

# PROTECTIVE SWEEPS and ARREST SEARCHES The Legacy of Maryland v. Buie<sup>1</sup>

Dean Hawkins  
Senior Instructor

On February 3, 1986, two men, Buie and Allen, committed an armed robbery of a restaurant in Maryland. One of them was wearing a red running suit. That same day, police obtained arrest warrants for the two. On February 5, police executed the arrest warrant for Buie. Once inside Buie's house, officers fanned out through the first and second floors. An officer twice shouted into the basement, ordering anyone down there to come out. Buie finally emerged from the basement and was arrested, searched, and handcuffed. Thereafter, a second officer entered the basement "in case there was someone else" down there. He noticed a red running suit lying on a stack of clothing and seized it.

Buie had an expectation of privacy in that area of his house. However, such rooms are not immune from entry. The privacy interest must be balanced against the

interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than,

it is in an on-the-street or roadside investigatory encounter.<sup>2</sup>

In holding that the red running suit was admissible as seized in "plain view," the Court held that police officers have a limited right to conduct a "protective sweep" for their own safety, stating that

... as an incident to the arrest the officers could, as a precautionary 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 immediately launched. Beyond that, however, we hold that 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*<sup>3</sup> and *Long*<sup>4</sup>, and as in those cases, we think this balance is the proper one.<sup>5</sup>

These words have been interpreted as giving rise to "two prongs" of *Buie*.

The first prong is the "search incident to arrest," which is predicated

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<sup>1</sup> *Maryland v. Buie*, 494 U.S. 325 (1990)

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<sup>2</sup> *Id.* at 333

<sup>3</sup> *Terry v. Ohio*, 392 U.S. 1 (1968)

<sup>4</sup> *Michigan v. Long*, 463 U.S. 1032 (1983)

<sup>5</sup> *Buie* at 334.

solely on the arrest. Did the Court really mean what a plain reading of these words indicates - that the scope of a “search incident to arrest” is now expanded beyond the *Chimel*<sup>6</sup> “lunging distance”? We will see in Part 3 that the answer is yes.

The second prong is the “protective sweep,” which requires articulable facts which would warrant a reasonably prudent officer in believing that the area to be searched harbors an individual posing a danger to those on the arrest scene.

This three part article examines court cases discussing “protective sweeps” under *Buie*, “searches incident to arrest” under *Buie*, and some cases that have cited *Buie* in support of broader Fourth Amendment / privacy issues. Part 1 includes case examples of protective sweeps held valid under *Buie*. Part 2 will address protective sweeps not complying with *Buie*. Part 3 will examine searches incident to arrest under *Buie* and other *Buie* issues.

## **PART 1**

### **“PROTECTIVE SWEEP” AS DEFINED IN *BUIE***

The *Buie* Court defined a protective sweep as “... a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.”<sup>7</sup>

The Court compared the protective sweep to a *Terry* on-the-street frisk and a

*Long* roadside frisk of an automobile passenger compartment. In holding that these frisks were reasonable despite the absence of a warrant or probable cause, the Court balanced the immediate interests of the police in protecting themselves from the danger posed by hidden weapons against the Fourth Amendment interests of the persons with whom they were dealing.

### **CASE EXAMPLES INVOLVING PROTECTIVE SWEEPS**

#### **Probable Cause of Danger Not Necessary**

In *U.S. v. Tucker*<sup>8</sup>, a team of FBI agents and Oklahoma City Police officers arrived at Defendant’s residence to serve an arrest warrant on him. The arrest team was one of several such teams serving warrants on members of a large-scale drug conspiracy. Officers were told that the suspects had a history of violent behavior and were known to have firearms. When Defendant appeared at the front door, he was instructed to open the locked metal-barred door. He disappeared from sight when he went in search of the key.

The officers heard rustling noises when Defendant was out of sight but could not determine if there were other individuals inside the residence. Defendant finally returned and unlocked the door. Officers ordered him to lie down and began taking him into custody while several other officers began a protective sweep of the residence. In one room, officers moved a sofa out from the wall but found no one hiding there. Instead, they observed a pile of cocaine. On the kitchen counter, the agents observed other items of evidence. They completed the

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<sup>6</sup> *Chimel v. California*, 395 U.S. 752 (1969)

<sup>7</sup> *Buie*, at 327

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<sup>8</sup> *U.S. v. Tucker*, 1999 U.S. App. LEXIS 1480 (10<sup>th</sup> Cir.)

protective sweep, which lasted well under five minutes, and removed Defendant to their vehicle.

In upholding the protective sweep, the Court cited *Buie* and stated that it was **not necessary for officers to show “probable cause to believe that a serious and demonstrable potentiality for danger existed.”** An officer must instead possess a “reasonable belief based on specific and articulable facts” that there might be such a threat. The officers were told that the numerous suspects in the alleged conspiracy had a history of violent behavior and were known to possess firearms. Moreover, the Court found that Defendant took an unusually long time out of the officers’ sight when he was searching for the keys, and that the rustling noises could have suggested to the officers that someone else was in the dwelling. The Court was persuaded that these facts supported a reasonable belief of a risk of ambush and, therefore, justified a protective sweep. In looking behind the couch, “the officers didn’t do anything more than look about in places where a human being could be. And they are entitled to look in a closet or open a bathroom door or look behind a bulky piece of furniture.”

### **Arrest Outside, then Sweep Inside**

In *U.S. v. Henry*<sup>9</sup>, the Court dealt with the issue of **a protective sweep where the arrest occurred just outside the door.** A team of United States Marshals and Washington Metropolitan Police Officers, armed with an arrest warrant, went in search of Henry. An informant had notified the Marshals that

Henry was staying in apartment # 34, was armed, and might be accompanied by confederates.

The officers began a stakeout of the apartment at 9:30 a.m. At 1:30 p.m., Henry stepped from the apartment into the internal hallway of the building, leaving the door ajar behind him. As Defendant was being arrested, he called out, “They got me.” Five officers stepped into the apartment with Defendant. An officer then conducted what he termed a “security check” of the apartment’s bedroom, bathroom, and kitchen to verify that there were no armed individuals present who might threaten the officers. In the bedroom, he discovered a gun sitting on top of a dresser and, in an open drawer, two bags of a white powdery substance, some of which was later determined to be heroin.

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. The officers’ exact location does not change the nature of the appropriate inquiry: 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?

The Court found sufficient evidence for the officers to objectively fear for their safety after the arrest. The fact that the door was open could cause the officer to believe that anyone inside would be aware that Defendant had been taken into custody, especially as Defendant had been heard to yell, “They got me.” This information, coupled with the arrest just outside the open door, was sufficient to

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<sup>9</sup> *United States v. Henry*, 48 F.3d 1282 (D.C. Cir. 1995)

lead a reasonably prudent policeman to fear that he was vulnerable to attack.

In *U.S. v. Biggs*<sup>10</sup>, officers had received information that the Defendant, wanted on a fugitive warrant, was in a local motel room. When the three officers arrived at the motel, Defendant's truck was parked outside his room. About two hours after the surveillance started, Defendant left his room, barefoot and shirtless, and, leaving the door to the room ajar, went to his truck in the parking lot. The officers arrested Defendant at the truck. After the Defendant was placed in custody at his truck and before taking the Defendant back into the room to get dressed, two of the officers went inside his motel room through the partially open motel room door and conducted a "protective sweep." During the sweep, a gun was found in plain view in an open suitcase located on the end of one of the beds in the room.

Was it reasonable for the officers to **sweep the motel room 20-75 feet from the arrest site once they had the Defendant under their control?** The officers based the need for the sweep on several articulable factors. First, the officers had received information that another person would be meeting Defendant at the motel room. Although the officers never saw anyone enter the room during the surveillance period, they did not know if someone was already in the room when they arrived. Second, the officers were familiar with Defendant and knew that he had been arrested on two previous occasions in the presence of someone in possession of a firearm. Third, Defendant left the motel room door open so that anyone present in the room had a clear

view of the officers, thereby threatening their safety from an unknown person present in the room. Finally, the officers did not act unreasonably in accompanying a shoeless, shirtless man about to be transported to jail back to his motel room. The Defendant had clothes and other personal items to be retrieved. It was only natural, as a matter of common sense, for the officers to go with the Defendant back into the room to retrieve his possessions. The law does not require officers to leave common sense at the door.

### **Non-Weapon Plain View Seizures**

In *U.S. v. Hromada*<sup>11</sup>, an undercover officer made two small purchases of marijuana from Defendant. There were strong indications that Defendant did not operate alone. On the day of the first drug transaction, Defendant was observed leaving and returning to his home with a woman companion who was present during the sale. Also, during one recorded telephone call to Defendant's home, the officer overheard Defendant consult with a male at his home about the price he should charge for the drugs. An arrest warrant was obtained for Defendant.

Once Defendant was arrested in the living room, officers fanned out through the house to check all other rooms and areas. They discovered Defendant's girlfriend in one room, and the roommate in another, and brought them to the living room. During their passage through the house, officers observed an abundance of marijuana plants, high intensity lights, and cultivation equipment in the master bedroom and closet, the master bathroom, and a second bedroom.

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<sup>10</sup> *U.S. v. Biggs*, 70 F.3d 913 (6<sup>th</sup> Cir. 1995)

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<sup>11</sup> *U.S. v. Hromada*, 49 F.3d 685 (11<sup>th</sup> Cir 1995)

In upholding the “plain view” seizures, the Court, citing *Buie*, stated that the purpose of the protective sweep of Defendant’s house was to secure it and investigate the officers’ reasonable suspicion of danger. It was also reasonable for them to believe that Defendant’s girlfriend and roommate were inside. Such a reasonable belief that someone else could be inside the house permits a protective sweep.

It is clear from the record that this was not a full-blown search. The officer opened doors only to areas large enough to harbor a person. There is no evidence that the officers opened drawers or that the sweep of the house was too extensive. In fact, the sweep lasted only about a minute. A cursory sweep of an area which a reasonably prudent officer believes to be harboring a suspect must last no longer than is reasonably necessary to dispel suspicion of danger.

**During a protective sweep, items seen that are, based upon an officer’s background and experience, immediately apparent as evidence of a crime may be lawfully seized.**

In *U.S. v. Flores*<sup>12</sup>, a warrant was issued for Defendant’s arrest. Officers found Defendant at home in his kitchen, standing approximately two feet away from his refrigerator. After handcuffing Defendant, officers found a loaded firearm on top of the refrigerator. While conducting a protective sweep of the house for other individuals who might pose a danger, officers noticed a loaded shotgun on the headboard of Defendant’s bed. They entered the bedroom to secure the gun. As officers secured the shotgun, they noticed **a plastic bag containing a**

**substance appearing to be methamphetamine in a small glass-doored compartment in the headboard.** Officers obtained a warrant to search the headboard compartment. Subsequent laboratory tests showed that the substance found in the headboard compartment was methamphetamine.

Citing *Buie*, the Court stated, “It is well established that officers conducting an arrest of an individual in a dwelling may conduct a warrantless protective search of that dwelling when they have a reasonable suspicion that ‘the house is harboring a person posing a danger to those on the arrest scene.’” The protective sweep “may extend only to a cursory inspection of those spaces where a person may be found.” When police officers conducting a proper protective sweep of a dwelling come across evidence of criminal activity in plain view, they may seize it, so long as a reasonable police officer would conclude, based on experience and the circumstances, that the item is probably incriminating.

The Court of Appeals sustained the District Court’s finding of fact that the glass door was transparent, giving the officers plain view of the bag of methamphetamine. They legally could have seized it at that point, even without the added precaution of a search warrant. The drugs found within the glass-doored compartment were admissible.

In *U.S. v. Smith*<sup>13</sup>, a felony arrest warrant and two misdemeanor arrest warrants were outstanding for Defendant. In addition, the police officers had information that Defendant was involved in running a methamphetamine operation. On the north side of Defendant’s house

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<sup>12</sup> *U.S. v. Flores*, 149 F.3d 1272 (10<sup>th</sup> Cir. 1998)

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<sup>13</sup> *U.S. v. Smith*, 131 F.3d 1392 (10<sup>th</sup> Cir 1997)

was a detached two-car garage. During a drive-by, the officers saw Defendant standing at the open door of the detached garage.

As the officers approached the house to serve the warrant, they split into two groups to cover both the house and garage. An officer led one group to the garage to locate Defendant and to conduct a protective sweep. He began to circle the outside of the garage. On the south side he saw a door with six to eight glass panes painted black. One of the panes was missing and the area was covered with cardboard. The officer pushed aside the cardboard, announced his presence, and asked if anyone was there. He looked through the opening and saw no one, but did see **glassware, chemical containers, tubing, and other equipment which he believed to be an illegal methamphetamine laboratory.** The officer did not enter, but continued around the garage. His entire sweep lasted approximately thirty to forty seconds. Meanwhile, the other group arrested Defendant in the house. The officer who conducted the protective sweep obtained a search warrant based on what he saw in the garage.

The Court justified the protective sweep under *Buie*. The factors giving the officer a reasonable belief that the area harbored an individual posing a danger to the officer or others included (1) that Defendant was operating a methamphetamine operation at the premises, (2) that others were living at the premises and assisting him, (3) that he had violated probation and was wanted on three arrest warrants, and (4) that he had been seen at the garage a short time before. The officer could rationally infer from these facts that Defendant had

accomplices in either the house or garage, and that they might use firearms to protect their drug business. The sweep was properly limited in scope, because the officer did not enter the garage when it appeared no one was in it. And its duration was between thirty and forty seconds, well within the time it took to arrest Defendant and depart. The officer's actions were also justified as an attempt to locate Defendant, who had been seen standing at the door of the garage approximately fifteen minutes earlier. At the time the officer began his sweep Defendant had not yet been located; the officer was not aware Defendant had been found and arrested until he had completed his sweep.

### **Weapon Plain View Seizures**

In *U.S. v. Bervaldi*<sup>14</sup>, officers, armed with an arrest warrant for Deridder, went to the residence believed to be his. An officer knocked hard on the door for about 10 minutes without response. As the officers were turning to leave, the door was opened about one foot by a man whose left hand was behind his back. When the officers announced they were police, the man slammed the door shut. The officers kicked the door open, entered the house, and caught the man within ten to twenty feet of the entrance. The officers now realized that this man was not Deridder. **A cocked, but unloaded 9 millimeter pistol** was found resting on a gym bag ten feet to the right of the door. The officers conducted a protective sweep of the house believing that Deridder or others might be in the house. During this sweep, the officers noticed a very strong smell of marijuana coming from the kitchen.

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<sup>14</sup> *U.S. v. Bervaldi*, 226 F.3d 1256 (11<sup>th</sup> Cir. 2000)

Based on this information a search warrant was obtained. The resultant search yielded substantial quantities of contraband drugs, weapons and currency. The Court found the protective sweep to be lawful, concluding "...that a reasonably prudent officer could believe, based on the cocked 9 millimeter pistol observed and the reasonable belief that Deridder was in the dwelling, that the house harbored an individual posing a danger sufficient to permit a sweep of its entirety."

In *U.S. v. Clayton*<sup>15</sup>, officers with an arrest warrant entered the building, saw the Defendant and another person present, and arrested Defendant.

One officer walked over to the southeast corner of the building. There, he observed an icebox in the corner and then observed a black gun case beside of the icebox. The officer **opened the gun case, which contained two firearms.** A search warrant was then obtained to search the building for weapons based on the observation of the gun case and firearms. The subsequent search yielded evidence of other crimes.

Applying the "protective sweep" principles set forth in *Buie*, the Court concluded that the limited search of the building did not violate the Fourth Amendment. Testimony indicated that firearms had been involved in earlier police interactions with Defendant and that the Defendant had made threats to officers on other occasions. An officer had heard noises, which sounded like someone moving, coming from the southeast corner of the building. He testified that he was concerned something of danger to the officers could be in that corner and that

other individuals could have been hiding behind the icebox. These facts and the inferences drawn therefrom are sufficient to establish that the officers had a reasonable belief that, even though Defendant was under arrest and in the hallway, someone posing a danger to them might be in the corner of the building.

In *U.S. v. Franklin*,<sup>16</sup> an FBI agent investigating bomb threats made to the Social Security Administration helped state authorities execute a state-issued arrest warrant for the Defendant. During a protective sweep, which lasted less than two minutes, the FBI Agent found and seized **a .22 caliber rifle hanging on the wall over Defendant's bed.** The Court held that the protective sweep was constitutional. Therefore, the rifle was in plain view and was lawfully seized.

The Court cited several facts and the inferences drawn therefrom as sufficient to establish that the officers had a reasonable belief that someone posing a danger to them might be in the residence. When state authorities and the FBI Agent went to Defendant's residence, they knew that Defendant had recently been treated for a gunshot wound to the leg. The gunshot wound demonstrates that Defendant had recently been in the company of a dangerous, armed individual. Defendant filed no charges based on the wound. Therefore, the officers could infer that he knew his attacker and that the individual could be on the premises. They also knew that two of Defendant's associates had been involved in illegal drug activity in which Defendant may have also been involved. One of those associates had an outstanding

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<sup>15</sup> *U.S. v Clayton*, 1999 U.S. App. LEXIS 30759 (10<sup>th</sup> Cir.)

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<sup>16</sup> *U.S. v. Franklin*, 1999 U.S. App. LEXIS 7801 (10<sup>th</sup> Cir.)

arrest warrant. The FBI Agent also knew that at least one other individual besides Defendant had been involved with the telephonic bomb threats. Therefore, concern that an accomplice might have been on the premises was reasonable.

### **Conclusion to Part 1**

As these cases demonstrate, *Buie* provides a new tool for law enforcement, i.e., protective sweeps. Law enforcement officers may now conduct a quick and limited search of the premises incident to arrest when there are articulable facts and inferences which would warrant a reasonably prudent officer in believing that there may be others present who could pose a danger to them. Evidence seized in plain view is admissible and can also support probable cause for a search warrant.