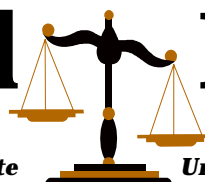




# CJI Legal Briefs



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## ARREST – ARREST WITHOUT A WARRANT IN CHILD PORNOGRAPHY CASE

In *United States v. Moore*, CA7, No. 99-2609, 5/31/00, one of the issues before the Court of Appeals for the Seventh Circuit was whether the police should seek a probable cause review from a neutral magistrate before executing an arrest for child pornography.

In *Roaden v. Kentucky*, 413 U.S. 496, 506 (1973), the Supreme Court held that the government must obtain a warrant before seizing allegedly obscene material. The case involved the seizure of a film by a county sheriff who had viewed the film and thought it violated the state’s anti-obscenity law. The Court reasoned that the material in question “fell arguably within First Amendment protection” and its seizure “is plainly a form of prior restraint.” A “prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness.” The Court demanded “the most scrupulous exactitude” in applying the warrant requirement “when the ‘things’ to be seized are books, and the basis for their seizure is the ideas which they contain.” (quoting *Stanford v. Texas*, 379 U.S. 476, 486 (1965)).

Moore asks us to extend this rule to require prior judicial approval of arrests for possession of child pornography. On one occasion, the Court expressly refused to decide whether a warrant is required to arrest a suspect on obscenity charges, see *Maryland v. Macon*, 472 U.S. 463, 467 (1985), and the Seventh Circuit rejects Moore’s suggestion for two reasons.

First, *Roaden* involved the warrantless seizure of obscene material, not the arrest of a person, and that distinction changes the standard governing police conduct. While arrest may serve in some circumstances as a prior restraint, its primary purpose is to bring a suspect before a magistrate to answer a charge. It implicates Fourth Amendment rights,

*(Continued on page 2)*

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which the Court has balanced against the interest in effective law enforcement by requiring probable cause prior to the arrest. See *Illinois v. Gates*, 462 U.S. 213, 237-39 (1983); *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (describing probable cause as a “practical, nontechnical conception affording the best compromise” between the interests of individual liberty and effective law enforcement).

Ideally, the judgment of probable cause is made in a warrant proceeding before a detached, neutral magistrate, but it also can be made, and routinely is made, by police officials. See *Gerstein*, 420 U.S. at 112. In *Gerstein*, the Court noted that although “the Court has expressed a preference for the use of arrest warrants when feasible . . . it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.” But see *Payton v. New York*, 445 U.S. 573, 576 (1980) (prohibiting warrantless entries into a suspect’s dwelling to effect felony arrest). Five years after *Payton*, the Court decided *Maryland v. Macon* and expressly left open the issue of whether a warrant may be required before an arrest on obscenity charges. 472 U.S. at 467. No authorities cited by either party to this appeal, nor any found by this Court have taken this additional step to require arrest warrants in any instance other than arrests in a suspect’s home. The protection of First and Fourth Amendment values does not compel this Court to take this step today.

The arrest of a suspect for possession of contraband does not constitute a prior restraint in the way the seizure of books or films does. While at first glance it may seem odd to require more judicial protection for the liberty of one’s books than for one’s body, the distinction reflects this country’s great concern with the chilling effect on protected speech brought on by a government seizure. An ordinary arrest implicates an individual’s Fourth Amendment freedoms and must meet the constitutional standard of reasonableness. The seizure of an individual’s books implicates both First and Fourth Amendment liberties, for which the Supreme Court has required heightened judicial protection to afford the right to free expression the breathing room it needs to survive. In some circumstances, an arrest might implicate First Amendment rights as well, but Moore’s arrest did not act as a prior restraint, and, therefore, we need not reach that issue.

Given the facts of this case, we decline to extend this level of heightened protection to arrests that do not constitute prior restraints. Officer Tertipes arrested Moore based on probable cause to believe he possessed child pornography. In terms of the First Amendment, Moore was not a speaker, and his arrest cannot be considered a prior restraint. Therefore, a warrantless arrest could be effected if the situation as known to Tertipes met the requirements of probable cause.

The second reason we reject Moore’s argument that a warrant was required for his arrest lies in

the distinction between arguably obscene material at issue in *Roaden*, and child pornography. Like obscenity, the Court has held that child pornography is not protected expression, and the states may regulate it without offending the Constitution. See *New York v. Ferber*, 458 U.S. 747, 764 (1982); see also *United States v. Anderson*, 803 F.2d 903, 907 n.3 (7th Cir. 1986). However, the concern with chilling protected speech by regulating arguably obscene material, which is presumptively protected under *Roaden*, 413 U.S. at 504, is outweighed by the compelling state interests in protecting children in the case of child pornography. See *Ferber*, 458 U.S. at 756-59. Accordingly, the states are free to regulate child pornography without the strictures of the complex, community standards test required for obscenity under *Miller v. California*, 413 U.S. 15, 24-25 (1973). See *Ferber*, 458 U.S. 764-65.

The application of child pornography standards involves a more limited inquiry than *Miller* requires, see *Ferber*, 458 U.S. at 764-65, and is within the competency and experience of police officers making a probable cause determination. As such, we see no need to extend *Roaden* to require pre-arrest judicial oversight of whether particular material constitutes child pornography.



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**CAPITAL PUNISHMENT –  
JURY INSTRUCTION ON  
INELIGIBILITY FOR  
PAROLE**

In *Ramdass v. Angelone*, No. 99-7000, 6/12/00, Ramdass was sentenced to death in Virginia for the murder of Mohammed Kayani. Under Virginia law, a conviction does not become final until the jury returns a verdict and, some time thereafter, the judge enters a final judgment of conviction. At the time of the Kayani sentencing trial, a final judgment had been entered against Ramdass for an armed robbery at a Pizza Hut restaurant and a jury had found him guilty of an armed robbery at a Domino's Pizza restaurant, but no final judgment had been entered. The prosecutor argued future dangerousness at the Kayani sentencing trial, claiming that Ramdass would commit further violent crimes if released. The jury recommended death. After final judgment was entered on the Domino's conviction, the Kayani judge held a hearing to consider whether to impose the recommended sentence. Arguing for a life sentence, Ramdass claimed that his prior convictions made him ineligible for parole under Virginia's three-strikes law, which denies parole to a person convicted of three separate felony offenses of murder, rape, or armed robbery, which were not part of a common act, transaction, or scheme. The court sentenced Ramdass to death, and the Virginia Supreme Court affirmed. On remand from this Court, the Virginia Supreme Court again affirmed the sentence, declining to apply the holding of *Simmons v. South Carolina*, 512 U.S. 154,

that a jury considering imposing death should be told if the defendant is parole ineligible under state law. The court concluded that Ramdass was not parole ineligible when the jury was considering his sentence because the Domino's crime, in which no final judgment had been entered, did not count as a conviction for purposes of the three-strikes law. Ultimately, Ramdass sought federal habeas relief. The District Court granted his petition, but the Court of Appeals reversed.

The United States Supreme Court affirmed the judgment stating extending *Simmons* to cover situations where it looks like a defendant will turn out to be parole ineligible is neither necessary or workable, and the Virginia Supreme Court was not unreasonable in refusing to do so.

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**CIVIL LIABILITY –  
ACCIDENTAL SHOOTING  
OF A FELLOW OFFICER**

In *Neal v. St. Louis County Board of Police Commissioners*, CA8, No. 99-2938, 7/3/00, the United States Court of Appeals for the Eighth Circuit was required to decide whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by accidentally shooting another officer while attempting to protect the other officer from an armed suspect. The Court answered no, and held that in such circumstances only a purpose to cause harm to the threatened officer will satisfy the element of conscience-shocking conduct necessary for a due process violation.

On January 29, 1997, Officer Willie Neal asked Officer Carleton Peterson to accompany him on an undercover operation that Neal had arranged for later that day. Peterson agreed to assist Neal, subject to the approval of Peterson's supervisor, Sergeant Bill Hines. After learning of the planned operation, Sergeant Hines asked Neal if he wanted additional backup officers to participate in the operation. Neal, the senior officer involved in the operation, refused the offer of additional backup.

Later that afternoon, Neal and Peterson drove to Mac's Package Liquor Store (Mac's), located at 5956 Natural Bridge Road in Saint Louis. Neal parked his car perpendicular to and facing the west wall of the building. Within minutes of arriving at Mac's, a person later identified as Jerome Baker approached the car from the passenger side and looked in the window at Peterson. Baker then walked around the car and headed towards Neal. Neal exited the vehicle and approached Baker. Baker shook Neal's hand and engaged Neal in conversation. As Baker and Neal talked, they walked to the southwest corner of Mac's building.

After observing Baker and Neal talk for a few moments, Peterson saw Neal raise his left hand in what he recognized as a sign of trouble. Peterson also realized that he could no longer see Baker, although Neal had never left his sight. Peterson got out of the undercover car and slowly moved to where he could see the southwest corner of the building. When he looked around the building's corner, he was surprised to see Baker pointing a pistol directly at Neal's head, jabbing the weapon

in a hostile and threatening manner, and forcing Neal to lower himself to the ground.

Peterson announced he was a police officer and ordered Baker to drop his gun. Upon hearing Peterson's announcement, Baker whirled around and immediately started firing at Peterson. Peterson returned two shots at Baker in an attempt to defend himself and Neal. Baker continued to fire, forcing Peterson to dodge to his left. Baker fled the scene before Peterson had the opportunity to fire any additional shots at the armed suspect.

Peterson noticed Neal was injured and assisted him back into the vehicle. Peterson then requested nearby witnesses to inform the police that Neal had been shot during the gunfight. When Emergency Medical Services personnel arrived at the scene, they examined Neal and declared him dead at 4:02 p.m. The Saint Louis Medical Examiner determined that Neal died due to a single bullet wound which entered the left side of his chest, traveled through both of his lungs and through his right arm. It was later determined that Peterson fired the bullet which struck and killed Neal. At the time of the shootout, Peterson did not realize that he had shot Neal. Moreover, he did not believe that Neal would be endangered by the shots he fired at Baker as Neal was lying on the ground.

On January 30, 1998, Neal's surviving family members initiated suit pursuant to 42 U.S.C. § 1983, alleging that Peterson violated Neal's Fourteenth Amendment substantive due process rights by not following departmental

procedures during the undercover operation. Plaintiffs also named the County of Saint Louis, the Chief of the Saint Louis County Police Department, and Members of the Saint Louis County Board of Police Commissioners as defendants in this case, arguing that these defendants failed to train and supervise Peterson in the proper procedures for undercover operations, or otherwise maintained policies or customs which contributed to the accidental shooting of Neal.

Plaintiffs essentially allege that Peterson's actions in causing Neal's death were an abuse of executive power so clearly unjustified as to be barred by the Fourteenth Amendment. Whether Peterson's actions were such an abuse of power turns on whether Peterson's actions towards Neal shocks the conscience in such a way as to violate the rights protected by the Fourteenth Amendment. See *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1716-21 (1998).

In situations where a state actor is afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, the chosen action will be deemed "conscience shocking" if the action was taken with "deliberate indifference." See *Lewis*, 118 S. Ct. at 1719. However, in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation, a state actor's action will shock the conscience only if the actor intended to cause harm. In the latter situations, as a practical matter, state actors do not have time to engage in actual

deliberation. Thus, in these types of situations, the Supreme Court has recognized that liability turns on whether force was applied in a good faith effort or maliciously and sadistically for the very purpose of causing harm. *Id.* (See *County of Sacramento v. Lewis* holding that an officer's high-speed chase with no intent to harm suspects physically or worsen their legal plight does not give rise to liability under the Fourteenth Amendment).

Plaintiffs attempted to show that Officer Peterson had time to deliberate departmental policies and practices designed to protect officers involved in undercover operations. More specifically, they argue that Peterson was deliberately indifferent to the following policies and practices which might have saved Neal's life: 1) pre-transaction planning or briefing, 2) use of authorized ammunition, 3) keeping fellow officers in sight during the undercover operation, 4) use of wires to record and monitor conversations between fellow officers and suspects, 5) use of additional officers to provide backup, and 6) use of a bulletproof vest. Plaintiffs suggest that the "deliberately indifferent" standard, rather than the "malicious or sadistic" standard, should be used because Peterson had time to consider these policies and deliberately chose to disregard them at a time when both Neal and he were free from danger. The Eighth Circuit rejected this argument.

Because Peterson did not violate Neal's Fourteenth Amendment rights, the County and City Official defendants cannot be held liable for a failure to train or super-

vise Officer Peterson. See *Brodenicki v. City of Omaha*, 75 F.3d 1261, 1266 (8<sup>th</sup> Cir. 1994) (holding that a city cannot be held liable under an inadequate training or municipal custom theory unless the defendant police officer is found liable on the underlying substantive claim).

The Eighth Circuit Court of Appeals stated that a police officer does not violate substantive due process rights by acting “deliberately indifferent” in accidentally shooting another officer while attempting to protect the other officer from an armed suspect who was holding a gun to the head of the other officer. Rather, in such circumstances, only a purpose to cause harm to the threatened officer is sufficiently conscience shocking to give rise to a Fourteenth Amendment violation.

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### FEDERAL EMPLOYMENT DISCRIMINATION LAW – AGE DISCRIMINATION

In *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536, 6/12/00, the United States Supreme Court made it easier for employees to prove they were victims of on-the-job discrimination, or at least to get their claims before a jury. This decision allows employees to win such a lawsuit without direct evidence of an employer’s illegal intent. This decision is likely to extend beyond age-bias disputes and create impact for other forms of employment-bias lawsuits.

The United States Supreme Court reasoned that a plaintiff’s prima facie case of discrimination (as defined in *McDonnell Dou-*

*glas Corp. v. Green*, 411 U.S. 792, 802, and subsequent decisions), combined with sufficient evidence for a reasonable factfinder to reject the employer’s nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination under the ADEA. In this case, Reeves established a prima facie case and made a substantial showing that respondent’s legitimate, nondiscriminatory explanation, i.e., his shoddy record keeping, was false. He offered evidence showing that he had properly maintained the attendance records in question and that cast doubt on whether he was responsible for any failure to discipline late and absent employees. In holding that the evidence was insufficient to sustain the jury’s verdict, the Fifth Circuit ignored this evidence, as well as the evidence supporting Reeves’ prima facie case, and instead confined its review of the evidence favoring Reeves to that showing that Chesnut, Sanderson Plumbing Product’s Director of Manufacturing, had directed derogatory, age-based comments at Reeves, and that Chesnut had singled him out for harsher treatment than younger employees. It is, therefore, apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury’s verdict should stand. In so reasoning, the court misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence.

In *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 511, the Court stated that, because the factfinder’s disbelief of the reasons put forward by the

defendant, together with the elements of the prima facie case, may suffice to show intentional discrimination, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. See, e.g., *Wright v. West*, 505 U.S. 277, 296. Moreover, once the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577. Such a showing by the plaintiff will not *always* be adequate to sustain a jury’s liability finding. Certainly there will be instances where, although the plaintiff has established a prima facie case and introduced sufficient evidence to reject the employer’s explanation, no rational factfinder could conclude that discrimination had occurred. This Court need not—and could not—resolve all such circumstances here. In this case, it suffices to say that a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

The ultimate question in every disparate treatment case is whether the plaintiff was the victim of intentional discrimination. Here, the District Court informed the jury that Reeves was required to show by a preponderance of the evidence that his age was a determining and motivating factor in the decision to terminate him. It instructed the jury that, to show Sanderson Plumbing Product's explanation was pretextual, Reeves had to demonstrate that age discrimination, not Sanderson's explanation, was the real reason for his discharge. Given that Reeves established a prima facie case, introduced enough evidence for the jury to reject Sanderson's explanation, and produced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for Reeves' firing, there was sufficient evidence for the jury to conclude that Sanderson Plumbing Products, Inc. had intentionally discriminated. 197 F.3d 688, reversed.

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**FIFTH AMENDMENT –  
PRIVILEGE AGAINST  
SELF-INCRIMINATION;  
USE IMMUNITY;  
EVIDENCE DERIVED  
FROM THE TESTIMONIAL  
ASPECTS OF IMMUNIZED  
ACT OF PRODUCTION OF  
DOCUMENTS**

In *United States v. Hubbell*, No. 99-166, 6/5/00, two questions were presented to the United States Supreme Court concerning the scope of a witness' protection against compelled self-incrimina-

tion. First, whether the **Fifth Amendment** privilege protects a witness from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity. Secondly, if the witness produces such documents pursuant to a grant of immunity, whether **18 U.S.C. § 6002** prevents the Government from using them to prepare criminal charges against him.

This proceeding arises out of the second prosecution of Webster Hubbell by the Independent Counsel appointed in August 1994 to investigate possible violations of federal law relating to the Whitewater Development Corporation. The first prosecution was terminated pursuant to a plea bargain. In December 1994, Hubbell pleaded guilty to charges of mail fraud and tax evasion arising out of his billing practices as a member of an Arkansas law firm from 1989 to 1992, and was sentenced to 21 months in prison. In the plea agreement, Hubbell promised to provide "full, complete, accurate, and truthful information" about matters relating to the Whitewater investigation. The second prosecution resulted from the Independent Counsel's attempt to determine whether Hubbell had violated that promise. In October 1996, while Hubbell was incarcerated, the Independent Counsel served him with a subpoena *duces tecum* calling for the production of 11 categories of documents before a grand jury sitting in Little Rock, Arkansas. On November 19, he appeared before the grand jury and invoked his Fifth Amendment privilege against self-incrimination. In response to questioning by the prosecutor, Hubbell

initially refused "to state whether there are documents within my possession, custody, or control responsive to the Subpoena." Thereafter, the prosecutor produced an order pursuant to **18 U.S.C. § 6003(a)**, directing him to respond to the subpoena and granting him immunity "to the extent allowed by law." Hubbell then produced 13,120 pages of documents and records. He also responded to a series of questions that established that those were all of the documents in his custody or control that were responsive to the commands in the subpoena, with the exception of a few documents he claimed were shielded by the attorney-client and attorney work-product privileges.

The term "privilege against self-incrimination" is not an entirely accurate description of a person's constitutional protection against being "compelled in any criminal case to be a witness against himself." The word "witness" in the constitutional text limits the relevant category of compelled incriminating communications to those that are "testimonial" in character. As Justice Holmes observed, there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating. Thus, even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice. The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief. *Pennsylvania v. Muniz*, 496 U.S.

582, 594-598 (1990). Similarly, the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.

More relevant to this case is the settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not “compelled” within the meaning of the privilege. The decision in *Fisher v. United States*, 425 U.S. 391 (1976), dealt with summonses issued by the Internal Revenue Service (IRS) seeking working papers used in the preparation of tax returns. Because the papers had been voluntarily prepared prior to the issuance of the summonses, they could not be “said to contain compelled testimonial evidence, asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.” See also *United States v. Doe*, 465 U.S. 605 (1984). It is clear, therefore, that Hubbell could not avoid compliance with the subpoena served on him merely because the demanded documents contained incriminating evidence, whether written by others or voluntarily prepared by himself.

The act of producing documents in response to a subpoena may have a compelled testimonial aspect. “The act of production” itself may implicitly communicate “statements of fact.” By “producing documents in compliance with a subpoena, the witness would ad-

mit that the papers existed, were in his possession or control, and were authentic.” When the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena. The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents. Whether the constitutional privilege protects the answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating.

Finally, the phrase “in any criminal case” in the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. Thus, a half-century ago this Court held that a trial judge had erroneously rejected a defendant’s claim of privilege on the ground that his answer to the pending question would not itself constitute evidence of the charged offense. As this Court explained:

“The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of

evidence needed to prosecute the claimant for a federal crime.” *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

It is apparent from the text of the subpoena itself that the prosecutor needed Hubbell’s assistance both to identify potential sources of information and to produce those sources. Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions. The assembly of literally hundreds of pages of material in response to a request for “any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to” an individual or members of his family during a 3-year period, is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition. Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a “lead to incriminating evidence,” or “a link in the chain of evidence needed to prosecute.”

Indeed, the record makes it clear that that is what happened in this case. The documents were produced before a grand jury sitting in the Eastern District of Arkansas in aid of the Independent

Counsel’s attempt to determine whether respondent had violated a commitment in his first plea agreement. The use of those sources of information eventually led to the return of an indictment by a grand jury sitting in the District of Columbia for offenses that apparently are unrelated to that plea agreement. What the District Court characterized as a “fishing expedition” did produce a fish, but not the one that the Independent Counsel expected to hook. It is abundantly clear that the testimonial aspect of respondent’s act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution. The documents did not magically appear in the prosecutor’s office like “manna from heaven.” They arrived there only after Hubbell asserted his constitutional privilege, received a grant of immunity, and—under the compulsion of the District Court’s order—took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through Hubbell’s truthful reply to the subpoena that the Government received the incriminating documents of which it made “substantial use ... in the investigation that led to the indictment.”

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**FIRST AMENDMENT -  
FREEDOM OF SPEECH**

In *Hill v. California*, No. 98-1856, 6/28/00, the United States Supreme Court gave states greater leeway to restrict anti-abortion demonstrations outside health clin-

ics, ruling that Colorado’s limits on “sidewalk counseling” legitimately protected abortion patients’ right to avoid unwanted speech.

The United States Supreme Court upheld Colorado Revised Statute § 18-9-122(3) which makes it unlawful for any person within 100 feet of a health care facility to “knowingly approach” within 8 feet of another person, without that person’s consent, in order to pass a leaflet or handbill, to display a sign to, or engage in oral protest, education, or counseling with that person. The petitioners, three anti-abortion demonstrators, sought to enjoin the enforcement of the statute. The Court stated that each side had legitimate and important concerns. Petitioner’s First Amendment interests are clear and undisputed. On the other hand, the State’s police powers allow it to protect its citizens’ health and safety, and may justify a special focus on access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests.

The Court noted that the statute provided specific guidance to enforcement authorities, which serve the interest in evenhanded application of the law. Further, the statute does not deal with restricting a speaker’s right to address a willing audience, but with protecting listeners from unwanted communication.




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**JUVENILE LAW –  
COMPETENCY HEARING;  
INSANITY DEFENSE**

*Golden v. State*, No. 99-572, 6/22/00, with a substituted opinion on 7/13/00, was a case arising out of the Westside Elementary School shootings near Jonesboro, Arkansas. The Arkansas Supreme Court held that a juvenile *must* be allowed to assert incompetency and have his competency determined prior to adjudication. However, there is no constitutional right to an insanity defense. *Medina v. California*, 505 U.S. 437 (1992). If one is not provided for by statute, then a defendant may not assert the defense. Since there is no statutory provision in effect in Arkansas conferring upon juveniles the right to assert an insanity defense, appellant’s due process rights were not violated by the trial court’s preclusion from allowing him to assert the insanity defense.

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**MIRANDA – MIRANDA  
CONTINUES TO GOVERN  
ADMISSIBILITY OF  
STATEMENTS IN BOTH  
STATE AND FEDERAL  
COURTS**

The United States Supreme Court in *Dickerson v. United States*, No. 99-5525, 6/26/00, dealt with a decision by the United States Court of Appeals for the Fourth Circuit. The Court stated in part:

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held that certain warnings must be given before a suspect’s statement made during custodial interrogation could

be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. § 3501 which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We, therefore, hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence, all in violation of the applicable provisions of Title 18 of the United States Code. Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received “*Miranda* warnings” before being interrogated. The District Court granted his motion to suppress, and the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. That court, by a divided vote, reversed the District Court’s suppression order. It agreed with the District Court’s conclusion that petitioner had not received *Miranda* warnings before making his statement. But it went on to hold that §3501, which in effect makes the admissibility of statements such as Dickerson’s turn solely on whether they were made voluntarily, was satisfied in this case. It then concluded that our decision in *Miranda* was not a con-

stitutional holding, and that, therefore, Congress could by statute have the final say on the question of admissibility. 166 F.3d 667 (1999).

Because of the importance of the questions raised by the Court of Appeals’ decision, the United States Supreme Court granted certiorari, 528 U.S. 1045 (1999), and reversed the decision of the United States Court of Appeals for the Fourth Circuit.

The Court began with a brief historical account of the law governing the admission of confessions. Prior to *Miranda*, the Court evaluated the admissibility of a suspect’s confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy. See, e.g., *King v. Rudd*, 1 Leach 115, 117—118, 122—123, 168 Eng. Rep. 160, 161, 164 (K. B. 1783) (Lord Mansfield, C. J.) (stating that the English courts excluded confessions obtained by threats and promises); *King v. Warickshall*, 1 Leach 262, 263—264, 168 Eng. Rep. 234, 235 (K. B. 1783) (“A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt ... but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape ... that no credit ought to be given to it; and therefore it is rejected”); *King v. Parratt*, 4 Car. & P. 570, 172 Eng. Rep. 829 (N. P. 1831); *Queen v. Garner*, 1 Den. 329, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Queen v. Baldry*, 2 Den. 430, 169 Eng. Rep. 568 (Ct.

Crim. App. 1852); *Hopt v. Territory of Utah*, 110 U.S. 574 (1884); *Pierce v. United States*, 160 U.S. 355, 357 (1896). Over time, the cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. See, e.g., *Bram v. United States*, 168 U.S. 532, 542 (1897) (stating that the voluntariness test “is controlled by that portion of the Fifth Amendment ... commanding that no person ‘shall be compelled in any criminal case to be a witness against himself’ ”); *Brown v. Mississippi*, 297 U.S. 278 (1936) (reversing a criminal conviction under the Due Process Clause because it was based on a confession obtained by physical coercion).

While *Bram* was decided before *Brown* and its progeny, for the middle third of the 20th century this Court based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. This Court applied the due process voluntariness test in “some 30 different cases decided during the era that intervened between *Brown* and *Escobedo v. Illinois*, 378 U.S. 478 [(1964)].” *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973). See, e.g., *Haynes v. Washington*, 373 U.S. 503 (1963); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Chambers v. Florida*, 309 U.S. 227 (1940). Those cases refined the test into an inquiry that examines “whether a defendant’s will was overborne” by the circumstances surrounding the giving of a confession. *Schneckloth*, 412 U.S., at 226. The due process test takes into

consideration “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” See also, *Haynes, supra*, at 513; *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962); *Reck v. Pate*, 367 U.S. 433, 440 (1961) (All the circumstances attendant upon the confession must be taken into account); *Malinski v. New York*, 324 U.S. 401, 404 (1945) (“If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant”). The determination depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. *Stein v. New York*, 346 U.S. 156, 185 (1953).

This Court never abandoned this due process jurisprudence, and thus continues to exclude confessions that were obtained involuntarily. But the decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Miranda* changed the focus of much of the inquiry in determining the admissibility of suspects’ incriminating statements. In *Malloy*, we held that the Fifth Amendment’s Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. *Miranda* was decided on the heels of *Malloy*.

In *Miranda*, it was noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. 384 U.S., at 445—458. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that even without employing brutality, the third degree or other specific

stratagems, ... custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. The coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be “accorded his privilege under the Fifth Amendment ... not to be compelled to incriminate himself.” Accordingly, concrete constitutional guidelines for law enforcement agencies and courts to follow were set out. Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as “*Miranda* rights”) are: a suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”

Two years after *Miranda* was decided, Congress enacted §3501. This section designated voluntariness as the touchstone of admissibility, omitted any warning requirement, and instructed trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession. Congress intended by its enactment to overrule *Miranda*. Because of the obvious conflict between our decision in *Miranda* and §3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If Congress has such authority, §3501’s total-

ity-of-the-circumstances approach must prevail over *Miranda*’s requirement of warnings; if not, that section must yield to *Miranda*’s more specific requirements.

The *Miranda* opinion itself begins by stating that the Court granted certiorari “to explore some facets of the problems ... of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.” 384 U.S., at 441—442 (emphasis added). In fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule. Indeed, the Court’s ultimate conclusion was that the unwarned confessions obtained in the four cases before the Court in *Miranda* “were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.” *Id.*, at 491.

Additional support for the conclusion that *Miranda* is constitutionally based is found in the *Miranda* Court’s invitation for legislative action to protect the constitutional right against coerced self-incrimination. After discussing the “compelling pressures” inherent in custodial police interrogation, the *Miranda* Court concluded that, in order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored. However, the Court emphasized that it could not foresee “the potential alternatives for protecting the privilege which might be devised

by Congress or the States,” and it accordingly opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were “at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.”

The Court of Appeals also relied on the fact that this Court has, after the *Miranda* decision, made exceptions from its rule in cases such as *New York v. Quarles*, 467 U.S. 649 (1984), and *Harris v. New York*, 401 U.S. 222 (1971). See 166 F.3d, at 672, 689—691. But the application of the *Miranda* doctrine in cases such as *Doyle v. Ohio*, 426 U.S. 610 (1976), and *Arizona v. Roberson*, 486 U.S. 675 (1988) has also been broadened. These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.

The Court did not think there was justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. See *Mitchell v. United States*, 526 U.S. 314, 331-332 (1999) (Scalia, J., dissenting) (stating that the fact that a rule has found “ ‘wide acceptance in the legal culture’ ” is “adequate reason not to overrule” it). While this Court has overruled its precedents when subsequent cases have un-

dermined their doctrinal underpinnings, see, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), this has not happened to the *Miranda* decision. If anything, the Court’s subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.

The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his “rights,” may nonetheless be excluded and a guilty defendant go free as a result. But experience suggests that the totality-of-the-circumstances test which §3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to and for courts to apply in a consistent manner. See, e.g., *Haynes v. Washington*, 373 U.S., at 515 (“The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw”). The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But as we said in *Berkemer v. McCarty*, 468 U.S. 420 (1984), cases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.

In sum, the United States Supreme Court concluded that *Miranda* announced a constitutional rule that Congress may not

supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves. The judgment of the Court of Appeals was reversed.

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#### SEARCH AND SEIZURE – EMERGENCY SEARCH

In *United States v. Cervantes*, CA9, No. 98-50722, 6/12/00, Police Officer John Yergler responded to a call to contact firefighters at an apartment building in Garden Grove, California. Upon Officer Yergler’s arrival at the scene, a firefighter told him that a tenant in Apartment 6 had complained of a strong chemical odor. The firefighter said that the fire department had called the police because it believed there might be a drug lab operating in the building.

As Officer Yergler approached Apartment 6, he smelled a strong chemical odor from approximately 20 feet away. Although he could not identify the chemical, Officer Yergler testified that the odor was similar to a strong solvent, cleaning agent, or an acetone-based chemical. He also believed the odor was consistent with methamphetamine production, which he had been trained to recognize. From his police training, Officer Yergler also knew that chemicals used in methamphetamine labs are explosive.

Officer Yergler then went to Apartment 3, which is directly below Apartment 6, because the chemical odor seemed stronger outside of Apartment 3 than any other apartment. Looking through a space below the blinds of a living room window, he saw two men sitting on a couch. The couch was

the only item of furniture in the room. Officer Yergler also looked under the kitchen window blinds and saw a man standing by the kitchen counter and a large pot on the floor. He then looked through a bedroom window and noticed that there was no furniture.

Officer Yergler returned to Apartment 6 and entered it with the permission of the tenant. The tenant had left the apartment with her infant child because she was afraid of harm from the fumes. Unable to find the odor's origin within Apartment 6, Officer Yergler determined that the odor was coming from Apartment 3 because that was where the odor was the strongest. Officer Yergler called for backup and waited until Officer Wasinger arrived.

Concerned about the chemical odor, and fearing that many of the apartment building's tenants would be injured if an explosion occurred, Officer Yergler decided to make contact with the men in Apartment 3. He pounded on the front door and identified himself as a police officer. Getting no response, he looked under the window blinds and saw that the three men had not moved; they remained seated in the living room. Officer Yergler pounded on the door a second time and identified himself. This time, Cervantes came to the window and looked out. Officer Yergler shined his flashlight on himself to show that he was a police officer and ordered Cervantes to "come to the door."

When Cervantes opened the door, the chemical odor coming from the apartment smelled much stronger to Officer Yergler. Officer Yergler told Cervantes in English that he was investigating the odor

coming from the apartment and asked Cervantes if he was aware of the odor. Cervantes did not respond. Instead, he stepped outside and attempted to shut the door behind him, but Officer Yergler pushed the door open. Officer Yergler asked Cervantes in English if he lived in the apartment, but received no response. He then asked the same question in Spanish of all three men; all three responded "No." Officer Yergler asked Cervantes if he could enter to determine the odor's cause, but Cervantes did not respond.

Officer Yergler, still concerned about the noxious fumes, entered Apartment 3 with Officer Wasinger following behind him. Once the police officers entered, all three suspects ran from the apartment. Officer Yergler chased Cervantes while Officer Wasinger chased the other two suspects.

Officer Yergler apprehended Cervantes in front of the apartment building and then reentered Apartment 3 to search for an unattended drug lab or other suspects. On the kitchen counter and in a large pot on the kitchen floor, he found a substance he believed to be methamphetamine. He then secured the premises, opened windows to air-out the apartment, and contacted the Garden Grove Police Department's Special Investigations Unit (SIU). While waiting for an investigator to arrive, he asked the apartment manager and assistant manager to help evacuate the tenants from the building and to turn off any open flames.

When Investigator Michael Reynolds of the SIU arrived, he searched the apartment, including the kitchen containing the suspected drugs. Investigator

Reynolds then applied for a search warrant, which was granted a few hours later. Upon further searching the apartment, the officers seized 30 pounds of methamphetamine in its final stages of production, cutting agents, a hydraulic press, iodine, Coleman fuel, and other items that could be used to make methamphetamine.

Hector Morales Cervantes was convicted of manufacturing and possessing with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1). He appealed contending that the district court erred by admitting into evidence items pursuant to the search warrant.

The Ninth Circuit first discussed the entry by Officer Yergler. The Court concluded that the entry by Officer Yergler was legal under the emergency doctrine theory. Cf. *Murdock v. Stout*, 54 F.3d 1437, 1441 n.3 (9th Cir. 1995). The emergency doctrine provides that if a police officer, while investigating within the scope necessary to respond to an emergency, discovers evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe that such evidence would be found. See, e.g., *People v. Davis*, 497 N.W.2d 910, 918 (Mich. 1993); *Perez v. State*, 514 S.W.2d 748, 749 (Tex Ct. Crim. App. 1974).

In *Mincey v. Arizona*, 437 U.S. 385 (1978), the United States Supreme Court noted that "the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." The Court recognized that the need to protect or preserve life

or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)). The Court, however, found that a four-day search of an apartment where a homicide had occurred was not reasonable because there was no “emergency threatening life or limb.”

The emergency doctrine’s requirements are clearly articulated in *People v. Mitchell*, 347 N.E.2d 607 (N.Y. 1976), which we quoted in *Murdock*, 54 F.3d at 1441: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

The Ninth Circuit Court of Appeals then applied the *Mitchell* test to the facts of this case. Officer Yergler was faced with a terrible, “sickening” chemical odor coming from Apartment 3, which he could smell as much as 20 feet away from the apartment. Officer Yergler, as well as the firefighters who summoned him, believed that the fumes might be associated with methamphetamine production. Officer Yergler knew from his training that methamphetamine labs are volatile and, therefore, reasonably feared that Apartment 3 could explode at any moment. See *United States v. Whitten*, 706 F.2d 1000, 1014 (9th Cir. 1983) (recognizing that methamphetamine labs create a risk of explosion). Officer Yergler

also reasonably believed that lives were in danger if an explosion occurred. This fear was heightened by the fact that the odor was coming from an apartment building, possibly containing many people. Cf. *United States v. Martin*, 781 F.2d 671, 674 (9th Cir. 1985) (holding that a potential explosion within an apartment increases the likelihood of finding exigent circumstances). Moreover, Officer Yergler testified that he witnessed several children around the apartment building. One of the apartment building’s tenants had left her apartment fearing harm to herself or to her infant child. Given all of these circumstances, Officer Yergler reasonably believed that an emergency was at hand and that his assistance was immediately necessary for the protection of life.

Officer Yergler testified that before the first search he was not sure whether the substance he smelled was caused by methamphetamine production, but he testified that given the strong noxious chemical odor and the fact that ... six apartments were there with another apartment building right across, he didn’t want to take the chance. The district court found that Officer Yergler was very credible and there was no indication that he was trying to make up a story afterwards to justify what he did. Officer Yergler’s actions after the search provide further evidence that he was primarily motivated by his concern for the safety of the apartment building’s occupants. Once he had secured the premises, Officer Yergler ordered the evacuation of the building and requested the tenants to turn off any open flames.

Officer Yergler testified that he had identified Apartment 3 as the source of the chemical odor. He had already investigated Apartment 6 and did not find the odor’s source. Moreover, the odor was stronger in front of Apartment 3 than in front of any other apartment. These facts show that Officer Yergler had a “reasonable basis, approximating probable cause,” to believe that the noxious chemical odor was coming from Apartment 3. See *Mitchell*, 347 N.E.2d at 609. Furthermore, Officer Yergler did not examine Apartment 3 more thoroughly than was necessary to search for a methamphetamine lab. He simply walked through the rooms and looked at items in plain view. See *Mincey*, 437 U.S. at 393 (“the police may seize any evidence that is in plain view during the course of their legitimate emergency activities”). Thus, the Ninth Circuit agreed with the district court that the officers’ searches of Apartment 3 were legal.

The Ninth Circuit then reviewed the search by Investigator Reynolds. The Court stated that unlike the searches conducted by Officers Yergler and Wasinger, Investigator Reynolds’ search of Apartment 3, does not satisfy the requirements of the emergency doctrine. By the time Investigator Reynolds entered the apartment, the risk of explosion had been defused. First, the police officers knew that there was neither lab equipment nor chemicals on the premises. Second, the apartment had been aired-out so there was no reasonable risk that the fumes could ignite. Third, there was no reasonable risk that the methamphetamine in the pot could explode

because it was in its final stages of production, well past the volatile early stages of production. Fourth, the apartment had been secured by police presence, which eliminated any risk that someone might enter the apartment. Therefore, the search by Investigator Reynolds was illegal.

The Ninth Circuit then excised the portion of the affidavit for search warrant which contained information obtained during the entry into the apartment by Investigator Reynolds. After excising Investigator Reynolds' observations, the warrant application shows that Officers Yergler and Wasinger: (1) smelled a strong chemical odor outside of Apartment 3 consistent with methamphetamine production; (2) were trained to know the smell of methamphetamine production; (3) have been present with the police narcotics unit in previous investigations of operational methamphetamine labs; (4) saw a large hydraulic press in Apartment 3; (5) saw a stainless steel pot on the apartment's kitchen floor, containing a brown chunky substance they believed was methamphetamine; and (6) witnessed the suspects flee Apartment 3.

Given the above facts, the magistrate had a "substantial basis" for concluding that there was probable cause to believe that contraband or evidence of a crime would be found in Apartment 3. Accordingly, the Ninth Circuit Court of Appeals stated that the district court did not err in denying Cervantes' motion to suppress evidence. The Ninth Circuit Court of Appeals affirmed Cervante's conviction.



### SEARCH AND SEIZURE – ENTRY TO ARREST; PROTECTIVE SWEEP

In *State v. Blanco*, Wis. Ct. App., No. 98-3153, 5/16/00, the Wisconsin Court of Appeals dealt with the two questions: (1) whether the entry into Al-Shammari's apartment with only an arrest warrant was lawful; and (2) whether the search of the crawl space above the bathtub was within the scope of a lawful protective sweep. The following are the facts of this case.

On September 10, 1997, at approximately 7:15 p.m., Milwaukee Police Officer Diane Arenas, Wauwatosa Police Detective Keith Werner, and two other Milwaukee police officers arrived at an apartment building located at 2867 South Kinnickinnic Avenue in the City of Milwaukee. The officers believed that Blanco was staying in apartment #118 at that location. The officers had an arrest warrant for Blanco for the crime of attempted first-degree homicide, while armed. The officers did not directly proceed to the apartment where Blanco was believed to be, but conducted further investigation. An officer showed Blanco's picture to the apartment manager, who stated that Blanco might be staying in apartment #118. An occupant of the apartment building told an officer that Blanco had just been outside the apartment building smoking a cigarette before the police arrived. Another occupant told the police that he had seen Blanco enter apartment #118 just before the police arrived.

At approximately 8:00 p.m., the officers knocked on the apartment door, announced that they were

police officers, and that they were there to arrest Blanco, pursuant to a felony arrest warrant. A female, later identified as Al-Shammari, refused to allow the officers to enter. During this time period, another officer observed Blanco attempt to leave the apartment through a window. Blanco aborted the attempt, however, when he saw the police. The police called for assistance from the Tactical Enforcement Unit.

The immediate area was secured, surrounding apartments were evacuated, and the police were granted entry to an apartment immediately above and identical to the Al-Shammari apartment. As a result of this access and a review of the layout of the apartment, police were aware that there was a crawl space above the bathtub where someone could hide. Communications were repeatedly attempted with Al-Shammari to have Blanco turn himself over to the police. During this time, the police heard noises and activity coming from Al-Shammari's bathroom, including an inordinate amount of toilet flushing, and voices and sounds near the crawl space above the bathtub. The police also heard repeated use of the garbage disposal in Al-Shammari's kitchen. As a result, the water was turned off to the Al-Shammari apartment.

At approximately 10:30 p.m., after their unsuccessful efforts to have Al-Shammari consent to entry, or Blanco voluntarily submit to arrest, the six-man Tactical Enforcement Unit entered the apartment by use of a key obtained from the building manager. Officer Gilbert Carrasco was the first to enter. He held his shield in front of him in anticipation of some type of

resistant force. Upon entry, three individuals were located: Al-Shammari, Blanco, and Rogelio Fuentez. The three were handcuffed and taken into custody. Carrasco proceeded to the bathroom to perform a protective sweep of that room. He testified that he was concerned that someone may have been hiding in the crawl space located above the bathtub. The board covering the crawl space was secured to the ceiling with four screws. Carrasco asked another officer for a screwdriver and he then removed the panel. Upon doing so, a bag containing marijuana fell on his head. He checked the crawl space for suspects, but it was empty.

As a result of the discovery of the contraband, the police obtained a search warrant for the premises and discovered additional marijuana, a total of 20.4 pounds, scales, \$1,745 in cash, three pagers, a cellular telephone, and a .380 caliber pistol. After being properly charged for the drug offenses, Blanco and Al-Shammari both filed motions seeking to suppress the evidence. The trial court conducted an evidentiary hearing and concluded that the entry into the apartment and the protective sweep were not inappropriate or unreasonable. Both Blanco and Al-Shammari pled guilty. Judgment was entered. Both now appeal.

#### *A. Entry With Only Arrest Warrant.*

When the police officers entered the Al-Shammari apartment, they did not have a search warrant. They did, however, have an arrest warrant for Blanco. The warrant was for a charge of attempted first-degree homicide, while armed. The address on the

warrant, however, was not the Al-Shammari apartment, but rather was an address in Wauwatosa, which was believed to be Blanco's residence. Before coming to the Al-Shammari apartment, the police had also visited several other abodes where it was suspected that Blanco might be staying. They did not find him at any of the other addresses. Upon arrival at the Al-Shammari apartment building, the police engaged in further investigation to determine whether Blanco was now residing in the Al-Shammari apartment. The police were advised by the apartment manager that Blanco might be staying in the Al-Shammari apartment, although the apartment was leased only to Al-Shammari. The police discovered that Blanco had been seen in front of the apartment building smoking a cigarette shortly before the police arrived, and that Blanco was seen returning to the Al-Shammari apartment afterwards. The police also observed a friend of Blanco approach the apartment building, but then retreat after seeing the officers. Further, Blanco was positively identified within the apartment by one officer who saw him through the door jam, and another who saw him attempt to escape through a window.

An arrest warrant authorizes the police to "enter the suspect's residence to execute the warrant if there is reason to believe he will be found there; the officer does not need a search warrant." *United States v. Pallais*, 921 F.2d 684, 690 (7th Cir. 1990) (citing *Payton v. New York*, 445 U.S. 573, 603 (1980)). The question raised in the instant case, however, is whether the police had reason to believe that Blanco was residing in the Al-

Shammari apartment. If so, this case is governed by *Payton*; if not, resolution rests on another line of cases, including *Steagald v. United States*, 451 U.S. 204 (1981) and *State v. Kiper*, 193 Wis. 2d 69, 532 N.W.2d 698 (1995).

*Payton* authorizes police entry to a home if they have probable cause to believe that the person named in the arrest warrant lives there and is present within. *See id.*, 445 U.S. at 576. *Payton* held:

*If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.*

*Payton* has been construed to mean that police may enter the home of a person named in an arrest warrant, if the person resides there, even though third persons also reside there. *See United States v. Harper*, 928 F.2d 894, 896 (9th Cir. 1991). In the instant case, the State argues that *Payton* governs, that the police had probable cause to believe that Blanco both resided in, and was present in, the Al-Shammari apartment at the time entry was effected to execute the arrest warrant.

The other line of cases suggests that an arrest warrant is insufficient to enter a third party's home, even if the police believe that the subject of the arrest warrant is

present there. In *Steagald*, the Supreme Court held that, absent consent or exigent circumstances, the police may not enter a third party's home to search for the subject of an arrest warrant. *See id.*, 451 U.S. at 205-06. Our Wisconsin Supreme Court decided a similar case in *Kiper*, concluding that the police did not have probable cause to believe that the subject of the arrest warrant in that case was a resident of the Kiper home. *See id.*, 193 Wis. 2d at 83-84. Accordingly, the court applied the *Steagald* rationale and held that, absent Kiper's consent, exigent circumstances, or a search warrant, the police were not authorized to enter Kiper's home to search for the subject of the arrest warrant. *See Kiper*, 193 Wis. 2d at 87-89. In the instant case, Blanco and Al-Shammari argue that Blanco was not residing in the apartment, but was simply a guest and, therefore, under the *Steagald* line of cases, the police were required to obtain a search warrant before entering the apartment.

In *Valdez v. McPheters*, 172 F.3d 1220 (10th Cir. 1999), the federal appeals court reconciled the conclusions reached in *Payton* and *Steagald*, stating:

*Payton and Steagald cannot be understood to divide the world into residences belonging solely to the suspect on the one hand, and third parties on the other. The rule announced in Payton is applicable so long as the suspect "possesses common authority over, or some other significant relationship to," the residence entered by police. Thus, entry into a residence pursuant to an arrest warrant is permitted*

*when "the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry."*

The Valdez court also observed:

*The majority of circuits which have addressed the issue have agreed that, under Payton, police officers entering a residence pursuant to an arrest warrant must demonstrate a reasonable belief that the arrestee lived in the residence, and a reasonable belief that the arrestee could be found within the residence at the time of the entry. See United States v. Route, 104 F.3d 59, 62 (5th Cir. [1997]) ("A valid arrest warrant carries with it the implicit but limited authority to enter the residence of the person named in the warrant in order to execute the warrant, where there is 'reason to believe' that the suspect is within"); United States v. Risse, 83 F.3d 212, 216 (8th Cir. 1996) ("officers executing an arrest warrant must have a 'reasonable belief that the suspect resides at the place to be entered ... and [have] reason to believe that the suspect is present' at the time the warrant is executed"); United States v. Lauter, 57 F.3d 212, 215 (2nd Cir. 1995) ("the proper inquiry is whether there is a reasonable belief that the suspect resides at the place to be entered ... and whether the officers have reason to believe that the suspect is present"); United States v. Edmonds, 52 F.3d 1236, 1248*

*(3d Cir. 1995) (although "the information available to the agents clearly did not exclude the possibility that [the suspect] was not in the apartment, the agents had reasonable grounds for concluding that he was there"), vacated in part on other grounds, 52 F.3d 1236, 1251 (3d Cir. 1995); United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir. [1995]) ("the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry").*

The Wisconsin Court of Appeals agreed with the reasoning espoused in *Valdez*. The dispositive issue then becomes whether the police have reasonable grounds to believe that the suspect of the search warrant was residing in the third party's home, or whether the information known to the police suggests merely that the suspect was visiting the third party's home. In *Kiper*, the reasonable facts suggested only that the subject of the arrest warrant was a visitor. There, the police entered the Kiper home knowing only that the suspect "had moved from the two addresses noted on the face of the arrest warrant, had no known present address, and ... was present at Kiper's apartment six weeks earlier." *Id.*, 193 Wis. 2d at 84. Similarly, in *Steagald*, the police entered the third party's home based upon information that the subject of the warrant could be reached by telephone at that residence

“during the next 24 hours.” *Id.*, 451 U.S. at 206.

The facts that the police officers relied upon in the instant case led to the reasonable belief that Blanco was not merely a guest or visitor in Al-Shammari’s home, but rather was residing there. Accordingly, this case is governed by *Payton*. *Payton* allows the police to enter a residence armed only with an arrest warrant if two factors are met: (1) the facts and circumstances present the police with a reasonable belief that the subject of the arrest warrant resides in the home; and (2) the facts and circumstances present the police with a reasonable belief that the subject of the arrest warrant is present in the home at the time entry is effected. See *id.*, 445 U.S. at 602-03.

During their investigation to locate Blanco, the police obtained the following information: (1) a tip that Blanco was “staying” at the apartment building; (2) confirmation from the building manager that Blanco may be staying in the Al-Shammari apartment; (3) representation from an occupant of the building that Blanco had just been outside the apartment smoking a cigarette; (4) representation from an occupant of the building that Blanco returned to the Al-Shammari apartment after smoking his cigarette; and (5) evidence that Blanco was not at the Wauwatosa address or any other location investigated earlier that day by police. Further, the police observed individuals inside the Al-Shammari apartment moving furniture and other objects around the apartment, heard a great deal of noise coming from the bathroom, saw Blanco attempt to escape the

apartment through the window, observed Blanco inside the apartment through the door jam, and observed a known friend of Blanco’s approach the apartment.

Blanco contends that the significant distinction between “staying at” and “residing at” renders the officers’ reliance on this information insufficient to enter the Al-Shammari apartment. The Wisconsin Court of Appeals disagreed. A similar argument was rejected in *Clayton v. City of Kingston*, 44 F. Supp. 2d 177 (N.D. N.Y. 1999), where the federal district court, relying on *United States v. Lovelock*, 170 F.3d 339, 344 (2d Cir. 1999), held that “the use of the word ‘stays’ is reasonably interpreted to mean that the suspect ... resided or lived at” the residence, which was searched. *Clayton*, 44 F. Supp. 2d at 182 (emphasis added). The Court agreed that in this context, the colloquial use of staying is consistent with residing. *Lovelock*, 170 F.3d at 344; see also *United States v. Risse*, 83 F.3d 212, 216-17 (8th Cir. 1996) (stating that the phrases “staying with” and “living with” are sufficient to support police officers’ belief that the suspect resided at the location at issue).

Thus, when the police officers were informed that Blanco was “staying” at the Al-Shammari apartment, it was reasonable for them to conclude that he was residing there. Given all of these factors, it was reasonable for the police to form a belief that Blanco was not merely visiting Al-Shammari. Rather, these facts support the reasonable conclusion that Blanco possessed common authority over, or some other significant relationship to, the apartment.

*Valdez*, 172 F.3d at 1225-26. Under the totality of the facts and circumstances, it was reasonable for the police to conclude that Blanco had made the Al-Shammari apartment his “dwelling” place and that he was residing there.

Based on the foregoing, the Wisconsin Court of Appeals concluded that the trial court’s finding that Blanco was residing in the apartment was not clearly erroneous. We further conclude that, based on the same information set forth above, it was reasonable for the police to conclude that Blanco was present within the apartment when they entered. Accordingly, the two factors required by *Payton* were satisfied and, as a result, the arrest warrant provided the police with lawful authority to enter the Al-Shammari apartment to search for the subject of the arrest warrant, Blanco.

#### *B. Protective Sweep*

Blanco and Al-Shammari next claim that the search of the crawl space above the bathtub, conducted as part of a protective sweep, was unlawful. Blanco and Al-Shammari contend that the police used the protective sweep doctrine as a mere ruse or pretext in order to open the screwed-down access panel because the police suspected contraband was hidden in the crawl space. The State responds that the police officer who opened the panel testified that he went to the bathroom to conduct a protective sweep, that he opened the panel based on a belief that someone may have been hiding in the crawl space, and that he was not searching for contraband.

The trial court considered the information available at the time,

including that: (1) Blanco's outstanding warrant was for attempted homicide while armed; (2) the officers had heard a great deal of noise and activity coming from the bathroom; (3) the police officer's knowledge that the crawl space was big enough for a person to hide in; and (4) it appeared from the condition of the paint around the panel's screws that the panel had recently been removed. The trial court found that, based on these factors, it was reasonable for the police to believe a person might have been hiding in the crawl space. The trial court concluded that the search of the crawl space as a part of a protective sweep "was not inappropriate and was not unreasonable under the law and circumstances."

In *Maryland v. Buie*, 494 U.S. 325 (1990), the United States Supreme Court held that officers may conduct a limited protective sweep of a home, following an in-home arrest, if they have "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." *Id.* at 337. The 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. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. *Id.* at 327. The sweep must also be limited in duration, lasting no longer than is necessary to dispel the reasonable suspicion of danger. *Id.* The Supreme Court held that, during an arrest, officers may without probable cause or reasonable suspicion look in closets and other spaces immediately adjoining the

place of arrest from which an attack could be immediately launched. *Id.* at 334. Beyond that limited cursory inspection, however, an officer must have articulable facts that support an inference that the area to be swept harbors an individual posing danger to those present. *See id.*

In applying the protective sweep doctrine, and what constitutes a "cursory visual inspection of those places in which a person might be hiding," courts look at the individual facts available to the police at the time the action is taken. *See United States v. Burrows*, 48 F.3d 1011, 1016-18 (7th Cir. 1995). In *Burrows*, the seventh circuit upheld a protective sweep where the police forced open four locked doors in a two-story apartment. *See id.* at 1017. The court determined "that the officers had the right to ensure their safety." *Id.* As evidenced by this case, there may be situations in which a *secured* place may be subjected to a cursory search.

The question in the instant case then becomes whether the search of the crawl space above the bathtub was proper under the protective sweep doctrine. Blanco and Al-Shammari point out that the panel had four screws fastening it to the ceiling and that the police officer needed to use a screwdriver to remove the screws before he could open the panel. They argue that there is no testimony that he had his gun drawn or had the assistance of other officers in the bathroom, as he should have, if he truly believed that someone was hiding in the crawl space. They contend that removal of the panel above the bathtub, under the pretext of "sweeping" the area for a person, was simply a ruse to dis-

cover suspected contraband.

The facts argued by Blanco and Al-Shammari do not fall on deaf ears. In hindsight, the actions of the officer may raise an eyebrow, particularly given the fact that the panel was screwed into the ceiling and, as it turned out, no other person was hiding in the crawl space. However, each situation must be examined by the facts and circumstances confronted by the police at the time the sweep was conducted.

The officers in this case were brought to a scene where an individual was wanted on a charge of attempted first-degree homicide, while armed. Certainly, the potential for an explosive and dangerous situation existed. The police officers were refused entry and Blanco refused to come out of the apartment for over three hours. The Tactical Enforcement Unit, called in to assist, entered the apartment with ballistic shields drawn. Although once the officers had gained entry and the suspects did not resist arrest, that did not preclude the possibility that another person might be hiding in the apartment. Our task is to examine all the facts and circumstances and to determine whether the police officer's conduct was reasonable, given the milieu of danger in which he was discharging his professional responsibility. Reasonably, a protective sweep is not a series of slides, any one of which can be isolated and then examined with the precision of an academic scalpel. Rather, it is a continuum of action, and sometimes reaction, requiring split-second decisions that should be examined only under the microscope of reasonableness.

Here, under all the facts and circumstances, the officer's action in "sweeping" the crawl space was

reasonable. In addition to the facts noted above, the police were also operating with the following relevant information: (1) during surveillance of the apartment, the police were able to view an apartment with an identical layout; (2) the police knew from this that there was a crawl space above the bathtub, which was two feet by five feet, a space sufficiently large enough to hide a person; (3) the police had heard an inordinate amount of noise and activity coming from the bathroom near the crawl space, leading them to suspect that someone might be in the crawl space attempting to break through the floor into the apartment above; (4) upon entry into the bathroom, Officer Carrasco observed that the paint around the screws holding the access panel of the crawl space to the ceiling had been tampered with, revealing that the panel had recently been removed.

In addition, we note that the police did not come into the apartment and start rummaging around looking for contraband. No other closet, drawer, cupboard or area was swept. The police swept only the area in which they had reason to believe that a person might be hiding. These facts dispel Blanco's and Al-Shammari's contention that the police were not checking the crawl space for persons, but were actually looking for illegal drugs. Moreover, even if a suspicion of contraband was created during the surveillance because of the inordinate amount of flushing and excessive use of the garbage disposal, such does not trump the police officers' actions in sweeping the area for persons. When a police officer is confronted with two reasonable

competing inferences, one that would justify the search and another that would not, the officer is entitled to rely on the reasonable inference justifying the search. *See State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988). Under the totality of the facts and circumstances, the Wisconsin Court of Appeals concluded that the protective sweep of the crawl space was reasonable. Accordingly, they affirmed the trial court's decision to deny the motions to suppress.

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#### SEARCH AND SEIZURE – SEARCH WARRANTS; PROBABLE CAUSE GROWING STALE

In *Gilbert v. State*, CR99-1059, 6/15/00, Gilbert argued that evidence should be suppressed because the probable cause had grown stale. The Arkansas Supreme Court stated that Rule 12.3(c) of the Arkansas Rules of Criminal Procedure provides that a search warrant shall be executed within a reasonable time, not to exceed sixty days. Although the question of whether information in a search warrant can go stale before its execution is an issue the Arkansas Supreme Court has not yet addressed, Arkansas case law has decided whether such information can become stale before the warrant is issued. For the most part, these cases hold that a delay in applying for a warrant can diminish probable cause, but that the delay is not considered separately, and the length of the delay is considered together with the nature of the unlawful activity and in the light

of common sense. *White v. State*, 47 Ark. App. 127, 134, 886 S.W.2d 876 (1994). Moreover, the Arkansas Court of Appeals has held that when the criminal activity is "of a continuing nature," an issuing magistrate may utilize his or her common sense regarding the relative staleness of the information on which the warrant is sought. *Cardozo & Paige v. State*, 7 Ark. App. 219, 646 S.W.2d 705 (1983). In *Cardozo*, the court adopted the following rationale:

The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: The character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. *Cardozo & Paige*, 7 Ark. App. at 222, 646 S.W.2d at 707. The Court agreed with the foregoing reasoning. In short, circumstances surrounding the issuance of a search warrant are interpreted in light of common sense, and this analysis can be extended by analogy to the execution of a warrant.

In addition, while probable cause must exist at the time the warrant is issued, not at an earlier time, a lapse of time is not necessarily the controlling consideration. *Watson v. State*, 308 Ark. 643, 826 S.W.2d 281 (1992) (citing *United States v. Stevens*, 525 F.2d 33 (8<sup>th</sup>

Cir. 1975), and *United States v. Ellison*, 793 F.2d 942 (8<sup>th</sup> Cir.), *cert. denied*, 470 U.S. 415 (1986)). Other factors include the nature of the criminal activity and the type of property sought, considered in the light of common sense. A delay is less significant when the search warrant lists items innocent on their face as opposed to *per se* inculpatory items that probably would remain in a suspect's residence for a short period of time.

Applying all of these factors to the case at hand, it is clear that the warrant had not become stale before it was executed. Gilbert was suspected of running a meth lab and maintaining a drug premises, which is the kind of activity that would not likely be dismantled quickly. The North Little Rock Police Department had the house under surveillance, as can be inferred from Officer Dunaway's testimony that Gilbert was coming and going at all hours and was never home for the five or six hours the police needed. In these circumstances, the officers would have known if the activity had ceased. Although the items recited in the warrant were *per se* inculpatory (the warrant listed controlled substances, related paraphernalia, and any paperwork associated with selling the drugs), that is not the only factor to consider in examining the delay. Viewed in the light of common sense, it cannot be said that the warrant had become stale by the time it was executed; thus, the trial court did not err in denying Gilbert's motion to suppress.



**SUBSTANTIVE LAW –  
BANK LARCENY IS NOT A  
LESSER INCLUDED  
OFFENSE IN FEDERAL  
BANK ROBBERY  
STATUTUE**

In *Carter v. United States*, Carter donned a ski mask and entered a bank, confronted an exiting customer and pushed her back inside. She screamed, startling others in the bank. Undeterred, Carter ran inside and leaped over a counter and through one of the teller windows. A teller rushed into the manager's office. Meanwhile, Carter opened several teller drawers and emptied the money into a bag. After removing almost \$16,000, he jumped back over the counter and fled. He was charged with violating the Federal Bank Robbery Statute, 18 U.S.C. § 2113(a) which punishes whoever, by force and violence, or by intimidation, takes ... any ... thing of value from a bank. While not contesting the basic facts, Carter pled not guilty on the theory that he had not taken the bank's money "by force and violence, or by intima-

tion," as §2113(a) requires. Before trial, he moved for a jury instruction on the offense of bank larceny described by §2113(b) as a lesser included offense of the offense described by §2113(a). Section 2113(b) entails less severe penalties than §2113(a), punishing, *inter alia*, whoever takes and carries away, with intent to steal or purloin, any ... thing of value exceeding \$1,000 from a ... bank. The District Court denied the motion. The jury, instructed on §2113(a) alone, returned a guilty verdict, pursuant to which the District Court entered judgment. The Third Circuit affirmed.

The United States Supreme Court held that §2113(b) requires three elements not required by §2113(a). These elements are (1) that the defendant act with intent to steal or purloin, (2) that the defendant take and carry away the property, and (3) that the property have a value exceeding \$1,000. Accordingly, §2113(b) is not a lesser included offense of §2113(a), and Carter is prohibited as a matter of law from obtaining a lesser included offense instruction on the offense described by §2113(b).

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