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ABRIDGED TOO FAR: ANTICIPATORY SEARCH WARRANTS AND THE FOURTH AMENDMENT

"An American has no sense of privacy He does not know what it means. There is no such thing in the country "

George Bernard Shaw¹

"A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals."

Justice William O. Douglas²

During the past decade, few issues in American society generated more public debate or raised more concerns than child abuse, drug use, and pornography. Horrifying instances of child abuse made national headlines.³ The Attorney General of the United States headed a commission that spent many months cataloguing the evils of pornography.⁴ The President of the United

1. J. BARTLETT, FAMILIAR QUOTATIONS 681 (15th ed. 1980) (from a speech in New York on Apr. 11, 1933).

2. *Draper v. United States*, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting), *overruled*, *United States v. Chadwick*, 433 U.S. 1 (1977).

3. In New York, Joel Steinberg, a disbarred lawyer, was convicted of first-degree manslaughter in the death of his illegally adopted six-year-old daughter, Lisa. Wash. Post, Feb. 2, 1989, at A24, col. 1. "The child had been severely beaten over a long period of time and was killed by a massive blow to her head. Mr. Steinberg and his companion waited 12 hours before calling for help. By the time an ambulance arrived, Lisa was no longer breathing." *Id.*

In Wisconsin, four-year-old Joshua DeShaney fell into a life-threatening coma after a severe beating by his father in March 1984. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 193 (1989). Emergency brain surgery disclosed bleeding caused by traumatic head injuries inflicted over a period of time; the child suffered brain damage so extensive that he probably will spend the remainder of his life in an institution for the profoundly retarded. *Id.* The Supreme Court refused to hold the State of Wisconsin liable for Joshua's injuries, even though state social workers "stood by and did nothing when suspicious circumstances dictated a more active role." *Id.* at 203. Wisconsin tried and convicted Joshua's father of child abuse. *Id.* at 193.

In California, the trial of former McMartin Preschool teachers Raymond Buckey and his mother, Peggy McMartin Buckey, ended with 52 not-guilty verdicts. Wash. Post, Jan. 19, 1990, at A1. The jury deadlocked on 13 other charges; Superior Court Judge William Pounders declared a mistrial on 12 sexual abuse counts against Raymond Buckey and dismissed a conspiracy charge against Peggy McMartin Buckey. *Id.* at col. 1 - col. 2. The trial took nearly three years to prosecute and cost almost \$15,000,000, *id.* at A6, col. 3; the case "poisoned everyone who had contact with it." *Id.* at A1, col. 1.

4. L.A. Times, July 10, 1986, at 1, col. 5 (citing 1986 ATT'Y GEN. COMM'N ON PORNOGRAPHY REP. (the "Meese Commission Report")).

States continued to lead the "war on drugs" in the face of widespread use and soaring murder rates.⁵

In response to these concerns, law enforcement officials have increased their efforts to combat crime.⁶ The Supreme Court has facilitated these efforts by relaxing certain fourth amendment protections.⁷ As a result, American jails are literally overflowing with criminals who are being apprehended in greater numbers and sentenced to stiffer terms.⁸

The Court, however, has not addressed the anticipatory search warrant. An anticipatory, or prospective, search warrant is based not upon the probability that evidence of a crime is presently located at the place to be searched, but upon the probability that someone will likely deliver to or deposit such evidence on those

5. President Nixon launched the federal war on drugs in 1969, "combin[ing] a crackdown on drug traffickers with an expansion of facilities for treating addicts, and also closer international cooperation against smugglers." *Return of the Hard-Drug Menace*, U.S. NEWS & WORLD REP., June 30, 1975, at 29. By 1975, although the federal government spent \$3 billion on drug enforcement, treatment, and prevention programs, the federal effort to stamp out drugs and drug traffic was described as "a failure in almost every respect." *Id.* Yet, the federal effort continues. President Bush's 1991 proposed budget allocated \$10.6 billion to combat drugs. Wash. Post, Jan. 30, 1990, at A8, col. 1. The program targeted \$7.6 billion for law enforcement, \$1.7 billion for drug treatment, and \$1.4 billion for drug prevention and education. *Id.*

6. From 1978 to 1987, annual drug arrests increased 54 percent. In 1986 alone [drug arrests] went up 12.6 percent; the police agencies that cover about 188 million Americans charged 777,285 suspects with drug violations. Drug convictions now account for at least one-third of the massive increase in state prison populations.

Nat'l L.J., Aug. 7, 1989, at S17, col. 2.

7. Notable examples of relaxed fourth amendment standards include: *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (extending the "special needs" exception to the warrant and probable cause requirements to include suspicionless drug testing of employees); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618-33 (1989) (same); *United States v. Leon*, 468 U.S. 897, 922-25 (1984) (adopting "good faith" exception to the exclusionary rule); *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (adopting a "totality-of-the-circumstances" approach to probable cause). See also *Florida v. Riley*, 488 U.S. 445, 450 (1989) (finding no fourth amendment search when police observed drugs through open roof of greenhouse while flying over it in helicopter); *California v. Greenwood*, 486 U.S. 35, 39-43 (1988) (finding no fourth amendment expectation of privacy in bags of garbage left on street for trash collector).

8. Federal and state prison populations have almost doubled over the last decade and currently stand at 673,565. See Joel, *Time to Deal with America's Prison Crisis*, HERITAGE FOUND. REP., Nov. 15, 1989 (quoting Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison Population Jumps 7.3 Percent in Six Months*, Press Release, Sept. 10, 1989). The overcrowding may worsen in the future: "The U.S. Sentencing Commission estimates that the federal prison population will rise from 42,000 in 1987 to 92,000 in 1997." *Id.* at n.7 (quoting Bureau of Justice Statistics, U.S. Dep't of Justice, *Our Crowded Jails: A National Plight*, June 1988). The Rand Corporation estimates that large state prison populations alone will increase 25 to 98% in the next eight years. *Id.* (quoting Clear, *Research in Corrections*, NAT'L INST. OF CORRECTIONS AND ROBERT J. KUTAK FOUND., Mar. 1988).

premises at some future time.⁹ Police use anticipatory search warrants when they have information indicating an imminent drug delivery at a specific location¹⁰ or when they discover drugs or child pornography in a package traveling through the United States mail.¹¹ The vast majority of state and federal courts that have addressed the constitutionality of anticipatory search warrants have found them constitutional.¹² A few courts, however, have found anticipatory search warrants unconstitutional,¹³ and others have stated concerns about the potential for abuse of these warrants.¹⁴

This Note reconsiders the policies and procedures surrounding anticipatory search warrants in light of the general trend of fourth amendment jurisprudence. First, after a brief overview of fourth amendment protections, the Note examines the philosophical underpinnings of the fourth amendment and the general retreat from those early principles in recent Supreme Court decisions. Second, it reviews the factual situations that create the need for anticipatory search warrants by examining three cases, particularly emphasizing the rationale in support of or in

9. See 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 94 (2d ed. 1987) (information as to prospective events).

10. See *United States v. Garcia*, 882 F.2d 699 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989); *State v. Gutman*, 670 P.2d 1166 (Alaska Ct. App. 1983); *State v. Wright*, 115 Idaho 1043, 772 P.2d 250 (Idaho Ct. App. 1989); *Commonwealth v. Riviera*, 387 Pa. Super. 196, 563 A.2d 1252 (1989).

11. See *United States v. Dornhofer*, 859 F.2d 1195 (4th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989); *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988); *United States v. Hale*, 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986); *United States v. Lowe*, 575 F.2d 1193 (6th Cir.), *cert. denied*, 439 U.S. 869 (1978); *United States v. Outland*, 476 F.2d 581 (6th Cir. 1973); *United States ex rel. Beal v. Skaff*, 418 F.2d 430 (7th Cir. 1969); *United States v. Zygarowski*, 724 F. Supp. 1052 (D. Mass. 1989); *United States v. Flippen*, 674 F. Supp. 536 (E.D. Va. 1987), *aff'd mem.*, 861 F.2d 266 (4th Cir. 1988); *United States v. Feldman*, 366 F. Supp. 356 (D. Haw. 1973).

12. See *Garcia*, 882 F.2d 699; *Dornhofer*, 859 F.2d 1195; *Goodwin*, 854 F.2d 33; *Hale*, 784 F.2d 1465; *Lowe*, 575 F.2d 1193; *Outland*, 476 F.2d 581; *Skaff*, 418 F.2d 430; *Zygarowski*, 724 F. Supp. 1052; *Feldman*, 366 F. Supp. 356; *Johnson v. State*, 617 P.2d 1117 (Alaska 1980); *Gutman*, 670 P.2d 1166; *State v. Cox*, 110 Ariz. 603, 522 P.2d 29 (1974); *Mehrens v. State*, 138 Ariz. 458, 675 P.2d 718 (Ariz. Ct. App. 1983), *cert. denied*, 469 U.S. 870 (1984); *Bernie v. State*, 524 So. 2d 988 (Fla. 1988); *Wright*, 115 Idaho 1043, 772 P.2d 250; *Commonwealth v. Soares*, 384 Mass. 149, 424 N.E.2d 221 (1981); *State v. Mier*, 147 N.J. Super. 17, 370 A.2d 515 (1977); *People v. Glen*, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656 (1972); *Reviera*, 387 Pa. Super. 196, 563 A.2d 1252; *State v. Coker*, 746 S.W.2d 167 (Tenn. 1987), *cert. denied*, 488 U.S. 871 (1988); *State v. Slowe*, 728 P.2d 110 (Utah 1985).

13. See *United States ex rel. Campbell v. Rundle*, 327 F.2d 153 (3d Cir. 1964); *Flippen*, 674 F. Supp. 536; *United States v. Roberts*, 333 F. Supp. 786 (E.D. Tenn. 1971); *State v. Guthrie*, 90 Me. 448, 38 A. 368 (1897).

14. See *Garcia*, 882 F.2d 699; *Wright*, 115 Idaho 1043, 772 P.2d 250; *infra* notes 114-51, 170-202 and accompanying text.

opposition to such warrants. Third, the Note focuses on the constitutionality and the propriety of anticipatory search warrants.

Finally, this Note proposes a solution to the problem, acknowledging the limited utility of anticipatory search warrants while offering specific guidance for avoiding the inherent dangers that accompany such warrants. A recent federal district court decision addressing an anticipatory search warrant tests the utility of this resolution and highlights its potential impact on future cases.¹⁵ The Note concludes that, in an era in which hysteria and moral indignation about drug use, child abuse, and pornography provide the impetus for judicial decisions that threaten to break down the most sacred barriers between the state and the individual, the Court should return to the bedrock values underlying the fourth amendment. Rather than blindly facilitating police efforts to combat crime, the Court should reaffirm the basic right to privacy in one's own home by strictly limiting the scope and use of anticipatory search warrants.¹⁶

THE FOURTH AMENDMENT: CELEBRATED ASCENT, INDELICATE DECLINE

The fourth amendment¹⁷ protects individual privacy and possessory rights¹⁸ by prohibiting unreasonable searches and seizures.¹⁹ A search is subject to the amendment's warrant requirements when police inspection intrudes upon a legitimate expectation of privacy.²⁰ A neutral and detached magistrate must issue a warrant,²¹ whether to arrest or to search, and he may

15. *United States v. Moore*, 742 F. Supp. 727 (N.D.N.Y. 1990); see *infra* notes 271-323 and accompanying text.

16. Although anticipatory search warrants are not per se unconstitutional, they present a great potential for abuse if not carefully monitored by the judiciary. The Supreme Court should provide police, magistrates, and judges with clear guidance on how to craft such a warrant within the bounds of the fourth amendment.

17. The fourth amendment to the Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV

18. See *Segura v. United States*, 468 U.S. 796, 806 (1984).

19. See U.S. CONST. amend. IV; cases cited *supra* note 13.

20. See *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

21. See *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("[I]nferences [must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

not issue it without probable cause and a particular description of the place to be searched and the things to be seized.²² Courts usually exclude evidence that law enforcement officials obtained pursuant to a search warrant that was not based on probable cause or was otherwise defective.²³

Origin of the Fourth Amendment

The fourth amendment to the Constitution arose out of the furor over the writs of assistance that customs officers used to detect smuggled goods in the American colonies.²⁴ These writs of assistance were general search warrants²⁵ that authorized a civil officer and his deputies to "search any house, shop, [or] warehouse, . . . break open doors, chests, [or] packages, in case of resistance; and remove any prohibited . . . goods or merchandise."²⁶ This grant of nearly absolute and unlimited discretion enabled officials to search, at their will, wherever they suspected

22. See U.S. CONST. amend. IV

23. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383, 393-94 (1914), *overruled*, *Elkins v. United States*, 364 U.S. 206 (1960). In *Mapp*, the Court held that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

Mapp, 367 U.S. at 655.

The good faith exception that the Court adopted in *United States v. Leon*, 468 U.S. 897 (1984), severely curtailed the exclusionary rule. In *Leon*, the Court concluded:

[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. [The exclusionary rule] cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity. We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.

Id. at 918-22; see *infra* notes 95-111 and accompanying text.

24. N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51 (1970).

25. Writs of assistance became effective in England after an act of Charles II in 1662. *Id.* at 53. An act of William III in 1696 made the writs applicable to the American colonies. *Id.*

26. *Id.*

smuggled or prohibited goods "and to break open any receptacle or package falling under their suspecting eye[s]." ²⁷

Early leaders of the American independence movement recognized the evil of these writs of assistance.²⁸ James Otis, Jr., a Boston lawyer, called the writs "the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book."²⁹ John Adams was a spectator at the court hearing at which Otis "completely electrified the large audience in the court room with his denunciation of England's whole policy toward the Colonies and with his argument against general warrants."³⁰ Adams assessed the impact of Otis' speech in glowing terms: "I do say in the most solemn manner, that Mr Otis's [sic] oration against the Writs of Assistance breathed into this nation the breath of life."³¹ In Adams' eyes,

[Otis] was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.³²

The first American precedent for the fourth amendment was clause X of the Virginia Bill of Rights of 1776, which the Williamsburg Convention adopted on June 12, 1776.³³ The clause provided

[t]hat general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.³⁴

Inclusion in the Virginia Bill of Rights assured that a search and seizure provision would appear in every state declaration or bill of rights.³⁵ The Massachusetts Declaration of Rights of 1780,

27. *Id.* at 54.

28. *Id.* at 58-60.

29. *Id.* at 59.

30. *Id.* at 58.

31. *Id.* at 59 (quoting 10 C. ADAMS, *THE LIFE AND WORKS OF JOHN ADAMS* 276 (1856)).

32. *Id.* (quoting 10 C. ADAMS, *supra* note 31, at 247-48).

33. *Id.* at 79.

34. *Id.* at 79 n.3 (quoting 2 B. POORE, *FEDERAL AND STATE CONSTITUTIONS* 1909 (1877)).

35. *Id.* at 80.

using "more elaborate wording" than Virginia, was the first state declaration to use the expression "unreasonable searches and seizures."³⁶

The drive to include a bill of rights in the Constitution led to the eventual adoption of the current fourth amendment.³⁷ Inspired by forceful leadership from Virginia's Patrick Henry, anti-Federalists maintained that a strong central government could not be trusted to protect individual liberty without adopting certain expressly reserved rights into the Constitution.³⁸ Henry applauded the Virginia Constitution for having, "with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred!"³⁹ In particular, Henry warned that federal sheriffs acting under authority of general warrants would pose a great danger:

When these harpies are aided by excisemen, who may search, at any time, your houses and most secret recesses, will the people bear it? If you think so, you differ from me. The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds.⁴⁰

Henry also decried the lack of concern for individual rights:

I feel myself distressed, because the necessity of securing our *personal rights* seems not to have pervaded the minds of men;

36. *Id.* at 82. Article 14 read:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued, but in cases, and with the formalities prescribed by the laws.

Id. (quoting 1 B. POORE, *supra* note 34, at 959).

37. *Id.* at 83.

38. *Id.* at 92-93.

39. *Id.* at 93 (quoting 3 DEBATES ON THE FEDERAL CONSTITUTION 445-49 (J. Elliot ed. 1836) [hereinafter DEBATES]).

40. *Id.* at 92-93 (quoting 3 DEBATES, *supra* note 39, at 58, 445-49).

for many valuable things are omitted [from the proposed Constitution]:—for instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken in the most arbitrary manner without any evidence or reason. Everything the most secret may be searched and ransacked by the strong arm of power.⁴¹

Henry's sentiment prevailed; both houses of Congress formally enacted the fourth amendment, which the states subsequently ratified.⁴²

Development of Fourth Amendment Law in the Supreme Court

Reasonableness

*Boyd v. United States*⁴³ was one of the earliest cases concerning an unreasonable search and seizure. In *Boyd*, the defendant allegedly defrauded customs officials of import duties on a glass shipment.⁴⁴ Taking advantage of customs revenue law, the district attorney secured an order requiring the defendant to produce an invoice on a previous shipment of glass.⁴⁵ The Supreme Court held that the compulsory production of a man's private papers in order to establish a criminal charge against him or to require forfeiture of his property was an unreasonable search and seizure under the fourth amendment.⁴⁶ The Court declared:

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person

41. *Id.* at 94 (quoting 3 DEBATES, *supra* note 39, at 588).

42. *Id.* at 102-03.

43. 116 U.S. 616 (1886).

44. *Id.* at 617-18.

45. *Id.* at 618.

46. *Id.* at 634-35.

and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.⁴⁷

This individual rights sentiment continued to pervade the Court's opinions after the turn of the century.⁴⁸ Yet, as Justice Butler acknowledged in *Go-Bart Importing Co. v. United States*,⁴⁹ "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."⁵⁰

In the late 1960's, the Warren Court established the cardinal constitutional rule on reasonableness in *Katz v. United States*.⁵¹ Warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."⁵² Over the years, the Court outlined several exceptions as they became necessary: exigent circumstances,⁵³ searches incident to a valid arrest,⁵⁴ consent searches,⁵⁵ inventory searches,⁵⁶ searches of vehicles,⁵⁷ searches of vessels on the high seas,⁵⁸ border searches,⁵⁹ and searches in which "special needs, beyond the normal need for law enforcement,

47. *Id.* at 635.

48. *Ker v. California*, 374 U.S. 23 (1963), provided a good example of how the *Boyd* philosophy carried through to the Court's opinions in later years. In *Ker*, the Court stated:

Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be "as of the very essence of constitutional liberty" the guaranty of which "is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen. "

Id. at 32-33 (quoting *Gould v. United States*, 255 U.S. 298, 304 (1921)). The Court continued in the same vein: "While the language of the Amendment is 'general,' it 'forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made' " *Id.* (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)).

49. 282 U.S. 344.

50. *Id.* at 357.

51. 389 U.S. 347 (1967).

52. *Id.* at 357 (footnote omitted).

53. See *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

54. See *Michigan v. DeFillippo*, 443 U.S. 31, 40 (1979).

55. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 222-23 (1973).

56. See *South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976).

57. See *United States v. Chadwick*, 433 U.S. 1, 12 (1977).

58. See *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983).

59. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985).

make the warrant and probable-cause requirements impracticable."⁶⁰ For each exception, after balancing the need for effective law enforcement against the individual's privacy right,⁶¹ the Court determined that a warrant, probable cause, or both may be absent in making a search. Each new exception represented an incremental reduction in fourth amendment protection.

Several of the exceptions arose from drug interdiction and enforcement.⁶² The Court's recent extension of the "special needs" exception to employee drug testing is particularly disturbing. In *Skinner v. Railway Labor Executives' Association*⁶³ and *National Treasury Employees Union v. Von Raab*,⁶⁴ the Court held that random, suspicionless drug tests (breath, blood, and urine) do not constitute unreasonable searches and seizures.⁶⁵ Dispensing with both the warrant and probable cause requirements, the Court in *Skinner* held that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of [any] such suspicion."⁶⁶

This extension of the special needs exception is especially troubling in *Von Raab*, in which statistics failed to reveal a widespread problem,⁶⁷ thus proving that the justification for testing was almost entirely speculative.⁶⁸ As Justice Scalia noted, the Court's holding was merely a symbolic response to the drug

60. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

61. See *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

62. See, e.g., *Montoya de Hernandez*, 473 U.S. at 532-36 (customs officers at Los Angeles airport detained suspect because she fit the profile of an "alimentary canal smuggler" frequent trips to Miami or Los Angeles, inability to speak English, lack of friends or family in the United States, and arrival from Bogota, Colombia, a "source city" for narcotics; after over 24 hours of detention, suspect began to defecate balloons filled with cocaine, eventually passing nearly 90 such balloons); *Villamonte-Marquez*, 462 U.S. at 582-84 (customs officers boarded a sailboat in Louisiana ship channel ostensibly to check the vessel's documentation and discovered 5,800 pounds of marijuana; according to the defendant, they were acting on an informant's tip); *United States v. Chadwick*, 433 U.S. 1, 3-5 (1977) (suspect matched profile used to spot drug traffickers; police conducted warrantless search of footlocker and discovered large amount of marijuana).

63. 489 U.S. 602 (1989).

64. 489 U.S. 656 (1989).

65. See *Von Raab*, 489 U.S. at 678-79; *Skinner*, 489 U.S. at 633-34.

66. *Skinner*, 489 U.S. at 624.

67. *Von Raab*, 489 U.S. at 683-84 (Scalia, J., dissenting).

68. *Id.* at 681-84 (Scalia, J., dissenting).

scourge with no regard for privacy rights.⁶⁹ The Court's treatment of the warrant and probable cause requirements was hardly sacred, appearing more like one of the "stealthy encroachments" warned of in *Boyd*.⁷⁰

Probable Cause

Over the years, the Supreme Court evolved the concept of probable cause. In 1813, Chief Justice Marshall stated only that probable cause "means less than evidence which would justify condemnation."⁷¹ In 1925, in *Carroll v. United States*,⁷² the Court adopted an equally concise definition, stating that "the substance of all the definitions" of probable cause "is a reasonable ground for belief in guilt."⁷³ In 1949, the Court elaborated on these earlier attempts to pin down the notion of probable cause in *Brinegar v. United States*.⁷⁴

In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Since Marshall's time, [probable cause] has come to mean more than bare suspicion: [it] exists where "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.⁷⁵

69. *Id.* at 686-87 (Scalia, J., dissenting). Scalia delivered a scathing attack on the *Von Raab* majority. The following passage captures the essence of his dissent:

Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in [*Von Raab*] because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

Id. at 680-81 (Scalia, J., dissenting).

70. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

71. *See Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813).

72. 267 U.S. 132 (1925).

73. *Id.* at 161 (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881)).

74. 338 U.S. 160 (1949).

75. *Id.* at 175-76 (footnote omitted) (quoting *Carroll*, 267 U.S. at 162).

Two cases in the 1960's, *Aguilar v. Texas*⁷⁶ and *Spinelli v. United States*,⁷⁷ defined more sharply the nature of a proper probable cause inquiry. The *Aguilar-Spinelli* framework was a two-part test meant to guide a magistrate in judging the reliability of an informant's hearsay affidavit.⁷⁸ This test had a veracity prong, covering the credibility of the informant and the reliability of his information, and a basis of knowledge prong, requiring that "underlying circumstances" be set forth to verify the informant's conclusion.⁷⁹

The *Aguilar-Spinelli* rules stood for fourteen years, until the Court expressly abandoned them in *Illinois v. Gates*.⁸⁰ In *Gates*, the majority of the Court, led by Justice Rehnquist, reversed an Illinois Supreme Court decision that suppressed certain evidence on the basis of the *Aguilar-Spinelli* two-pronged test.⁸¹ Rehnquist noted that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."⁸² Instead, a "totality-of-the-circumstances approach is far more consistent with [the Court's] prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip."⁸³

Rehnquist's rationale was, in part, that affidavits should not be subject to technical requirements because nonlawyers normally draft affidavits "in the midst and haste of a criminal investigation."⁸⁴ Moreover, many persons who issue search and arrest warrants are neither lawyers nor judges; these laymen also should be free from technical requirements.⁸⁵ Finally, Rehnquist worried that police would resort to warrantless searches and, rather than face the scrutiny of the *Aguilar-Spinelli* test, attempt to establish consent or some other exception to the warrant clause that might develop at the time of the search.⁸⁶ Inevitably, "[t]he strictures that accompany the 'two-pronged

76. 378 U.S. 108 (1964).

77. 393 U.S. 410 (1969).

78. *Id.* at 412-18.

79. *Id.* at 413.

80. 462 U.S. 213 (1983).

81. *Id.* at 227-30.

82. *Id.* at 232.

83. *Id.* at 230-31 (footnote omitted).

84. *Id.* at 235 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).

85. *Id.*

86. *Id.* at 236.

test' cannot avoid seriously impeding the task of law enforcement."⁸⁷

Justice Brennan, in his dissent, adopted a decidedly different view than did Rehnquist. Brennan's arguments, defending the *Aguilar-Spinelli* standards, are the better views, largely because they more closely reflect Patrick Henry's and James Otis' opposition to the writs of assistance.⁸⁸ They are certainly truer to the philosophy of *Boyd*.⁸⁹

Brennan conceded that the *Aguilar-Spinelli* framework "require[d] the police to provide magistrates with certain crucial information."⁹⁰ This structured inquiry, however,

preserve[d] the role of magistrates as independent arbiters of probable cause, insure[d] greater accuracy in probable-cause determinations, and advance[d] the substantive value of precluding findings of probable cause, and attendant intrusions, based on anything less than information from an honest or credible person who has acquired his information in a reliable way.⁹¹

Brennan acknowledged that "[e]veryone shares the Court's concern over the horrors of drug trafficking," but adhered to the thought that "under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil."⁹² As Brennan wisely pointed out,

We must be ever mindful of Justice Stewart's admonition in *Coolidge v. New Hampshire*: "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, [the fourth amendment] and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts."⁹³

Gates exemplified the Court's continual backsliding in the area of fourth amendment protections. Concern for effective law enforcement against drug use and trafficking, the latest crisis of

87. *Id.* at 237.

88. *See supra* notes 24-42 and accompanying text.

89. *See supra* notes 43-47 and accompanying text.

90. *Gates*, 462 U.S. at 287 (Brennan, J., dissenting).

91. *Id.*

92. *Id.* at 290 (Brennan, J., dissenting).

93. *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (citation omitted)).

epic proportions, was the impetus for a degradation of every individual's legitimate expectation of privacy. Here again, the specter of *Boyd's* "stealthy encroachments"⁹⁴ cast a shadow over individual rights.

The Exclusionary Rule

Like reasonableness and probable cause, the exclusionary rule has developed over the course of many years. Initially, in *Weeks v. United States*,⁹⁵ the Supreme Court excluded evidence in federal cases only if an illegal search and seizure produced such evidence.⁹⁶ In *Wolf v. Colorado*,⁹⁷ the Court had the opportunity to extend the exclusionary rule to the states and seemed ready to do so:

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is implicit in the "concept of ordered liberty." The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, [can] be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.⁹⁸

Despite this rather forceful commentary on the importance of fourth amendment protections, the Court refused to sanction any extension of the exclusionary rule in *Wolf*.⁹⁹

94. See *supra* notes 43-47 and accompanying text.

95. 232 U.S. 383 (1914).

96. *Id.* at 398. In *Weeks*, the Court stated in no uncertain terms:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Id. at 393-94.

97. 338 U.S. 25 (1949).

98. *Id.* at 27-28.

99. *Id.* at 33. The Court in *Wolf* noted that the *Weeks* doctrine of excluding illegally

Not until 1961 in *Mapp v. Ohio*¹⁰⁰ did the Court extend the exclusionary rule to the states.¹⁰¹ As Justice Clark noted in his majority opinion, the fourth amendment, in conjunction with the fifth amendment, perpetuates "‘principles of humanity and civil liberty.’"¹⁰² These two amendments express "‘supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy’"¹⁰³ Without the exclusionary rule, "[t]he ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."¹⁰⁴

The exclusionary rule stood undisturbed for twenty-three years, applicable to both state and federal governments. In 1984, however, the Court adopted a good faith exception to the exclusionary rule in *United States v. Leon*.¹⁰⁵ Justice White’s rationale in adopting this good faith exception was that the exclusionary rule served no deterrent function when police, acting with objective good faith, obtained a search warrant from a magistrate and acted within the warrant’s scope.¹⁰⁶ Furthermore, according to White, strict application of the exclusionary rule carried too many costs: the exclusion of evidence impeded the truthfinding function of judge and jury, resulting in the acquittal of guilty defendants or the imposition of reduced sentences,¹⁰⁷ which in turn led to "‘disrespect for the law and the administration of justice.’"¹⁰⁸

Once again, Justice Brennan’s dissent was truer to the values underlying the fourth amendment:

It is difficult to give any meaning at all to the limitations imposed by the [Fourth] Amendment if they are read to proscribe only certain conduct by the police but to allow other

obtained evidence in federal prosecutions was neither "derived from the explicit requirements of the Fourth Amendment" nor "based on legislation expressing Congressional policy in the enforcement of the Constitution." *Id.* at 28. Moreover, 31 states rejected this doctrine subsequent to the decision in *Weeks*. *Id.* at 29. Finally, the Court pointed out more appropriate and effective remedies than the exclusion of illegally obtained evidence: actions for damages by aggrieved private citizens, internal discipline among police, and public opinion. *Id.* at 31.

100. 367 U.S. 643 (1961).

101. *Id.* at 655.

102. *Id.* at 657 (quoting *Bram v. United States*, 168 U.S. 532, 544 (1897)).

103. *Id.* (quoting *Feldman v. United States*, 322 U.S. 487, 489-90 (1944)).

104. *Id.* at 660.

105. 468 U.S. 897, 922-24 (1984).

106. *Id.* at 919-20.

107. *Id.* at 907.

108. *Id.* at 908 (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

agents of the same government to take advantage of evidence secured by the police in violation of its requirements. The [Fourth] Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained.¹⁰⁹

Brennan's dissenting opinion reflected the concerns for judicial integrity and the right to privacy that Clark expressed so eloquently in *Mapp*: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."¹¹⁰ Clark continued, quoting Justice Brandeis: "'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'"¹¹¹

The development of fourth amendment law, from the 1700's to the present, began with a religious fervor for the protection of individual rights and privacy and ended with a decade-long retreat from those early principles. Numerous exceptions, purportedly narrowly drawn, have nearly extinguished the notion that warrantless searches are per se unreasonable. The amorphous, relaxed standard now used to determine probable cause offers magistrates little guidance as to what information is crucial to such a finding. Finally, the good faith exception has extracted the teeth of the exclusionary rule. In each case, the Supreme Court has turned its back on fundamental concepts that the Framers of the Constitution deemed sacred. Against such a backdrop, this Note examines the constitutionality and propriety of anticipatory search warrants.

ANTICIPATORY SEARCH WARRANTS: FACTS AND CIRCUMSTANCES

Various factual situations have given rise to anticipatory search warrants. Although authorities most commonly seek anticipatory search warrants in drug and child pornography cases, officers have also sought such warrants to obtain incriminating documents

109. *Id.* at 933-34 (Brennan, J., dissenting) (footnote omitted).

110. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

111. *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928)).

from a lawyer¹¹² and to obtain surgical instruments and other articles necessary to perform abortions.¹¹³ The following United States courts of appeals cases illustrate the typical situations involving drugs or child pornography.

Federal Court

*United States v. Garcia*¹¹⁴

Several defendants in *United States v. Garcia* operated a cocaine smuggling ring between the United States and Panama.¹¹⁵

112. See *Mehrens v. State*, 138 Ariz. 458, 675 P.2d 718 (Ariz. Ct. App. 1983), *cert. denied*, 469 U.S. 870 (1984). Attorney Craig Mehrens represented Ronald Wayman on charges of molesting his minor daughter. *Id.* at 459, 675 P.2d at 719. During their investigation of Wayman, the police learned that he had written and sent letters to his daughter allegedly containing incriminating statements and that these letters were in Mehrens' possession. *Id.*

The trial court took possession of the letters during a debate over their discovery and eventually ordered Mehrens to reclaim them. *Id.* at 460, 675 P.2d at 720. The State obtained an anticipatory search warrant that directed the police to search Mehrens when he came to the courthouse. *Id.* As Mehrens left the court's chambers, the police served the warrant on him; when Mehrens refused to comply voluntarily, the police seized his briefcase containing the letters. *Id.*

Mehrens filed a "contravention of search warrant" action to have the letters returned, but the trial court denied this petition. *Id.* Mehrens then appealed to the Arizona Court of Appeals, which affirmed the trial court's ruling. *Id.* at 463, 675 P.2d at 723.

113. See *United States ex rel. Campbell v. Rundle*, 327 F.2d 153 (3d Cir. 1964). In *Rundle*, a Pennsylvania state policeman received information that equipment necessary to perform abortions was located at a building owned by the defendant, Charles Campbell. *Id.* at 155. Because the use of such equipment to procure miscarriages was a felony at the time, a magistrate issued an anticipatory search warrant based upon the allegations of possession of these abortion instruments. *Id.* at 154-55.

The police executed the warrant later in the evening on the date of issuance. *Id.* Among the items seized were surgical instruments, drugs, hypodermic needles, surgical bandages, and an examining chair. *Id.* at 155-56. The police also seized the clothes Campbell was wearing (white cap, surgeon's mask, white coat, rubber gloves, and white trousers), as well as a large quantity of cash which Campbell was carrying. *Id.* at 156.

Campbell was convicted and sentenced to five years in prison. *Id.* Following the Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), Campbell petitioned the court for a writ of habeas corpus, attacking the anticipatory search warrant on the grounds that the police had not shown probable cause. *Rundle*, 327 F.2d at 156. The Third Circuit concluded that the search warrant was invalid, as the affidavit supporting it contained mere speculation that the defendant might violate the law in the future. *Id.* at 162. The court held that a search warrant must be "based upon a judicial determination of the *present existence of justifying grounds*—*i.e.*, at the time of the issuance of the warrant." *Id.* at 163.

Rundle was one of the earliest decisions on the issue of anticipatory warrants and relates in some fashion to the discussion of timeliness. See *infra* notes 203-18 and accompanying text. Because the facts are so bizarre, however, the case offers little help in deciding the issue.

114. 882 F.2d 699 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989).

115. *Id.* at 700.

In February 1988, two servicemen, Darryl Hooks and Kendell Oliver, arrived in Miami from Panama carrying thirty-three kilograms of cocaine.¹¹⁶ Customs officers noticed that the two men appeared nervous and decided to search them after reading Oliver's name on a "customs alert list."¹¹⁷ The search revealed the cocaine.¹¹⁸

Hooks and Oliver later met with Drug Enforcement Administration (DEA) agents and agreed to cooperate with the government in a controlled delivery of the cocaine to one of the defendants, Celina Wilson-Grant.¹¹⁹ At this point, the DEA agents applied for and received an anticipatory search warrant to search the apartment designated by Wilson-Grant¹²⁰ for cocaine, currency, drug records, and narcotics paraphernalia.¹²¹ Execution of the warrant was contingent upon delivery of the drugs by Hooks and Oliver.¹²²

Shortly after Hooks and Oliver entered the apartment, but before Wilson-Grant actually took possession of the cocaine, DEA agents entered the premises, announced that they had a warrant, and began to search the apartment.¹²³ Wilson-Grant was arrested on drug-trafficking charges¹²⁴ and subsequently sought to suppress the evidence recovered in the search on the grounds that the search warrant was invalid.¹²⁵

Wilson-Grant challenged the anticipatory search warrant on two theories. First, she alleged, the warrant in this case was invalid, and anticipatory search warrants in general were per se unconstitutional, because the DEA agents did not have probable cause to believe contraband was located in the apartment when the court issued the warrant.¹²⁶ Second, she argued, the contin-

116. *Id.* Drug traffickers used military servicemen stationed in Panama as couriers to transport the cocaine into the United States; the servicemen, on leave or traveling to the United States on government business, would obtain the cocaine from Panamanian sources and then smuggle it through Miami to New York, where they delivered it to the defendants. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 701.

120. Hooks and Oliver phoned Wilson-Grant and, after explaining their delay to her satisfaction, arranged to bring the cocaine to an apartment owned by another codefendant, Francisca Caballero. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 701-02.

126. *Id.* at 702.

gency governing the execution of the warrant—delivery of the cocaine—had not yet occurred when the DEA agents entered the premises.¹²⁷

The United States Court of Appeals for the Second Circuit rejected both arguments.¹²⁸ Addressing the constitutionality of the search warrant, the court acknowledged that an anticipatory search warrant is, by definition, a warrant issued before the occurrence of events necessary for a constitutional search of the premises.¹²⁹ The court made it clear that if the specified events did not transpire, the warrant was void.¹³⁰ In the court's opinion, probable cause supported anticipatory warrants only when a government official produced independent evidence that delivery of contraband would or was likely to occur and the warrant was conditioned upon that delivery.¹³¹ The court found immaterial the fact that the contraband was not presently located at the place described in the warrant, so long as probable cause existed that it would be present upon execution of the search warrant.¹³²

The Second Circuit found Professor LaFave's reasoning particularly persuasive on the issue of constitutionality.¹³³ LaFave argued in his treatise,

[A]s a general proposition the facts put forward to justify issuance of an anticipatory warrant are more likely to establish that probable cause will exist at the time of the search than the typical warrant based solely upon the known prior location of the items to be seized at the place to be searched.¹³⁴

LaFave adopted the reasoning of *People v. Glen*,¹³⁵ a 1972 New York case:

At best, present possession is only probative of the likelihood of future possession. In cases [involving anticipatory warrants,] the certainty of future possession is greater or is often greater than that based on information of past and presumably current

127. *Id.*

128. *Id.* at 702-05.

129. *Id.* at 702.

130. *Id.*

131. *Id.* (citing *United States ex rel. Beal v. Skaff*, 418 F.2d 430 (7th Cir. 1969)).

132. *Id.* (citing *United States v. Dornhofer*, 859 F.2d 1195 (4th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989); *United States v. Lowe*, 575 F.2d 1193 (6th Cir.), *cert. denied*, 439 U.S. 869 (1978)).

133. *Id.*

134. 2 W. LAFAVE, *supra* note 9, at 97.

135. 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656, *cert. denied*, 409 U.S. 849 (1972).

possession. [I]n many kinds of organized crime the evidence supplied to obtain warrants does not relate to current crimes but past crimes with circumstances showing the likelihood of continuance of the same activity. In the present cases the evidence that there would be a consummated prospective crime was logically and probatively stronger. The necessary pieces were in motion and all but inevitably the pieces would fall into a set, at a later time, constituting the crime.¹³⁶

For the court in *Garcia*, the most important policy considerations were encouraging law enforcement officials to obtain judicial approval before searching private premises and discouraging police from proceeding without a warrant rather than risking a loss of both criminal and contraband.¹³⁷ According to the Second Circuit, allowing a police officer to obtain a warrant in advance of the delivery of contraband, rather than forcing him to go to the scene without a warrant, would better serve the objectives of the fourth amendment.¹³⁸ The court stated that a police officer proceeding without a warrant is constrained not only by the narrow limitation courts have placed upon the "exigent circumstances" exception,¹³⁹ but also by the risk of being second-guessed by judicial authorities at a later date as to whether the known facts legally justified the search.¹⁴⁰ In fact, the court reasoned

136. 2 W LAFAYE, *supra* note 9, at 97 (quoting *Glen*, 30 N.Y.2d at 258-60, 282 N.E.2d at 617-18, 331 N.Y.S.2d at 661-62).

137. *Garcia*, 882 F.2d at 703.

138. *Id.*

139. *Id.* (citing *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Zabare*, 871 F.2d 282 (2d Cir.), *cert. denied*, 110 S. Ct. 161 (1989); *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989); *United States v. Clement*, 854 F.2d 1116 (8th Cir. 1988); *United States v. Spinelli*, 848 F.2d 26 (2d Cir. 1988)).

140. *Id.* The facts that courts recognize as solid building blocks of probable cause include:

- 1) Flight; 2) Furtive movements; 3) Hiding; 4) Attempt to destroy evidence;
- 5) Resistance to officers; 6) Admissions or confessions; 7) Evasive answers;
- 8) Unreasonable explanations; 9) Fingerprint identifications; 10) Hair follicle identifications; 11) Handwriting comparisons; 12) Fabric comparisons; 13) Identification of suspects by witnesses; 14) The emergency setting—crime zone; 15) The emergency setting—automobile; 16) Ballistics evidence; 17) Contraband or weapons in plain view; 18) Criminal record; 19) Hearsay information—informant; 20) Hearsay information—fellow officer; 21) Hearsay information—general; 22) Expert police opinion; 23) Police corroboration; 24) Unusual or suspicious conduct; 25) Fact of crime or felony; 26) Police computerized information (NCIC, etc.); 27) Police radio broadcasts; 28) Use of drug-detecting dogs; 29) Voice print identifications; 30) Blood tests; 31) Electronically obtained evidence.

J. CREAMER, *THE LAW OF ARREST, SEARCH AND SEIZURE* 15 (1980).

that anticipatory search warrants actually protect individual fourth amendment rights by discouraging warrantless searches.¹⁴¹

Although holding that anticipatory search warrants were not unconstitutional per se, the Second Circuit acknowledged that "any warrant conditioned on what may occur in the future presents some potential for abuse."¹⁴² In order to prevent such abuse, "[m]agistrates and judges should . . . take care to require independent evidence giving rise to probable cause that the contraband will be located at the premises at the time of the search."¹⁴³ The court offered several concrete suggestions as to how the magistrate should make this critical determination.¹⁴⁴ First,

affidavits supporting the application for an anticipatory [search] warrant must show, not only that the agent believes a delivery of contraband is going to occur, but also *how* he has obtained this belief, how reliable his sources are, and what part government agents will play in the delivery. Judicial officers must then scrutinize whether there is probable cause to believe that the delivery will occur, and whether there is probable cause to believe that the contraband will be located on the premises when the search takes place.¹⁴⁵

Second, "when an anticipatory [search] warrant is used, the magistrate should protect against its premature execution by listing in the warrant conditions governing the execution which are explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents."¹⁴⁶ Third, and finally, "magistrates must also carefully craft anticipatory [search] warrants to limit the scope of the warrant-authorized search to items which law enforcement officers have probable cause to believe are located on the premises."¹⁴⁷ Magistrates must pay "careful heed" to the particularity requirement of the fourth amendment.¹⁴⁸

The Second Circuit summarily dismissed the defendant's second argument that the anticipatory search warrant was executed

141. See *Garcia*, 882 F.2d at 703.

142. *Id.*

143. *Id.*

144. *Id.* at 703-04.

145. *Id.* at 703.

146. *Id.* at 703-04.

147. *Id.* at 704. Search warrants must contain descriptions reflecting "the most scrupulous exactitude." *Id.* (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

148. *Id.*

prematurely¹⁴⁹ The warrant did not require that Wilson-Grant take possession of the cocaine, nor did it require that Hooks and Oliver relinquish possession.¹⁵⁰ The court concluded that Hooks and Oliver's entering the apartment and placing the duffel bags on the floor constituted a "sufficient delivery" to the premises, thus fulfilling the warrant's condition and enabling the search.¹⁵¹

*United States v. Goodwin*¹⁵²

In order to identify and prosecute individuals who receive child pornography through the mail, the United States Postal Inspection Service set up the National Child Pornography Reverse Sting Project.¹⁵³ Postal inspectors used various means to identify persons predisposed towards child pornography.¹⁵⁴ Ralph Goodwin came to the Postal Inspection Service's attention in 1983, when he placed a suspicious advertisement in an issue of the *Met Forum*, a now defunct Washington area swinger's magazine.¹⁵⁵ Goodwin was a white, middle-aged married man with four children, employed by a large advertising firm, who spent over \$100 a year on hard core pornography.¹⁵⁶ Goodwin indicated an interest in both heterosexual and homosexual activity involving youths.¹⁵⁷

Based on substantial evidence of predisposition, the Far Eastern Trading Company¹⁵⁸ sent Goodwin a solicitation letter plainly focused on child pornography, as well as a response coupon if Goodwin wanted more information.¹⁵⁹ When Goodwin mailed back the completed response form, the Far Eastern Trading Company sent him a catalogue of available mail order child pornography

149. *Id.*

150. *Id.*

151. *Id.*

152. 854 F.2d 33 (4th Cir. 1988).

153. *Id.* at 34. This project was known as "Operation Looking Glass." *Id.*

154. *Id.*

155. *Id.* The advertisement read: "Wanted: Lollitots, moppets & chicken magazines & photographs. If you have single copies you want to sell, send your telephone number to MP Code 3941." *Id.*

156. *Id.* at 35.

157. *Id.*

158. The Far Eastern Trading Company, Ltd., was a phony corporation that the directors of Operation Looking Glass set up as an undercover child pornography mail order firm. *Id.* at 34. Hong Kong was chosen as its location because of the substantial quantity of child pornography that originates overseas. *Id.* In order to lend further authenticity to the reverse sting operation, the directors of Operation Looking Glass established a branch office in the Virgin Islands. *Id.*

159. *Id.* at 35.

material.¹⁶⁰ Goodwin ordered four magazines and enclosed a check for eighty dollars.¹⁶¹

Postal inspectors observed delivery of the magazines on June 10, 1987; a short time later, they executed a search warrant which had been issued prior to the delivery.¹⁶² Goodwin challenged the anticipatory search warrant on the grounds that it violated the fourth amendment because "probable cause to believe that the materials were at the house did not exist at the time the warrant was issued."¹⁶³

The Fourth Circuit dismissed Goodwin's argument and held that the lower court properly issued the search warrant.¹⁶⁴ Agreeing with the Ninth Circuit's analysis in *United States v. Hale*,¹⁶⁵ the court found the search warrant properly supported because the pornography, in the hands of postal officials, was "on a sure course to its destination."¹⁶⁶ The postal inspector's affidavit established probable cause because it described the events planned to effect delivery of the pornography and those events actually occurred.¹⁶⁷

State Court

State courts also have examined the constitutionality of anticipatory warrants, with the vast majority of cases involving the receipt of drugs by mail or the delivery of drugs in person.¹⁶⁸ A

160. *Id.* The catalogue vividly described seven video tapes, two films, and seven magazines dealing with child pornography. *Id.* The government assembled all of the pornographic material at Operation Looking Glass' facilities in Newark, New Jersey, from material that the authorities had seized earlier. *Id.* at 34.

161. *Id.* at 35. The four magazines Goodwin ordered contained advertisements of children depicted in sexually explicit situations. *Id.*

162. *Id.* at 35-36. The postal inspectors recovered, among other things, Goodwin's correspondence with the Far Eastern Trading Company, the typewriter he used to type letters to Far Eastern, and the two child pornography magazines that he received earlier that day. *Id.* The inspectors also recovered a large volume of nudist and sexually explicit material depicting both children and adults. *Id.*

163. *Id.*

164. *Id.* at 36-37.

165. 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986).

166. *Goodwin*, 854 F.2d at 36 (citing *Hale*, 784 F.2d at 1468).

167. *Id.*

168. *See Johnson v. State*, 617 P.2d 1117 (Alaska 1980); *State v. Wright*, 115 Idaho 1043, 772 P.2d 250 (Idaho Ct. App. 1989); *Commonwealth v. Soares*, 384 Mass. 149, 424 N.E.2d 221 (1981); *People v. Glen*, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656, *cert. denied*, 409 U.S. 849 (1972); *Commonwealth v. Riviera*, 387 Pa. Super. 196, 563 A.2d 1252 (1989).

recent decision from the Idaho Court of Appeals summarized the concerns about anticipatory search warrants.¹⁶⁹

*State v. Wright*¹⁷⁰

In *State v. Wright*, an Idaho Falls policeman arrested Robert Burnside on a drug-related charge in 1984.¹⁷¹ Subsequently, the policeman received confidential information regarding Burnside and others in that area who were reportedly involved in Burnside's drug organization, including the defendant, Ronald Wright.¹⁷²

In August 1986, police officers obtained anticipatory search warrants to search Burnside's vehicle and two residences, including Wright's home.¹⁷³ Two days after the warrants' issuance, the search of Wright's house revealed marijuana cigarettes, methamphetamine, and drug paraphernalia.¹⁷⁴ Wright was charged with possession of a controlled substance.¹⁷⁵

Three judges wrote opinions in *State v. Wright*.¹⁷⁶ Chief Judge Walters, writing the opinion of the court, upheld the anticipatory search warrant.¹⁷⁷ He cited *People v. Glen*¹⁷⁸ for the proposition that obtaining an anticipatory search warrant before delivery of the contraband is preferable to seizing the property without a warrant upon the contraband's arrival.¹⁷⁹ Walters, however, included a cautionary statement from *Glen*:

[W]here there is no present possession the supporting evidence for the prospective warrant must be strong that the particular possession of particular property will occur and that the elements to bring about that possession are in process and will result in the possession at the time and place specified.

169. *Wright*, 115 Idaho 1043, 772 P.2d 250.

170. *Id.*

171. *Id.* at 1044, 772 P.2d at 251.

172. *Id.*

173. *Id.* The policeman's affidavit and testimony that Burnside planned to transport a large quantity of narcotics from Boise to Idaho Falls within the following week formed the basis for the warrants. *Id.*

174. *Id.*

175. *Id.* The trial court refused to suppress the evidence obtained during the search. *Id.* at 1045, 772 P.2d at 252.

176. *Id.* at 1043-53, 772 P.2d at 250-60. Two of the judges "specially concurred" in order to address the question of anticipatory search warrants. See *infra* notes 182-202 and accompanying text.

177. *Id.* at 1049, 772 P.2d at 256.

178. 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656, cert. denied, 409 U.S. 849 (1972).

179. *Wright*, 115 Idaho at 1049, 772 P.2d at 256.

Moreover, the issuing Judge should be satisfied that there is no likelihood that the warrant will be executed prematurely¹⁸⁰

Walters found the anticipatory search warrant permissible because the evidence indicating that a prospective crime was to be consummated was "logically and probatively strong" and because he found little, if any, likelihood of premature execution of the warrant.¹⁸¹

Judge Swanstrom, specially concurring, faulted the issuing magistrate because the anticipatory search warrant failed to condition execution on some confirming event that would indicate that Burnside had effected a "delivery" of drugs to Wright's house.¹⁸² In issuing the warrant to search Wright's house, the magistrate relied solely on the police officer's testimony that Burnside would be returning to Idaho Falls from Boise with narcotics.¹⁸³ Only later, at the suppression hearing, did the officer testify that he planned to "wait until Robert Burnside had arrived with the drugs" before searching Wright's residence.¹⁸⁴

For Swanstrom, this anticipatory search warrant left open too great a possibility for premature execution.¹⁸⁵ *Johnson v. State*,¹⁸⁶ a 1980 case from the Supreme Court of Alaska, provided the solution:

For an anticipatory warrant to be valid, there must be probable cause to believe that the items to be seized will be at the place to be searched at the time the warrant is executed, or in other words, that the warrant will not be prematurely executed. We think it most appropriate in anticipatory warrant situations, that the magistrate insert a direction in the search warrant making execution contingent on the happening of an event which evidences probable cause that the item to be seized is in the place to be searched, rather than directing that the warrant be executed immediately or forthwith.¹⁸⁷

Swanstrom found probable cause lacking because the magistrate had not included an instruction conditioning the warrant's exe-

180. *Id.* (citing *Glen*, 30 N.Y.2d at 259, 282 N.E.2d at 617, 331 N.Y.S.2d at 661).

181. *Id.*

182. *Id.* (Swanstrom, J., concurring).

183. *Id.* at 1050, 772 P.2d at 257 (Swanstrom, J., concurring).

184. *Id.*

185. *Id.*

186. 617 P.2d 1117 (Alaska 1980).

187. *Id.* at 1124 n.11.

cution upon the happening of some event.¹⁸⁸ Furthermore, Swanstrom reasoned that the police also had no probable cause at the time of execution because the officer, after finding very few narcotics in Burnside's car, relied upon the weak "negative inference" that a delivery must have been made to Wright's home prior to the search of the car.¹⁸⁹

Judge Burnett, also specially concurring, specifically articulated the underlying concerns about anticipatory search warrants.¹⁹⁰ Finding that such warrants were not unconstitutional per se, Burnett identified three risks inherent in anticipatory warrants.¹⁹¹ The first danger is premature issuance of the warrant based upon mere speculation of future criminal activity.¹⁹² According to Burnett, admonishing judges to require a particularized showing of probable cause would solve this problem.¹⁹³ The second risk is that police officers may assume an important judicial function of magistrates—the determination of probable cause that the objects to be seized are located at the place to be searched.¹⁹⁴ Burnett opined that combining a specific showing of probable cause to search with a specified event to trigger the search would avoid this problem.¹⁹⁵ The triggering event "prevent[s] the police from weighing evidence obtained *after* the warrant's issuance, in

188. *Wright*, 115 Idaho at 1051, 772 P.2d at 258 (Swanstrom, J., concurring).

189. *Id.*

190. *Id.* (Burnett, J., concurring).

191. *Id.* at 1051-52, 772 P.2d at 258-59 (Burnett, J., concurring).

192. *Id.* at 1051, 772 P.2d at 258 (Burnett, J., concurring).

193. *Id.* The Second Circuit's opinion on this issue in *United States v. Garcia*, 882 F.2d 699, 703 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989), bears repeating here:

[We] recognize that any warrant conditioned on what may occur in the future presents some potential for abuse. Magistrates and judges should therefore take care to require independent evidence giving rise to probable cause that the contraband will be located at the premises at the time of the search. This means that affidavits supporting the application for an anticipatory warrant must show, not only that the agent believes a delivery of contraband is going to occur, but also *how* he has obtained this belief, how reliable his sources are, and what part government agents will play in the delivery. Judicial officers must then scrutinize whether there is probable cause to believe that the delivery will occur, and whether there is probable cause to believe that the contraband will be located on the premises when the search takes place.

194. *Wright*, 115 Idaho at 1052, 772 P.2d at 259 (Burnett, J., concurring). The Ninth Circuit also identified this concern in *United States v. Hendricks*: "Defendant accurately perceives the vice of the prospective search warrant: By issuing such a warrant, the magistrate abdicates to the DEA agents an important judicial function—the determination that probable cause exists to believe that the objects are currently in the place to be searched." 743 F.2d 653, 655 (9th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985).

195. *Wright*, 115 Idaho at 1052, 772 P.2d at 259 (Burnett, J., concurring).

determining for themselves when the search should occur.”¹⁹⁶ The third danger is premature execution of the warrant, before the evidence is at the place or in the possession of the person to be searched.¹⁹⁷ Once again, Burnett believed that specification of a triggering event would minimize this risk.¹⁹⁸

Swanstrom and Burnett agreed that the anticipatory search warrant for Wright’s residence was invalid for lack of probable cause.¹⁹⁹ In addition, both were disturbed that the magistrate’s failure to specify an event, time, or set of circumstances that would trigger the future execution of the warrant might lead to premature execution.²⁰⁰ Nevertheless, they concurred in the denial of the motion to suppress based upon *United States v. Leon*²⁰¹ and the good faith exception to the exclusionary rule.²⁰²

ANTICIPATORY SEARCH WARRANTS: CONSTITUTIONALITY AND PROPRIETY

The question remains, however, whether anticipatory search warrants are constitutional. The answer is yes, if officials properly craft them. Under certain circumstances, however, an anticipatory search warrant may be unconstitutional, such as when officials poorly craft the warrant. In addition, a constitutional taint can arise from the facts and circumstances surrounding the warrant’s execution.

Constitutionality

If the police wait too long before executing a search warrant or if the information supporting the warrant is too old to furnish probable cause, the warrant becomes stale.²⁰³ A stale search

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 1051-53, 772 P.2d at 258-60 (Burnett, J., concurring). As Burnett stated, “The probable cause affidavit and accompanying testimony were long on quantity of information depicting Wright’s association with a drug dealer, Burnside, but short on quality of information showing that the evidence sought would be at the place (Wright’s house) to be searched.” *Id.* at 1052-53, 772 P.2d at 259-60 (Burnett, J., concurring).

200. *Id.* at 1049-53, 772 P.2d at 256-60 (Swanstrom and Burnett, JJ., concurring).

201. 468 U.S. 897 (1984).

202. *Wright*, 115 Idaho at 1051, 1053, 772 P.2d at 258, 260 (Swanstrom and Burnett, JJ., concurring). The outcome of *Wright*, in the face of clear constitutional violations, is a prime example of how the good faith exception can swallow up the exclusionary rule.

203. See *United States v. McCall*, 740 F.2d 1331, 1335-36 (4th Cir. 1984). As the Fourth

warrant fails because of the excessive delay between the observation of criminal activity and the issuance of the warrant.²⁰⁴ The anticipatory search warrant is the polar opposite of the stale search warrant. Defendants invariably attack anticipatory search warrants because the criminal activity that would give rise to probable cause has not yet occurred.²⁰⁵ In determining the constitutionality of any warrant, timeliness is a key concern.²⁰⁶

Confusion over the timeliness issue centers on the phrase "present probable cause."²⁰⁷ Specifically, the interpretation of the word "present" creates the confusion. On the one hand, "present" might mean simply that probable cause exists to support a search; on the other hand, it might mean that probable cause exists that certain items are *presently* located at the premises to be searched. The former interpretation is correct.²⁰⁸ The final conclusion that items sought under the search warrant are located at the place to be searched can and should be separated from the initial finding of probable cause to search.²⁰⁹

Although it concerns the staleness issue, *Sgro v. United States*²¹⁰ is an instructive case. *Sgro* involved a warrant to search for

Circuit noted in *McCall*,

Cases in which staleness becomes an issue arise in two different contexts. First, the facts alleged in the warrant may have been sufficient to establish probable cause when the warrant was issued, but the government's delay in executing the warrant possibly tainted the search. Second, the warrant itself may be suspect because the information on which it rested was arguably too old to furnish "present" probable cause.

Id. at 1336 (citations omitted).

204. See generally 2 W LAFAYE, *supra* note 9, at 75-88 (indicating that staleness can be a function of several factors, including amount of time that has passed since the crime, continuity of the criminal activity under investigation, opportunity to remove or destroy contraband, and nature of the place to be searched).

205. See *supra* note 127 and accompanying text.

206. See generally Mascolo, *The Staleness of Probable Cause in Affidavits for Search Warrants: Resolving the Issue of Timeliness*, 43 CONN. B.J. 189 (1969) (timely showing of probable cause, based upon fresh facts, necessary for issuance of valid search warrant).

207. See, e.g., *McCall*, 740 F.2d at 1336 ("[T]he warrant itself may be suspect because the information on which it rested was arguably too old to furnish 'present' probable cause"); 2 W LAFAYE, *supra* note 9, at 95 (presenting the argument that "the Fourth Amendment has been violated because there was no showing of probable cause but instead only a showing that such cause might be present upon some future occasion").

208. *McCall*, 740 F.2d at 1336 (reviewing court "must determine whether information sufficient to constitute probable cause was ever presented").

209. See *United States v. Solario*, 577 F.2d 554, 555 (9th Cir. 1978). The Ninth Circuit stated that in determining probable cause, the magistrate is not required to determine whether the items that the police are searching for are in fact located at the premises to be searched, but only whether reasonable ground exists to believe that they are there. *Id.*

210. 287 U.S. 206 (1932).

intoxicating liquors.²¹¹ Declaring the warrant invalid,²¹² the Supreme Court stated that "it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case."²¹³

Sgro is instructive because the critical inquiry in determining timeliness is not whether the allegedly criminal acts occurred in the past or are likely to occur in the future, but only whether they relate closely to the time of the warrant's issuance. On either side of the actual signing of the warrant, either past or future activity can support a finding of probable cause. Unsupported and merely speculative activity, however, can make a finding of probable cause impossible.

For these reasons, most courts and leading commentators have agreed that anticipatory search warrants are not per se unconstitutional, although the probable cause that the magistrate finds will come into existence only upon the occurrence of a future event.²¹⁴ When a court reviews a probable cause determination and looks exclusively at the exact instant that the magistrate's pen touches the paper, its focus becomes too narrow. In cases similar to *Garcia*,²¹⁵ when police officers explicitly laid out the details of a controlled delivery of narcotics before the magis-

211. *Id.* at 208-10.

212. The court initially issued the warrant on July 6, 1926, supported by an affidavit alleging the purchase of a beer on the premises on June 29, 1926. *Id.* at 207-08. The court reissued the warrant on July 27. *Id.* at 207. The Supreme Court held that the warrant was void because execution occurred three weeks after original issuance. *Id.* at 212.

213. *Id.* at 210-11.

214. See, e.g., *People v. Glen*, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656, *cert. denied*, 409 U.S. 849 (1972); 2 W LAFAYE, *supra* note 9, at 95-97. *Glen* involved an anticipatory search warrant issued prior to the delivery by bus of a package containing narcotics. *Glen*, 30 N.Y.2d at 257, 282 N.E.2d at 616, 331 N.Y.S.2d at 659. Courts upholding anticipatory search warrants often cite *Glen* for the conclusion that

[i]n cases like these, the certainty of future possession is greater or is often greater than that based on information of past and presumably current possession. [I]n many kinds of organized crime the evidence supplied to obtain warrants does not relate to current crimes but past crimes with circumstances showing the likelihood of continuance of the same activity. In the present cases the evidence that there would be a consummated prospective crime was logically and probatively stronger.

Id. at 259-60, 282 N.E.2d at 617-18, 331 N.Y.S.2d at 661. This case was also the subject of what appears to be the only other article dealing with this precise area of the law. See Note, *Criminal Procedure—Search and Seizure—Prospective Search Warrants*, 19 WAYNE L. REV. 1339 (1973).

215. *United States v. Garcia*, 882 F.2d 699 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989).

trate,²¹⁶ the anticipatory search warrant was constitutional.²¹⁷ When the information supplied to the magistrate indicates that contraband is on a sure course to the premises that the officer wants to search, an anticipatory search warrant can satisfy the requirements of the fourth amendment.²¹⁸

Propriety

"Uncontrolled" Deliveries

Although not unconstitutional per se, anticipatory search warrants do present several potential pitfalls. For instance, some situations simply do not lend themselves to controlled deliveries.

In *United States v. Hendricks*,²¹⁹ a customs officer in Los Angeles inspected a cardboard box that arrived from Brazil and was addressed to Dennis Hendricks.²²⁰ The manner of shipment required Hendricks to pick up the box personally.²²¹ After finding cocaine hidden inside the box, the inspector turned over the entire package to the DEA.²²² On the basis of this and other evidence subsequently gathered, and with full knowledge that the box was in the possession of DEA agents, a magistrate issued a warrant for a search of Hendricks' residence.²²³

Execution of the anticipatory search warrant was conditional: "this search warrant is to be executed only upon the condition

216. See *supra* notes 119-22 and accompanying text.

217. See 2 W LAFAYE, *supra* note 9, at 95-96.

218. Some courts have disagreed. See *supra* note 13 and cases cited therein. As the court stated in *United States v. Roberts*, 333 F Supp. 786 (E.D. Tenn. 1971),

It is well settled that a requirement for the issuance of a search warrant is that the facts submitted by affidavit in the application for the warrant be sufficient to justify the conclusion that the property which is the object of the search is probably on the person or premises to be searched at the time the warrant is issued. A search warrant will not issue upon an affidavit reciting only the anticipation of a future offense. Rather the allegations of a search warrant apply to conditions existing "at the time of the issuance of the warrant."

Id. at 787-88 (quoting *Coyne v. Watson*, 282 F Supp. 235, 238 (S.D. Ohio 1967), *aff'd*, 392 F.2d 585 (6th Cir.), *cert. denied*, 393 U.S. 951 (1968)).

This Note agrees that anticipatory search warrants are not per se unconstitutional and does not advocate an absolute rule against their use. Instead, this Note advocates strict judicial control when law enforcement personnel use anticipatory search warrants due to the potential for abuse.

219. 743 F.2d 653 (9th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985).

220. *Id.* at 653.

221. *Id.*

222. *Id.*

223. *Id.* at 653-54.

that the above described box *is brought to* the aforesaid premises."²²⁴ The DEA agents therefore had to call Hendricks to ask him to pick up the suitcase.²²⁵ Hendricks moved to suppress the evidence obtained when the DEA ultimately executed the anticipatory search warrant.²²⁶

In *Hendricks*, the Ninth Circuit properly ruled that the magistrate issued the anticipatory search warrant without probable cause because of the uncertainty of delivery to Hendricks' residence.²²⁷ By calling Hendricks to pick up the suitcase, the DEA created probable cause to search the house.²²⁸ The court analogized this situation to one in which police created exigent circumstances and then used the exigencies to justify a search.²²⁹

The court conceded that issuance of the warrant would have been proper if (1) the suitcase was in the house, (2) probable cause existed for the belief that the suitcase was in the house, or (3) the DEA knew that the suitcase was on a sure course to the house.²³⁰ The issuing magistrate knew, however, that the suitcase was in the possession of the DEA agents, not at the house.²³¹ In issuing the warrant with such knowledge, the court stated, "The magistrate abdicates to the DEA agents an important judicial function—the determination that probable cause exists to believe that the objects are currently in the place to be searched."²³² The court called this abdication the "vice of the prospective search warrant."²³³

A magistrate's abdication of control in a situation like *Hendricks* erodes both respect for judicial authority and general trust in constitutional protections. Although police discretion may seem to facilitate police surveillance, thereby helping to capture persons involved in the drug trade, the heavy price of reduced constitutional protection may haunt our society later. As noted in *Mapp v. Ohio*,²³⁴ "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its

224. *Id.* (emphasis added by the court).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 654 n.1.

229. *Id.* (citing *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980)).

230. *Id.* at 654-55.

231. *Id.* at 654. Apparently, the magistrate also knew that Hendricks was required to pick up the package. *Id.* at 653.

232. *Id.* at 655.

233. *Id.*

234. 367 U.S. 643 (1961).

disregard of the charter of its own existence."²³⁵ Unfortunately, anticipatory search warrants invite the kind of police overreaching that the Supreme Court foresaw in *Mapp*.

Stationary Contraband

Another argument in support of anticipatory search warrants is that the time required to obtain a warrant presents major practical difficulties for law enforcement officials.²³⁶ As the Second Circuit noted in *United States v. Garcia*,²³⁷ "In many instances, the speed with which government agents are required to act, 'especially when dealing with the furtive and transitory activities of persons who traffic in narcotics,' demands that they proceed without a warrant or risk losing both criminal and contraband."²³⁸ This argument may hold true for drug cases, but for child pornography cases, it is certainly debatable, if not wholly false.

In *United States v. Goodwin*,²³⁹ the Fourth Circuit ruled that an anticipatory search warrant was valid in a child pornography reverse sting operation.²⁴⁰ The Ninth Circuit's holding in *United States v. Hale*²⁴¹ formed the basis for the Fourth Circuit's decision. In *Hale*, the court upheld an anticipatory search warrant for child pornography, explaining that when the contraband to be seized is "on a sure course to its destination, as in the mail, the prior issuance of a warrant is permissible."²⁴²

Better reasoning appeared in *United States v. Flappen*,²⁴³ in which the United States District Court for the Eastern District of Virginia rejected the *Hale* analysis and declared that anticipatory search warrants in child pornography cases are unconstitutional under the fourth amendment.²⁴⁴ In *Flappen*, the court qualitatively distinguished drugs and child pornography.²⁴⁵ In most cases, drugs are either used or immediately distributed

235. *Id.* at 659.

236. See *United States v. Garcia*, 882 F.2d 699, 703 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989).

237. 882 F.2d 699.

238. *Id.* at 703 (quoting W. LAFAVE, *SEARCH AND SEIZURE* 700 (1978)).

239. 854 F.2d 33 (4th Cir. 1988); see *supra* notes 152-67 and accompanying text.

240. *Goodwin*, 854 F.2d at 36.

241. 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986).

242. *Id.* at 1468; accord *United States v. Hendricks*, 743 F.2d 653 (9th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985) (invalidating an anticipatory search warrant because the delivery and receipt of contraband was uncertain).

243. 674 F. Supp. 536 (E.D. Va. 1987), *aff'd mem.*, 861 F.2d 266 (4th Cir. 1988).

244. *Id.* at 539.

245. *Id.*

upon delivery.²⁴⁶ If government officials may not seize drugs immediately upon delivery, the evidence may disappear during the delay in procuring a search warrant.²⁴⁷ Child pornography, however, is not used or distributed upon delivery.²⁴⁸ The affidavit that the postal inspector submitted to secure the search warrant stated that "recipients of child pornography 'rarely dispose of their collection of sexually-explicit material . . . They almost always maintain and possess their collection of materials in the privacy and security of their own homes.'"²⁴⁹

According to this district court, the child pornography situation therefore provides government officials with the time to pursue a search warrant through normal channels, unlike drug situations.²⁵⁰ For the court in *Flippen*, "allowing anticipatory search warrants in this area unnecessarily diminishes the Fourth Amendment right of the people to be secure from 'unreasonable searches and seizures.'"²⁵¹ This reasoning is precisely what the Supreme Court should use to limit the scope and use of anticipatory warrants.

Whenever possible, the police should pursue the "normal" warrant procedure, especially when they know that the disposal of the contraband will take some time. Perhaps by discouraging anticipatory search warrants in this type of situation, the Court would send a message, not that child pornographers are any less morally reprehensible or deserving of capture than drug dealers, but that judicial control over the probable cause determination is critical to proper maintenance of fourth amendment protections. In this small way, the Court could halt the recent tendency to exalt increased police flexibility over individual fourth amendment protections.

The Court has long recognized society's strong desire to encourage the police, whenever possible, to obtain judicial approval before searching private premises.²⁵² The importance of this pol-

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 539-40 (quoting Affidavits of Gerald Dexter for Search Warrants, at 2).

250. *Id.* at 540.

251. *Id.*

252. See 2 W LAFAYE, *supra* note 9, at 96. Professor LaFave finds the reasoning in *Alvidres v. Superior Court*, 12 Cal. App. 3d 575, 581, 90 Cal. Rptr. 682, 685-86 (1970), to be most persuasive on this point:

The entire thrust of the exclusionary rule and the cases which have applied it is to encourage the use of search warrants by law enforcement officials.

icy cannot be challenged seriously. Implementing this policy with anticipatory search warrants that do not strictly circumscribe police behavior, however, may be of little value. For any anticipatory warrant, future events are critical to the probable cause determination. If the police wholly manage those future events, then the probable cause determination has been placed into the hands of officials who should not have such control. In seeking a warrant, the police objective to prevent crime should be manifest; in that same situation, the magistrate must protect constitutional rights.

ANTICIPATORY SEARCH WARRANTS AND FOURTH AMENDMENT PROTECTIONS: WHERE DO WE GO FROM HERE?

Fourth amendment jurisprudence has generally retreated from the principles envisioned by the Framers of the amendment. Furthermore, courts dealing with the relatively recent phenomenon of anticipatory search warrants, although not categorically rejecting them, have been wary of the potential for abuse that they create. Finally, review of certain factual situations reveals that anticipatory search warrants are simply inappropriate in some cases. Given such a backdrop, this Note proposes a solution²⁵³

One of the major difficulties which confronts law enforcement in the attempt to comply with court enunciated requirements for a "reasonable" search and seizure is the time that is consumed in obtaining search warrants.

The speed with which law enforcement is often required to act, especially when dealing with the furtive and transitory activities of persons who traffic in narcotics, demands that the courts make every effort to assist law enforcement in complying with the edicts that the courts themselves have issued.

We must ask ourselves whether the objective of the rule is better served by permitting officers under circumstances similar to the case at bar to obtain a warrant in advance of the delivery of the narcotic or by forcing them to go to the scene without a warrant and there make a decision at the risk of being second-guessed by the judiciary if they are successful in recovering evidence or contraband. We believe that achievement of the goals which our high court had in mind in adopting the exclusionary evidence rule is best attained by permitting officers to seek warrants in advance when they can clearly demonstrate that their right to search will exist within a reasonable time in the future. Nowhere in either the federal or state constitutions, nor in the Statutes of California, is there any language which would appear to prohibit the issuance of a warrant to search at a future time.

2 W LAFAVE, *supra* note 9, at 96.

253. LaFave and several courts have suggested that one solution may lie in police use of telephonic warrants. *See United States v. Hendricks*, 743 F.2d 653, 655 n.2 (9th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985); *Flippen*, 674 F Supp. at 540 n.4; 2 W LAFAVE,

that addresses both the stated and unstated concerns surrounding anticipatory search warrants.

Some elements of the proposal relate to the issuing magistrate. For instance, magistrates must know what is required for the particularized showing of probable cause that supports an anticipatory search warrant. This and other requirements, although not exhaustive, should provide magistrates with enough guidance to eliminate largely the dangers inherent in the anticipatory search warrant. The standard for any magistrate involved in the possible issuance of such a warrant is strict, rigorous, and thorough scrutiny.

Other elements of the proposal relate to the police officer(s) involved. Police must understand what they can and cannot do, upon both application for the anticipatory search warrant and execution of the warrant. Here again, restraint, rather than increased flexibility, must be the watchword.

Finally, all of the elements apply to any comprehensive review of the process by judges either at suppression hearings or at the appellate level. Those judges who look at the anticipatory search warrant procedure with the benefit of hindsight must be mindful of the rigorous restrictions placed upon such warrants at the outset.

Proposed Solution

*The Magistrate must find probable cause that a delivery will occur*²⁵⁴

Based on the totality of the circumstances, the magistrate must strictly scrutinize the reliability and credibility of the independ-

supra note 9, at 99. As the name suggests, telephonic warrants involve the police telephoning a judge or magistrate from the scene of the crime after they personally observe criminal activity and believe enough evidence establishes probable cause to search. See *United States v. McGriff*, 678 F. Supp. 1010, 1013-14 (E.D.N.Y. 1988); see also Alpert, *Telephonic Search Warrants*, 38 U. MIAMI L. REV. 625 (1984) (discussing the prospects and problems associated with telephonic search warrants, concluding that such warrants could become an important middle ground between traditional warrant procedures and warrantless searches). Unfortunately, the difficult logistics of procuring a telephonic search warrant are sometimes impossible to overcome given the irregularity of police working hours and the possible risks of alerting the criminals involved. See *United States v. Echegoyen*, 799 F.2d 1271, 1279 n.6 (9th Cir. 1986) (obtaining telephonic warrant impractical despite the fact that officers spent approximately three hours at the location before making their initial entry). Telephonic warrants, as an alternative to anticipatory search warrants, do not appear to be a viable long-term solution.

254. See *United States v. Garcia*, 882 F.2d 699, 703 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989); *supra* notes 114-51 and accompanying text.

ent information presented. As the Second Circuit noted in *Garcia*, the affidavits supporting the application for the anticipatory search warrant must show the following: a) the agent's belief that the delivery will occur; b) the agent's basis for this belief; c) the reliability of the agent's sources; and d) the part government agents will play in the delivery.²⁵⁵ The warrant must not put the police officers involved into a position in which their actions "create" probable cause. Specifically, in order to avoid a situation like that in *Hendricks*,²⁵⁶ a magistrate may not issue an anticipatory search warrant without proof of an intended delivery.

*Execution must be contingent upon a triggering event*²⁵⁷

The triggering event must be "explicit, clear and narrowly drawn to avoid misunderstanding or manipulation by government agents."²⁵⁸ The magistrate must make clear to the officer(s) involved that the specified event must occur precisely as outlined in the body of the warrant. The police must not be able to substitute their own judgment as to the existence of probable cause for that of the issuing magistrate. This element of the proposal will prevent premature execution.²⁵⁹

*The police must accurately estimate the time of the delivery*²⁶⁰

Magistrates must avoid vague, open-ended warrants. As *Sgro v. United States*²⁶¹ revealed, the facts delineated in the officer's supporting affidavit must be "closely related to the time of the issue of the warrant in order to maintain probable cause."²⁶² The issuing magistrate must limit the executive "window of opportunity" to as short a time as possible. Concern over police overreaching and desire for judicial control of the probable cause determination support a forty-eight hour limit.²⁶³

255. *Garcia*, 882 F.2d at 703-04.

256. See *Hendricks*, 743 F.2d 653; *supra* notes 219-35 and accompanying text.

257. See *State v. Wright*, 115 Idaho 1043, 1052, 772 P.2d 250, 259 (Idaho Ct. App. 1989) (Burnett, J., concurring); *supra* notes 190-98 and accompanying text.

258. See *Garcia*, 882 F.2d at 703-04; *supra* notes 142-48 and accompanying text.

259. See *Garcia*, 882 F.2d at 703-04; *Wright*, 115 Idaho at 1052, 772 P.2d at 259 (Burnett, J., concurring).

260. See Note, *supra* note 214, at 1348.

261. 287 U.S. 206 (1932).

262. *Id.* at 210.

263. This standard is admittedly arbitrary. This issue is an appropriate subject for

*The police must show a clear likelihood of immediate distribution of the contraband in question*²⁶⁴

The potential problems with anticipatory search warrants should encourage police to follow normal warrant procedures whenever possible. In situations involving contraband such as child pornography, which is rarely disposed of or distributed,²⁶⁵ the need for quick action is greatly diminished. Consequently, magistrates should not issue anticipatory search warrants in such cases.

*If the triggering event fails to occur, the anticipatory search warrant is void, and the police must revisit the issuing magistrate before proceeding*²⁶⁶

This element flows logically from the second element of the proposal—contingency upon a triggering event. The issuing magistrate must make clear to the officer(s) involved that no amount of logical supposition or inference can save an anticipatory search warrant if the triggering event does not occur. The triggering event is the lifeline for the probable cause underlying the anticipatory search warrant; once the lifeline is cut, the warrant is dead.

*If the triggering event fails to occur, the good faith exception*²⁶⁷
*to the exclusionary rule shall not apply*²⁶⁸

This element of the proposal affects the judges who review anticipatory search warrants during suppression hearings or when evidentiary questions are heard on appeal. This rule fits within the well-accepted “exception to the exception” that Justice White recognized in *United States v. Leon*²⁶⁹: no officer may execute a search warrant when the warrant is so facially deficient that the

legislative action should Congress choose to place a time limit on the execution of anticipatory search warrants. At present, the Federal Rules of Criminal Procedure place a 10-day limit on the execution of normal search warrants. FED. R. CRIM. P. 41(c)(1).

264. See *United States v. Flippen*, 674 F Supp. 536, 539-40 (E.D. Va. 1987), *aff'd mem.*, 861 F.2d 266 (4th Cir. 1988).

265. *Id.*

266. See *United States v. Moore*, 742 F Supp. 727, 735 (N.D.N.Y. 1990); *infra* notes 307-10 and accompanying text.

267. See *United States v. Leon*, 468 U.S. 897, 922 (1984); *supra* notes 105-11 and accompanying text.

268. See *Moore*, 742 F Supp. at 738; *infra* notes 314-17 and accompanying text.

269. 468 U.S. 897.

officer cannot reasonably presume it is valid.²⁷⁰ If the reviewing judge faces a situation in which the officer in question proceeded with a search after the specified triggering event failed to occur and, more to the point, after the issuing magistrate admonished the officer not to do so, then the good faith exception to the exclusionary rule should not allow admission of the incriminating evidence. In the face of restraints on the use of anticipatory search warrants, such conduct by an officer of the law would be patently improper. Given that the Supreme Court adopted the exclusionary rule to curb police misconduct, this element of the proposal would well serve the purposes of the rule.

Application

A recent decision in the United States District Court for the Northern District of New York clearly illustrates the potential impact of the proposed solution. *United States v. Moore*²⁷¹ involved a motion to suppress evidence obtained in a narcotics investigation.²⁷² This decision, although embodying most of the elements of the proposed solution, illustrates the nearly total erosion of fourth amendment protections.

The Facts of Moore

On June 7, 1989, Sergeant Robert Kroll of the East Greenbush Police Department received a phone call from Paul Irwin, a police officer in El Paso, Texas.²⁷³ Irwin informed Kroll that trained narcotics dogs had identified two United Parcel Service (UPS) packages, addressed to Joseph Donahue, 100 Orchard St., Apt. C1, Rensselaer, New York.²⁷⁴ Kroll consulted with Detective Tim Murphy, a member of the Albany Police Department, and typed a search warrant application.²⁷⁵

270. *Id.* at 923. The other "exceptions to the exception" that Justice White recognized were: (1) when the police officer knowingly made false statements in his supporting affidavit; (2) when the issuing magistrate was neither neutral nor detached; and (3) when the affidavit supporting the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.*

271. 742 F. Supp. 727.

272. *Id.* at 729.

273. *Id.*

274. *Id.* at 730. Donahue was one of three defendants in the case, the other two being James Carrington and William Moore. *Id.* at 727.

275. *Id.* at 730.

The application requested permission to search Donahue's person, his apartment, and any of his storage areas.²⁷⁶ The application described the objects of the search to be the two boxes from El Paso, as well as "any and all records or documents related to this scheme."²⁷⁷ In order to lend factual support, Kroll included his conversation with Irwin, the El Paso officer, in the application.²⁷⁸ The application also stated that Kroll had known Donahue professionally for fifteen years, that Kroll had seen Donahue arriving and leaving from 100 Orchard Street, and that the telephone company confirmed that Donahue had purchased phone service for 100 Orchard Street.²⁷⁹

The next morning at the Latham, New York, UPS facility, several police officers, including Kroll and Murphy, inspected the packages when they arrived from Texas.²⁸⁰ Each package contained two sealed coolers, which in turn contained bricks of marijuana.²⁸¹ The officers resealed the packages and formulated a plan to arrest Donahue after he accepted delivery of the packages.²⁸²

Before proceeding, Murphy penned a handwritten addendum to the original warrant application typed by Kroll.²⁸³ Kroll and his partner, Michael Davidson, then drove to the office of Charles Assini, Town Justice for the Town of East Greenbush.²⁸⁴ Kroll signed the warrant application in the car and waited while

276. *Id.*

277. *Id.* at 730-31. The application described the boxes, including their weight and delivery address, as well as their imminent arrival at the Latham UPS facility. *Id.* at 731.

278. *Id.*

279. *Id.*

280. *Id.* at 730. When trained narcotics dogs again identified the two suspect packages, Detective Rena Epting obtained a separate warrant to open the packages. *Id.*

281. *Id.*

282. *Id.* The plan involved another Albany detective, who would don a UPS uniform and make a controlled delivery of the packages to Donahue's apartment with a UPS security guard. *Id.*

283. *Id.* at 731. The handwritten addendum read as follows:

On 8 June 1989 Det. Epting of the Albany Police dept. S.I.U. along with his/her K-9 partner (Boa or ["Rufus" crossed out]) conducted a certified inspection resulting in a positive affirmation. A search warrant was obtained and the contents of the packages were inspected.

Contents Listed As Follows: Blue Thermos Brand Cooler Containing a Number of Full & 1/2 Bricks of marijuana. See attached Polaroid Photo

Packages subsequently resealed; while in police custody, and shipped to Jos. Donahue (this application) who accepted same. Packages from time of inspection to acceptance by Donahue were continuously and constantly in Police Custody.

Id.

284. *Id.* at 730. Kroll had called Assini earlier and informed him that law enforcement

Davidson presented the application to Judge Assini.²⁸⁵ Assini reviewed the application and asked Davidson several questions.²⁸⁶ Assini then signed the warrant,²⁸⁷ but failed to sign the jurat, the certification next to Kroll's signature.²⁸⁸

Soon after Kroll and Davidson returned to Rensselaer, Albany, Detective Thomas Blair, posing as a UPS employee, attempted the controlled delivery at 100 Orchard Street.²⁸⁹ When no one answered the door, Blair returned to the UPS facility with the packages, with Kroll and Davidson, who intended to stake out the facility and wait for Donahue, following soon after.²⁹⁰

At that point, events took a strange twist. Around noon, after Blair returned to the UPS facility with the packages but before Kroll and Davidson could return to set up their stakeout, an individual later identified as Scott Rehm arrived at the UPS facility and claimed to be Donahue.²⁹¹ Rehm signed for the packages, and Blair helped carry the packages to Rehm's car, noting its make, model, and license number.²⁹² Blair then radioed to Kroll that Donahue had picked up the two packages; however, when Blair described the individual who signed for the packages, Kroll immediately responded that the person described was definitely not Donahue.²⁹³

Kroll was the only officer in position to follow Rehm when he left the UPS facility.²⁹⁴ After proceeding calmly for a few miles, Rehm accelerated to a high rate of speed, eventually eluding

officials had monitored the progress of the suspect packages since they were first identified in El Paso. *Id.* at 731.

285. *Id.* at 730.

286. *Id.* at 731. In response to these questions, Davidson informed Assini that the delivery was imminent and that the officers wished to obtain the warrant in order to serve it at the time of delivery. *Id.*

287. *Id.*

288. *Id.* at 735. The jurat read: "Subscribed and Sworn to before me this 8[th] day of June, 1989." *Id.* at 730 n.3.

289. *Id.* at 731.

290. *Id.* at 731-32. Rather than leave the packages with Donahue's landlord, who offered to accept them, Blair left a UPS sticker on the door of Donahue's apartment, which stated that UPS had attempted a delivery and returned the packages to the UPS facility in Latham. *Id.* Several members of the East Greenbush Police Department kept Donahue's residence under surveillance after this failed delivery attempt. *Id.* at 732. The surveillance was not wholly effective, however, because the police did not have enough personnel to watch every door that led to Donahue's apartment. *Id.*

291. *Id.* at 731-32.

292. *Id.* at 732.

293. *Id.*

294. *Id.*

Kroll; the police never saw the packages again after they were loaded into Rehm's car.²⁹⁵

At approximately 5:30 p.m., Kroll and several other officers executed the warrant signed by Assini, seizing coolers similar to the ones found inside the packages at Latham.²⁹⁶ They also seized drugs, drug paraphernalia, and records.²⁹⁷ At trial, Donahue moved to suppress the evidence.²⁹⁸

The Decision

The district court noted that the warrant signed by Assini was partially anticipatory, in relation to the suspect packages, and partially nonanticipatory, in relation to the "records and documents" connected with the scheme.²⁹⁹ According to the court, under the standards established in *United States v. Garcia*,³⁰⁰ the anticipatory portion of the search warrant violated the fourth amendment for three reasons.³⁰¹

First, the handwritten addendum indicated falsely that the packages had been delivered to and accepted by the defendant.³⁰² Second, the government did not show that Davidson answered Assini's questions under oath, as required by the fourth amendment, thus preventing any consideration of Davidson's statements.³⁰³ Without these statements, Assini could not know by reading the body of the warrant application how the drugs were to be delivered or even that the drugs were "'on a sure course of delivery.'"³⁰⁴ Third, and most importantly, the officers never observed the delivery of the packages to Donahue's residence.³⁰⁵ Because the warrant was contingent upon a delivery that never occurred, the court reasoned that the anticipatory portion of the warrant was void.³⁰⁶

295. *Id.*

296. *Id.* Kroll entered Donahue's apartment through a window and quickly found the defendant. *Id.*

297. *Id.* At approximately the same time, Davidson located Rehm in East Greenbush and questioned him, but Rehm did not have the packages. *Id.*

298. *Id.*

299. *Id.* at 733.

300. 882 F.2d 699 (2d. Cir.), *cert. denied*, 110 S. Ct. 348 (1989); *see supra* notes 128-51 and accompanying text.

301. *Moore*, 742 F. Supp. at 734-35.

302. *Id.* at 734.

303. *Id.* at 734-35.

304. *Id.* (quoting *United States v. Hale*, 784 F.2d 1465, 1468 (9th Cir. 1986)).

305. *Id.*

306. *Id.* The court noted that neither party addressed the affidavit's most glaring

The court also held that the police had a duty to report back to Assini after losing track of Rehm's car and before executing the anticipatory portion of the warrant.³⁰⁷ Citing Second Circuit precedent,³⁰⁸ the court placed a duty on police to report new or corrective information to the issuing magistrate when this information would have a bearing upon the probable cause determination.³⁰⁹ As the court artfully noted, "[A]nticipated probable cause vanished with the car."³¹⁰

The court also found that no information in the warrant application supported the nonanticipatory portion of the search warrant relating to records and documents.³¹¹ Specifically, because the warrant application mentioned nothing about the possibility that Donahue might be packaging drugs for resale, or any other drug activity involving his apartment, no indicia of probable cause justified the search based upon the nonanticipatory portions of the document.³¹² Accordingly, the court found that the entire search warrant and its execution violated the guarantees of the fourth amendment.³¹³

The court then went on to determine whether the *Leon* good faith exception should apply.³¹⁴ As for the anticipatory portion of the search warrant, the court concluded that a reasonably well-trained officer in Kroll's position would have known that the search was illegal despite the magistrate's authorization.³¹⁵ Kroll knew that the delivery of the drugs to Donahue's home was critical to triggering probable cause and that no delivery in fact occurred.³¹⁶ The court cited *Garcia* as controlling on this point: if the planned event does not transpire, an anticipatory warrant is void.³¹⁷

omission. Because Assini never signed the jurat, the court had no indication that the officers presented the affidavit under oath. The court believed that "[o]n this ground, both the anticipatory and nonanticipatory aspects of the warrant contravene[d] fourth amendment principles." *Id.*

307. *Id.* at 736.

308. *United States v. Marin-Buitrado*, 734 F.2d 889, 894 (2d Cir. 1984).

309. *Moore*, 742 F Supp. at 736.

310. *Id.*

311. *Id.* at 737.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 738.

316. *Id.*

317. *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989).

Despite the foregoing reasoning, the court ultimately found that the good faith exception applied to the nonanticipatory portion of the search warrant and denied Donahue's motion to suppress.³¹⁸ The court believed that the officers could rely on Assini's probable cause determination that records and documents would be present in the apartment,³¹⁹ despite its own earlier holding that the officers did not present Assini with sufficient facts to demonstrate a fair probability that such records or documents would be found at Donahue's residence.³²⁰ The court feebly attempted to justify the outcome by pointing to the Supreme Court's statement in *Leon* that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause."³²¹ The bottom line remained that a clear violation of the fourth amendment had once again gone uncorrected.

Aftermath

The district court in *Moore* adhered to several elements of this Note's proposed solution to the problem of anticipatory search warrants. Reliance on *Garcia*, perhaps the clearest endorsement yet for strict control over anticipatory search warrants,³²² partially explains the court's proper review of the matter. Even so, the court was determined to find a way to deny the defendant's motion to suppress the evidence.

Clearly, the court should have granted the motion. The non-anticipatory portion of the warrant was entirely dependent upon the anticipatory portion, and no amount of good faith should save a search warrant, whether anticipatory or nonanticipatory, that was as thoroughly tainted by fourth amendment violations as the one written and executed by Kroll and Murphy.

Years of gradual disregard and disrespect for fourth amendment protections have encouraged the type of fishing expedition seen in *Moore*, in which a court went to great lengths to include evidence against an individual charged with a drug-related crime. In a way, the many individual retreats from fourth amendment guarantees have had a negative, synergistic effect, leaving the

318. *Moore*, 742 F Supp. at 739.

319. *Id.*

320. *Id.*

321. *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 914 (1984)).

322. See *supra* notes 114-51 and accompanying text.

fourth amendment more like a broken shell than the rugged armor that its Framers envisioned. One wonders if there could possibly be a more compelling case for enforcement of the fourth amendment than the facts of *Moore*; yet, the fourth amendment did not prevail.

The Supreme Court's denial of certiorari in *Garcia*³²³ indicates that the Justices believe enough protections exist in cases involving anticipatory search warrants to ensure a guarantee of fourth amendment rights. Unfortunately, even the *Garcia* opinion cannot guarantee fourth amendment protections in the face of the Court's history of deference to police flexibility and hostility to the exclusion of incriminating evidence. If the Court wants to establish real, as opposed to illusory, fourth amendment protections, the Court must issue an opinion that sets that philosophy in stone. Otherwise, lower courts, no matter how well meaning, will continue to roll back fourth amendment protections.

CONCLUSION

The tension between effective law enforcement and respect for the right of privacy is at the heart of the anticipatory search warrant dilemma:

[U]nderlying the restraint on unreasonable searches is a fundamental attribute of freedom—an identifying characteristic of the free society—a respect for privacy

It is in this as much as in any other single characteristic that the free society differs from the totalitarian state. Privacy is incompatible with totalitarianism because it is likely to cover—indeed to propagate—non-conformity. In the privacy of their homes, men and women do many things, no doubt, of which their neighbors, if they but knew, would disapprove. Some of what they do may be immoral and impious and even wicked—or might be thought so by the censorious. But it is best for society to permit a wide degree of latitude to the conduct of its individual members when that conduct has no impact upon their fellow men. Tolerance is an indispensable condition of freedom.³²⁴

Individuals like Patrick Henry and James Otis made a conscious choice when they helped craft the language of the fourth amendment:

323. 110 S. Ct. 348 (1989).

324. A. BARTH, *THE PRICE OF LIBERTY* 75 (1972).

It was basically because they foresaw and did not relish the possibility of [a totalitarian] world that the Englishmen and Americans of the eighteenth century chose the risks inherent in limited law enforcement. They did not choose to exalt order over liberty or public safety over private rights. Privacy, they understood, was an indispensable condition for the growth of initiative and individuality and diversity—in short, for the realization of man's potentialities and the flowering of the human spirit. These were worth the payment of a price in police efficiency³²⁵

These early judgments of the Framers of the fourth amendment have been lost on a majority of the Supreme Court in recent years.

As for the problems inherent in anticipatory search warrants, the Court would be wise to adhere to its own historical philosophy, best illustrated in *Johnson v. United States*.³²⁶ Justice Jackson stated the following:

Crime, even in the privacy of one's own quarters, is [a] grave concern to society. The right of officers to thrust themselves into a home is also a grave concern. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.³²⁷

Given the growing concern over drug trafficking, child abuse, and pornography in our society and the recent backsliding in fourth amendment protections, the Court should limit the use and scope of anticipatory search warrants to certain well-defined situations. Although these search warrants are not unconstitutional per se, the Court should establish for magistrates the supporting evidence and conditions of execution that will keep anticipatory search warrants within strict boundaries. In this manner, the Court can and must alleviate any confusion among magistrates issuing these warrants.

The vital privacy interests that the fourth amendment protects demand that the Court strictly limit anticipatory search warrants and alleviate any confusion for the magistrates who issue them.

325. *Id.* at 76.

326. 333 U.S. 10 (1948).

327. *Id.* at 14.

In doing so, the Court can only help to protect the rights of all citizens. Patrick Henry would demand no less.

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