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## FOURTH AMENDMENT—PROTECTIVE SWEEP DOCTRINE: WHEN DOES THE FOURTH AMENDMENT ALLOW POLICE OFFICERS TO SEARCH THE HOME INCIDENT TO A LAWFUL ARREST?

**Maryland v. Buie, 110 S. Ct. 1093 (1990)**

### I. INTRODUCTION

In *Maryland v. Buie*,<sup>1</sup> the Supreme Court held that the fourth amendment permits an officer executing an arrest warrant in a private dwelling to search rooms other than the room in which the arrest is made, whenever the searching officer possesses a reasonable belief, based on specific and articulable facts, that the adjacent rooms harbor another individual posing a danger to those on the arrest scene. The majority based its approval of this "protective sweep" on the "reasonable suspicion" exception to traditional fourth amendment searches first articulated in *Terry v. State of Ohio*.<sup>2</sup> The majority thus extended the *Terry* holding, which permits officers to conduct a protective, warrantless search of a person, to "protective sweeps" conducted by police officers incident to a lawful, in-home arrest.<sup>3</sup>

Conversely, the *Buie* dissent argued that the *Terry* test does not extend to searches of the home and that the fourth amendment warrant and probable cause requirements should be applied to protective sweeps in private dwellings.<sup>4</sup> The dissent warned that the majority understated the intrusiveness of the search, and reasoned that the majority's holding further would erode traditional fourth amendment protection from warrantless searches of the home.<sup>5</sup>

This Note examines the evolution of the protective sweep doctrine and the prior Supreme Court cases which have defined the

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<sup>1</sup> 110 S. Ct. 1093 (1990).

<sup>2</sup> 392 U.S. 1 (1968).

<sup>3</sup> *Buie*, 110 S. Ct. at 1098.

<sup>4</sup> *Id.* at 1103 (Brennan, J., dissenting).

<sup>5</sup> *Id.* at 1102 (Brennan, J., dissenting).

right of law enforcement officers to conduct a warrantless search under either exigent circumstances or incident to an arrest. This Note argues that the *Buie* majority correctly balanced the legitimate concerns of officer safety against the sanctity of the home embodied in the fourth amendment. The Court thus reasonably extended the *Terry* doctrine to warrantless searches of the home while preserving fourth amendment safeguards against unreasonable search and seizures. This Note argues, however, that while the emphasis on officer safety is appropriate, the majority failed to offer adequate guidance as to the types of "specific and articulable" facts which may outweigh the established fourth amendment protections of the home. When assessing the constitutionality of a protective sweep, this Note suggests that certain factors should be given priority in balancing the concerns of officer safety against the protections of the fourth amendment.

## II. HISTORY OF THE PROTECTIVE SWEEP DOCTRINE<sup>6</sup>

Generally, a "protective sweep" is a "quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others."<sup>7</sup> The protective sweep is an exception to the fourth amendment mandate that a law enforcement officer have probable cause and a search warrant to conduct a search of an individual's home.<sup>8</sup> Courts have developed the "protective sweep" doctrine to allow officers lawfully executing an arrest warrant to take action to protect themselves when they reasonably fear that confederates of the arrestee might endanger their safety.<sup>9</sup> This doctrine emerged in response to the uncertainty regarding the right of law enforcement officers to conduct a search incident to an in-home arrest.

Prior to *Chimel v. California*,<sup>10</sup> an officer generally was allowed to

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<sup>6</sup> See generally Joseph, *The Protective Sweep Doctrine: Protecting Arresting Officers from Attack by Persons Other than the Arrestee*, 33 CATH. U.L. REV. 95 (1983) [hereinafter Joseph]; Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously with an Arrest on or Near Private Premises*, 30 SYRACUSE L. REV. 973 (1979) [hereinafter Kelder]; W. LAFAVE, SEARCH AND SEIZURE § 6.4 (2d ed. 1987) [hereinafter W. LAFAVE].

<sup>7</sup> *Buie*, 110 S. Ct. at 1094.

<sup>8</sup> The fourth amendment to the United States Constitution provides:

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.

U.S. CONST. amend. IV.

<sup>9</sup> *State v. Toliver*, 5 Wash. App. 321, 324, 487 P.2d 264, 267 (1971).

<sup>10</sup> 395 U.S. 752 (1969).

search throughout the place where an arrest was made to find and seize items connected with the crime.<sup>11</sup> This right to conduct a warrantless search incident to a lawful arrest extended to searches far beyond the room in which the arrest was made.<sup>12</sup> Officers generally were allowed to search the entire area considered to be in the "possession" or under the "control" of the person arrested.<sup>13</sup>

In *Chimel*, officers went to the arrestee's premises and waited with his wife for the arrestee to return.<sup>14</sup> Upon the arrival of the arrestee, the officers executed the arrest and then searched the entire three bedroom house for evidence. The officers searched the attic, garage and even opened drawers to look for evidence.<sup>15</sup> The California court upheld the search of the petitioner's entire house under the "possession" and "control" theory.<sup>16</sup>

The *Chimel* Court examined the confused state of the law regarding the right to conduct a warrantless search of the home, and held that an officer executing an arrest warrant may search the arrestee's person and any "nearby area" from which he or she might obtain possession of a weapon or destructible evidence.<sup>17</sup> The Court stated, however, that a "comparable justification" did not exist to allow the officers to search any room other than the one in which the arrest occurred.<sup>18</sup> The Court concluded that the fourth amendment mandates that searches of other rooms or through closed and concealed areas can only be conducted under the authority of a search warrant.<sup>19</sup>

The *Chimel* Court thus separated the protection rationale, which warranted the search of the arrestee and the area under his or her immediate control, from the desire to obtain evidence, which did not warrant such an intrusive search of the rest of the home. The Court in *Chimel* acknowledged that this approach was similar to the analysis underlying their previous decision in *Terry v. Ohio*.<sup>20</sup>

In *Terry*, decided one year before *Chimel*, the Court replaced the

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<sup>11</sup> *United States v. Rabinowitz*, 339 U.S. 56, 61 (1950).

<sup>12</sup> *See, e.g., Harris v. United States*, 331 U.S. 145 (1947) (search of entire four room apartment of a man arrested in his living room approved as "incident to arrest").

<sup>13</sup> *Chimel*, 395 U.S. at 760.

<sup>14</sup> *Id.* at 753.

<sup>15</sup> *Id.* at 754.

<sup>16</sup> *Id.* at 760.

<sup>17</sup> *Id.* at 763.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* It is important to remember that the search in *Chimel* beyond the immediate reach of the arrestee was primarily a search for evidence, not a protective search for potentially dangerous third persons. *See infra* text accompanying notes 84-87 for a discussion of this important distinction.

<sup>20</sup> *Id.* at 762.

requirement of probable cause for searches and seizures in certain arrest situations with a reasonableness test.<sup>21</sup> The *Terry* Court examined the legality of a street-side, stop-and-frisk search by an officer who, though he had no probable cause to make an arrest, nonetheless suspected that the individual under surveillance was armed and dangerous.<sup>22</sup> The Court held that if a police officer reasonably concludes from the facts present that the person with whom he or she is dealing is dangerous, then the officer can conduct a carefully limited search of the person to look for weapons that may be used against the officer.<sup>23</sup>

The *Terry* Court limited the scope of this exception to the fourth amendment's warrant and probable cause requirements by declaring a two-pronged reasonableness test; specifically, the officer's intrusion must be: (1) justified at its inception; and (2) reasonably related in scope to the circumstances which justified the initial action.<sup>24</sup>

Applying this dual inquiry, the *Terry* Court first held that an officer must be able to point to "specific and articulable facts" which, together with the rational inferences from those facts would justify the officer's intrusion.<sup>25</sup> The Court reasoned that the fourth amendment requires that these facts be judged against an objective standard that asks whether the facts available to the officer at the moment of the search would "warrant a man of reasonable caution" to believe that the action taken was appropriate.<sup>26</sup> These specific facts require more than the arresting officer's "good faith,"<sup>27</sup> "hunches," or unparticularized suspicion.<sup>28</sup>

The *Terry* Court then analyzed the scope of the officer's actions to determine if the search was reasonably related in scope to the circumstances at hand. The Court acknowledged that even such a

<sup>21</sup> *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

<sup>22</sup> *Id.* at 6-7. The officer in *Terry* had examined two men loitering in front of a store, and suspected them of planning a robbery. When the officer identified himself as a police officer and asked the men for their names, they "mumbled something" in response. *Id.* at 7. At this point the officer grabbed Terry and patted down the outside of his clothing and felt a pistol. *Id.* He ordered the men inside the store where he removed a revolver from Terry's pocket. *Id.* The officer testified that he patted the men down only to see if they had weapons, and he did not put his hands beneath the outer garments of Terry until he felt the gun. *Id.*

<sup>23</sup> *Id.* at 30.

<sup>24</sup> *Id.* at 20.

<sup>25</sup> *Id.* at 21.

<sup>26</sup> *Id.* at 22.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 27.

brief search was intrusive,<sup>29</sup> but it also stressed that in certain situations, an officer's concern for his or her safety must outweigh the intrusiveness of the search.<sup>30</sup> The officer's search in *Terry* properly was confined in scope to an intrusion reasonably designed to discover weapons or instruments which could have been used to attack the officer.<sup>31</sup> The Court emphasized that the search was prompted only by the officer's concern for his safety and stressed the limited nature of the holding.<sup>32</sup>

The Court subsequently has extended the *Terry* rationale to other factual settings.<sup>33</sup> For example, in *Michigan v. Long*,<sup>34</sup> the Court applied the *Terry* rationale in holding that a police officer may search for hidden weapons in the passenger compartment of an automobile if the officer reasonably believes based on "specific and articulable facts," that the suspect is dangerous and may gain immediate control of weapons.<sup>35</sup> The *Long* Court recognized that the actions of the officer at issue were prompted by safety concerns, and expressly rejected the contention that the holding of *Terry* was limited to searches of detained suspects.<sup>36</sup>

In recent years, many federal and state courts confronting the legality of protective sweeps<sup>37</sup> have required that arresting officers have the articulable suspicion required in *Terry* that third parties are on the premises.<sup>38</sup> However, the courts have disagreed over what

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<sup>29</sup> The Court held that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25.

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.* at 29.

<sup>32</sup> The Court held in part:

We merely hold today that where 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.

*Id.* at 30.

<sup>33</sup> See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug testing of railroad employees); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (routine vehicle stop at border checkpoint).

<sup>34</sup> 463 U.S. 1032 (1983).

<sup>35</sup> *Id.* at 1049.

<sup>36</sup> *Maryland v. Buie*, 110 S. Ct. 1093, 1095 (1990).

<sup>37</sup> For an extensive listing of both federal and state cases addressing "protective sweeps," see Kelder, *supra* note 6, at 974-76; see also Brief for Petitioner at 9-11 nn. 2 & 3, *Maryland v. Buie*, 110 S. Ct. 1093 (No. 88-1369) (1990).

<sup>38</sup> *United States v. Castillo*, 866 F.2d 1071, 1079 (9th Cir. 1988).

standard to apply when determining whether a protective sweep is reasonable under the fourth amendment. Some courts have held that police must have probable cause to believe that third parties are present before they can legally search the entire house.<sup>39</sup> Other courts have attempted to consider the total circumstances of the encounter and balance the exigency of the arrest situation against the nature of the intrusion.<sup>40</sup> Thus, courts have demonstrated confusion regarding the applicability of *Terry* and the scope of *Chimel* when defining the protective sweep doctrine.

### III. FACTUAL AND PROCEDURAL BACKGROUND

On February 3, 1986, the Prince George's County police department obtained arrest warrants for Jerome Edward Buie and Lloyd Allen in connection with an armed robbery of a restaurant earlier that day.<sup>41</sup> The police placed Buie's home under surveillance.<sup>42</sup> On February 5, 1986, a police department secretary telephoned Buie's home and spoke to a female and to Buie. Six or seven officers then proceeded to Buie's home to execute the arrest warrant.<sup>43</sup>

Upon their arrival, five officers entered Buie's residence and began to search for him.<sup>44</sup> Corporal James Rozar announced that he would guard the basement so that no one could come up and surprise the officers.<sup>45</sup> Rozar drew his service revolver and twice shouted downstairs, ordering anyone in the basement to come up.<sup>46</sup> A voice finally asked who was calling, and Rozar announced three times: "This is the police, show me your hands."<sup>47</sup> A pair of hands emerged from around the stairwell, and Buie ascended from the basement.<sup>48</sup> Rozar then proceeded to arrest, search, and handcuff Buie.<sup>49</sup>

Shortly thereafter, Detective James Frolich entered the base-

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<sup>39</sup> See, e.g., *United States v. Gerry*, 845 F.2d 34, 36-37 (1st Cir. 1988); *United States v. Kolodziej*, 706 F.2d 590, 597 (5th Cir. 1983); *Buie v. State*, 314 Md. 151, 550 A.2d 79 (1988).

<sup>40</sup> *United States v. Baker*, 577 F.2d 1147, 1152 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978).

<sup>41</sup> *Maryland v. Buie*, 110 S. Ct. 1093, 1095 (1990).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

ment "in case there was someone around."<sup>50</sup> Once downstairs, he noticed a red running suit lying in plain view on a stack of clothing; he proceeded to seize it.<sup>51</sup> This suit matched the description given by a witness of the suit worn by one of the robbers.<sup>52</sup> After seizing the suit, Detective Frolich proceeded upstairs.<sup>53</sup>

At trial, Buie argued that the officer had no right to enter the basement; therefore, the unconstitutionally seized running suit should be suppressed as evidence. The trial judge ruled against Buie's argument, holding that Frolich's search of the basement was reasonable to insure the officers' safety.<sup>54</sup> The running suit was admitted into evidence, and Buie subsequently was convicted in the circuit court for robbery with a deadly weapon and the use of a handgun in the commission of a felony.<sup>55</sup> Buie appealed to the Court of Special Appeals, arguing that the trial judge erred in admitting the suit into evidence.<sup>56</sup> The Court of Special Appeals affirmed the trial court's decision, stating that if the police are lawfully in the home and the arrestee has accomplices who are still at large, reasonable suspicion, rather than probable cause, is sufficient to jus-

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<sup>50</sup> Buie v. Maryland, 72 Md. App. 562, 566, 531 A.2d 1290, 1292 (1987). It is unclear from the record exactly why Officer Frolich descended into the basement. This should be significant on remand. The transcript of the defense counsel's cross-examination of Officer Frolich during the suppression hearing contains the following with respect to Officer Frolich's entry into the basement:

Q. And you observed the officer handcuff [Buie]?

A. Yes, sir.

Q. And then place him under arrest?

A. Yes, sir.

Q. What did the officer do with [Buie] at that point?

A. I don't know.

Q. Took him out, whatever. At this point, you decided to go into the basement?

A. Yes, sir.

Q. Did you know what you were looking for?

A. I just went down there in case there was someone around.

....

Q. Did you have any reason to believe that anyone else was in the house besides Mr. Buie?

A. I had no idea who lived there.

*Id.* at 566-67, 531 A.2d at 1292.

<sup>51</sup> Buie, 110 S. Ct. at 1095.

<sup>52</sup> Buie, 72 Md. App. at 565, 531 A.2d at 1292.

<sup>53</sup> *Id.*

<sup>54</sup> The trial court judge denied the motion to suppress and held in part:

[t]hey had a right to search and they had a right to seize based on the facts of this case. The man comes out from a basement, the police don't know how many people are down there. He is charged with a serious offense.

I think the police acted reasonably in this case and if they had gone back to get a [search] warrant, that [the running suit] wouldn't have been there.

Buie v. State, 314 Md. 151, 155, 550 A.2d 79, 81 (1988).

<sup>55</sup> Buie, 72 Md. App. at 565, 531 A.2d at 1291.

<sup>56</sup> *Id.*

tify a limited, additional intrusion to investigate the possibility of their presence.<sup>57</sup>

The Maryland Court of Appeals granted certiorari and reversed the lower court.<sup>58</sup> The Court of Appeals stressed the special sanctity of the home under the fourth amendment and stated that to justify a protective sweep of the home, the government must show that there is probable cause to believe that "serious and demonstrable potentiality of danger" exists.<sup>59</sup> Accordingly, the court held that in light of the police officer's acknowledged lack of probable cause, the search of Buie's basement violated the fourth amendment, and the running suit should not have been admitted into evidence.<sup>60</sup>

The Supreme Court granted certiorari to determine when police officers may conduct a warrantless search of the home under the guise of a "protective sweep."<sup>61</sup>

#### IV. SUPREME COURT OPINIONS

##### A. MAJORITY OPINION

Writing for the majority, Justice White began by stating that the fourth amendment clearly entitled the officers to enter Buie's home and, once lawfully in the basement, to seize the running suit in plain view.<sup>62</sup> The majority reasoned that the issue in this case was the level of justification the fourth amendment required to permit Detective Frolich to enter the basement to see if someone was there.<sup>63</sup>

The majority acknowledged that the fourth amendment barred only unreasonable searches and seizures.<sup>64</sup> Justice White recognized that to determine reasonableness, the Court must balance the intrusion of the search on the individual's fourth amendment interests against the intrusion's promotion of legitimate government interests.<sup>65</sup> The Court acknowledged that although a search of a house generally is not reasonable without a warrant issued on probable cause, there are contexts where the public interest is such that neither a warrant nor probable cause is required.<sup>66</sup>

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<sup>57</sup> *Id.* at 576, 531 A.2d at 1297.

<sup>58</sup> *Buie v. State*, 314 Md. 151, 550 A.2d 79 (1988).

<sup>59</sup> *Id.* at 159-60, 550 A.2d at 83.

<sup>60</sup> *Id.*

<sup>61</sup> *Maryland v. Buie*, 110 S. Ct. 1093, 1096 (1990).

<sup>62</sup> *Id.* at 1096.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

<sup>66</sup> *Id.* at 1097.

The Court then focused on *Terry v. Ohio*<sup>67</sup> and its holding that a street "frisk" for weapons is governed by a reasonableness test, and therefore is not subject to the warrant procedure.<sup>68</sup> The Court noted that the holding of *Terry* was not limited to its factual situation and already had been extended in *Michigan v. Long*<sup>69</sup> to permit searches of the passenger compartment of an automobile.<sup>70</sup>

The majority then reasoned that the "ingredients to apply the balance struck in *Terry* and *Long* were present in this case."<sup>71</sup> According to the majority, the salient ingredient in the *Terry* doctrine was an officer's concern for his or her own safety or the safety of others.<sup>72</sup> The majority asserted that the Court in *Terry* and *Long* was concerned with the immediate interest of police officers in taking steps to assure themselves that the persons under investigation were not armed or capable of immediate control of a weapon that could unexpectedly be used against them.<sup>73</sup> Likewise, the officers in *Buie* had an interest in taking steps to assure themselves that the house in which the suspect had just been arrested was not harboring other dangerous persons who could unexpectedly launch an attack.<sup>74</sup> The Court concluded that the risk of danger associated with an in-home arrest was "as great as, if not greater than, the danger of an on-the-street or roadside investigatory encounter."<sup>75</sup> The Court stressed that, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf," and thus concluded that an ambush in an unknown and confined setting is to be feared more than one in open and more familiar surroundings.<sup>76</sup>

The majority then held that the interest of arresting officers in taking reasonable steps to ensure their safety was sufficient to outweigh the intrusion involved.<sup>77</sup> The Court, consistent with its holding in *Chimel v. California*,<sup>78</sup> stated further that an officer may, as a precautionary measure and without probable cause or reasonable

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<sup>67</sup> 392 U.S. 1 (1968). See also *supra* text accompanying notes 21-35.

<sup>68</sup> *Id.* at 20-21.

<sup>69</sup> 463 U.S. 1032 (1983). See also *supra* text accompanying notes 34-35.

<sup>70</sup> *Buie*, 110 S. Ct. at 1097.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1097-99.

<sup>73</sup> *Id.* at 1097.

<sup>74</sup> *Id.* at 1098.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 395 U.S. 752 (1969). The Court in *Chimel* held that an officer could search the arrestee's person and the area "within his immediate control," limited to the "area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

suspicion, look in closets and spaces immediately adjoining the place of arrest from which an attack could be immediately launched.<sup>79</sup> The Court declared, however, that beyond this limited search, the officer must be able to provide “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.”<sup>80</sup> The Court did not give any examples of what facts or types of facts an officer should consider when making an assessment of the existence of potential danger from third persons.

The Court limited this search to only a cursory inspection of those spaces where a person may be found.<sup>81</sup> The Court explained that because a protective sweep was not motivated by a search for evidence, it had to be limited to what was necessary to protect the safety of the officer and others.<sup>82</sup> Furthermore, the Court held that a sweep could last no longer than necessary to erase the reasonable suspicion of danger—at a maximum, it could last no longer than it would take to complete the arrest and leave the premises.<sup>83</sup>

The majority proceeded to distinguish *Buie* from *Chimel*.<sup>84</sup> The majority reasoned that while *Chimel* was concerned with a full-blown search of the entire house for evidence of the robbery, the intrusion in *Buie* was more limited.<sup>85</sup> Justice White made the important distinction that while the justification for the search of the arrestee in *Chimel* was the threat of danger posed by the arrestee, the danger in *Buie* was the threat posed by unseen persons in the house.<sup>86</sup> The Court then reiterated that the search invalidated in *Chimel* was a full scale search for evidence, while a protective sweep is justified only when an officer acts to protect his or her safety.<sup>87</sup>

Finally, the Court concluded that the Court of Appeals had applied an unnecessarily strict fourth amendment standard by requiring that the protective sweep be justified by probable cause.<sup>88</sup> The Court remanded the case to the Maryland Court of Appeals to determine whether Detective Frolich possessed a reasonable belief based on specific and articulable facts that Buie’s basement har-

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<sup>79</sup> *Buie*, 110 S. Ct. at 1098.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1099.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

bored an individual posing a danger to those on the arrest scene.<sup>89</sup>

#### B. CONCURRING OPINIONS

In his concurrence, Justice Stevens emphasized that the majority holding applies only to *protective* sweeps.<sup>90</sup> Justice Stevens stressed that such a search is permissible only when the officers' actions are justified by their concern for their safety.<sup>91</sup> Stevens reasoned that, on remand, the state would have to demonstrate the following: first, that the officers had a reasonable basis for believing that someone in the basement might attack them or interfere with the arrest; and second, that it would have been safer for Detective Frolich to go down the stairs instead of simply guarding them from above while Buie was removed from the house.<sup>92</sup> Stevens noted that the facts of the case suggested that no reasonable suspicion of danger justified the entry into the basement and that the State may face a formidable task on remand.<sup>93</sup>

Justice Kennedy added a one paragraph concurrence in which he expressed his disagreement with Justice Stevens' belief that the officer's search of the basement was unjustified by the circumstances of the arrest.<sup>94</sup> Justice Kennedy instead argued that the officers' conduct was in full accord with standard police safety procedure and was a necessary precaution.<sup>95</sup> Justice Kennedy added that his comment was necessary to stress that the views of Justice Stevens were not to be "interpreted as authoritative guidance for application of our ruling to the facts of the case."<sup>96</sup>

#### C. THE DISSENTING OPINION

Justice Brennan, joined by Justice Marshall, filed a dissent which lamented the extension of the *Terry* doctrine into the home.<sup>97</sup> Justice Brennan criticized the majority for extending the *Terry* rationale to a "wide variety of more intrusive searches and seizures."<sup>98</sup> Justice Brennan feared that the narrow exception of the *Terry* rule was swallowing up the general rule that searches were reasonable

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<sup>89</sup> *Id.* at 1100.

<sup>90</sup> *Id.* (Stevens, J., concurring).

<sup>91</sup> *Id.* (Stevens, J., concurring).

<sup>92</sup> *Id.* (Stevens, J., concurring).

<sup>93</sup> *Id.* (Stevens, J., concurring).

<sup>94</sup> *Id.* at 1101 (Kennedy, J., concurring).

<sup>95</sup> *Id.* (Kennedy, J., concurring).

<sup>96</sup> *Id.* (Kennedy, J., concurring).

<sup>97</sup> *Id.* (Brennan, J., dissenting).

<sup>98</sup> *Id.* (Brennan, J., dissenting).

only if based on probable cause.<sup>99</sup>

Justice Brennan began his dissent by agreeing that officers executing arrest warrants in private homes do have an interest in protecting themselves from third parties on the premises.<sup>100</sup> However, he argued that the majority offered no support for its assumption that the dangers of ambush during planned home arrests approached the danger of the on-the-beat situation addressed in *Terry*.<sup>101</sup>

Justice Brennan stressed that physical entry into the home was the chief evil against which the wording of the fourth amendment is directed.<sup>102</sup> He argued that the majority underestimated the intrusive nature of a protective sweep, and he feared that a protective sweep would bring virtually all personal possessions in the home not hidden from view within the police officer's purview.<sup>103</sup> Justice Brennan predicted that police officers searching for dangerous confederates of the arrestee might enter every room, open chests and closets, and view a wide range of personal possessions.<sup>104</sup>

Justice Brennan argued that although a protective sweep may not constitute a "full blown" search, it was much closer to it than a limited "pat-down" for weapons or a frisk of an automobile.<sup>105</sup> While the majority reasoned that the "ingredient" of officer safety warranted the reliance on *Terry*, Justice Brennan reasoned that the *Buie* facts lacked the limited search "ingredient" present in *Terry*.<sup>106</sup> He found that the intrusion in *Buie* was more than minimal; therefore, the majority's holding deviated from *Terry* and its progeny.<sup>107</sup>

Justice Brennan concluded that, in light of the special sanctity of a private residence and the highly intrusive nature of a protective sweep, police officers must have *probable cause* to fear that their personal safety is threatened by an arrestee's hidden confederate before they may sweep through the entire house.<sup>108</sup>

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<sup>99</sup> *Id.* (Brennan, J., dissenting).

<sup>100</sup> *Id.* (Brennan, J., dissenting).

<sup>101</sup> *Id.* (Brennan, J., dissenting).

<sup>102</sup> *Id.* at 1102 (Brennan, J., dissenting).

<sup>103</sup> *Id.* (Brennan, J., dissenting).

<sup>104</sup> *Id.* (Brennan, J., dissenting). Justice Brennan feared that officers conducting a protective sweep would also "view letters, documents and personal effects that are on tables or desks or are visible inside open drawers; books, records, tapes, and pictures on shelves; and clothing, medicines, toiletries and other paraphernalia not carefully stored in dressing drawers or bathroom cupboards." *Id.* (Brennan, J., dissenting).

<sup>105</sup> *Id.* (Brennan, J., dissenting).

<sup>106</sup> *Id.* at 1102-03 (Brennan, J., dissenting).

<sup>107</sup> *Id.* at 1103 (Brennan, J., dissenting).

<sup>108</sup> *Id.* (Brennan, J., dissenting).

## V. ANALYSIS

The majority in *Buie* correctly balanced the safety concerns of the officer against the intrusiveness of the search under the fourth amendment. Prior to *Buie*, the Court implicitly had recognized the possibility that officers may conduct a search incident to an arrest.<sup>109</sup> *Buie* merely made explicit the right of officers to take action to protect their safety. Justice White sensibly rejected the respondent's argument that probable cause is required to justify a protective sweep.<sup>110</sup> A probable cause standard is unnecessary and impracticable in light of the dangerous situations confronted by police officers during an in-home arrest. The majority also wisely rejected the petitioner's insistence that no level of suspicion is needed to justify a protective sweep during an in-house arrest.<sup>111</sup> Acceptance of this "no suspicion" standard would have been unquestionably a major defeat to the protections of the fourth amendment, and would have given arresting officers *carte blanche* to conduct a protective search incident to any lawful arrest. The Court correctly chose the middle ground of the *Terry* requirement of reasonable suspicion.

At first glance, the holding in *Buie* may appear, as Justice Brennan argued, to be an unwarranted and dangerous extension of *Terry*, leading to intrusions into the cherished sanctity of the home. However, the holding in *Buie* is generally consistent with both the Court's fourth amendment jurisprudence and the holdings of *Terry* and *Chimel*.<sup>112</sup> In addition, a closer examination of the holding indicates that it is limited strictly to situations where officer safety is a viable concern. This limitation should prevent some of the abuses that courts have allowed in their varied applications of the protective sweep doctrine.

*Buie* comports with the Court's recent fourth amendment jurisprudence. Since the decision in *Terry*, the Court frequently has used a balancing approach to authorize governmental intrusions based on less than probable cause. The Court repeatedly has found the government's interest in various objectives to outweigh the intrusion of a warrantless search for a variety of reasons less compelling

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<sup>109</sup> The Court in *Payton v. New York*, 445 U.S. 573 (1980), stated in dicta that while the area that may be legally searched is broader under a search warrant than an arrest warrant, the "difference may be more theoretical than real . . . because the police may need to check the entire premises for safety reasons." *Id.* at 589.

<sup>110</sup> *Buie*, 110 S. Ct. at 1096-97. For an explanation of Respondent's argument, see Brief of Respondent, *Maryland v. Buie*, 110 S. Ct. 1093 (1990) (No. 88-1369).

<sup>111</sup> *Buie*, 110 S. Ct. at 1098 n.2. For an explanation of Petitioner's argument see Brief for Petitioner, *Maryland v. Buie*, 110 S. Ct. 1093 (1990) (No. 88-1369).

<sup>112</sup> See *supra* note 78 for a discussion of *Chimel*.

than officer safety.<sup>113</sup> For example, in 1989, the Court held in *National Treasury Employees Union v. Von Raab*<sup>114</sup> that the government's interest in preventing the promotion of drug users to sensitive positions outweighed the employee's expectation of privacy, and thus permitted suspicionless drug testing of customs agents.<sup>115</sup> The Court certainly believes that the government's interest in protecting the lives of police officers is greater than an interest in detecting drug use in customs agents.<sup>116</sup>

Moreover, in situations very similar to a protective sweep, the Court has held that both officer safety and the safety of others will outweigh the need for a warrant and probable cause.<sup>117</sup> For example, in *Chimel*,<sup>118</sup> the officer was allowed to search the arrestee and the area under the arrestee's immediate control for protective reasons without reasonable suspicion or probable cause. In *United States v. Robinson*,<sup>119</sup> the "Supreme Court converted the search incident doctrine into a *per se* rule permitting searches within the limit set by *Chimel*."<sup>120</sup> The Court in *Robinson* held that a search incident to a lawful arrest is permissible whether or not weapons or evidence reasonably could be expected to be found.<sup>121</sup> *Chimel* and *Robinson* demonstrate that concern for an officer's safety as he or she makes a lawful arrest justifies a narrowly defined search of the person.<sup>122</sup> An officer conducting a protective sweep for safety reasons has an equally compelling safety interest.

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<sup>113</sup> See, e.g., *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602 (1989) (government's interest in the safety of the nation's railroads justifies drug testing of railroad employees); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (government's interest in operating a probation system warrants a probation officer's search of probationer's home); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (government's interest in seizing smuggled contraband makes 16 hour detention of person at border reasonable); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (government's interest in interdicting the flow of illegal aliens justifies the routine vehicle stop at border checkpoint).

<sup>114</sup> 109 S. Ct. 1384 (1989).

<sup>115</sup> *Id.* at 1396, 1397.

<sup>116</sup> The Court has recognized that officer safety is a compelling government interest. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983); *Michigan v. Summers*, 452 U.S. 692 (1981).

<sup>117</sup> See *Long*, 463 U.S. at 1049 (officer protection justified cursory check of car for weapons during detention of driver); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (officer safety justified ordering driver of car to step out of vehicle onto shoulder of road during stop for routine traffic violation); *Adams v. Williams*, 407 U.S. 143, 147-48 (1972) (concern for officer safety justified removal of weapons from driver's waistband based on informer's tip).

<sup>118</sup> 395 U.S. 752, 763 (1969).

<sup>119</sup> 414 U.S. 218 (1973).

<sup>120</sup> Joseph, *supra* note 6, at 100.

<sup>121</sup> *Robinson*, 414 U.S. at 235.

<sup>122</sup> Joseph, *supra* note 6, at 101-02.

The *Buie* Court also followed the analytical framework used in *Terry* and *Chimel* when it examined the validity of a warrantless search. The *Terry* Court insisted that the officer conducting an unwarranted search must satisfy a dual inquiry.<sup>123</sup> An officer's action must be justified at its inception, and it must be related reasonably in scope to the circumstances which justified the action in the first place.<sup>124</sup> The *Chimel* Court applied the same approach in allowing the officer's search of the arrestee for self-protective reasons, but it struck down the full search of the premises.<sup>125</sup> The *Buie* Court adopted a similar approach. The Court required that an officer conducting a protective sweep first must produce the specific facts which led him or her to believe that there was a dangerous third person present at the arrest scene, and then must limit his or her search to the scope necessary to protect himself or herself from any third persons who may be present.<sup>126</sup>

The demonstration of specific and articulable facts required by *Buie* is an objective test that prevents reliance on the mere hunches or "good faith" of the arresting officers.<sup>127</sup> This is the same objective case by case approach first articulated in *Terry*.<sup>128</sup> This requirement should prevent lower courts from allowing protective sweeps merely because of the presence of a third person; instead, it will require officers to demonstrate why they believe that the third person poses a threat to those on the arrest scene.<sup>129</sup>

Even if the officer can articulate the specific facts which led him or her to develop a reasonable suspicion of danger, the officer may only inspect those places where a person may be found; the search may not last longer than necessary to dispel the threat of danger, and may never last longer than it takes to complete the arrest and leave the premises.<sup>130</sup> These requirements limit the scope of the search in two important and sensible ways. First, the protective sweep may only be a  *cursory*  inspection of places where a person could be found, and is limited to what is necessary to protect the safety of officers and others.<sup>131</sup> Accordingly, Justice Brennan's con-

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<sup>123</sup> *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

<sup>124</sup> *Id.* at 20.

<sup>125</sup> 395 U.S. 752, 762-63 (1969).

<sup>126</sup> *Maryland v. Buie*, 110 S. Ct. 1093, 1099 (1990).

<sup>127</sup> *Id.* (citing *Terry*, 392 U.S. at 21-22).

<sup>128</sup> *Terry*, 392 U.S. at 21-22.

<sup>129</sup> Compare *Gagliano v. State*, 97 Nev. 297, 629 P.2d 781 (1981) (protective sweep illegal since officer had no reason to believe anyone present but defendant and teenaged daughter), with *United States v. Irizarry*, 673 F.2d 554 (1st Cir. 1982) (protective sweep upheld when another person actually seen within building with gun).

<sup>130</sup> *Buie*, 110 S. Ct. at 1099.

<sup>131</sup> *Id.*

cern that officers will conduct full-blown searches of the premises during a protective sweep is unfounded.<sup>132</sup> This limitation should prevent examination of documents and searches into drawers, desks, cabinets, and other areas where a person could not be hidden.<sup>133</sup> Second, the majority held that a protective sweep may last no longer than is necessary to effectuate the arrest and depart the premises.<sup>134</sup> This limitation should prevent officers from using the rationale of a protective sweep as an excuse to linger at an arrest scene for the purpose of conducting a warrantless search for evidence. Obviously, the rationale of a "protective" search loses its force if the officers can extend the search solely for investigative purposes.

Thus, the *Buie* Court correctly balanced the intrusiveness of the protective sweep against the government's interest in protecting its law enforcement officers. Moreover, *Buie* is consistent with *Terry* and *Chimel* and, if applied properly, will limit the scope and intrusiveness of warrantless searches of the home.

## VI. APPLICATION OF *BUIE*

Many courts and commentators have agreed that less than probable cause is required to justify a police "protective sweep."<sup>135</sup>

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<sup>132</sup> The *Buie* majority reasoned that their reliance on the cursory nature of the protective sweep was consistent with the Court's holding in *Arizona v. Hicks*, 480 U.S. 321 (1987). *Buie*, 110 S. Ct. at 1099 n.3. *Hicks* held that an officer's moving of a turntable to look at its serial number exceeded a "cursory inspection" and could only be justified by probable cause. *Hicks*, 480 U.S. at 328. *Buie* stressed that the officer in *Hicks* clearly was searching for evidence and was not motivated by officer safety. *Buie*, 110 S. Ct. at 1099 n.3. Although a protective sweep is also a "search," it is permissible on less than probable cause because it is "limited to that which is necessary to protect the safety of officers and others." *Id.*

<sup>133</sup> The *Buie* decision, if misapplied, could have serious ramifications for the plain view doctrine. The plain view doctrine allows police, under certain circumstances, to seize evidence in plain view without a warrant if the initial intrusion that brought the police within plain view of the evidence is a recognized exception to the warrant requirement. *Hicks*, 480 U.S. at 134. The *Buie* decision does not allow officers conducting a protective sweep to conduct the sort of search invalidated in *Hicks*. An officer's search must be limited to that "which is necessary to protect the officer and others." *Buie*, 110 S. Ct. at 1099.

<sup>134</sup> *Id.*

<sup>135</sup> Kelder, *supra* note 6, at 1022.

[T]his article submits that the better approach is to adhere to the balance erected in *Terry*. A standard of reasonable suspicion based on "specific and articulable facts" is a rather low threshold showing of necessity for a search, and one which can apparently be applied in the protective sweep area without undue risk to the safety of law enforcement officers.

See also Joseph, *supra* note 6, at 120 ("[o]fficers would need reasonable suspicion both to believe others were on the premises and that those persons are likely to be dangerous to the officers").

Professor LaFave has noted that

[i]t would make little sense to say that police may take protective measures against those known to be present, but that they may never stray beyond the room of the arrest to see if there are others present who, by virtue of their location, may be in an even more advantageous position to offer forcible resistance on behalf of the arrestee.<sup>136</sup>

The difficult task is to articulate the set of facts and circumstances needed to justify such protective action.<sup>137</sup> Unfortunately, the majority in *Buie* failed to examine the types of factors that may be important for courts to weigh when determining the reasonableness of an officer's actions. As evidenced by the conflicting concurrences in *Buie*, it is unclear what factors the Maryland Court of Appeals should consider on remand. As a result, lower courts may apply *Buie* too broadly, thereby justifying unnecessary officer actions. Without the proper guidance, law enforcement officers may be left with the power to conduct warrantless searches of the home subject only to the requirement that they retroactively justify the search with concerns about their safety.

If the majority acknowledged that certain concerns justify an officer's warrantless searches, then the nature of these concerns should be explored in some detail. Many lower courts examining the protective sweep doctrine have suggested facts and circumstances that justify the self-protective actions of the officer. It is imperative to the preservation of fourth amendment rights that in cases where an objective, reasonableness test is applied, courts justify and explain the circumstances under which an officer may conduct a warrantless search of the premises.

This Note suggests that the factors to be considered can be separated into the following categories: (1) the nature of the arrestee; and (2) the nature of the premises.<sup>138</sup> It is important to remember that these concerns often overlap and the exigent circumstances of the arrest situation are not capable of clear delineation and categorization. In addition, these factors must coalesce into a reasonable suspicion that an individual posing a danger to the arresting officers is present at the arrest site.

#### A. NATURE OF THE ARRESTEE

This inquiry should begin with an examination of the serious-

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<sup>136</sup> W. LAFAVE, *supra* note 6, § 6.4(c), at 647.

<sup>137</sup> *Id.*

<sup>138</sup> These factors are derived from the examination of "protective sweep" cases contained in both W. LAFAVE, *supra* note 6, § 6.4(c), at 648-51, and Kelder, *supra* note 6, at 1010-13.

ness of the crime committed for which the arrest was made. This consideration gives weight to the fact that the level of danger felt by arresting officers may differ according to the criminal conduct involved. For example, courts have recognized a greater level of danger associated with drug related offenses<sup>139</sup> and murder cases.<sup>140</sup> This approach forces the officers to carefully weigh the nature of the crime committed; as a result, it should protect individuals from unnecessary government intrusion in cases that certainly do not warrant protective action.<sup>141</sup>

This category should also take account of whether the particular arrestee is known to work with confederates. Courts often have considered this a legitimate source of concern for arresting officers.<sup>142</sup> Whether any accomplices of the arrestee are still at large or have already been arrested is also a pertinent consideration.<sup>143</sup> The known existence of confederates, however, is not a substitute for a reasonable suspicion that a confederate is present at the time of the arrest. Although an officer's knowledge regarding a suspect's use of confederates should be weighted, the holding in *Buie* demands more than just knowledge that a suspect has a propensity for using confederates; it requires individualized suspicion that a dan-

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<sup>139</sup> See, e.g., *United States v. Jackson*, 778 F.2d 933, 936-37 (2d Cir. 1985), *cert. denied*, 479 U.S. 910 (1986) (protective sweep allowed based on general knowledge that drug dealers are often armed); *United States v. Marszalkowski*, 669 F.2d 655 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982) (protective sweep upheld because "drug dealers are likely to be armed and dangerous" and there was ongoing activity on premises); *United States v. Broomfield*, 336 F. Supp. 179 (E.D. Mich. 1972) (protective sweep upheld because officers knew defendant was involved in major drug traffic conspiracy, "a violence-prone business").

<sup>140</sup> See, e.g., *Commonwealth v. Bowden*, 379 Mass. 472, 399 N.E.2d 482 (1980) (protective sweep permissible incident to arrest of defendant who had just murdered a man on the street).

<sup>141</sup> See, e.g., *State v. Seiss*, 168 N.J. Super. 269, 402 A.2d 972 (1972) (protective sweep not justified in arrest of defendant for nonpayment of traffic fines since officers "were not thrust into a situation which created a risk to their safety").

<sup>142</sup> See, e.g., *United States v. Baker*, 577 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978) (protective sweep upheld because of knowledge of confederate seen the day before); *United States v. Sellers*, 520 F.2d 1281 (4th Cir. 1975), *cert. denied*, 425 U.S. 1075 (1977) (protective sweep upheld when officers had information that arrestee was traveling with armed associates); *United States v. Looney*, 481 F.2d 31 (5th Cir.), *cert. denied*, 414 U.S. 1070 (1973) (sweep upheld because defendant had known propensity for using confederates); *Broomfield*, 336 F. Supp. 179 (E.D. Mich. 1972) (sweep upheld when evidence showed that defendant was member of criminal conspiracy and was not acting alone in the offense).

<sup>143</sup> *People v. Mack*, 27 Cal. 3d 145, 611 P.2d 454, 165 Cal. Rptr. 113 (1980) (sweep upheld when officer knew defendant had been arrested for armed robbery and that his accomplice had escaped).

gerous individual is present at the time of the arrest.<sup>144</sup>

#### B. NATURE OF THE PREMISES

This category accounts for the officer's perception of the actual location of the arrest and any exigent circumstances surrounding the arrest. The category's primary concern is evidence at the arrest site that other people may be present on the premises.<sup>145</sup> Minor consideration may also be given to the time and place of the arrest. A midnight raid in an area known for drug related violence may warrant more initial caution than a mid-day arrest in a more tranquil setting. In addition, exigent circumstances of the arrest sometimes make clear the officer's concern for safety. These concerns range from actual shooting<sup>146</sup> at the premises to suspicious behavior by the arrestee or suspicious noises.<sup>147</sup>

An examination of a protective sweep in light of the above factors will assist courts in determining the reasonableness of a search. However, even if a court is satisfied that an officer possessed the reasonable suspicion warranting a protective sweep, the sweep may still be invalidated if it exceeded its permissible scope. As the dissent aptly noted, *Buie* may be resolved quickly on remand.<sup>148</sup>

An integral part of the Court's holding in *Buie* is the requirement that the sweep may last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."<sup>149</sup> Although it is unclear from the record whether *Buie* was safely outside the premises when Officer Frolich entered the basement, the dissent noted that the Court of Appeals had concluded that "at

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<sup>144</sup> *United State v. Gerry*, 845 F.2d 34 (1st Cir. 1988) (sweep justified because car of another suspect was parked in driveway and officer heard sound of voices within).

<sup>145</sup> See *United States v. Irizarry*, 673 F.2d 554 (1st Cir. 1982) (another person actually seen with gun); *United States v. Wiga*, 662 F.2d 1325 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982) (protective sweep upheld because discovery of a second person meant defendant's statement that no one was within the premises was a lie); *State v. Willis*, 269 N.W.2d 355 (Minn. 1978) (protective search upheld after arrest of rapist because taxi driver who drove arrestee told police another person was present).

<sup>146</sup> See, e.g., *United States v. Caraza*, 843 F.2d 432 (11th Cir. 1988) (protective sweep permissible after arrest for cocaine possession when officer initially called to premises because of report of gunfire); *State v. McCurry*, 587 S.W.2d 337 (Mo. App. 1979) (protective sweep allowed after persons inside shot at officers); *State v. Mackins*, 47 N.C. App. 168, 266 S.E.2d 694 (1980) (officers justified in entering and searching after two shots had been fired from building, killing one person and wounding another).

<sup>147</sup> *United States v. Turbyfill*, 373 F. Supp. 1372 (W.D. Mo. 1974), *aff'd*, 525 F.2d 57 (8th Cir. 1975) (alarming noises in basement placed officers in reasonable apprehension of danger).

<sup>148</sup> *Maryland v. Buie*, 110 S. Ct. 1093, 1102 n.4 (1990) (Brennan, J., dissenting).

<sup>149</sup> *Id.* at 1099.

the time of the warrantless search, Buie was safely outside the house, handcuffed and unarmed.”<sup>150</sup> This fact, however, is disputed by the parties. If the state court concludes that the protective sweep of the basement occurred after the police had adequate time to complete the arrest and depart the house, then the court must invalidate the search. Accordingly, an examination of the reasonableness of the search would be unnecessary.

Assuming that Detective Frolich’s search was not after the officers departed Buie’s residence, an examination of the reasonableness of the search in light of the factors mentioned above serves to highlight the important issues that courts must consider when assessing the legality of a protective sweep. An examination of the “nature of the arrestee” begins by noting that Buie was being arrested for armed robbery, a dangerous crime involving a weapon.<sup>151</sup> The officers were also aware that an arrest warrant had been issued for Lloyd Allen, the accomplice of Buie.<sup>152</sup> These factors logically would tend to increase the potential of danger during the arrest.

An examination of the “nature of the premises” also supplies facts which could reasonably lead an officer to suspect danger. The phone call to Buie’s residence revealed that at least one other person, a female, was present.<sup>153</sup> Detective Frolich was unsure how many people lived in the house.<sup>154</sup> In addition, upon entry into the home, Buie did not immediately turn himself over to the police. Buie suspiciously remained in the basement while Detective Frolich called three times for Buie to reveal himself if present.<sup>155</sup> This fact could also lead an officer to assume that Buie had something, or someone, to hide in the basement.

However, it is unclear from the record exactly why Detective Frolich entered the basement. Detective Frolich did not articulate any specific facts which led him to infer that a dangerous third person was on the premises. Frolich did have reasonable suspicion, if not probable cause, to believe that third persons were present on the premises due to the women seen at the arrest site. However, there was no evidence that these individuals posed any danger to the arresting officers. Moreover, the police had Buie’s home under surveillance since the robbery and had not spotted Allen, Buie’s ac-

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<sup>150</sup> *Id.* at 1102 (Brennan, J., dissenting) (citing *Buie v. Maryland*, 314 Md. 151, 166, 550 A.2d 79, 86 (1988)).

<sup>151</sup> *Id.* at 1095.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Buie v. Maryland*, 72 Md. App. 562, 566-67, 531 A.2d 1290, 1292 (1987).

<sup>155</sup> *Buie*, 110 S. Ct. at 1095.

complice, near the premises.<sup>156</sup>

The *Buie* case demonstrates the possible confusion that can result from the application of the objective "reasonableness" test of *Terry* under these circumstances. It appears that the officers conducting the arrest of Buie had enough information to reasonably infer that a third person may be present at the Buie home.<sup>157</sup> However, Detective Frolich did not present these facts, nor did he argue that he entered the basement looking for a dangerous third person out of a concern for his safety. The test of *Buie* requires that an officer produce the specific and articulable facts that led him or her to reasonably infer that another dangerous person was also present.<sup>158</sup> The interest in preserving the protections of the fourth amendment should prompt the court on remand to cast a wary eye at ill-defined suspicions and hunches. The record suggests that Detective Frolich failed this test.

## VII. CONCLUSION

The *Buie* Court addressed an important and recurring issue by examining the protective sweep doctrine. By balancing the legitimate safety concerns of the officer against the intrusiveness of the protective sweep, the Court attempted to define the circumstances which warrant such a search. This decision is consistent with the Court's current approach to warrantless searches and is a responsible extension of the *Terry* doctrine into a traditional area of cherished fourth amendment protection.

If properly followed, the Court's holding should protect both the safety of law enforcement officers and the privacy interests of citizens in their homes. However, the *Buie* Court relied on the *Terry* standard of "specific and articulable" facts without defining what factors officers and courts should consider when assessing the reasonableness of a protective sweep. Courts must carefully examine the circumstances surrounding a protective sweep when determining whether an officer's warrantless search is justified as a protective action.

MARK J. SIFFERLEN

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<sup>156</sup> *Buie v. State*, 314 Md. 151, 165, 550 A.2d 79, 86 (1988).

<sup>157</sup> Reasonable inferences of danger could be drawn from the following: the nature of the crime; the accomplice had not been arrested; no gun had been found; other people were present at the house; and Buie's suspicious delay in emerging from the basement.

<sup>158</sup> *Buie*, 110 S. Ct. at 1100.