

## SECOND CIRCUIT REVIEW

## Expert Analysis

# Court Clarifies Scope Of Protective Sweep Doctrine

In 1990, the Supreme Court first set forth the “protective sweep” doctrine in *Maryland v. Buie*,<sup>1</sup> which provides that “[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Since the *Buie* decision, lower courts have split on how the protective sweep doctrine should be applied outside the context of an in-home arrest. The U.S. Court of Appeals for the Second Circuit, along with four other courts of appeals, has held that the protective sweep doctrine may apply in limited, non-arrest situations.

This month, we discuss *United States v. Hassock*,<sup>2</sup> in which the Second Circuit addressed the scope of the protective sweep doctrine outside of the arrest context. Specifically, the *Hassock* decision, written by Senior Circuit Judge Roger J. Miner and joined by Judges Barrington D. Parker and Reena Raggi, declined to extend this doctrine to allow protective sweeps of living quarters after officers gain entry by consent.

### Background and History

In November 2008, Special Agents from the Department of Homeland Security, Immigration and Customs Enforcement received information from a confidential informant that an individual known as “Basil,” an alleged marijuana dealer and illegal alien, possessed an illegal handgun in his basement apartment in the Bronx. An inter-agency task force, including individuals from the Drug Enforcement Administration, the Federal Bureau of Investigations, the New York Police Department, the New York State Police, and the Internal Revenue Service, conducted an investigation of Basil, which revealed that he occupied the front bedroom in the basement apartment in which he resided. On Nov. 25, 2008, after unsuccessful efforts to determine Basil’s true identity through record and residence checks, the task force attempted to conduct a “knock and talk” at Basil’s apartment building<sup>3</sup> to interview potential residents to see if the information the task force



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had was accurate. According to one of the agents involved, the “initial reason” for the visit was to talk to Basil and potentially arrest him.<sup>4</sup>

After an hour of surveillance from their vehicle, members of the task force gained entry to the apartment when an unidentified woman answered their knock at the rear door of the building and allowed them inside. One of the agents had a “brief exchange” with her about who was in the apartment. She responded that she did not know and had just woken up. The agents did not question her further or attempt to determine her identity when she agreed that they could come in the apartment to “look around.”

In *Hassock*, the Second Circuit reaffirmed the limited scope of the protective sweep doctrine in contexts other than the in-home execution of an arrest warrant.

In what the government described as a “protective sweep,” agents passed through the apartment directly to the front bedroom, which they believed was occupied by Basil. One of the agents approached the bedroom with his gun ready, out of concern, according to the agent, that Basil “could come out with a firearm or a gun or pose a danger.”<sup>5</sup> Agents found the room empty except for a queen-sized bed. A task force member squatted down to look under the bed, and found a Hi-Point .380 caliber pistol with a defaced serial number. Members of the task force remained in the apartment for approximately two hours and continued to search the common areas, as well as behind a sofa. The agents spoke further with the woman who had allowed them to enter the apartment. She stated that a man named “Bas” or

“Basil” occupied the front apartment. The agents subsequently learned that the individual known as Basil was Eric Hassock.

In March 2009, Mr. Hassock was charged in the U.S. District Court for the Southern District of New York with one count of illegal re-entry subsequent to a felony conviction, in violation of 8 U.S.C. §§1326(a), 1326(b)(1), and one count of unlawful possession of a firearm subsequent to a felony conviction, in violation of 18 U.S.C. §922(g)(1). The firearm located under Mr. Hassock’s bed formed the basis for the latter count. At trial, Mr. Hassock moved to suppress the firearm recovered from his bedroom as the fruit of an unlawful search.

The government opposed his motion on the ground that the search was a permissible protective sweep and justified by the Supreme Court’s decision in *Buie*. After an evidentiary hearing, District Judge Barbara S. Jones issued an opinion and order in November 2009, granting Mr. Hassock’s suppression motion.

Specifically, Judge Jones found that the protective sweep doctrine did not apply to the facts and circumstances surrounding the agents’ search and that the search of Mr. Hassock’s bedroom was, therefore, unreasonable under the Fourth Amendment. In so holding, the district court found that because the task force entered Mr. Hassock’s apartment voluntarily, the agents “put themselves at risk of the very danger that necessitated the protective sweep.”<sup>6</sup> Judge Jones recognized that the Second Circuit had previously extended the protective sweep doctrine beyond the arrest warrant context. However, as Judge Jones observed, the Second Circuit declined to extend this doctrine further to consent entries, as extending *Buie* to such circumstances “might provide officers an opportunity to circumvent the warrant requirement, as they could request entry with the ulterior purpose of conducting a protective sweep.”<sup>7</sup>

The government appealed the order granting the motion to suppress.

### The Second Circuit Decision

In affirming the district court’s order, the Second Circuit began its analysis with the “basic principle of Fourth Amendment law that searches inside a home without a warrant are presumptively unreasonable.”<sup>8</sup> The Second Circuit then carefully reviewed the Supreme Court’s decision in *Buie*, and its progeny, which have held that presumption to be rebutted

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in the case of searches that fit within the definition of a “protective sweep.”

In *Buie*, as the *Hassock* court explained, police investigated the armed robbery of a restaurant by two men, one of whom wore a red running suit. After securing an arrest warrant and verifying that one of the suspects, Jerome Buie, was at home, officers entered his house and dispersed. One officer shouted into the basement for anyone present to come out, at which point Mr. Buie emerged and was arrested. Another officer then entered the basement to search for others who might be hiding and discovered a red running suit in plain view, which he seized. Mr. Buie unsuccessfully sought to suppress the running suit and was subsequently convicted at trial.

As the *Buie* Court explained, at issue was “what level of justification is required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises.”<sup>9</sup>

Recognizing that there are contexts “where the public interest is such that neither a warrant nor probable cause is required” before officers may conduct a search,<sup>10</sup> the Supreme Court reviewed its holdings in *Terry v. Ohio*<sup>11</sup> and *Michigan v. Long*,<sup>12</sup> which held that, consistent with the Fourth Amendment, police could conduct limited searches for weapons “where a reasonably prudent officer would be warranted in the belief, based on specific and articulable facts...that he is dealing with an armed and dangerous individual.”<sup>13</sup>

The Court found that those same principles authorized the officers in *Buie* to conduct a “frisk”—a limited protective sweep—of Mr. Buie’s basement to ensure officer safety. As the Court held: “The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”<sup>14</sup>

As the *Hassock* court observed, the circuit courts remain divided on the proper basis for entry into a home before officers may conduct a protective sweep. The U.S. Courts of Appeals for the Ninth and Tenth circuits have read *Buie* narrowly, upholding protective sweeps only when officers enter a dwelling to make an in-home arrest.<sup>15</sup> The U.S. Courts of Appeals for the First, Fifth, Seventh, and D.C. circuits, by contrast, have extended *Buie* to allow protective sweeps of living quarters in non-arrest situations. Moreover, the Fifth and D.C. circuits have upheld protective sweeps where officers gain admittance through consent.

The Second Circuit has joined the majority of its sister circuits in concluding that *Buie*’s reasonableness framework “may justify a protective sweep in circumstances other than during the in-home execution of an arrest warrant.”<sup>16</sup> Specifically, in *United States v. Miller*, the Second Circuit extended *Buie* to allow a protective sweep where officers are present in a home “under lawful process.” In *Miller*, officers entered an apartment pursuant to an order of protection secured against Alfred Miller, who had told his roommate that he would “put a bullet through his head.”<sup>17</sup> When Mr. Miller asked if he could enter a bedroom, an officer gave him permission to do so but followed him into the bedroom for safety.<sup>18</sup> Once inside, the officer saw a shotgun, which ultimately led to Mr. Miller’s conviction for possessing a firearm after a previous conviction for a felony.

On appeal, the Second Circuit found that the firearm was seized pursuant to a lawful protective sweep. Relying on *Terry*, *Long* and *Buie*, the Second Circuit held that “a law enforcement officer present in a home under lawful process [such as an order of protection] may conduct a protective sweep when the officer possesses 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...scene.”<sup>19</sup>

The Second Circuit has twice been presented with the issue of whether *Buie* allows protective sweeps when officers enter a home based on consent, but in each case left the issue unresolved. In each instance, the court found that the officers had failed to articulate specific facts to suggest that they were in danger from hidden occupants.

In *United States v. Gandia*,<sup>20</sup> however, the court hinted that even if the officers had conducted a valid protective sweep, the doctrine may not apply when officers gain entry based on consent. As the court stated in dicta: “Although we do not decide this issue, we do note that when police have gained access to a suspect’s home through his or her consent, there is a concern that generously construing *Buie* will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home.”

The court’s decision leaves open the question of whether the protective sweep exception applies to other situations, apart from an arrest or legitimate process, where police are lawfully on the premises for a legitimate governmental reason.

In *Hassock*, the Second Circuit reaffirmed the limitations of the protective sweep doctrine, but declined to provide a clear answer as to whether the doctrine applies only in cases where officers are on the premises to effect an in-house arrest (as in *Buie*) or to execute a legal process (as in *Miller*). In this case, the court found that the protective sweep did not apply, because the sweep was not antecedent to any other legitimate purpose.

As the Court explained, “a protective sweep is reasonable only to safeguard officers in the pursuit of an otherwise legitimate purpose. Where no other purpose is being pursued, a sweep is no different from any other search and, therefore, requires a warrant, exigency, or authorized consent.”<sup>21</sup>

In holding that the agents’ search was unreasonable, the court recognized, as had the district court, that it might have been objectively reasonable for the agents to believe that Mr. Hassock’s presence on the premises posed a danger to their safety. Nonetheless, the court held that it was not clear to the agents before they entered the apartment whether the woman who granted them access had authority to consent to a search of the premises.

The court further found that even though the officers went to Mr. Hassock’s apartment with a legitimate purpose to question and possibly arrest him, “that purpose could not be pursued until Hassock was found.”<sup>22</sup> When Mr. Hassock did not

answer the door, the “sweep” became the reason for the agents to remain in the apartment as they searched for Mr. Hassock. “Under the circumstances,” the court held, “the officers undertook a full search for the object of their inquiry rather than a protective sweep incident to an independent lawful purpose” and did so “without a warrant, proper consent, exigent circumstances, or even probable cause to believe that Hassock was present.”<sup>23</sup> The search of Mr. Hassock’s bedroom was therefore unreasonable and in violation of the Fourth Amendment.

## Conclusion

In *Hassock*, the Second Circuit reaffirmed the limited scope of the protective sweep doctrine in contexts other than the in-home execution of an arrest warrant. However, the court’s decision leaves open the question of whether the protective sweep exception applies to other situations, apart from an arrest or legitimate process, where police are lawfully on the premises for a legitimate governmental reason. It will be interesting to see how far the Second Circuit is willing to extend *Buie* and whether the court will follow the lead of its sister circuits in this important area of Fourth Amendment law.

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1. 494 U.S. 325 (1990).
2. Docket No. 09-5193-cr, 2011 WL 257446 (2d Cir. Jan. 28, 2011).
3. *Hassock*, 2011 WL 257446, at 1.
4. *Id.*
5. *Id.* at 2.
6. *United States v. Hassock*, 676 F. Supp. 2d 154, 161-62 (S.D.N.Y. 2009).
7. *Id.* at 160 (quoting *United States v. Miller*, 430 F.3d 93, 100 n.3 (2d Cir. 2005)).
8. *Hassock*, 2011 WL 257446, at 4 (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)).
9. *Buie*, 494 U.S. at 327.
10. *Id.* at 331.
11. 392 U.S. 1 (1968).
12. 463 U.S. 1032 (1983) (extending *Terry* to authorize limited searches of the passenger compartment of an automobile based on officer’s reasonable suspicion that the suspect is dangerous and may gain control of weapons).
13. *Buie*, 494 U.S. at 331-32 (internal quotations and citations omitted).
14. *Id.* at 337.
15. Compare *United States v. Martins*, 413 F.3d 139, 149 (1st Cir. 2005) (upholding protective sweep where entry justified by exigent circumstances); *Leaf v. Shelnut*, 400 F.3d 1070, 1087 (7th Cir. 2005) (same); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004) (en banc) (upholding protective sweep where co-occupant admitted officers to question defendant about threats); and *United States v. Patrick*, 959 F.2d 991, 996-97 (D.C. Cir. 1992) (upholding protective sweep where police entered on consent of lessee) with *United States v. Torres-Castro*, 470 F.3d 992, 997 (10th Cir. 2006) (limiting protective sweeps to those “performed incident to an arrest”) and *United States v. Reid*, 226 F.3d 1020, 1028 (9th Cir. 2000) (concluding warrantless search of apartment was not a protective sweep and was not justified by exigent circumstances).
16. *Hassock*, 2011 WL 257446, at 8 (quoting *Miller*, 430 F.3d at 100).
17. *Miller*, 430 F.3d at 96.
18. *Id.*
19. *Id.* at 98 (internal quotation marks omitted).
20. 424 F.3d 255, 262 (2d Cir. 2005).
21. *Hassock*, 2011 WL 257446, at 9.
22. *Id.*
23. *Id.*