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ONE MINUTE BRIEF

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NUMBER: 2020-13 **DATE:** 04-13-20 **BY:** Devallis Rutledge **TOPIC:** Protective Sweeps

ISSUE: What is the permissible scope of police activity under the “protective sweep” doctrine?

*“A ‘protective sweep’ is a quick and limited **search** of premises, **incident to an arrest**, and conducted to protect the safety of police officers and others. It is **narrowly confined** to a cursory visual inspection of those **places in which a person might be hiding**. ...*

*“The sweep lasts 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**. ...*

*“[A protective sweep] is decidedly **not automatic**, but may be conducted **only** when justified by a **reasonable, articulable suspicion** that the house is harboring a **person** posing a danger to those on the arrest scene.” *Maryland v. Buie* (1990) 494 US 325, 327, 335-36 (ruling that evidence coming into “plain view” could be seized, and that officers could check areas **“immediately adjoining the place of arrest” without suspicion**). See 1MB 2017-28.*

● *Buie* is the **only** US Supreme Court decision outlining the contours of the “protective sweep” exception for warrantless search. It was based on the court’s **rationale** that taking a suspect into custody inside confined spaces that were familiar to the suspect but not to the arresting officer created heightened dangers **if** the circumstances indicated that a potential assailant might be hiding there, able to attack the officer during or after the arrest. See *id.*, at 333-34. But under the language quoted above, *Buie* is not authority for certain other acts:

1. A **“protective sweep” cannot be made for weapons, contraband or injured victims** (though the “rescue/emergency aid” doctrine may apply in the latter case—*Brigham City, Utah v. Stuart* (2006) 547 US 398, 403; *People v. Troyer* (2011) 51 Cal.4th 599, 605; 1MB 2011-03.)

2. A “protective sweep” does not justify opening bags, backpacks, drawers, or containers that could not conceal a hidden assailant. *Cf. US v. Ross* (1982) 456 US 798, 824—lawful search for a person “will not justify a warrantless search of a suitcase.”

3. Officers may not *routinely* conduct a “protective sweep,” whenever they enter a home, for whatever purpose. *People v. Werner* (2012) 207 Cal.App.4th 1195, 1208-10.

4. As written, *Buie* limited “protective sweeps” to cases where officers have **lawfully entered**, are **making an arrest**, **and** have an **articulable suspicion** of a potential assailant. There are lower-court cases citing *Buie* to justify **entry** to make a protective sweep, and to justify sweeps when officers were lawfully inside for reasons other than making an arrest; however, the US Supreme Court has not resolved the issues raised by these cases, nor has the California Supreme Court done so. *People v. Celis* (2004) 33 Cal.4th 667, 678-79.

- Moreover, reliance on these cases is problematic, at best. For example, *People v. Maier* (1991) 226 Cal.App.3d 1670, is sometimes cited as authority for making **entry** to do a “protective sweep.” But *Maier* was discussing the lawfulness of an entry **in Illinois**, by an **Illinois deputy sheriff**, that resulted in the seizure of a California murder weapon. Because suppression of evidence in a *California* prosecution could not meaningfully deter misconduct by *Illinois* officers—even if their entry and search had violated the Fourth Amendment, *People v. Orlosky* (1974) 40 Cal.App.3d 935, 939—there was no need to decide the lawfulness of the entry, arguably making the discussion of justification for the Illinois entry non-binding **dicta**.

Similarly, *US v. Paopao* (9th Cir. 2006) 469 F3d 760, said that officers could **enter** an apartment after arresting a suspect in the hallway, to do a “protective sweep.” But the apartment was actually a commercial site for illegal gambling, and the court correctly held that **the suspect had no “standing”** to challenge the entry, once again rendering the discussion of the entry for “protective sweep” mere **dicta**. *Dicta* (superfluous discussion unnecessary to the **holding**) has **no precedential effect**. *Colgrove v. Battin* (1973) 413 US 149, 157-58.

BOTTOM LINE: Per *Maryland v. Buie*, officers lawfully inside a residence **making an arrest may look into immediately adjoining areas**, and **with articulable suspicion that a potential assailant may be on the premises**, may conduct a **quick “protective sweep” of other places of possible concealment of a person or persons**. (Emphases added in quoted material.)

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