No. 05-1042

In the Supreme Court of the United States

ALFRED G. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether police officers, who were lawfully in an apartment pursuant to a protective order, may conduct a brief, protective sweep when they reasonably fear for their safety.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 430 F.3d 93. The memorandum opinion of the district court (Pet. App. B1-B7) is reported at 306 F. Supp. 2d 414.

JURISDICTION

The court of appeals entered its judgment on November 16, 2005. The petition for a writ of certiorari was filed on February 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of being a felon in possession of a firearm,

in violation of 18 U.S.C. 922(g)(1). He was sentenced to 29 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed the conviction and remanded the case only for resentencing in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005), and *United States* v. *Crosby*, 397 F.3d 103 (2d Cir. 2005).

1. On September 23, 2003, New York City police officers accompanied petitioner's cousin, Kendu Newkirk, to the apartment he had shared with petitioner. Earlier that day, Newkirk had obtained an order of protection against petitioner in the Bronx County Family Court, which provided that he could enter the apartment, accompanied by two police officers, to retrieve his belongings. Newkirk informed the accompanying officers that he had obtained the order of protection because petitioner had threatened to "put a bullet through his head." Pet. App. A4.

Newkirk entered the apartment with his key, encountering petitioner and his girlfriend inside. The officers explained to petitioner that they were serving the order of protection and assisting Newkirk in removing his belongings. Pet. App. A4-A5. Petitioner then asked the police to "watch [Newkirk]" because "I don't want [him] to take my stuff." *Id.* at A5. As Newkirk was packing his belongings, petitioner asked the officers if he could enter a bedroom from which Newkirk had just exited to retrieve something. *Ibid.* One of the officers assented, but then followed petitioner into the bedroom "[f]or safety." *Ibid.* When following petitioner out of the room, the officer saw a shotgun standing upright in an open closet and in plain view. *Id.* at A5, B3. The officers arrested petitioner, who turned over another firearm and admitted possession of them both. *Id.* at A5.

2. A grand jury returned a one-count indictment that charged petitioner with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Petitioner moved to suppress the firearms and his statements. The district court denied the motion to suppress. Pet. App. B1-B8. The court held that the officer's entry into the bedroom with petitioner was a permissible protective sweep under *Maryland* v. *Buie*, 494 U.S. 325 (1990). The Court noted the "enhanced risk of danger experienced by an officer in a home," where the officer is "on his adversary's 'turf.'" Pet. App. B5 (quoting *Buie*, 494 U.S. at 333). While *Buie* involved the execution of an arrest warrant, the court reasoned that the "concern for officer safety when an officer is lawfully present in the home to assist with an OP [order of protection] in a domestic dispute * * * is no less than when the officer is there to make an arrest," because "[e]ach situation is fraught with the potential for ambush and violence." *Id*. at B6. Because petitioner's earlier threat to "put a bullet through [Newkirk's] head" "implied motive, a willingness to resort to violence, and access to firearms," the court held that the officer reasonably perceived a threat to safety that justified the very limited protective entry into the bedroom. *Ibid*.

3. The court of appeals affirmed. Pet. App. A1-A17. The court held that the protective sweep exception to the warrant requirement established by this Court in *Buie*, *supra*, was not limited to in-home arrests. Noting *Buie*'s analytical roots in the protective pat-downs permitted by *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Michigan* v. *Long*, 463 U.S. 1032 (1983), the court reasoned that, "[a]t the core of *Terry*, *Long* and *Buie* is the common understanding that the Fourth Amendment's reasonableness requirement is sufficiently flexible to allow

officers who have an objectively credible fear of danger to take basic precautions to protect themselves." Pet. App. A9-A10. The court accordingly concluded that *Buie*'s rationale—that officers lawfully present in a home who reasonably fear for their safety must be permitted to take steps to protect themselves—"applies with equal force when officers are lawfully present in a home for purposes other than the in-home execution of an arrest warrant," as long as the officer's presence creates a reasonable risk of "danger that is similar to, or greater than, that which they would face if they were carrying out an arrest warrant." *Id.* at A10. In so holding, the court joined the decisions of several other circuits that had likewise declined to confine the protective sweep doctrine to the specific context of executing arrest warrants. *Id.* at A10-A11.

The court then held that the protective sweep in this case was lawful. Pet. App. A13-A16. The court reasoned that petitioner's specific threat to Newkirk, which had resulted in the court's issuance of a protective order, and the possibility that the emotions aroused by the domestic dispute could resurface, established a reasonable basis for the officer's "limited," "quick and unobtrusive" entry. *Id.* at A15-A16; see *id.* at A16 (officer's entry was "narrowly tailored to dispel the threat that [petitioner] would have posed by being in the second bedroom alone").

ARGUMENT

Petitioner seeks (Pet. 4-8) this Court's review to address whether a protective sweep under *Maryland* v. *Buie*, 494 U.S. 325 (1990), is categorically limited to the in-home execution of arrest warrants. Because the court of appeals' decision is correct and consistent with the

holdings of other circuits, this Court's review is not warranted.

1. The courts of appeals that have addressed the question have consistently held, like the Second Circuit here, that protective sweeps may be permissible when officers lawfully enter a residence for reasons other than the execution of an arrest warrant. See *United States* v. *Martins*, 413 F.3d 139, 150 (1st Cir.) (holding that "police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry"), cert. denied, 126 S. Ct. 644 (2005); *Leaf* v. *Shelnutt*, 400 F.3d 1070, 1086-1088 (7th Cir. 2005) (finding that "it was not necessary for the officers to have made an arrest in order for their search of the apartment to be justified"); *United States* v. *Gould*, 364 F.3d 578, 584-587 (5th Cir.) (en banc) (relying on *Buie* to uphold protective sweep following a consensual entry into an apartment), cert. denied, 543 U.S. 955 (2004); *United States* v. *Taylor*, 248 F.3d 506, 513 (6th Cir.) (same), cert. denied, 534 U.S. 981 (2001); *United States* v. *Patrick*, 959 F.2d 991, 996-997 (D.C. Cir. 1992) (same).

Petitioner's reliance (Pet. 5) on *United States* v. *Waldner*, 425 F.3d 514 (8th Cir. 2005), *United States* v. *Davis*, 290 F.3d 1239 (10th Cir. 2002), and *United States* v. *Reid*, 226 F.3d 1020 (9th Cir. 2000), is misplaced.[1]

Davis creates no conflict because that case addressed the existence of exigent circumstances to enter

[1] In *Gould*, this Court denied certiorari when the same conflict with *Davis* and *Reid* over the application of *Buie* outside the context of arrest warrants was asserted. See *Gould* v. *United States*, 543 U.S. 955 (2004); Gov't Br. in Opp. at 11-13, *Gould*, *supra* (No. 03-11063). No different outcome is warranted here.

a home in the first place. The court held that no such exigency existed, which rendered the officers' presence in the house entirely unlawful. 290 F.3d at 1243-1244. Accordingly, the court's footnoted observation that *Buie* involved an arrest situation, *id*. at 1242 n.4, was dicta, and it was equivocal dicta at that, see *ibid*. (noting that, "[e]ven if a 'protective sweep' were permissible" in a non-arrest situation, the officers' entry "exceeded the scope prescribed in *Buie*").

Likewise, in *Reid*, the Ninth Circuit invalidated a protective sweep that was undertaken in the absence of voluntary consent to enter the apartment and that thereby extended the scope of the officers' already unlawful intrusion. 226 F.3d at 1026-1027. In addition, while the court observed that *Buie* involved an arrest, and the facts at issue did not, the court immediately went on to hold that "the government did not point to any facts that demonstrated that a reasonably prudent officer would have believed that the apartment 'harbor[ed] an individual posing a danger to those on the arrest scene,'" *id*. at 1027 (quoting *Buie*, 494 U.S. at 334), or even "that another person was inside the apartment," *id*. at 1028.[2]

Thus, both *Davis* and *Reid* stand for nothing more than the proposition that concerns for officer safety do not render lawful an officer's presence in a place where he has no right to be. That distinction between lawful

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[2] Furthermore, as petitioner recognizes (Pet. 5), Ninth Circuit law on this question is not settled. In *United States* v. *Garcia*, 997 F.2d 1273 (1993), the Ninth Circuit upheld a protective sweep that was undertaken "for [the officers'] safety" after officers made a lawful consensual entry into an apartment, *id*. at 1282. There thus is no sound basis for concluding that the present case would have been resolved differently had it arisen within the Ninth Circuit.

and unlawful entries is critical. In *Buie*, the Court emphasized that the "police [had] every right to enter the home" under the Fourth Amendment. 494 U.S. at 334 n.1. It was only after the officers were lawfully inside that "the potential for danger justified a standard of less than probable cause for conducting a limited protective sweep." *Ibid.* That same principle applies when the lawful entry is based upon the enforcement of a protective order. Once lawfully inside, it is the potential for danger rather than the legal basis for entry that justifies a protective sweep based on reasonable suspicion.

In *Waldner*, the Eighth Circuit acknowledged that other circuits had extended *Buie* to non-arrest situations, but stressed that they had done so only upon a "showing of a reasonable suspicion of dangerous individuals in the house." 425 F.3d at 517. The court declined to extend *Buie* further, because in Waldner's case "there [was] no evidence that the officers had any articulable facts that an unknown individual might be in the office, or anywhere else in the house, ready to launch an attack." *Ibid.* The court thus held that, "[u]nder these circumstances," the protective sweep "exceeded its permissible scope." *Ibid.* A concurring opinion by Judge Murphy underscored that the court's decision "does not mean that *Buie* would always foreclose a protective sweep when officers are serving a protective order." *Id.* at 518.

2. Contrary to petitioner's argument (Pet. 7-8), the court of appeals' decision does not cloud the standard for protective sweeps articulated in *Buie*. Whether officers enter a residence pursuant to an arrest warrant or some other lawful basis for entry, the standard for a protective sweep remains the same. The officers must have a reasonable, articulable basis for determining that a

threat to safety exists, and the scope of the sweep must be limited to alleviating that specific concern. See *Buie*, 494 U.S. at 327.

Petitioner offers no evidence that the multiple courts of appeals that have been applying *Buie* outside the context of an arrest warrant for years have had difficulty administering that well-established standard in the different settings they have confronted. While the existence of potential danger may be easier to establish in cases involving arrests, as *Buie* recognized, 494 U.S. at 333, nothing in *Buie*'s language or rationale categorically forecloses proof that an equivalent threat could arise following other lawful entries. Nor does petitioner identify any basis in the Fourth Amendment's standard of reasonableness for holding that officers' lives are less worthy of protection when enforcing a judicially issued protective order than when executing an arrest warrant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2006