassock is the most recent Federal appellate decision to examine Buie. An inter-agency task force received information that an individual had a semiautomatic handgun at a specific address in the Bronx. Task force members went to the apartment to conduct a “knock and talk” to interview the resident in order to obtain information regarding the person they were seeking. A woman answered the door who stated, in response to an agent’s question, that she did not know if anyone else was in the residence. Agents asked to look around and the woman consented. In a bedroom, beneath a bed, the agent recovered a .380 caliber pistol.

At the suppression hearing, the government argued the task force members were conducting a lawful protective sweep pursuant to Buie. In granting the defendant’s Motion to Suppress, the district court observed, “by making a voluntary decision to enter the [a]partment . . . the task force put themselves at risk of the very danger that necessitated the protective sweep.” The government based its appeal on the holding in Buie. In reaching its holding, the Second Circuit made a thorough examination of its sister circuits. The Court concluded:

[T]he agents here had no legal process and, although they went to the Hassock apartment with a legitimate purpose the questioning and possible arrest of Hassock when Hassock did not answer the door, that purpose could not be pursued until Hassock was found. Under these circumstances, the sweep cannot be viewed as a reasonable security measure incident to Hassock’s interrogation or arrest. Instead, the ‘sweep’ itself became the purpose for the agents’ continued presence on the premises insofar as they thereby searched the location for Hassock.

The Fifth Circuit “has created a non-exhaustive five-factor list to determine whether exigent circumstances exist: one, the degree of urgency involved and the amount of time necessary to obtain a warrant; two, the reasonable belief that contraband is about to be removed; three, the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought; four, the information indicating that the possessors of the contraband are aware that the police are on their trail; and five, the ready destructibility of the contraband and knowledge that efforts to dispose of it and to escape are characteristics in which those trafficking in contraband generally engage.”

V. Conclusion

“The legality of the protective sweep is a difficult question. It requires balancing two deeply important interests—the lives of law enforcement officers and the constitutional right of the people to be secure in their homes under the Fourth Amendment.” Courts remain concerned with the physical well being of officers placed in harm’s way. “On the Government’s side of the balance, we have the substantial and important interest in preserving officer safety.” “[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” The Buie decision, which created the “protective sweep” exception to the Fourth Amendment, is alive,
well, and thriving. Federal Circuit Courts have not dismantled *Buie*, but rather expanded the practicality of its holding for law enforcement officers with articulated reasonable suspicion.

**About the AUTHOR**

JEFFREY T. WENNAR has been practicing law since 1979. He began his legal career as an Assistant State’s Attorney in Prince George’s County, Maryland. Mr. Wennar has been a Senior Assistant State’s Attorney in Montgomery County, Maryland since August 2001. Mr. Wennar has lectured to many legal, civic, and educational groups. He has also lectured throughout the United States on Community/Gang Prosecution. Mr. Wennar writes and is a published author. He has participated in writing the national legal considerations curriculum on behalf of the Bureau of Justice Assistance for both Basic and Advanced Training for Street Gang Investigators. In 1995 he was recognized by Federal Bureau of Investigation Director, Louis Freeh, for his successful prosecution of the Hester drug gang. In 2003 and 2004, Mr. Wennar received the prestigious Frederic Milton Thrasher Award from the National Gang Crime Research Center; for superior community service. In 2005, the Maryland General Assembly, House of Delegates recognized Mr. Wennar’s contribution to Montgomery County and the State of Maryland by passing a Resolution congratulating him on his services to the County and State. Mr. Wennar is a member of the Executive Board of the Mid Atlantic Gang Investigators Network, and is the Legislative Chair for the National Alliance of Gang Investigators Associations. He is currently an Adjunct Professor at American University. While at American University Mr. Wennar developed and taught the course *Gangs and Gang Violence in America*. Mr. Wennar is also an Adjunct Professor at Washington College of Law where he developed and teaches two courses: an advanced trial advocacy class that focuses on prosecuting the gang homicide as well as an ethics course regarding the challenges and obligations of a prosecutor.