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# Chapter 2

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## Search and Seizure

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SUMMARY

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The interplay of the First and Fourth Amendments results in special rules in the area of search and seizure of obscene materials. In traditional search and seizure situations, the First Amendment is generally not an issue. In the obscenity area, however, the prosecutor must be prepared to deal with difficulties caused by this additional element. Search and seizure issues ordinarily do not arise in the bookstore case where the charge is based upon a *sale*, but they will arise where *seizure* is required as the only means of obtaining the objectionable materials or records.

## MASS SEARCH AND SEIZURE

The Supreme Court has held that certain procedures must be followed in the search and seizure of allegedly obscene materials. The development of these procedures has been a gradual process. The first significant case on this issue was *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961). In *Marcus*, Missouri had a special statute for the search and seizure of obscene publications resulting in their destruction by "burning or otherwise" if they were found by a court to be obscene. No pre-seizure notice to the owner was required. The court issued a "general warrant" running against a wholesale distributor and operators of retail newsstands. The officer's affidavit supporting the warrants simply stated that "of his own knowledge" the appellants "kept for the purpose of [sale]...obscene...publications...." No copies of any magazines or descriptions thereof were filed with the affidavit. The warrant permitted the officers to "search the said premises...and...seize...[obscene materials] and take same into your possession...." Different officers executed the warrants at the different establishments. They seized all magazines which in their "judgment" were obscene. When they "thought 'a magazine...ought to be picked up' they seized all copies of it." Approximately 11,000 copies of 280 publications were seized. 367 U.S. at 722-23.

The Supreme Court held that this procedure lacked procedural safeguards which due process required to assure non-obscene material constitutional protection. The Court stressed that search and seizure procedures that might be acceptable in dealing with contraband (such as gambling paraphernalia, drugs, or intoxicating liquor) were not permissible in the obscenity area because of the danger of infringing protected speech. The presence of the First Amendment protections requires greater procedural safeguards.

The Court found other defects in the Missouri procedure as well. The warrants were issued "on the strength of the conclusory asser-

tions,” and not on the basis of any detailed presentation to the judge. 367 **U.S.** at 731-32. There was no “scrutiny by the judge of any materials considered by the complainant to be obscene.” 367 **U.S.** at 732. The officers themselves determined which magazines to seize. There was no adversary proceeding prior to the imposition of “extensive restraints” on speech. The eventual hearing took place two months after the seizure, during which time the magazines were held without any judicial determination on the issue of actual obscenity.

The lesson of *Marcus* is that before *this* type of mass seizure takes place, there must be a step in the procedure “designed to focus searchingly on the question of obscenity.” 367 **U.S.** at 732. The Court implied that the required procedure be a full adversarial hearing on the obscenity issue. Remember, however, that the *Marcus* seizure was for the purpose of “destruction” and not for the use of the materials as evidence of a crime.

The Supreme Court again tackled the mass seizure issue in *A Quantity of Books v. Kansas*, 378 **U.S.** 205 (1964). *A Quantity of Books* dealt with a Kansas procedure similar to Missouri’s. However, prior to the issuance of the warrant, the magistrate personally examined, in an *ex parte* procedure, seven of the “novels” and found them obscene. In all, 1,715 copies of 31 different novels were seized. The Court held the procedure unconstitutional since it “did not adequately safeguard against the suppression of non-obscene books.” 378 **U.S.** at 208. The Court ruled that because the seizure was of all copies of the books, and because no adversary hearing preceded the seizure, the entire proceeding was defective.

*Marcus* and *A Quantity of Books* make clear that a “massive” seizure of all copies prior to an adversary hearing on the issue of obscenity is unconstitutional. These cases did not address the situation where the seizure was not massive or did not include all available copies of the same publication. These cases must therefore be distinguished from the mere seizure of one copy to be used as evidence in a criminal trial.<sup>1</sup> It should also be reemphasized that *Marcus* and *A Quantify of Books* were *not* criminal proceedings, but proceedings for the destruction of all obscene books in question.

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<sup>1</sup> In a bookstore case, the prosecutor will rarely be required to seize **one** copy of a magazine to use in evidence. It can usually be purchased. However, in the case of a film, it is generally necessary to seize at least one print as evidence. Videotapes can be rented and copied by a police officer or purchased.

## THE SEIZURE OF EVIDENCE

In *Lee Art Theatre, Inc. v. Virginia*, 392 US. 636 (1968), law enforcement officers seized films to be used primarily as evidence for criminal proceedings. In this case, a theatre operator was convicted in state court for possessing and exhibiting obscene motion pictures. The Supreme Court reversed the conviction and held, in a *per curiam* opinion, that the supporting affidavit was based only on the officer's *determination* that the material was obscene. The officer arrived at this conclusion after he viewed the films and observed the billboard outside the theatre. Citing *Marcus*, the Court stated that since the warrant was issued solely upon the conclusory assertion of the officer without any inquiry by the magistrate "into the factual basis for the officer's conclusions," this was "not a procedure 'designed to focus searchingly on the question of obscenity' ...and therefore fell short of [the] Constitutional requirements demanding necessary sensitivity to freedom of expression." 392 U.S. at 637. An important feature of this case, however, is that the Court stopped short of requiring the magistrate to actually view the film before issuing the warrant.

The Supreme Court cleared up much of the confusion surrounding the procedures for the seizure of films in 1973 in *Heller v. New York*, 413 U.S. 483 (1973). In *Heller*, a judge accompanied the officers to a movie theatre, paid admission, and viewed a sexually explicit film. Upon seeing the film, the judge issued warrants for the film's seizure and theatre manager's arrest on grounds that the film was obscene. No pretrial motion was made for its suppression as evidence. There was no showing that the seizure prevented exhibition of the film by use of another copy. The manager's trial was held 47 days after his arrest and seizure and he was convicted. He argued, *inter alia*, that seizure of the film without a *prior* adversary hearing violated the Fourteenth Amendment. The Supreme Court rejected this argument and affirmed his conviction. *It held that where a film is seized for the bonafide purpose of preserving it as evidence in a criminal proceeding, and it is seized pursuant to a warrant issued after a determination of probable obscenity by a neutral magistrate and, following the seizure, a prompt trial or judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible.* On a showing to the trial court that other copies of the film are not available for exhibition, the Court should permit the seized film to be copied so that exhibition can be continued pending judicial resolution of the obscenity issue in the trial or an adversary proceeding. Otherwise, the film must be returned. *With such safeguards, a pre-seizure adversary hearing is not mandated by the First Amendment.*

The *Heller* Court stated that there is *no* absolute constitutional right

to a "prior adversary hearing applicable to all cases where allegedly obscene material is seized." 413 U.S. at 488. In particular, there is no such right where the "allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution." 413 U.S. at 488. The Court reiterated that it was an "open question whether a judge" needs to view the film before issuing the warrant. 413 U.S. at 488. The Court contrasted *Marcus* and *A Quantity of Books* which concerned the "seizure of large quantities of books for the sole purpose of their destruction." 413 U.S. at 491. In those circumstances, a pre-seizure judicial determination of obscenity in an adversarial proceeding was required.

But seizing films to destroy them or block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where...there is no showing...that seizure of the copy prevented continuing exhibition of the film.

413 U.S. at 492.

## HIGHER STANDARD OF CARE REQUIREMENT

Some specific restrictions and higher standards are imposed on law enforcement officers when conducting a search and seizure involving obscene material. Although the additional element of the First Amendment does require a greater standard of care, the Supreme Court has outlined the necessary procedural steps to assure a constitutionally valid search.

In the most recent decision regarding this "higher standard", the Supreme Court reaffirmed many of its earlier opinions. In *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874 (1986), the Court held that the special procedural protections enunciated in *Roaden*, *A Quantity of Books*, *Marcus*, *Heller*, and *Lee Art Theatre* (all discussed in this chapter) were "adequate to ensure that First Amendment interests would not be impaired by the issuance and execution of warrants authorizing the seizure of books or films." The primary significance of this opinion is that the Court seemed unwilling to extend these restrictions further. For example, it refused to extend this "higher standard" to a showing of probable cause. The Court held that presumptively protected materials should be evaluated under the same standard of probable cause used to review warrant applications generally. (For a further discussion, see Probable Cause later in this chapter.)

**Search Incident to Arrest**

On the same day the Court decided *Heller*, it also decided *Roaden v. Kentucky*, 413 U.S. 496 (1973). In *Roaden*, a county sheriff viewed a sexually explicit film at a local drive-in theatre. At the conclusion of the showing, he arrested the theatre manager for exhibiting an obscene film and seized, without a warrant, one copy of the film for use as evidence. There was no prior judicial determination of obscenity. The Kentucky Court of Appeals upheld the warrantless seizure of the obscene film as incident to a lawful arrest. (See: *Chimel v. California*, 395 U.S. 752 (1969).) The Supreme Court reversed, holding that the sheriff's seizure, without the authority of a constitutionally sufficient warrant, was unreasonable under the First, Fourth, and Fourteenth Amendment standards. The seizure was not unreasonable simply because it would have been easy to secure a warrant. Rather, a prior restraint on the right of expression — whether by books or films — calls for a higher hurdle of reasonableness. The situation did *not* present an exigent circumstance in which police action must be "now or never" to preserve evidence of the crime. In such a situation it may be reasonable to permit action without prior judicial approval.

The *Roaden* Court stated that in evaluating search of a theatre or bookstore for a determination of whether a seizure is reasonable or unreasonable in violation of the Fourth Amendment, the Court must take into account the First Amendment. Thus in a search incident to arrest, "instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves' ..are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under the Fourth and Fourteenth Amendment standards." 413 U.S. at 502. Hence, the exception to the warrant requirement for a "search incident to an arrest" is not applicable where the objects seized are books or films. This is consistent with the rulings of *Marcus and Lee Art Theater*. Because of the First Amendment, the requirements for specificity in an affidavit and warrant are greater where the items to be seized are books or other materials embodying speech. Simply put, a "prior restraint of the right of expression...calls for a higher hurdle in the evaluation of values." 413 U.S. at 504. However, the Court did not eliminate the "exigent circumstances" exception to the warrant requirement: "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." 413 U.S. at 505. But on any less of a showing, a search warrant will be required.

**Probable Cause**

As discussed earlier, in *New York v. P.J. Video*, 475 U.S. 868 (1986),

the Supreme Court stated that this "higher hurdle" of search and seizure found in *Roaden* did not require a higher level of probable cause. Although a neutral magistrate is still required to make the probable cause determination, the Supreme Court held that in an application for a warrant to search and seize obscene material, supporting affidavits do not need to meet a higher standard of probable cause. In *P.J. Video* a law enforcement officer viewed 10 video cassette movies which were rented from the defendant's store. In his application for a search warrant, the officer submitted affidavits which summarized the sexual activities shown in the movies. A New York Supreme Court Justice issued a warrant. The officer then executed the warrant and seized the 10 video cassettes. The obscenity charges brought against the defendant were eventually dismissed due to an insufficient showing before the magistrate to establish probable cause. The New York Court of Appeals upheld the dismissal, and relying on *Roaden*, argued that "there is a higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs for example." *People v. P.J. Video, Inc.*, 483 N.E.2d 1120, 1123 (N.Y. 1985). On *certiorari*, the U.S. Supreme Court reversed the judgment of New York's highest court. "We...hold that an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally." *P.J. Video, Inc.*, 475 U.S. at 875. The Court added that the standard set forth in *Illinois v. Gates*, 462 U.S. 213 (1983), to determine probable cause, is adequate to assure the protection of both First and Fourth Amendment rights.<sup>2</sup>

#### The "Threshold of Dissemination" Factor

In the area of search and seizure of obscene material, whether the material seized is on the "threshold of dissemination" is a factor to be considered in determining if a higher standard of care is required by the First Amendment. It is important to note that in *A Quantity of Books, Marcus, Heller, Lee Art Theatre*, and *Roaden*, the seized materials in question were on the "threshold of dissemination," and consequently were afforded greater protection. In *Mishkin v. New York*, 383 U.S. 502, 513 (1966), the Court indicated that in a massive seizure situation, it would consider "evidence of whether the books seized in the basement storeroom were on the "threshold of dissemination."

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<sup>2</sup>On remand to the New York Court of Appeals, the state court held that the New York Constitution imposes more exacting standards for the issuance of search warrants authorizing seizure of allegedly obscene material than does the Federal Constitution. Therefore it upheld its earlier decision to dismiss the obscenity charges against *P.J. Video, Inc.* *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 557-58 (N.Y. 1986).

Although the Supreme Court has not taken a definitive stand on this issue, the presumption that seized materials are protected by the First Amendment loses its vigor in certain "settings." *Ginzburg v. United States*, 383 U.S. 463 (1966). See: *United States v. Cangiano*, 491 F.2d 906 (2nd Cir. 1974), *cert.denied*, 419 U.S. 904 (1974); *State v. Bird*, 499 S.W.2d 780 (Mo. 1973), *aff'd*, 419 U.S. 933.

#### The Neutral Magistrate

In 1979, the Supreme Court issued its opinion in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). In *Lo-Ji*, a police officer purchased two films from an "adult bookstore" and after viewing them, took them to a Town Justice (a non-lawyer) to obtain a search warrant. The Justice determined that the films were obscene and issued a warrant to search the store and seize other copies of the two films. At the request of the officer, and responding to an assertion in the affidavit that similar materials could be found on the premises, the Justice accompanied the officer to execute the warrant and determine independently if any other items were in violation of the law. The Justice included in the warrant a recital authorizing the seizure of "[t]he following items which the Court independently [on examination] has determined to be possessed in violation" of obscenity laws, but did not list or describe any items, and left the warrant open-ended. At the store, the clerk was arrested. The Justice, accompanied by state police investigators, uniformed officers, and three prosecutors (11 persons), then conducted a search which lasted nearly six hours. The Justice viewed films using coin-operated projectors that had been adjusted so that no coins were needed for their operation. He also examined reading materials after the officers accompanying him had removed the cellophane wrappers. The Justice also examined pictures in boxes containing film that had been removed from a glass enclosed display case. Upon determining that probable cause existed that the materials he had examined were obscene, the Justice orally ordered their seizure. No second search warrant was issued at this time. After the search and seizure was completed, the police performed an inventory of the items seized, then listed them on an Inventory which was later served. The owner's motion to suppress all seized evidence was denied and he was convicted.

The Supreme Court reversed, holding that the Fourth Amendment prohibited the seizure of items under a warrant that did not describe the items seized and was open-ended (only an Inventory was completed after the seizure was carried out). Further, the judicial officer was not neutral and detached, acting instead as a law enforcement officer as if part of a search party. This procedure was not authorized by *Heller*. Here the Justice undertook to telescope the processes of the application for a warrant, the issuance of the warrant, and its execu-

tion. Finally, the Court rejected the claim that the store had no expectation of privacy because the items seized were displayed in areas of the store open to the general public. The Court reasoned that just because a store invites the public to enter, it does not consent to wholesale searches and seizures that do not conform to Fourth Amendment guarantees.

The Justice did not manifest "neutrality and detachment." Rather, the facts disclosed that he became "a member, if not the leader of the search party which was essentially a police operation" — he became "an adjunct law enforcement officer." 442 U.S. at 327. The Court reemphasized its scrutiny of large scale seizures.

The Court stated, however, that in certain circumstances a magistrate could actually visit the bookstore or theatre to view allegedly obscene materials and retain his neutrality and detachment.

We do not suggest, of course, that a 'neutral and detached magistrate' . . . loses his character as such merely because he leaves his regular office in order to make himself readily available to law enforcement officers who may wish to seek the issuance of warrants by him.

442 U.S. at 329 n.6. The Court cited *Heller* as an example, where a judge signed the warrant for the seizure of the film in the theatre itself after viewing it. However, it is impermissible for a magistrate as in *Lo-Ji* "to participate with the police and prosecutors in its execution." 442 U.S. at 329 n.6. This case may well have been upheld if the Justice had visited the store, independently reviewed items available for sale or viewing, and then completed and signed a separate search warrant specifically listing the items viewed and authorized for seizure. The Justice could have then left the premises and the officers could have seized the named items.

Since *Heller*, in virtually every case where the Court has had an opportunity to rule on the issue, it has held that it is unnecessary for the magistrate to actually view specifically described material before issuing a warrant. *P.J. Video*, 475 U.S. at 875-76. If the magistrate is furnished, *ex parte*, sufficient information to both focus searchingly and find probable cause, a warrant may be issued. See: *United States v. Echols*, 577 F.2d 308 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979) ("The basis for the issuance of the search warrant was an affidavit explicitly describing the contents of some of the films"); *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *United States v. Marks*, 520 F.2d 913 (6th Cir. 1975), *rev'd. on other grounds*, 430 U.S. 188 (1977); *United States v. Jacobs*, 513 F.2d 564 (9th Cir. 1975); *United States v. Tupler*, 564

F.2d 1294(9th Cir. 1977); *United States v. Christian*, 549 F.2d 1369(10th Cir. 1977), cert.denied, 430 U.S. 910 (1977); *State v. Thompkins*, 211 S.E.2d 549 (S.C. 1975). The affidavit must, of course, state facts and not mere conclusions. *Lee Art Theatre, Inc.*, 392 U.S. 636 (1968). See also: *People v. Patroff*, 490 N.E.2d 148, 151 (Ill. App.Ct. 1986), cert.denied, 479 U.S. 876 (1986), in which the court held that a magistrate need not see the material in question to establish probable cause, but the supporting affidavits must be "specific and explicit and not merely conclusional."

In one state appellate court decision, *State v. Stout*, 470 So.2d 581, (La.Ct.App. 1 Cir. 1985), the court loosened even further the affidavit requirements. The court found that any credible person, including an unidentified informant, may provide adequate information to establish probable cause. In *Stout*, law enforcement officers received information from a number of female informants who were either approached or actually paid by the defendant to participate in "hard core" movies. These women were shown films which included fellatio and sexual intercourse to demonstrate what type of performance was expected of them. One informant was "wired for sound" and engaged the defendant in a conversation in his store. The defendant proposed that she make a film including fellatio and sexual intercourse and other sexual acts for compensation. Based on this information a search warrant was issued and executed that night. Law enforcement officers seized 21 video cassettes, an electric vibrator and a dildo from his store. The defendant moved to have the physical evidence suppressed on the grounds that the search warrant failed to show probable cause on its face. The court held that under these circumstances it was not necessary for either a magistrate or police officers to view the allegedly obscene films. Relying on *Illinois v. Gates*, 462 U.S. 213 (1983), the court ruled that "an unidentified informant may provide adequate information to establish probable cause for a search warrant, so long as the basis for the information and the informant's reliability, when examined under the totality of circumstances, are established." *Stout*, 470 So.2d at 584.

### **The "Plain View" Doctrine**

In *Lo-Ji, Heller, A Quantity of Books, Marcus, and Roaden*, the Court has virtually eliminated the "plain view" exception to the Fourth Amendment's warrant requirement. This is grounded upon additional protection afforded by the First Amendment. As the Court said in *Lo-Ji*:

Of course, contraband may be seized without a warrant under the 'plain view' doctrine....But we have recognized special constraints upon searches and seizures of material arguably protected by the First Amendment...; materials normally may

not be seized on the basis of alleged obscenity without a warrant.

442 U.S. at 326 n.5. At least one federal court has recognized an exemption. In *L.M.E., Inc. v. City of Hollywood*, 605 F.Supp. 185 (S.D. Fla. 1985), the court distinguished its case from *Lo-Ji*. It agreed that allegedly obscene films could not be seized without a warrant, but then held that once a film has been properly declared obscene it stands in no better position than any other item of contraband. Therefore it can thereafter be seized under the "plain view" doctrine.

In a child pornography investigation, a "plain view seizure" was made of adult pornography items, including "swingers" magazines, advertisements, and photographs mailed to such magazines by the defendants. The evidence was admissible pursuant to Fed. R. Evid. 404 (6) to show knowledge, motive or intent on the part of the defendants. *U.S. v. Esch*, 832 F.2d 531, 535 (10th Cir. 1987).

Sexual devices may also be seized in "plain view" without a warrant. *Smell v. State of Georgia*, 233 S.E.2d 187 (Ga. 1977), appeal dismissed for want of a substantial federal question, 435 U.S. 982 (1978). Devices designed and marketed as useful primarily for the "stimulation" of human genitalia do not enjoy the protection of the First Amendment and may be mass seized without a search warrant as any other contraband. See also: *Southwick v. State of Texas*, 701 S.W.2d 927 (Tex. Ct. App. 1 Dist. 1985); *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. 1981). For finding that hand pump for penis enlargement was an obscene item, see *State v. Loshin*, 517 N.E.2d 229 (Ohio Ct. App. 1986).

### Search Warrant Specificity

In *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), a magistrate issued a warrant authorizing the seizure from a porn store of not only the nine magazines described in the affidavit but "any magazines, movies and video tapes containing depictions or portion[s] thereof of the following: cunnilingus, fellatio, anal intercourse, vaginal intercourse, excretion of semen from penis onto other person, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus...." 725 F.2d at 1093. The police seized several hundred books. The court upheld the seizure stating that by "confining the officers to seizing materials that contained depictions...of sexual intercourse and variations thereof described in the warrant, the warrant satisfied the requirement of particular description..." 725 F.2d at 1093. Hence, under *Sequoia Books, Inc.* the warrant may authorize both the seizure of specifically described magazines, and more importantly, the seizure of other magazines

containing depictions of specified sexual acts.<sup>3</sup> Although the *Sequoia* warrant did not so provide, we suggest that any such warrant also indicate that only "hard-core" depictions of such specific conduct, "explicitly showing where penetration of the genitals is clearly visible" be added to provide narrower and more specific directions. See also later cases applying similar warrants. *People v. Sequoia Books, Inc.*, 495 N.E.2d 1292 (Ill.App.Ct. 2 Dist. 1986); *People v. Sequoia Books, Inc.*, 496 N.E.2d 740 (Ill.App.Ct. 2 Dist. 1986), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 95 L.Ed.2d 855 (1987); *People v. Sequoia Books, Inc.*, 500 N.E.2d 82 (Ill.App.Ct. 2 Dist. 1986), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 98 L.Ed.2d 225 (1987); *People v. Sequoia Books, Inc.*, 501 N.E.2d 856 (Ill.App.Ct. 2 Dist. 1986), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 98 L.Ed.2d 225 (1987); *People v. Sequoia Books, Inc.*, 513 N.E.2d 468 (Ill.App.Ct. 2 Dist. 1987); *People v. Sequoia Books, Inc.*, 513 N.E.2d 1154 (Ill.App.Ct. 2 Dist. 1987); *People v. Sequoia Books, Inc.*, 518 N.E.2d 775 (Ill.App.Ct. 2 Dist. 1988).

Although in *Sequoia Books, Inc.* the court held that a search warrant may constitutionally authorize the seizure of material that was not particularly named, other courts have argued that "other material" must be specifically described. In *U.S. v. Guarino*, 729 F.2d 864 (1st Cir. 1984), three magazines were named and described in detail in the affidavit to support the application for a search warrant. The magistrate issued a warrant commanding the seizure of these three magazines and a "quantity of obscene materials, including books, pamphlets, magazines, newspapers, films, and prints" which were of the "same tenor" as the three particularized magazines. 729 F.2d at 865. This warrant was found to be inadequate because it did not describe the items to be seized with "sufficient particularity." Citing *Lo-Ji Sales*, 442 U.S. at 325, the court stated that this type of warrant was inadequate. "[T]he warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action." (Note that the *Guarino* warrant authorized taking "obscene" items of the "same tenor" rather than specifying particular scenes of certain conduct as in *Sequoia*. Neither the United States in the *Guarino* case, nor *Sequoia Books, Inc.* in its case, petitioned for *certiorari*.) A prosecutor or grand jury may not utilize an overly broad, general subpoena duces tecum to require even a corporation to produce "presumptively protected" materials. In *Re Grand Jury Sub-*

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<sup>3</sup> Whether the *Sequoia* holding will be supported by the Supreme Court and other jurisdictions is an open question. Prosecuting attorneys and law enforcement agencies should continue to exercise extreme caution where mass seizures are concerned. Trial courts in Houston, St. Louis, Seattle, and Dallas have recently upheld similar warrant procedures, and an intermediate appeals court (10th District of Texas) affirmed a warrant and conviction from Brazos County, Texas.

*poena: Subpoena Duces Tecum*, 829 F.2d 1291 (4th Cir. 1987).

### The Child Porn Analogy

Recently, helpful decisions have been issued by the 9th Circuit. These opinions, however, are concerned primarily with warrant specificity as it applies to the seizure of child pornography. Since the courts recognize a greater societal concern for the protection of children, child pornography has not received the First Amendment protection presumed for adult pornography. *New York v. Ferber*, 458 U.S. 747 (1982). Therefore defense attorneys may attempt to distinguish any child pornography cases which seem to allow more relaxed search warrant specificity requirements than adult pornography cases. But many of these decisions indicate that similar criteria is to be used: the warrant must "particularly" describe the material to be seized and the language of the warrant must "sufficiently [circumscribe] the officers' discretion at the time of the seizure." *United States v. Hurt*, 808 F.2d 707, 708 (9th Cir. 1987). As long as the warrant explicitly specifies the material to be seized, and the law enforcement officer is not required to make a "discretionary" obscenity determination, the warrant should pass constitutional muster. The following decisions have upheld this standard.

In the earliest of these cases, *United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986), the defendant was convicted of illegally receiving child pornography and obscene merchandise in the mail from the Netherlands. A customs agent intercepted and examined a movie entitled "Bambino" and three sets of pictures. He considered them obscene and sought a search warrant for the defendant's home. In his supporting affidavit, the customs agent recounted his inspection and seizure of the material, and provided copies of the material to the magistrate. The agent stated his intention "to have [the] previously described envelopes [of obscene material] delivered as addressed by an employee of the United States Postal Service," 784 F.2d at 1467, and then to execute the warrant after delivery was confirmed. The warrant authorized the seizure of the named movie, "Bambino" and the three sets of photographs. The warrant also authorized the seizure of

[C]orrespondence, receipts, bills of sale, order forms, advertisement brochures and other documents related to the importation, receipt, sale and/or distribution of the said magazine and photographs, negatives, or films depicting obscene, lewd, lascivious or indecent sexual conduct, which are evidence, fruits and instrumentalities...

784 F.2d at 1468. Similar to the holding in *Guarino* and *Marcus*, this section of the warrant was found to be too general. The court provided

two guidelines to follow to meet the "higher procedural standards" required for search warrants of presumptively protected material.

First, the warrant must specifically describe the material to be seized. Blanket clauses that do not refer to specific items and to material directly related to specific items are not proper bases for constitutional search and seizures. (Citations omitted.) Second, the exceptions to the warrant requirement are narrowly construed. The plain view exception argued by the government, for example, cannot be used to search for or seize alleged obscenity or alleged child pornography that is unidentified in the warrant. (Citations omitted.)

784 F.2d at 1469. The court explained that if this section of the warrant was acceptable, police could subvert the procedural requirement that a neutral magistrate make the initial determination of obscenity. Courts have been consistent on this issue: the Fourth Amendment does not permit issuance of a warrant that leaves it *entirely* to the discretion of police officers conducting a search to decide what items are "obscene" and therefore subject to seizure. It is important to note, however, that the *Hale* court invalidated only a portion of this warrant, holding that "partial invalidity of a warrant...does not taint the entire warrant." The court allowed the portion of the warrant which specifically described "Bambino" and the three sets of photographs.

In another 9th Circuit opinion, which followed closely on the heels of *Hale*, the court provided even more specific procedural guidelines. In *United States v. Hurt*, 795 F.2d 765 (9th Cir. 1986), amended 808 F.2d 707 (9th Cir. 1987), *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 98 L.Ed.2d 33 (1987), the defendant was charged and convicted for the use of mails for the delivery of obscene materials, 18 U.S.C. 1461.4 Like *Hale*, the defendant received child pornography from a Scandinavian country, Sweden. Postal inspectors examined the material and obtained a warrant to search Hurt's residence based on the obscene content of three films. The warrant authorized the seizure of the three particularized films plus "any other materials depicting minors engaged in sexually

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<sup>4</sup> *Hurt* is important in other areas of obscenity law also. This case continues to clarify the meaning of §1461. The court stated that the language "whoever knowingly uses the mails" was intended by Congress to include both those who order delivery of obscene material, as well as those who send it. Some earlier cases also address the meaning of §1461. In *United States v. Petrov*, 747 F.2d 824 (2nd Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985), the court held that "whoever" includes commercial photoprocessors who process obscene photographs and, knowing the material is obscene, mail the order back to the customer. See also: *United States v. Gantzer*, 633 F.Supp. 174 (W.D.N.Y. 1986), where the court found that any person who mails obscene material, whether for commercial gain or purely personal use, is criminally liable under §1461. See also: *United States v. Gantzer*, 810 F.2d 349 (2nd Cir. 1987).

explicit conduct and '[c]orrespondence, and records of any kind, reflecting the ordering, receipt, shipping, and payment for child pornography.'" 795 F.2d at 768. The defendant argued that this warrant was "very similar" to the warrant found invalid in *Hale*. In an important opinion for prosecutors, the court distinguished *Hurt* from *Hale* and upheld the warrant and seizure:

The warrant in the matter before us particularly described the material to be seized. The officers were specifically commanded to search for material "depicting minors (that is, persons under the age of 16) engaged in sexually explicit activity" as required by the Fourth Amendment. This language *sufficiently circumscribed the officers' discretion* at the time of the seizure. See *Lo-Ji Sales, Inc.*, ... The words used in the warrant to describe the material [i.e. the child pornography] sought need no expert training or experience to clarify and limit their meaning. *Any rational adult person can recognize sexually explicit conduct engaged in by children under the age of 16 when he sees it.*

808 F.2d at 708 (emphasis added).<sup>5</sup> Two more 9th Circuit decisions have upheld warrants which authorized the seizure of material in which juveniles engage in "explicit sexual conduct." In both *United States v. Smith*, 795 F.2d 841 (9th Cir. 1986), and *United States v. Wiegund*, 812 F.2d 1239 (9th Cir. 1987), the courts held warrants similar to that in *Hurt* to be valid. In *Smith*, the defendant was convicted of violating the federal child pornography statutes which forbid the production and distribution of visual depictions of minors engaged in sexually explicit conduct. In *Smith* the defendant photographed three girls under the age of 18 and sent the film to a photo company to be developed. The company contacted U.S. postal inspectors. The inspectors examined the photos, interviewed two of the girls and Smith, consulted a pediatrician, and then filed an affidavit for a warrant to search Smith's residence. The court stated that there were two procedural weaknesses in the application for the warrant. First, the magistrate did not see the photos. Second, the affidavit simply concluded that the photos depicted "explicit sexual conduct." But these did not prove "fatal to the warrant in light of the affidavit taken as a whole." 795 F.2d at 847. The court stated that the magistrate should have seen the photos; this would have been the "ideal course" since the photos were available. The court also justified the conclusory statement that the photos depicted "explicit sexual conduct" on the grounds that this term is well

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<sup>5</sup> Note this citation is different from the original *Hurt* decision. This quotation is taken from an amended opinion decided on January 20, 1987. *Hurt's* conviction was upheld and a request for an *en banc* rehearing was denied.

defined in the statute under which Smith was convicted.<sup>6</sup> “[T]he magistrate reasonably considered [that] the statement of an experienced postal inspector that the photos depicted ‘sexually explicit conduct’ [were] within the statute.” 795 E.2d at 848. In the most recent decision, *U.S. v. Wiegund*, the court strongly reaffirmed the position taken in *Hurt* in regard to the specificity requirement of the language in a search warrant. In this case the defendant, Wiegand, was convicted of the sexual exploitation of children and of conspiracy to exploit children. A confidential informant told the F.B.I. that he had seen child pornographic movies in the defendant’s home. Another informant wore a body recorder during a conversation with Wiegand. In the recorded conversation, Wiegand described one of his films as showing “a very cute 12- or 13-year-old girl” undergoing sexual intercourse. Wiegand went on to say that some girls in his films ranged in age from 5 to 10: Based on this information, the government agent deposed that “he had reason to believe that at Wiegand’s mobile home park...there were ‘films, photographs, videotapes, negatives/or slides, depicting a person under the age of 18 years of age engaged in an act of sexual conduct,’ which he specified in greater detail.” The magistrate issued a warrant relying on this deposition. The defendant, basing his argument on *United States v. Diamond*, 808 F.2d 922 (1st Cir. 1986); claimed that police officers making a search did not have a basis for distinguishing a film depicting “young-looking adults” from films depicting children. The *Wiegund* court disagreed with *Diamond* and instead followed the *Hurt* precedent of its own circuit. In *Wiegund*, the court argued that common sense suggests that one can usually distinguish a child from an adult. Statutory rape laws are based on this assumption. The court went on to argue that seizure of material depicting an adult acting the part of a child is not an unreasonable search. Even if non-obscene material were seized, the remedy would be to return that material, *not* suppress the evidence. 812 F.2d at 1243.

In *U.S. v. Villard*, 678 F.Supp. 483 (D.N.J. 1988) the court sup-

<sup>6</sup> 18 U.S.C. § 2256 (1984 Supp., 1986 redesignation) is the definition section of the child pornography statute. It provides in relevant part:

“For the purposes of this chapter, the term...

- (2) “sexually explicit conduct” means actual or simulated —
- (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (B) bestiality;
- (C) masturbation;
- (D) sadistic or masochistic abuse; or
- (E) lascivious exhibition of the genitals or pubic area of any person[.]”

<sup>7</sup> The *U.S.v. Diamond*, 808 F.2d 922 panel opinion has been vacated. A rehearing *en banc* was granted and a final decision was released. 820 F.2d 10 (1st Cir. 1987).

pressed child pornography slides which were found in a closet incident to service of an arrest warrant. Applying the doctrine of *Arizona v. Hicks*, 480 U.S. 321 (1987), the court said the detective engaged in a warrantless search absent probable cause and that no good faith exception could apply. Other recent search and seizure cases include *U.S. v. Camacho*, 674 F.Supp. 118 (S.D.N.Y. 1987).

### **"Reverse Stings"**

Given the sophisticated secretive manner in which many successful child molesters/pornographers operate, law enforcement has had to develop imaginative strategies to locate offenders and develop evidence of their crimes. One of the most successful techniques utilized is the so-called "reverse sting" operation wherein the government agency has offered, through an appropriate cover identity, to sell and ship child pornography to targeted individuals under controlled deliveries, followed immediately by a search and seizure.

There are a number of critical issues involved in such investigative techniques but none is more important than maintaining control over the pornography and conducting a proper search based on an appropriate affidavit. In federal cases the courts have held federal jurisdiction was not "manufactured" where investigators did not provoke any act that the defendants were not predisposed to undertake. *U.S. v. Esch*, 183 F.2d 531 (10th Cir. 1987). See also: *U.S. v. Flippen*, 674 F.Supp. 536 (E.D.Va. 1987) (involving anticipatory warrant issues, insufficiency of probable cause and good faith exceptions); *U.S. v. Goodwin*, 674 F.Supp. 1211 (E.D.Va. 1987) (upholding anticipatory search warrant); *U.S. v. Rubio*, 834 F.2d 442 (5th Cir. 1987) (reverse sting upheld, no search issues). *U.S. v. Tolczeki*, 614 F.Supp. 1424 (N.D. Ohio 1985); *U.S. v. Nelson*, 847 F.2d 285 (6th Cir. 1988).

### **Adult Pornography Incidental to Search**

Numerous experienced federal, state and local investigators have long recognized that many child molesters/pornographers utilize adult pornography and obscenity to use with and show to children to lower the victim's inhibitions against sexual activity and related photography and to obtain ideas to "model" in their own photography. A proper understanding of a pedophile's collection, habits, and other facts revealed by same, make important contributions in your understanding of the type of offender and can effectively rebut many defense strategies by showing absence of mistake, motive, knowledge or intent. Fed. R. Evid. 404(b).

A number of courts have recognized the usefulness of such material and have admitted it for limited purposes. *U.S. v. Esch*, 832 F.2d 531 (10th Cir. 1987). Related non-child pornography cases that may

provide some insight to you include *Hunter v. State*, 361 S.E.2d 787 (Ga. 1987), a harmful to minors prosecution wherein a child was shown sexually explicit films, reversed for lack of evidence; *Marker v State*, 748 P.2d 295, 296 (Wyo. 1988). Sodomasochistic materials found in defendant's apartment were properly admitted to establish motive and identity in prosecution of aggravated assault on defendant's three-year-old son. (The boy's penis was cut.) Among materials seized was the publication "229 Bound Boys" which contained graphic depictions of teenage boys in various painful situations, "including having their genitals placed in ropes, chains and other painful devices." In *State v. Rael*, 364 S.E.2d 125 (N.C. 1988) the defendant's conviction of first degree sexual offense with a child was affirmed when Playboy videos and *Hustler* magazines, described by the victim as having been shown to him by the defendant, were admitted to corroborate testimony. See also: *Henson v. State*, 356 S.E.2d 556 (Ga.Ct. App. 1987); *Collins v. State*, 513 So.2d 877 (Miss. 1987); *State v. Miggler*, 419 N.W.2d 81 (Minn.Ct.App. 1988)(evidencesuppressed); *People v. Daniels*, 518 N.E.2d 669 (Ill.App.Ct. 2 Dist. 1987).

Note: In a related matter the Minnesota Court of Appeals reversed a child pornography conviction when the defendant's letters written to commercial pornographers were shown to the jury after having been deemed inadmissible as "too prejudicial." *State v. Winnigham*, 406 N.W.2d. 70 (Minn.Ct.App. 1987).

### **"Buy-Bust"**

In a number of jurisdictions the courts have dealt with "buy-bust" procedures, i.e., an officer purchases a magazine, examines it, then if he believes the magazine is obscene, arrests the seller. Some courts have been reluctant to permit this procedure. In *Macon v. State*, 471 A.2d 1090 (Md.Ct.App. 1984), an officer purchased an allegedly obscene magazine, immediately arrested the seller without a warrant, and seized the money given in exchange for the magazine. The court ruled that this was a constructive seizure of the magazine in contradiction of the constitutionally mandated warrant procedure. On certiorari to the U.S. Supreme Court, this opinion was reversed. In *Maryland v. Macon*, 472 U.S. 463 (1985), the Court held that an undercover officer entering an adult bookstore was not a search and his subsequent purchase of some magazines was not a seizure. Since there were no Fourth Amendment violations, the magazines were admitted as evidence. Even when the police officer retrieved the \$50 bill he used to pay for the magazines, the Court stated that this did not effectuate a "seizure." But the Supreme Court did not specifically approve the "buy-bust" procedure, although some jurisdictions have. See: *People v. Peters*, 368 N.Y.S.2d 753 (N.Y. Co. Ct. 1975); *Wood v. State* 240 S.E.2d 743 (Ga.Ct.App. 1977), cert. denied, 439 U.S. 899 (1978); *Hall v. Common-*

*wealth*, 505 S.W.2d 166 (Ky.Ct.App. 1974); and *State v. Kelly*, 728 S.W.2d 674 (Mo.Ct.App. 1987).

A number of courts have found that these warrantless arrests generally cannot be upheld since they rely on the *ad hoc* obscenity determination of the officer. Likewise, seizures of evidence incident thereto are barred. See: *State v. Furuyama*, 637 P.2d 1095 (Hawaii 1981). In *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), *cert. denied*, 447 U.S. 931 (1980), the court held that a series of purchases and warrantless arrests, accompanied by public announcements and systematic visits to retailers, constituted an unconstitutional prior restraint.

The procedure adopted and enforced by McAuliffe and his office resembles the procedure scrutinized in *Bantam Books*. McAuliffe, with the use of a calculated scheme that included public announcements in the local newspapers, systematic visits to retailers of the magazines in question, and a program of carefully timed warrantless arrests, effected a "constructive seizure" of the complainant's publications without first allowing a neutral, detached magistrate to make an independent judicial determination of the propriety of the seizure.<sup>8</sup>

610 F.2d at 1360. To avoid unnecessary constitutional issues, the officer would be well-advised to allow a detached and neutral magistrate to review a purchased book and issue an arrest warrant against the seller — the officer may then lawfully execute the warrant, making the arrest. A simple addition to the affidavit for arrest warrant, stating "Material viewed and probable cause determination of obscenity made by \_\_\_\_\_, Judge" will provide the independent scrutiny in an *ex parte* arrest warrant practice. See sample warrant in Appendix A.

In one case, officers went to a bookstore and purchased a magazine, presented the magazine to a magistrate who determined it to be obscene, then returned to the store on the same day with an *arrest* warrant and seized another copy of that same magazine. The warrantless seizure of the second magazine was held not to violate the defendant's constitutional rights. *Kervin v. State of Georgia*, 323 S.E.2d 643 (Ga. Ct. App. 1984). Since the charge will be based on the sale, it is generally unnecessary to seize another copy of the same item, and

<sup>8</sup> *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), involved notices from a legislatively created commission, phrased as orders, to distributors notifying them of books objectionable for the sale, distribution, or display to youths under 18 years of age. The Supreme Court declared the actions unconstitutional since the "threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" constituted informal censorship by inhibiting the circulation of non-obscene publications. 372 U.S. at 67.

the second copy seizure should be avoided. Once the purchase is made, a search warrant may be desirable only for records, photos, etc. In video tape cases, a tape can be rented and viewed by the police or judge, and/or a copy made for the purpose, and a search warrant issued for its seizure or return.

## THE "GOOD FAITH" EXCEPTION

Prior to July 5, 1984, when the Supreme Court delivered its opinions in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), courts were constrained to exclude evidence seized in violation of Fourth Amendment standards. In *Leon* and *Sheppard*, the Court held that even if a search warrant was defective, the evidence should not be suppressed unless the warrant was executed in "bad faith" by the law enforcement officers. This is an important exception to the exclusionary rule and it has been successfully applied to at least one case where the material seized was presumptively protected by the First Amendment. In *Randall Book Corp. v. State*, 497 A.2d 1174 (Md.Ct.App. 1985), the defendant corporation operated a bookstore which sold "adult" books, magazines and films. Baltimore County police officers purchased a variety of "adult" magazines on four separate occasions. Believing the material was obscene, the police filed an affidavit and obtained a search warrant. The affidavit described in detail the magazines and included copies of the magazine covers. The warrant authorized the seizure and removal of "all books, magazines, photographs, films and posters that are displayed for advertising purposes which depict sadomasochistic abuse, sexual conduct, and sexual excitement." The court stated that, although this warrant may have been worded too generally, the defect was rendered inconsequential based on the *Leon* decision:

It is immaterial whether the search warrant in this case was fatally defective either as authorizing the seizure of First Amendment protected material or permitting the police officers to determine what material is obscene...We therefore hold in accordance with the *Leon* standards, that the objective good faith of the officers in executing the warrant would render any defect in the warrant irrelevant.

497 A.2d at 1180. Be careful to note, however, that evidence seized under a general warrant may still be suppressed. In *United States v. Nader*, 621 F.Supp. 1076 (D.C.D.C. 1985), the warrant was so general that the executing officers could not presume it to be valid. Since the court determined that the warrant was a blatantly general warrant,

there was no basis not to apply the exclusionary rule.

## SEIZURE OF MOVIE PROJECTORS

A prosecuting attorney should also be aware of the value of seizing movie projectors. See: *N & N, Inc. v. Veline*, 315 S.E.2d 908 (Ga. 1984). In cases involving peep-show movies, projectors and video players may be admissible as evidence of the act of distribution, intent to distribute, scienter, and pandering.<sup>9</sup> See: *United States v. Klaw*, 227 F.Supp. 12 (S.D.N.Y. 1964), *rev'd on other grounds*, 350 F.2d 155 (2nd Cir. 1965); *State v. Burgun*, 384 N.E.2d 255, 257 (Ohio 1978). Since projectors are a means of exercising First Amendment rights of free speech, the prosecutor should again use caution where mass seizures are concerned or where the projectors are 16 or 35mm and not specially adapted for porn films. See: *Universal Amusement Co., Inc. v. Vance*, 559 F.2d 1286, 1293 (5th Cir. 1977), *aff'd*, 587 F.2d 176 (5th Cir. 1979) (en banc), *cert. denied*, 442 U.S. 929 (1979); *Europa Books, Inc. v. Pomerleau*, 395 A.2d 1195 (Md. Ct. Spec. App. 1979); *Porno, Inc. v. Municipal Court*, 33 Cal.App.3d 122, 108 Cal. Rptr. 797 (1973). Business and shipping records, and other exhibits related to the materials may also be seized. *Torch v. United States*, 609 F.2d 1088 (4th Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

## SUMMARY

1. There must be an adversary hearing prior to seizure, where the seizure is of a large quantity of materials *and* for the purpose of destruction, and not for use as evidence in a criminal trial. *Marcus; A Quantity of Books*. If the seizure is not for the purpose of ultimate destruction, then *no* prior adversary hearing is necessary, even if the seizure is massive, as long as it is for a "bona fide" evidentiary purpose. *Heller v. New York; United States v. Cangiano*, 491 F.2d 906, 912-13 (2nd Cir. 1974). See also: *Hicks v. Miranda*, 422 U.S. 332, 334-35 n.1 (1975). Following massive evidence seizures, as in *Sequoia*, it is probably wise to provide or agree to a post-seizure adversary hearing.

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<sup>9</sup>The projectors may also be the only means available by which the films can be exhibited to a jury, since many of the films are constructed to only operate on "peepshow" projectors. Projectors or video peep show machines that are designed or specially adapted for showing porn films may also qualify as "criminal tools or instruments" and be the subject of felony charges under those separate statutes.

2. If the materials are to be seized, not for destruction but for use as evidence and pursuant to a warrant, the procedure is permissible if

a. The warrant is issued after a determination of probable cause by a neutral magistrate; and

b. Following the seizure, a prompt judicial determination of the obscenity issue in the trial or an adversary proceeding is available at the request of any interested party;<sup>10</sup> and

c. On a showing that other copies of a film are not available to an exhibitor, he must be permitted to make a copy of the seized film so that showing can be continued pending judicial resolution of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned. *Heller v. New York*.

3. Allegedly obscene material may *not* be seized incident to arrest. "Exigent circumstances" would be an exception to this rule, i.e., "now or never." *Roaden v. Kentucky*.

4. Requirements for specificity in an affidavit and search warrant are greater when materials seized are "presumptively protected by the First Amendment (books and movies). But, if such materials are not on the "threshold of dissemination," they may not be entitled to this higher standard. *Mishkin v. New York*. The standard of probable cause is the same in obscenity cases as in other criminal cases. *P.J. Video*.

5. The affidavit must not state mere conclusory assertions; it must state the factual basis for the conclusions, a detailed summary of the contents. The affidavit must enable the magistrate to focus searchingly on the question of obscenity. *Lee Art Theatre, Inc. v. Virginia*.

6. The "plain view" doctrine will not support a warrantless seizure of allegedly obscene materials. *Lo-Ji Sales, Inc. v. New York*. "Sexual devices" are an exception to this rule — they have no First Amendment protection.<sup>11</sup> *Smell v. State of Georgia*. The seizure of

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<sup>10</sup> The Supreme Court has never held that a "speedy" trial will not qualify as a "prompt judicial determination," and most prosecuting attorneys take this legal position. Therefore, unless a statute or case so requires, the jury trial is sufficient and no separate post-seizure adversary hearing before trial is mandated.

<sup>11</sup> The Supreme Court has recognized this exception, but a prosecuting attorney should analyze his state or federal law and its interpretation by the courts to determine whether this exception will be followed in his jurisdiction. Devices are *per se* illegal by statute in Georgia and Texas, but could be found "obscene" under other states' laws.

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patently obvious child pornography may be another exception. *United States v. Hurt* authorizes the seizure of child pornography if the warrant simply specifies any juveniles depicted in “explicit sexual conduct.”

7. The search warrant must specifically describe the material to be seized; no general or open-ended warrants are permissible. It *may* be sufficient if the warrant authorizes the seizure of magazines containing explicit depictions of specified sexual acts. *Sequoia Books, Inc. v. McDonald*. However, the warrant may not authorize officers to seize all materials which are “obscene” or “similar” to those the magistrate had determined were probably obscene. *U.S. v. Guarino; Lo-Ji Sales, Inc. v. New York*.

8. Even if a warrant is defective, but is executed in “good faith,” the exclusionary rule may not apply. *U.S. v. Leon and Massachusetts o. Sheppard* and, as applied to an obscenity case, *Randall Book Corporation v. State*. Warrants “obviously general” will always be held to be invalid by the Fourth Amendment. *U.S. v. Nader*.

9. It is permissible for a magistrate to view the materials in his office, theatre, or bookstore, and to sign the warrant at that location before the items are seized. *Heller; Lo-Ji*. The magistrate may not participate in the execution of the warrant; he may not be a member of the search party as an adjunct law enforcement officer. The magistrate must be “neutral and detached.” *Heller; Lo-Ji*.

10. Police should avoid the “buy-bust” procedure (purchase and arrest without a warrant). Although there is some supporting authority, this may be a “constructive seizure” based on an officer’s *ad hoc* obscenity determination. *Furuyama; Roaden*. This is especially to be avoided if accompanied by public announcements and systematic visits and arrests. *Penthouse International, Ltd*. Recommended procedure: purchase magazine, obtain warrant from magistrate, and then arrest.